Dokumentation

EU-RECHT FÜR MENSCHEN MIT BEHINDERUNGEN UND DAS ÜBEREINKOMMEN DER VEREINTEN NATIONEN

413DV08 Trier, 09.-10. Dezember 2013

Hintergrunddokumentation

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7.	Information Note from the European Commission on progress in implementing the UN Convention on the Rights of Persons with Disabilities to the EPSCO Council, Brussels, 7 June 2011 (lediglich auf Englisch verfügbar)	
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12.	Urteil des Gerichtshofs vom 11. April 2013, verbundene Rechtssachen C-335/11 und C-337/11, *Jette Ring gegen Dansk almennyttigt Boligselskab DAB (C-335/11) und Lone Skouboe Werge gegen Dansk Arbejdsgiverforening* (C-337/11)	
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16.	*Case of Lashin v. Russia* (Application no. 33117/02) Judgment of the Court (First Section) of 22 January 2013 (lediglich auf Englisch verfügbar)	
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	Vorschlag für eine neue Richtlinie	
21.	Vorschlag für eine Richtlinie des Rates zur Anwendung des Grundsatzes der Gleichbehandlung ungeachtet der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung, KOM(2008) 426 endgültig, Brüssel, 02.07.2008	

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22.	Code of good Practice for the employment of people with Disabilities, Bureau Decision of 22 June 2005 (lediglich auf Englisch verfügbar)	

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23.	Richtlinie 2004/17/EC des Europäischen Parlaments und des Rates vom 31. März 2004 zur Koordinierung der Zuschlagserteilung durch Auftraggeber im Bereich der Wasser-, Energie-, und Verkersversorgung sowie der Postdienste	
24.	Richtlinie 2004/18/EG des Europäischen Parlaments und des Rates vom 31. März 2004 über die Koordinierung der Verfahren zur Vergabe öffentlicher Bauaufträge, Lieferaufträge und Dienstleistungsaufträge	
25.	Richtlinie 2007/66/EG des Europäischen Parlaments und des Rates vom 11. Dezember 2007 zur Änderung der Richtlinien 89/665/EWG und 92/13/EWG des Rates im Hinblick auf die Verbesserung der Wirksamkeit der Nachprüfungsverfahren bezüglich der Vergabe öffentlicher Aufträge	
26.	Commission Staff Working Document - Buying Social: A guide to taking account of social considerations in public procurement. Brussels, 19.10.2010. SEC(2010) 1258 final (lediglich auf Englisch verfügbar)	
27.	Verordnung (EG) Nr. 2204/2002 der Kommission vom 12. Dezember 2002 über die Anwendung der Artikel 87 und 88 EG-Vertrag auf Beschäftigungsbeihilfen	

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28.	Verordnung (EU) Nr. 181/2011 des Europäischen Parlaments und des Rates vom 16. Februar 2011 über die Fahrgastrechte im Kraftomnibusverkehr und zur Änderung der Verordnung (EG) Nr. 2006/2004	
29.	Verordnung (EU) Nr. 1177/2010 des Europäischen Parlaments und des Rates vom 24. November 2010 über die Fahrgastrechte im See- und Binnenschiffsverkehr und zur Änderung der Verordnung (EG) Nr. 2006/2004	
30.	Verordnung (EG) Nr. 1371/2007 des Europäischen Parlaments und des Rates vom 23. Oktober 2007 über die Rechte und Pflichten der Fahrgäste im Eisenbahnverkehr	
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33.	Evaluation of Regulation 1107/2006 Final report Main report and Appendices A-B June 2010 – Executive Summary (lediglich auf Englisch verfügbar)	

G. Telekommunikation

34.	Mitteilung der Kommission an das Europäische Parlament, den Rat, den Europäischen Wirtschafts- und Sozialausschuss un den Ausschuss der Regionen - „Für eine barrierefreie Informationsgesellschaft", KOM(2008) 804 endgültig	
35.	Mitteilung der Kommission an den Rat, das Europäische Parlament, den Europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen - eAccessibility [SEK(2005)1095], KOM(2005) 425 endgültig.	

H. Weitere Dokumente

36.	List of secondary legislation relevant to "disability" (lediglich auf Englisch verfügbar)	
37.	Hinweise zur Vorlage von Vorabentscheidungsersuchen durch die nationalen Gerichte	

I. Neue Dokumente, die während oder nach der Konferenz hinzugefügt wurden

38.	The Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12 - on Equal Recognition before the Law (lediglich auf Englisch verfügbar)	
39.	The Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 9 - Accessibility (lediglich auf Englisch verfügbar)	
40.	Case of *Jasinskis v Latvia* (Application Nr. 45744/08) Judgment of the Court (Third Section) of 21 December 2011 (lediglich auf Englisch verfügbar)	

KONSOLIDIERTE FASSUNG DES VERTRAGS ÜBER DIE EUROPÄISCHE UNION, 30.03.2010

Amtsblatt der europäischen Union C 83, S. 13, 30.03.2010

Artikel 2

Die Werte, auf die sich die Union gründet, sind die Achtung der Menschenwürde, Freiheit, Demokratie, Gleichheit, Rechtsstaatlichkeit und die Wahrung der Menschenrechte einschließlich der Rechte der Personen, die Minderheiten angehören. Diese Werte sind allen Mitgliedstaaten in einer Gesellschaft gemeinsam, die sich durch Pluralismus, Nichtdiskriminierung, Toleranz, Gerechtigkeit, Solidarität und die Gleichheit von Frauen und Männern auszeichnet.

Artikel 3
(ex-Artikel 2 EUV)

(1) Ziel der Union ist es, den Frieden, ihre Werte und das Wohlergehen ihrer Völker zu fördern.

(2) Die Union bietet ihren Bürgerinnen und Bürgern einen Raum der Freiheit, der Sicherheit und des Rechts ohne Binnengrenzen, in dem — in Verbindung mit geeigneten Maßnahmen in Bezug auf die Kontrollen an den Außengrenzen, das Asyl, die Einwanderung sowie die Verhütung und Bekämpfung der Kriminalität — der freie Personenverkehr gewährleistet ist.

(3) Die Union errichtet einen Binnenmarkt. Sie wirkt auf die nachhaltige Entwicklung Europas auf der Grundlage eines ausgewogenen Wirtschaftswachstums und von Preisstabilität, eine in hohem Maße wettbewerbsfähige soziale Marktwirtschaft, die auf Vollbeschäftigung und sozialen Fortschritt abzielt, sowie ein hohes Maß an Umweltschutz und Verbesserung der Umweltqualität hin. Sie fördert den wissenschaftlichen und technischen Fortschritt.

Sie bekämpft soziale Ausgrenzung und Diskriminierungen und fördert soziale Gerechtigkeit und sozialen Schutz, die Gleichstellung von Frauen und Männern, die Solidarität zwischen den Generationen und den Schutz der Rechte des Kindes.

Sie fördert den wirtschaftlichen, sozialen und territorialen Zusammenhalt und die Solidarität zwischen den Mitgliedstaaten.

Sie wahrt den Reichtum ihrer kulturellen und sprachlichen Vielfalt und sorgt für den Schutz und die Entwicklung des kulturellen Erbes Europas.

(4) Die Union errichtet eine Wirtschafts- und Währungsunion, deren Währung der Euro ist.

(5) In ihren Beziehungen zur übrigen Welt schützt und fördert die Union ihre Werte und Interessen und trägt zum Schutz ihrer Bürgerinnen und Bürger bei. Sie leistet einen Beitrag zu Frieden, Sicherheit, globaler nachhaltiger Entwicklung, Solidarität

und gegenseitiger Achtung unter den Völkern, zu freiem und gerechtem Handel, zur Beseitigung der Armut und zum Schutz der Menschenrechte, insbesondere der Rechte des Kindes, sowie zur strikten Einhaltung und Weiterentwicklung des Völkerrechts, insbesondere zur Wahrung der Grundsätze der Charta der Vereinten Nationen.

(6) Die Union verfolgt ihre Ziele mit geeigneten Mitteln entsprechend den Zuständigkeiten, die ihr in den Verträgen übertragen sind.

Artikel 6
(ex-Artikel 6 EUV)

(1) Die Union erkennt die Rechte, Freiheiten und Grundsätze an, die in der Charta der Grundrechte der Europäischen Union vom 7. Dezember 2000 in der am 12. Dezember 2007 in Straßburg angepassten Fassung niedergelegt sind; die Charta der Grundrechte und die Verträge sind rechtlich gleichrangig.

Durch die Bestimmungen der Charta werden die in den Verträgen festgelegten Zuständigkeiten der Union in keiner Weise erweitert.

Die in der Charta niedergelegten Rechte, Freiheiten und Grundsätze werden gemäß den allgemeinen Bestimmungen des Titels VII der Charta, der ihre Auslegung und Anwendung regelt, und unter gebührender Berücksichtigung der in der Charta angeführten Erläuterungen, in denen die Quellen dieser Bestimmungen angegeben sind, ausgelegt.

(2) Die Union tritt der Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten bei. Dieser Beitritt ändert nicht die in den Verträgen festgelegten Zuständigkeiten der Union.

(3) Die Grundrechte, wie sie in der Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten gewährleistet sind und wie sie sich aus den gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten ergeben, sind als allgemeine Grundsätze Teil des Unionsrechts.

Artikel 19

(1) Der Gerichtshof der Europäischen Union umfasst den Gerichtshof, das Gericht und Fachgerichte. Er sichert die Wahrung des Rechts bei der Auslegung und Anwendung der Verträge.

Die Mitgliedstaaten schaffen die erforderlichen Rechtsbehelfe, damit ein wirksamer Rechtsschutz in den vom Unionsrecht erfassten Bereichen gewährleistet ist.

(2) Der Gerichtshof besteht aus einem Richter je Mitgliedstaat. Er wird von Generalanwälten unterstützt.

Das Gericht besteht aus mindestens einem Richter je Mitgliedstaat.

Als Richter und Generalanwälte des Gerichtshofs und als Richter des Gerichts sind Persönlichkeiten auszuwählen, die jede Gewähr für Unabhängigkeit bieten und die Voraussetzungen der Artikel 253 und 254 des Vertrags über die Arbeitsweise der Europäischen Union erfüllen. Sie werden von den Regierungen der Mitgliedstaaten im gegenseitigen Einvernehmen für eine Amtszeit von sechs Jahren ernannt. Die Wiederernennung ausscheidender Richter und Generalanwälte ist zulässig.

(3) Der Gerichtshof der Europäischen Union entscheidet nach Maßgabe der Verträge

a) über Klagen eines Mitgliedstaats, eines Organs oder natürlicher oder juristischer Personen;

b) im Wege der Vorabentscheidung auf Antrag der einzelstaatlichen Gerichte über die Auslegung des Unionsrechts oder über die Gültigkeit der Handlungen der Organe;

c) in allen anderen in den Verträgen vorgesehenen Fällen.

KONSOLIDIERTE FASSUNG DES VERTRAGS ÜBER DIE ARBEITSWEISE DER EUROPÄISCHEN UNION

Amtsblatt der Europäischen Union C 83, S. 47, 30.03.2010

Artikel 10

Bei der Festlegung und Durchführung ihrer Politik und ihrer Maßnahmen zielt die Union darauf ab, Diskriminierungen aus Gründen des Geschlechts, der Rasse, der ethnischen Herkunft, der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung zu bekämpfen.

Artikel 19
(ex-Artikel 13 EGV)

(1) Unbeschadet der sonstigen Bestimmungen der Verträge kann der Rat im Rahmen der durch die Verträge auf die Union übertragenen Zuständigkeiten gemäß einem besonderen Gesetzgebungsverfahren und nach Zustimmung des Europäischen Parlaments einstimmig geeignete Vorkehrungen treffen, um Diskriminierungen aus Gründen des Geschlechts, der Rasse, der ethnischen Herkunft, der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung zu bekämpfen.

(2) Abweichend von Absatz 1 können das Europäische Parlament und der Rat gemäß dem ordentlichen Gesetzgebungsverfahren die Grundprinzipien für Fördermaßnahmen der Union unter Ausschluss jeglicher Harmonisierung der Rechts- und Verwaltungsvorschriften der Mitgliedstaaten zur Unterstützung der Maßnahmen festlegen, die die Mitgliedstaaten treffen, um zur Verwirklichung der in Absatz 1 genannten Ziele beizutragen.

Artikel 267
(ex-Artikel 234 EGV)

Der Gerichtshof der Europäischen Union entscheidet im Wege der Vorabentscheidung

a) über die Auslegung der Verträge,

b) über die Gültigkeit und die Auslegung der Handlungen der Organe, Einrichtungen oder sonstigen Stellen der Union,

Wird eine derartige Frage einem Gericht eines Mitgliedstaats gestellt und hält dieses Gericht eine Entscheidung darüber zum Erlass seines Urteils für erforderlich, so kann es diese Frage dem Gerichtshof zur Entscheidung vorlegen.

Wird eine derartige Frage in einem schwebenden Verfahren bei einem einzelstaatlichen Gericht gestellt, dessen Entscheidungen selbst nicht mehr mit

Rechtsmitteln des innerstaatlichen Rechts angefochten werden können, so ist dieses Gericht zur Anrufung des Gerichtshofs verpflichtet.

Wird eine derartige Frage in einem schwebenden Verfahren, das eine inhaftierte Person betrifft, bei einem einzelstaatlichen Gericht gestellt, so entscheidet der Gerichtshof innerhalb kürzester Zeit.

CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION

Amtsblatt der Europäischen Union C 364, S. 1, 18.12.2000

KAPITEL III

GLEICHHEIT

Artikel 20

Gleichheit vor dem Gesetz

Alle Personen sind vor dem Gesetz gleich.

Artikel 21

Nichtdiskriminierung

(1) Diskriminierungen, insbesondere wegen des Geschlechts, der Rasse, der Hautfarbe, der ethnischen oder sozialen Herkunft, der genetischen Merkmale, der Sprache, der Religion oder der Weltanschauung, der politischen oder sonstigen Anschauung, der Zugehörigkeit zu einer nationalen Minderheit, des Vermögens, der Geburt, einer Behinderung, des Alters oder der sexuellen Ausrichtung, sind verboten.

(2) Im Anwendungsbereich des Vertrags zur Gründung der Europäischen Gemeinschaft und des Vertrags über die Europäische Union ist unbeschadet der besonderen Bestimmungen dieser Verträge jede Diskriminierung aus Gründen der Staatsangehörigkeit verboten.

Artikel 22

Vielfalt der Kulturen, Religionen und Sprachen

Die Union achtet die Vielfalt der Kulturen, Religionen und Sprachen.

Artikel 23

Gleichheit von Männern und Frauen

Die Gleichheit von Männern und Frauen ist in allen Bereichen, einschließlich der Beschäftigung, der Arbeit und des Arbeitsentgelts, sicherzustellen.

Der Grundsatz der Gleichheit steht der Beibehaltung oder der Einführung spezifischer Vergünstigungen für das unterrepräsentierte Geschlecht nicht entgegen.

Artikel 24

Rechte des Kindes

(1) Kinder haben Anspruch auf den Schutz und die Fürsorge, die für ihr Wohlergehen notwendig sind. Sie können ihre Meinung frei äußern. Ihre Meinung wird in den Angelegenheiten, die sie betreffen, in einer ihrem Alter und ihrem Reifegrad entsprechenden Weise berücksichtigt.

(2) Bei allen Kinder betreffenden Maßnahmen öffentlicher oder privater Einrichtungen muss das Wohl des Kindes eine vorrangige Erwägung sein.

(3) Jedes Kind hat Anspruch auf regelmäßige persönliche Beziehungen und direkte Kontakte zu beiden Elternteilen, es sei denn, dies steht seinem Wohl entgegen.

Artikel 25

Rechte älterer Menschen

Die Union anerkennt und achtet das Recht älterer Menschen auf ein würdiges und unabhängiges Leben und auf Teilnahme am sozialen und kulturellen Leben.

Artikel 26

Integration von Menschen mit Behinderung

Die Union anerkennt und achtet den Anspruch von Menschen mit Behinderung auf Maßnahmen zur Gewährleistung ihrer Eigenständigkeit, ihrer sozialen und beruflichen Eingliederung und ihrer Teilnahme am Leben der Gemeinschaft.

EUROPÄISCHE KOMMISSION

Brüssel, den 15.11.2010
KOM(2010) 636 endgültig

MITTEILUNG DER KOMMISSION AN DAS EUROPÄISCHE PARLAMENT, DEN RAT, DEN EUROPÄISCHEN WIRTSCHAFTS- UND SOZIALAUSSCHUSS UND DEN AUSSCHUSS DER REGIONEN

Europäische Strategie zugunsten von Menschen mit Behinderungen 2010-2020: Erneuertes Engagement für ein barrierefreies Europa

{SEK(2010) 1323}
{SEK(2010) 1324}

MITTEILUNG DER KOMMISSION AN DAS EUROPÄISCHE PARLAMENT, DEN RAT, DEN EUROPÄISCHEN WIRTSCHAFTS- UND SOZIALAUSSCHUSS UND DEN AUSSCHUSS DER REGIONEN

Europäische Strategie zugunsten von Menschen mit Behinderungen 2010-2020: Erneuertes Engagement für ein barrierefreies Europa

INHALTSVERZEICHNIS

1. EINLEITUNG

In der Europäischen Union (EU) hat jede sechste Person eine leichte bis schwere Behinderung.[1] Das sind etwa 80 Millionen Menschen, die wegen umwelt- und einstellungsbedingter Barrieren häufig an einer vollen Teilhabe an der Gesellschaft und Wirtschaft gehindert werden. Für Menschen mit Behinderungen liegt die Armutsquote 70 % über dem Durchschnitt,[2] was teilweise durch ihren eingeschränkten Zugang zur Arbeitswelt bedingt ist.

Mehr als ein Drittel der über 75-Jährigen haben Behinderungen, die sie in gewissem Maße beeinträchtigen, und über 20 % sind erheblich beeinträchtigt.[3] Diese Prozentsätze dürften weiter ansteigen, da die Bevölkerung in der EU immer älter wird.

Die EU und ihre Mitgliedstaaten haben ein umfassendes Mandat zur Verbesserung der sozialen und wirtschaftlichen Situation von Menschen mit Behinderungen.

- In Artikel 1 der Charta der Grundrechte der Europäischen Union (Charta) ist Folgendes niedergelegt: „Die Würde des Menschen ist unantastbar. Sie ist zu achten und zu schützen." Artikel 26 lautet: „Die Union anerkennt und achtet den Anspruch von Menschen mit Behinderung auf Maßnahmen zur Gewährleistung ihrer Eigenständigkeit, ihrer sozialen und beruflichen Eingliederung und ihrer Teilnahme am Leben der Gemeinschaft." Überdies verbietet Artikel 21 jede Diskriminierung wegen einer Behinderung.

- Aufgrund des Vertrags über die Arbeitsweise der Europäischen Union (AEUV) ist die Union verpflichtet, bei der Festlegung und Durchführung ihrer Politik und ihrer Maßnahmen Diskriminierungen aus Gründen einer Behinderung zu bekämpfen (Artikel 10); außerdem ist sie befugt, Rechtsvorschriften zur Bekämpfung solcher Diskriminierungen zu erlassen (Artikel 19).

- Das Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen (VN-Übereinkommen), das erste rechtsverbindliche internationale Menschenrechtsinstrument, bei dem die EU und ihre Mitgliedstaaten Vertragsparteien sind, wird in Bälde in der ganzen EU Geltung haben.[4] Das VN-Übereinkommen legt fest, dass die Vertragsstaaten alle Menschenrechte und Grundfreiheiten von Menschen mit Behinderungen schützen und fördern.

Laut VN-Übereinkommen zählen zu den Menschen mit Behinderungen Menschen, die langfristige körperliche, seelische, geistige oder Sinnesbeeinträchtigungen haben, welche sie in Wechselwirkung mit verschiedenen Barrieren an der vollen, wirksamen und gleichberechtigten Teilhabe an der Gesellschaft hindern können.

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1 EU-Arbeitskräfteerhebung 2002 – Ad-hoc-Modul über die Beschäftigung behinderter Personen (Ad-hoc-Modul AKE).

2 EU-Statistik über Einkommen und Lebensbedingungen (EU-SILC), 2004.

3 Ad-hoc-Modul AKE und EU-SILC 2007.

4 Das VN-Übereinkommen wurde 2007 verabschiedet und von allen Mitgliedstaaten und der EU unterzeichnet; bis zum 15. Oktober 2010 wurde es von 16 Mitgliedstaaten (BE, CZ, DK, DE, ES, FR, IT, LV, LT, HU, AT, PT, SI, SK, SE, UK) ratifiziert, die übrigen Mitgliedstaaten stehen kurz vor der Ratifizierung. Das VN-Übereinkommen wird für die EU verbindlich und Teil des geltenden EU-Rechts sein.

Die Kommission wird mit den Mitgliedstaaten zusammenarbeiten, um die Hindernisse für ein barrierefreies Europa abzubauen, und somit verschiedenen Entschließungen des Europäischen Parlaments und des Rates[5] aus jüngster Zeit Folge leisten. Die vorliegende Strategie gibt den Rahmen für Maßnahmen auf europäischer Ebene vor, mit denen – zusammen mit nationalen Maßnahmen – den vielfältigen Problemen von Männern, Frauen und Kindern mit Behinderungen begegnet werden soll.

Eine uneingeschränkte Teilhabe von Menschen mit Behinderungen am wirtschaftlichen und gesellschaftlichen Leben ist wesentlich, soll die Europa-2020-Strategie für intelligentes, nachhaltiges und integratives Wachstum[6] erfolgreich sein. Der Aufbau einer Gesellschaft, die niemanden ausschließt, eröffnet auch Marktmöglichkeiten und fördert die Innovation. Angesichts der Nachfrage seitens einer wachsenden Zahl von immer älter werdenden Verbrauchern sprechen stichhaltige wirtschaftliche Argumente dafür, Dienstleistungen und Produkte allen zugänglich zu machen. So ist z. B. der EU-Markt für Hilfsmittel (mit einem geschätzten Jahreswert von über 30 Mrd. EUR[7]) nach wie vor zersplittert, und diese Produkte sind teuer. Die politischen und regulatorischen Rahmenbedingungen werden den Bedürfnissen von Menschen mit Behinderungen nicht in angemessener Weise gerecht, genauso wenig die Entwicklung von Produkten und Dienstleistungen. Der Zugang zu zahlreichen Waren und Dienstleistungen sowie zu einem Großteil des baulichen Umfelds ist nach wie vor unzureichend.

Es besteht dringender Handlungsbedarf, umso mehr, als der Konjunkturabschwung sich negativ auf die Situation von Menschen mit Behinderungen ausgewirkt hat. Mit der Strategie werden verbesserte Lebensbedingungen für den Einzelnen und gleichzeitig vielfältige Vorteile für die Gesellschaft und die Wirtschaft ohne ungebührliche Belastung von Industrie und Verwaltungen angestrebt.

2. ZIELE UND MAßNAHMEN

Allgemeines Ziel dieser Strategie ist es, Menschen mit Behinderungen in die Lage zu versetzen, ihre vollen Rechte wahrzunehmen und uneingeschränkt an der Gesellschaft und der europäischen Wirtschaft teilzuhaben, vor allem im Rahmen des Binnenmarkts. Um dieses Ziel zu erreichen und eine wirksame Durchführung des VN-Übereinkommens in der ganzen EU zu gewährleisten, bedarf es einer kohärenten Vorgehensweise. In der Strategie werden die Maßnahmen auf EU-Ebene benannt, mit denen die nationalen Maßnahmen ergänzt werden sollen, und es werden die Mechanismen[8] aufgezeigt, die zur Durchführung des VN-Übereinkommens auf EU-Ebene, auch innerhalb der EU-Institutionen, notwendig sind. Außerdem verdeutlicht die Strategie, welche Unterstützung in den Bereichen Bereitstellung von finanziellen Mitteln, Forschung, Bewusstseinsbildung, Statistik und Datensammlung erforderlich ist.

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5 Entschließungen des Rates SOC 375 vom 2. Juni 2010 und 2008/C 75/01 sowie Entschließung des Europäischen Parlaments B6-0194/2009, P6_TA(2009)0334.

6 KOM(2010) 2020.

7 Deloitte & Touche, Access to Assistive Technology in the EU, 2003, und BCC Research, 2008.

8 Artikel 33 des VN-Übereinkommens.

Die Strategie legt den Schwerpunkt auf die Beseitigung von Barrieren.[9] Die Kommission hat hierzu acht wesentliche Aktionsbereiche festgelegt: **Zugänglichkeit, Teilhabe, Gleichstellung, Beschäftigung, allgemeine und berufliche Bildung, sozialer Schutz, Gesundheit und Maßnahmen im Außenbereich**. Für jeden Aktionsbereich werden die wichtigsten Maßnahmen skizziert, wobei das übergeordnete Ziel auf EU-Ebene jeweils in einem Kästchen ins Blickfeld gerückt wird. Diese Bereiche wurden ausgewählt, weil sie einen Beitrag zu den allgemeinen Zielen der Strategie und des VN-Übereinkommens, den damit zusammenhängenden Strategiedokumenten der EU-Institutionen und des Europarats sowie den Ergebnissen des EU-Aktionsplans für Menschen mit Behinderungen 2003-2010 und einer Anhörung der Mitgliedstaaten, Interessengruppen und der breiten Öffentlichkeit leisten können. Die nationalen Maßnahmen, auf die verwiesen wird, sollen die Maßnahmen auf EU-Ebene ergänzen; sie decken die Verpflichtungen, die den Mitgliedstaaten aus dem VN-Übereinkommen erwachsen, nicht erschöpfend ab. Die Kommission wird sich des Weiteren im Rahmen der Europa-2020-Strategie, ihrer Vorreiterinitiativen und der Neubelebung des Binnenmarkts mit der Situation der Menschen mit Behinderungen befassen.

2.1. Aktionsbereiche

1 — Zugänglichkeit

Es gilt, für Menschen mit Behinderungen den gleichberechtigten Zugang zur physischen Umwelt, zu Verkehrsmitteln, Informations- und Kommunikationstechnologien und -systemen (IKT) sowie zu anderen Einrichtungen und Diensten zu gewährleisten. In allen diesen Bereichen bestehen noch erhebliche Barrieren. So entsprechen beispielsweise in der EU-27 im Schnitt lediglich 5 % der öffentlichen Internetseiten voll und ganz den Standards für die Barrierefreiheit im Netz, auch wenn ein größerer Prozentsatz der Seiten zum Teil zugänglich ist. Noch immer bieten zahlreiche Fernsehsender kaum Programme mit Untertitelung und Audiodeskription an.[10]

Zugänglichkeit ist eine Voraussetzung für die Teilhabe am gesellschaftlichen und wirtschaftlichen Leben, doch für die EU ist es noch ein weiter Weg bis zur Erreichung dieses Ziels. Die Kommission schlägt vor, auf Rechtsvorschriften und andere Instrumente, etwa Normung, zu setzen, um die Zugänglichkeit zur baulichen Umwelt, zu IKT und zu Verkehrsmitteln in Einklang mit den Leitinitiativen „Digitale Agenda“ und „Innovationsunion“ zu optimieren. Auf der Grundlage der Grundsätze intelligenter Rechtsetzung wird sie prüfen, inwiefern es von Vorteil ist, Regulierungsmaßnahmen zu verabschieden, um die Zugänglichkeit zu Produkten und Diensten zu gewährleisten, einschließlich Maßnahmen zur verstärkten Nutzung der öffentlichen Auftragsvergabe (die sich in den USA als äußerst wirksam herausgestellt hat[11]). Sie wird die Einbeziehung des Aspekts Zugänglichkeit und des Konzepts „Design für alle“ in die Lehrpläne und Ausbildung der betroffenen Berufsgruppen fördern. Des Weiteren wird sie einen EU-weiten Markt für assistive Technologien unterstützen. Nach Konsultation der Mitgliedstaaten und anderer Interessengruppen wird die Kommission in Erwägung ziehen, ob bis 2012 ein europäischer Rechtsakt über die Zugänglichkeit vorgelegt werden soll und spezifische Standards für

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9 Laut einer Eurobarometer-Umfrage aus dem Jahr 2006 sind 91 % der Befragten der Meinung, dass mehr Geld für die Beseitigung von physischen Barrieren für Menschen mit Behinderungen bereitgestellt werden soll.

10 EK (2007), SEK (2007) 1469, S. 7.

11 Section 508 des Rehabilitation Act und Architectural Barriers Act.

einzelne Sektoren entwickelt werden könnten, um das Funktionieren des Binnenmarkts für barrierefreie Produkte und Dienste wesentlich zu verbessern.

Die EU-Maßnahmen werden die nationalen Maßnahmen zur Verwirklichung der Zugänglichkeit und zum Abbau vorhandener Barrieren sowie zur Verbesserung der Verfügbarkeit assistiver Technologien und der Wahlmöglichkeiten in diesem Bereich unterstützen und ergänzen.

Gewährleistung des barrierefreien Zugangs zu Waren, Dienstleistungen – auch öffentlichen Dienstleistungen – und Hilfsmitteln für Menschen mit Behinderungen

2 — Teilhabe

Nach wie vor sehen sich Menschen mit Behinderungen zahlreichen Hindernissen für die uneingeschränkte Ausübung ihrer Grundrechte, auch ihrer Rechte der Unionsbürgerschaft, und für ihre Teilhabe als gleichberechtigte Mitglieder der Gesellschaft gegenüber. Zu diesen Rechten gehören das Recht auf Freizügigkeit, das Recht selbst zu bestimmen, wo und wie man leben möchte, sowie das Recht auf uneingeschränkten Zugang zu Kultur-, Erholungs- und Sportaktivitäten. So kann z. B. eine Person mit einer anerkannten Behinderung, die in ein anderes Land in der EU umzieht, ihren Anspruch auf nationale Leistungen, wie etwa kostenlose oder ermäßigte Nutzung von öffentlichen Verkehrsmitteln, verlieren.

Die Kommission wird sich dafür einsetzen, dass

– die Hindernisse für die Ausübung der Rechte von Menschen mit Behinderungen als Individuen, Verbraucher, Studierende sowie als wirtschaftliche und politische Akteure beseitigt werden; die Probleme in Zusammenhang mit der Mobilität innerhalb der EU gelöst werden; die Nutzung des europäischen Musters für den Behindertenparkausweis erleichtert und gefördert wird;

– der Übergang von der institutionellen zur wohnortnahen Betreuung gefördert wird, und zwar durch Nutzung der Strukturfonds und des Fonds zur Entwicklung des ländlichen Raums zwecks Unterstützung der Entwicklung von wohnortnahen Leistungen; das Bewusstsein für die Situation von Menschen mit Behinderungen in Wohnheimen, insbesondere von Kindern und älteren Menschen, geschärft wird;

– der barrierefreie Zugang zu Organisationen, Aktivitäten, Veranstaltungen, Begegnungen, Waren und Dienstleistungen, auch audiovisuellen, in den Bereichen Sport, Freizeit, Kultur und Erholung verbessert wird; die Teilnahme an Sportaktivitäten und die Organisation von behindertenspezifischen Aktivitäten gefördert werden; geprüft wird, wie die Verwendung von Gebärdensprachen und Brailleschrift im Umgang mit den EU-Behörden erleichtert werden kann; die Frage des barrierefreien Zugangs zu Wahlen aufgegriffen wird, damit die Ausübung des Wahlrechts der EU-Bürger/innen erleichtert wird; die grenzüberschreitende Übermittlung von urheberrechtlich geschützten Werken in zugänglichen Formaten gefördert wird; die Nutzung der in der Richtlinie über das Urheberrecht[12] niedergelegten Ausnahmeregelungen gefördert wird.

Die EU-Maßnahmen werden nationale Maßnahmen unterstützen, die darauf abstellen, dass

[12] Richtlinie 2001/29/EG. Am 14.9.2009 wurde eine Vereinbarung der Interessengruppen unterzeichnet.

– der Übergang von der institutionellen zur wohnortnahen Betreuung verwirklicht wird, u. a. durch Nutzung der Strukturfonds und des Fonds für die Entwicklung des ländlichen Raums für die Schulung der Humanressourcen und die Anpassung der sozialen Infrastruktur, die Entwicklung von Finanzierungssystemen zur persönlichen Unterstützung, die Förderung von angemessenen Arbeitsbedingungen für professionelle Pflegekräfte und die Unterstützung für Familien und informelle Pflegekräfte;

– Organisationen und Aktivitäten in den Bereichen Sport, Freizeit, Kultur und Erholung zugänglich und die Ausnahmeregelungen der Richtlinie über das Urheberrecht genutzt werden.

Verwirklichung der vollen Teilhabe von Menschen mit Behinderungen an der Gesellschaft, indem

- sie in die Lage versetzt werden, in den Genuss aller Vorteile der EU-Bürgerschaft zu kommen;

- administrative und einstellungsbedingte Barrieren für eine volle und gleichberechtigte Teilhabe beseitigt werden;

- hochwertige wohnortnahe Dienstleistungen, einschließlich des Zugangs zu persönlicher Assistenz, angeboten werden.

3 — Gleichstellung

Über 50 % aller europäischen Bürger/innen sind der Meinung, dass Diskriminierung wegen einer Behinderung oder des Alters in der EU weitverbreitet ist.[13] Wie in den Artikeln 1, 21 und 26 der EU-Charta und den Artikeln 10 und 19 AEUV gefordert, wird die Kommission die Gleichbehandlung von Menschen mit Behinderungen fördern und dabei einen zweigleisigen Ansatz verfolgen, bei dem zum einen die geltenden EU-Rechtsvorschriften herangezogen werden, um Schutz vor Diskriminierungen zu bieten, und zum anderen eine aktive Politik zur Bekämpfung von Diskriminierungen und Förderung der Chancengleichheit im Rahmen der EU-Strategien durchgeführt wird. Die Kommission wird auch dem Aspekt der Mehrfachdiskriminierung von Menschen mit Behinderungen, die aus weiteren Gründen wie Staatsangehörigkeit, Alter, Rasse oder ethnische Herkunft, Geschlecht, Religion oder Weltanschauung sowie sexuelle Ausrichtung Diskriminierungen ausgesetzt sind, Aufmerksamkeit schenken.

Außerdem wird sie darauf achten, dass die Richtlinie 2000/78/EG[14] zum Verbot von Diskriminierungen in Beschäftigung und Beruf in vollem Umfang angewendet wird. Durch Sensibilisierungskampagnen auf EU-Ebene und in den Mitgliedstaaten wird sie die Vielfalt fördern und Diskriminierungen bekämpfen; zudem wird sie die Arbeit von NRO auf EU-Ebene, die auf diesem Gebiet tätig sind, unterstützen.

[13] Eurobarometer Spezial 317.

[14] Richtlinie 2000/78/EG des Rates (ABl. L 303 vom 2.12.2000, S. 16).

Die EU-Maßnahmen werden die nationalen Strategien und Programme zur Förderung der Gleichstellung unterstützen und ergänzen, etwa durch Förderung der Konformität der nationalen Rechtsvorschriften über Rechtsfähigkeit mit dem VN-Übereinkommen.

Beseitigung von Diskriminierungen aufgrund einer Behinderung in der EU

4 — Beschäftigung

Hochwertige Arbeitsplätze gewährleisten wirtschaftliche Unabhängigkeit, fördern die Selbstentfaltung und sind der beste Schutz vor Armut. Die Erwerbstätigenquote für Menschen mit Behinderungen beträgt allerdings lediglich etwa 50 %.[15] Damit die EU-Wachstumsziele erreicht werden können, müssen mehr Menschen mit Behinderungen einer bezahlten Erwerbstätigkeit auf dem offenen Arbeitsmarkt nachgehen. Die Kommission wird das Potenzial der Europa-2020-Strategie und ihrer Agenda für neue Kompetenzen und neue Beschäftigungsmöglichkeiten voll ausschöpfen und den Mitgliedstaaten Analysen und politische Leitlinien an die Hand geben sowie Informationsaustausch und sonstige Unterstützung anbieten. Sie wird die Kenntnisse über die Beschäftigungslage von Frauen und Männern mit Behinderungen verbessern, Probleme aufzeigen und Lösungsvorschläge unterbreiten. Besondere Aufmerksamkeit wird sie Jugendlichen mit Behinderungen bei ihrem Übergang von der Ausbildung ins Erwerbsleben widmen. Sie wird die Frage der innerberuflichen Mobilität auf dem offenen Arbeitsmarkt und in geschützten Werkstätten aufgreifen und dabei auf Informationsaustausch und wechselseitiges Lernen setzen. Des Weiteren wird sie sich unter Einbeziehung der Sozialpartner mit den Themen Selbständigkeit und hochwertige Arbeitsplätze befassen, einschließlich Aspekten wie Arbeitsbedingungen und beruflicher Aufstieg. Die Kommission wird verstärkt freiwillige Initiativen zur Förderung von Vielfalt in Unternehmen, wie etwa von Arbeitgebern unterzeichnete Chartas der Vielfalt, und eine Initiative für eine soziale Unternehmenskultur unterstützen.

Die EU-Maßnahmen werden nationale Bemühungen unterstützen und ergänzen, die darauf abstellen, die Arbeitsmarktsituation von Menschen mit Behinderungen zu analysieren; gegen die Sozialleistungsabhängigkeit von Menschen mit Behinderungen vorzugehen, die sie davon abhalten, in den Arbeitsmarkt einzutreten; die Eingliederung von Menschen mit Behinderungen in den Arbeitsmarkt mithilfe des Europäischen Sozialfonds (ESF) zu erleichtern; aktive arbeitsmarktpolitische Maßnahmen zu entwickeln; Arbeitsplätze besser zugänglich zu machen; Dienstleistungen für Stellenvermittlung, Unterstützungsstrukturen und Schulung am Arbeitsplatz zu entwickeln; die Nutzung der Allgemeinen Gruppenfreistellungsverordnung[16] zu fördern, die vorsieht, dass staatliche Beihilfen ohne vorherige Anmeldung bei der Kommission gewährt werden können.

Schaffung der Voraussetzungen, damit viel mehr Menschen mit Behinderungen ihren Lebensunterhalt auf dem offenen Arbeitsmarkt verdienen können

5 — Allgemeine und berufliche Bildung

In der Altersgruppe der 16- bis 19-Jährigen beträgt die Quote der Nichtbeteiligung an schulischer Bildung für stark behinderte Jugendliche 37 % und für teilweise behinderte

[15] AKE 2002, Ad-hoc-Modul.

[16] Verordnung (EG) Nr. 800/2008 der Kommission (ABl. L 214 vom 9.8.2008, S. 3).

Jugendliche 25 % gegenüber 17 % für nichtbehinderte Jugendliche.[17] Der Zugang zum Regelunterricht ist für schwerbehinderte Kinder schwierig und mitunter erfolgt eine Trennung. Menschen mit Behinderungen, vor allem Kinder, müssen in angemessener Weise in das allgemeine Bildungssystem integriert und individuell unterstützt werden, wobei das Wohl des Kindes zu berücksichtigen ist. Unter völliger Achtung der Zuständigkeit der Mitgliedstaaten für den Lehrinhalt und die Organisation der Bildungssysteme wird die Kommission das Ziel einer integrativen und hochwertigen allgemeinen und beruflichen Bildung im Rahmen der Initiative „Jugend in Bewegung“ unterstützen. Sie wird den Kenntnisstand zu Bildungsniveaus und Möglichkeiten für Menschen mit Behinderungen verbessern und ihre Mobilität fördern, indem sie die Beteiligung am Programm für lebenslanges Lernen erleichtert.

Die EU-Maßnahmen werden die nationalen Bemühungen im Rahmen des ET 2020, des strategischen Rahmens für die europäische Zusammenarbeit auf dem Gebiet der allgemeinen und beruflichen Bildung[18], unterstützen, die darauf abstellen, rechtliche und organisatorische Hindernisse zu beseitigen, die für Menschen mit Behinderungen in den Systemen der allgemeinen Bildung und des lebenslangen Lernens bestehen; die integrative Bildung und das personalisierte Lernen durch rechtzeitige Unterstützung und Früherkennung besonderer Bedürfnisse zu fördern; eine angemessene Schulung und Unterstützung der Fachkräfte auf allen Ebenen des Bildungswesens anzubieten sowie über Beteiligungsquoten und Ergebnisse Bericht zu erstatten.

Förderung der integrativen Bildung und des lebenslangen Lernens für Schüler/innen und Studierende mit Behinderungen

6 — Sozialer Schutz

Eine niedrigere Beteiligung an der allgemeinen Bildung und am Arbeitsmarkt führt zu Einkommensungleichheiten und Armut für Menschen mit Behinderungen sowie zu sozialer Ausgrenzung und Isolation. Menschen mit Behinderungen müssen soziale Sicherungssysteme und Programme zur Armutsbekämpfung, behinderungsbezogene Unterstützung, Programme des sozialen Wohnungsbaus und sonstige Unterstützungsdienste sowie Ruhestandsregelungen und Leistungsprogramme in Anspruch nehmen können. Die Kommission wird diesen Fragen im Rahmen der Europäischen Plattform zur Bekämpfung der Armut Beachtung schenken. Dazu gehört die Bewertung der Angemessenheit und Tragfähigkeit der sozialen Sicherungssysteme und der Unterstützung durch den ESF. Die EU wird nationale Maßnahmen zur Gewährleistung der Qualität und Tragfähigkeit der sozialen Sicherungssysteme für Menschen mit Behinderungen, vor allem durch politischen Austausch und gegenseitiges Lernen unterstützen, wobei die Zuständigkeiten der Mitgliedstaaten in vollem Umfang gewahrt bleiben.

Förderung angemessener Lebensbedingungen für Menschen mit Behinderungen

7 — Gesundheit

[17] AKE 2002, Ad-hoc-Modul.

[18] Schlussfolgerungen des Rates vom 12. Mai 2009 zum ET 2020 (ABl. L 119 vom 28.5.2009, S. 2).

Menschen mit Behinderungen haben mitunter nur eingeschränkten Zugang zu Gesundheitsleistungen, u. a. ärztlichen Routinebehandlungen, was zu weiteren, nicht mit ihrer Behinderung zusammenhängenden Benachteiligungen ihrer Gesundheit führen kann. Sie haben Anspruch auf gleichberechtigten Zugang zur Gesundheitsversorgung, einschließlich der Vorsorge, sowie speziellen, erschwinglichen und hochwertigen Gesundheits- und Rehabilitationsleistungen, die ihre Bedürfnisse berücksichtigen, auch geschlechtsspezifische. Hier sind in erster Linie die Mitgliedstaaten gefordert, die für die Organisation des Gesundheitswesens und die medizinische Versorgung zuständig sind. Die Kommission wird politische Entwicklungen zugunsten eines gleichberechtigten Zugangs zur Gesundheitsversorgung – u. a. zu hochwertigen Gesundheits- und Rehabilitationsleistungen – für Menschen mit Behinderungen unterstützen. Sie wird bei der Durchführung von Strategien zur Bekämpfung gesundheitlicher Ungleichheit besonderes Augenmerk auf Menschen mit Behinderungen legen, Maßnahmen im Bereich Gesundheit und Sicherheit am Arbeitsplatz fördern, mit denen das Risiko des Entstehens von Behinderungen während des Berufslebens verringert und die Wiedereingliederung von Arbeitskräften mit Behinderungen verbessert werden soll,[19] sowie auf die Vermeidung dieser Risiken hinarbeiten.

Die EU-Maßnahmen werden nationale Maßnahmen unterstützen, die darauf abstellen, diskriminierungsfreien Zugang zu Gesundheitsleistungen und –einrichtungen zu bieten; das Bewusstsein für die Behinderungsthematik im Medizinstudium und in den Lehrplänen für Angehörige der Gesundheitsberufe zu schärfen; angemessene Rehabilitationsleistungen anzubieten; Dienstleistungen im Bereich psychische Gesundheit und die Entwicklung von Leistungen in den Bereichen Frühintervention und Bedarfsanalyse zu fördern.

Förderung des gleichberechtigten Zugangs zu Gesundheitsleistungen und damit zusammenhängenden Einrichtungen für Menschen mit Behinderungen

8 — Maßnahmen im Außenbereich

Die EU und die Mitgliedstaaten sollten die Rechte der Menschen mit Behinderungen bei ihren Maßnahmen im Außenbereich fördern, u. a. im Rahmen der EU-Erweiterungs-, Nachbarschafts- und Entwicklungsprogramme. Die Kommission wird sich gegebenenfalls in einem umfassenderen Nichtdiskriminierungsrahmen dafür einsetzen, dass Behinderung als Menschenrechtsfrage bei EU-Maßnahmen im Außenbereich in den Fokus gerückt wird; das Bewusstsein für das VN-Übereinkommen und die Bedürfnisse von Menschen mit Behinderungen, einschließlich Barrierefreiheit, bei Soforthilfe und humanitärer Hilfe geschärft wird; das Netz der für Behindertenfragen zuständigen Korrespondenten gefestigt und das Bewusstsein für Behindertenfragen bei den EU-Delegationen geschärft wird; gewährleistet ist, dass Kandidatenländer und potenzielle Kandidatenländer Fortschritte bei der Förderung der Rechte von Menschen mit Behinderungen erzielen, und sichergestellt ist, dass die Finanzierungsinstrumente für die Heranführungshilfe genutzt werden, um die Situation von Menschen mit Behinderungen zu verbessern.

Die EU-Maßnahmen werden nationale Initiativen unterstützen und ergänzen, die darauf abstellen, Behindertenfragen in Gesprächen mit Drittstaaten aufzugreifen und gegebenenfalls – unter Berücksichtigung der in Accra eingegangenen Verpflichtungen bezüglich der Wirksamkeit der Entwicklungszusammenarbeit – die Behindertenthematik und die Durchführung des VN-Übereinkommens einzubeziehen. Sie wird Vereinbarungen und

[19] EU-Strategie für Gesundheit und Sicherheit am Arbeitsplatz 2007-2012 (KOM(2007) 62).

Verpflichtungen in Bezug auf Behindertenfragen in internationalen Foren (Vereinte Nationen, Europarat, OECD) fördern.

Förderung der Rechte von Menschen mit Behinderungen im Rahmen der EU-Maßnahmen im Außenbereich

2.2. Durchführung der Strategie

Für die Strategie bedarf es eines gemeinsamen und erneuerten Engagements der EU-Institutionen und aller Mitgliedstaaten. Die Maßnahmen in den genannten Schlüsselbereichen müssen durch folgende allgemeine Instrumente gestützt werden:

1 — Bewusstseinsbildung

Die Kommission wird dafür sorgen, dass gewährleistet ist, dass Menschen mit Behinderungen sich ihrer Rechte bewusst sind, und dabei besonderes Augenmerk auf den barrierefreien Zugang zu Materialien und Informationskanälen legen. Sie wird für Ansätze im Sinne des „Design für alle“ von Produkten, Dienstleistungen und Umfeldern sensibilisieren.

Die EU-Maßnahmen werden nationale Kampagnen zur Sensibilisierung der Öffentlichkeit für die Fähigkeiten und den Beitrag von Menschen mit Behinderungen unterstützen und ergänzen sowie den Austausch bewährter Verfahren in der hochrangigen Gruppe „Behinderungsfragen“ fördern.

Schärfung des Bewusstseins in der Gesellschaft für Behindertenfragen sowie Förderung einer besseren Aufklärung der Menschen mit Behinderungen über ihre Rechte und deren Ausübung

2 — Finanzielle Unterstützung

Die Kommission wird dafür sorgen, dass die EU-Programme in den Bereichen, die für Menschen mit Behinderungen von Belang sind, Finanzierungsmöglichkeiten bieten (etwa Forschungsprogramme). Kosten für Maßnahmen, die Menschen mit Behinderungen die Beteiligung an den EU-Programmen ermöglichen, sollten erstattungsfähig sein. Bei EU-Finanzierungsinstrumenten, insbesondere den Strukturfonds, müssen Barrierefreiheit und Nichtdiskriminierung gewährleistet sein.

Die EU-Maßnahmen werden Anstrengungen der Mitgliedstaaten unterstützen und ergänzen, die darauf abstellen, die Barrierefreiheit zu verbessern und Diskriminierungen zu bekämpfen durch allgemeine Finanzierung, durch eine ordnungsgemäße Anwendung des Artikels 16 der allgemeinen Verordnung über die Strukturfonds[20] und durch Festlegung höchster Anforderungen an die Barrierefreiheit bei der öffentlichen Auftragsvergabe. Alle Maßnahmen sollten in Einklang mit dem europäischen Wettbewerbsrecht, insbesondere den Vorschriften über staatliche Beihilfen, durchgeführt werden.

[20] Verordnung (EG) Nr. 1083/2006 des Rates (ABl. L 210 vom 31.7.2006, S. 25).

Optimierung der Nutzung der EU-Finanzierungsinstrumente für Barrierefreiheit und Nichtdiskriminierung sowie Steigerung des Bekanntheitsgrads von behindertenrelevanten Finanzierungsmöglichkeiten in Programmen für den Zeitraum nach 2013

3 — Statistiken und Datensammlung sowie Überwachung

Die Kommission wird für die Bündelung der behindertenrelevanten Informationen sorgen, die bei EU-Erhebungen im Sozialbereich (EU-Statistik über Einkommen und Lebensbedingungen, Arbeitskräfteerhebung – Ad-hoc-Modul, Europäische Gesundheitsumfrage) gesammelt werden, eine gezielte Erhebung zu den Hindernissen für die soziale Eingliederung behinderter Menschen ausarbeiten und eine Reihe von Indikatoren zur Überwachung der Situation von Menschen mit Behinderungen in Bezug auf Europa-2020-Kernziele (Bildung, Beschäftigung und Verringerung der Armut) vorlegen. Die EU-Agentur für Grundrechte wird aufgefordert, im Rahmen ihres Mandats durch Datensammlung, Forschungsarbeiten und Analysen zu dieser Aufgabe beizutragen.

Die Kommission wird zudem ein webbasiertes Instrument einrichten, das einen Überblick über die konkreten Maßnahmen und Rechtsvorschriften zur Umsetzung des VN-Übereinkommens vermittelt.

Die EU-Maßnahmen wird die Anstrengungen der Mitgliedstaaten unterstützen und ergänzen, die darauf abstellen, statistische Angaben und Daten zu sammeln, welche die Hindernisse, denen sich Menschen mit Behinderungen bei der Ausübung ihrer Rechte gegenübersehen, verdeutlichen.

Ergänzung regelmäßiger behindertenrelevanter Statistiken zwecks Überwachung der Situation von Menschen mit Behinderungen

4 — Im VN-Übereinkommen geforderte Mechanismen

Der in Artikel 33 des VN-Übereinkommens geforderte Regelungsrahmen (Anlaufstellen, Koordinierungsmechanismus, unabhängiger Mechanismus und Einbeziehung der Menschen mit Behinderungen und der sie vertretenden Organisationen) ist auf zwei Ebenen aufzugreifen: in den Mitgliedstaaten in einem breiten Spektrum der EU-Politik sowie innerhalb der EU-Institutionen. Auf EU-Ebene werden auf der Grundlage bestehender Einrichtungen Mechanismen für die Koordinierung zwischen den Kommissionsdienststellen und den EU-Institutionen zum einen sowie zwischen der EU und den Mitgliedstaaten zum anderen geschaffen. Die Durchführung der Strategie und des VN-Übereinkommens wird regelmäßig in der hochrangigen Gruppe „Behinderungsfragen“ mit Vertretern der Mitgliedstaaten und ihren nationalen Anlaufstellen, der Kommission, behinderten Menschen und den sie vertretenden Organisationen sowie anderen Interessengruppen erörtert. Für informelle Ministertagungen werden weiterhin Sachstandsberichte vorgelegt.

Außerdem wird ein Überwachungsrahmen geschaffen, der einen oder mehrere unabhängige Mechanismen einschließt und die Durchführung des VN-Übereinkommens fördert, schützt und überwacht. Im Anschluss an den Abschluss des VN-Übereinkommens und nach Erwägung der möglichen Rolle einer Anzahl bestehender Stellen und Einrichtungen der EU wird die Kommission einen Regelungsrahmen vorschlagen, um die Durchführung des

VN-Übereinkommens in Europa zu erleichtern, wobei übermäßiger Verwaltungsaufwand vermieden werden soll.

Die Kommission wird Ende 2013 einen Bericht über die im Rahmen dieser Strategie erzielten Fortschritte vorlegen, der die Durchführung der Maßnahmen, die Fortschritte in den Mitgliedstaaten und den EU-Bericht an den VN-Ausschuss für die Rechte von Menschen mit Behinderungen zum Gegenstand hat.[21] Sie wird Statistiken und Datensammlungen heranziehen, um die Veränderungen der Ungleichheiten zwischen Menschen mit Behinderungen und der Gesamtbevölkerung zu veranschaulichen und behindertenspezifische Indikatoren für die Europa-2020-Vorgaben in den Bereichen Bildung, Beschäftigung und Armutsbekämpfung zu erarbeiten. Bei dieser Gelegenheit können Strategie und Maßnahmen überarbeitet werden. Ein weiterer Bericht ist für 2016 geplant.

3. SCHLUSSFOLGERUNG

Mit dieser Strategie soll das gesamte Potenzial der EU-Charta der Grundrechte, des Vertrags über die Arbeitsweise der Europäischen Union und des VN-Übereinkommens ausgeschöpft sowie die Europa-2020-Strategie und ihre Instrumente voll genutzt werden. Die Strategie setzt einen Prozess in Gang, durch den für Menschen mit Behinderungen neue Möglichkeiten eröffnet werden, damit sie uneingeschränkt und gleichberechtigt mit anderen an der Gesellschaft teilhaben können. Angesichts der alternden Bevölkerung in Europa werden die Maßnahmen konkrete Auswirkungen auf die Lebensqualität eines wachsenden Teils der Bürger/innen haben. Die EU-Institutionen und die Mitgliedstaaten sind aufgerufen, im Rahmen dieser Strategie zusammenzuarbeiten, um ein barrierefreies Europa für alle zu schaffen.

[21] Artikel 35 und 36 des VN-Übereinkommens.

IV

(Vor dem 1. Dezember 2009 in Anwendung des EGV, des EUV und des Euratom-Vertrags angenommene Rechtsakte)

BESCHLUSS DES RATES

vom 26. November 2009

über den Abschluss des Übereinkommens der Vereinten Nationen über die Rechte von Menschen mit Behinderungen durch die Europäische Gemeinschaft

(2010/48/EG)

DER RAT DER EUROPÄISCHEN UNION —

gestützt auf den Vertrag zur Gründung der Europäischen Gemeinschaft, insbesondere auf die Artikel 13 und 95 in Verbindung mit Artikel 300 Absatz 2 Unterabsatz 1 Satz 2 und mit Artikel 300 Absatz 3 Unterabsatz 1,

auf Vorschlag der Kommission,

nach Stellungnahme des Europäischen Parlaments [1],

in Erwägung nachstehender Gründe:

(1) Im Mai 2004 ermächtigte der Rat die Kommission, im Namen der Europäischen Gemeinschaft Verhandlungen über das Übereinkommen der Vereinten Nationen über den Schutz und die Förderung der Rechte und der Würde von Menschen mit Behinderungen (nachstehend „VN-Übereinkommen“ genannt) zu führen.

(2) Das VN-Übereinkommen wurde am 13. Dezember 2006 von der Generalversammlung der Vereinten Nationen verabschiedet und ist am 3. Mai 2008 in Kraft getreten.

(3) Das VN-Übereinkommen wurde vorbehaltlich seines möglichen späteren Abschlusses am 30. März 2007 im Namen der Gemeinschaft unterzeichnet.

(4) Das VN-Übereinkommen stellt ein sachdienliches und wirksames Instrument zur Förderung und zum Schutz der Rechte von Personen mit Behinderungen innerhalb der Europäischen Union dar, ein Bereich, dem die Gemeinschaft und ihre Mitgliedstaaten größte Bedeutung beimessen.

(5) Das VN-Übereinkommen sollte daher so bald wie möglich im Namen der Gemeinschaft genehmigt werden.

(6) Diese Genehmigung sollte allerdings mit einem von der Europäischen Gemeinschaft geltend zu machenden Vorbehalt in Bezug auf Artikel 27 Absatz 1 des VN-Übereinkommens verbunden werden, wonach die Gemeinschaft das Übereinkommen unbeschadet des im Gemeinschaftsrecht — in Artikel 3 Absatz 4 der Richtlinie 2000/78/EG des Rates [2] — verankerten Rechts ihrer Mitgliedstaaten abschließt, den Grundsatz der Nichtdiskriminierung wegen einer Behinderung nicht auf die Streitkräfte anzuwenden.

(7) Sowohl die Gemeinschaft als auch ihre Mitgliedstaaten haben Zuständigkeiten für die unter das VN-Übereinkommen fallenden Sachgebiete. Deshalb sollten die Gemeinschaft und die Mitgliedstaaten Vertragsparteien des Übereinkommens werden, so dass sie gemeinsam die ihnen durch das VN-Übereinkommen auferlegten Verpflichtungen erfüllen und die ihnen übertragenen Rechte in Fällen gemischter Zuständigkeit in kohärenter Weise ausüben können.

(8) Die Gemeinschaft sollte zusammen mit der Urkunde zur förmlichen Bestätigung auch eine Erklärung gemäß Artikel 44 Absatz 1 des Übereinkommens hinterlegen, in der die durch das Übereinkommen geregelten Angelegenheiten, für die ihre Mitgliedstaaten ihr die Zuständigkeit übertragen haben, im Einzelnen aufgeführt werden —

BESCHLIESST:

Artikel 1

(1) Das VN-Übereinkommen über die Rechte von Menschen mit Behinderungen wird mit einem Vorbehalt zu seinem Artikel 27 Absatz 1 im Namen der Gemeinschaft genehmigt.

(2) Der Wortlaut des VN-Übereinkommens ist in Anhang I dieses Beschlusses wiedergegeben.

Der Wortlaut des Vorbehalts ist in Anhang III dieses Beschlusses enthalten.

[1] Stellungnahme vom 27. April 2009 (noch nicht im Amtsblatt veröffentlicht).

[2] ABl. L 303 vom 2.12.2000, S. 16.

Artikel 2

(1) Der Präsident des Rates wird ermächtigt, die Person(en) zu bestellen, die befugt ist (sind), die Urkunde zur förmlichen Bestätigung des VN-Übereinkommens gemäß seinen Artikeln 41 und 43 im Namen der Europäischen Gemeinschaft beim Generalsekretär der Vereinten Nationen zu hinterlegen.

(2) Bei der Hinterlegung der Urkunde zur förmlichen Bestätigung hinterlegt (hinterlegen) die bestellte(n) Person(en) gemäß Artikel 44 Absatz 1 des Übereinkommens die in Anhang II dieses Beschlusses wiedergegebene Erklärung zur Zuständigkeit und den in Anhang III wiedergegebenen Vorbehalt.

Artikel 3

In Angelegenheiten, die in die Zuständigkeit der Gemeinschaft fallen, ist — unbeschadet der jeweiligen Zuständigkeiten der Mitgliedstaaten — die Kommission die Anlaufstelle für Angelegenheiten im Zusammenhang mit der Durchführung des VN-Übereinkommens gemäß dessen Artikel 33 Absatz 1. Die Einzelheiten dieser Funktion als Anlaufstelle werden vor der Hinterlegung der Urkunde zur förmlichen Bestätigung im Namen der Gemeinschaft in einem Verhaltenskodex festgelegt.

Artikel 4

(1) In Angelegenheiten, die in die ausschließliche Zuständigkeit der Gemeinschaft fallen, vertritt die Kommission die Gemeinschaft in Zusammenkünften der durch das VN-Übereinkommen geschaffenen Gremien, insbesondere auf der in Artikel 40 genannten Konferenz der Vertragsstaaten, und handelt im Namen der Gemeinschaft, wenn es um Fragen geht, die in die Zuständigkeit dieser Gremien fallen.

(2) In Angelegenheiten, die in die geteilte Zuständigkeit der Gemeinschaft und der Mitgliedstaaten fallen, legen die Kommission und die Mitgliedstaaten vorab geeignete Modalitäten für die Vertretung der Haltung der Gemeinschaft in Zusammenkünften der durch das VN-Übereinkommen geschaffenen Gremien fest. Die Einzelheiten dieser Vertretung werden vor der Hinterlegung der Urkunde zur förmlichen Bestätigung im Namen der Gemeinschaft in einem Verhaltenskodex festgelegt.

(3) In den in den Absätzen 1 und 2 genannten Zusammenkünften arbeiten die Kommission und die Mitgliedstaaten — sofern erforderlich nach vorheriger Absprache mit anderen betroffenen Gemeinschaftsorganen — eng zusammen, insbesondere in Fragen der Überwachung, der Berichterstattung und der Abstimmungsregelungen. Die Modalitäten zur Gewährleistung einer engen Zusammenarbeit sind ebenfalls Gegenstand des in Absatz 2 genannten Verhaltenskodex.

Artikel 5

Dieser Beschluss wird im *Amtsblatt der Europäischen Union* veröffentlicht.

Geschehen zu Brüssel am 26. November 2009.

Im Namen des Rates
Der Präsident
J. BJÖRKLUND

ANHANG I

ÜBEREINKOMMEN ÜBER DIE RECHTE VON MENSCHEN MIT BEHINDERUNGEN

Präambel

DIE VERTRAGSSTAATEN DIESES ÜBEREINKOMMENS —

a) unter Hinweis auf die in der Charta der Vereinten Nationen verkündeten Grundsätze, denen zufolge die Anerkennung der Würde und des Wertes, die allen Mitgliedern der menschlichen Gesellschaft innewohnen, sowie ihrer gleichen und unveräußerlichen Rechte die Grundlage von Freiheit, Gerechtigkeit und Frieden in der Welt bildet,

b) in der Erkenntnis, dass die Vereinten Nationen in der Allgemeinen Erklärung der Menschenrechte und in den Internationalen Menschenrechtspakten verkündet haben und übereingekommen sind, dass jeder Mensch ohne Unterschied Anspruch auf alle darin aufgeführten Rechte und Freiheiten hat,

c) bekräftigend, dass alle Menschenrechte und Grundfreiheiten allgemein gültig und unteilbar sind, einander bedingen und miteinander verknüpft sind und dass Menschen mit Behinderungen der volle Genuss dieser Rechte und Freiheiten ohne Diskriminierung garantiert werden muss,

d) unter Hinweis auf den Internationalen Pakt über wirtschaftliche, soziale und kulturelle Rechte, den Internationalen Pakt über bürgerliche und politische Rechte, das Internationale Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung, das Übereinkommen zur Beseitigung jeder Form von Diskriminierung der Frau, das Übereinkommen gegen Folter und andere grausame, unmenschliche oder erniedrigende Behandlung oder Strafe, das Übereinkommen über die Rechte des Kindes und das Internationale Übereinkommen zum Schutz der Rechte aller Wanderarbeitnehmer und ihrer Familienangehörigen,

e) in der Erkenntnis, dass das Verständnis von Behinderung sich ständig weiterentwickelt und dass Behinderung aus der Wechselwirkung zwischen Menschen mit Beeinträchtigungen und einstellungs- und umweltbedingten Barrieren entsteht, die sie an der vollen, wirksamen und gleichberechtigten Teilhabe an der Gesellschaft hindern,

f) in der Erkenntnis, dass die in dem Weltaktionsprogramm für Behinderte und den Rahmenbestimmungen für die Herstellung der Chancengleichheit für Behinderte enthaltenen Grundsätze und Leitlinien einen wichtigen Einfluss auf die Förderung, Ausarbeitung und Bewertung von politischen Konzepten, Plänen, Programmen und Maßnahmen auf einzelstaatlicher, regionaler und internationaler Ebene zur Verbesserung der Chancengleichheit für Menschen mit Behinderungen haben,

g) nachdrücklich darauf hinweisend, wie wichtig es ist, die Behinderungsthematik zu einem festen Bestandteil der einschlägigen Strategien der nachhaltigen Entwicklung zu machen,

h) ebenso in der Erkenntnis, dass jede Diskriminierung aufgrund von Behinderung eine Verletzung der Würde und des Wertes darstellt, die jedem Menschen innewohnen,

i) ferner in der Erkenntnis der Vielfalt der Menschen mit Behinderungen,

j) in Anerkennung der Notwendigkeit, die Menschenrechte aller Menschen mit Behinderungen, einschließlich derjenigen, die intensivere Unterstützung benötigen, zu fördern und zu schützen,

k) besorgt darüber, dass sich Menschen mit Behinderungen trotz dieser verschiedenen Dokumente und Verpflichtungen in allen Teilen der Welt nach wie vor Hindernissen für ihre Teilhabe als gleichberechtigte Mitglieder der Gesellschaft sowie Verletzungen ihrer Menschenrechte gegenübersehen,

l) in Anerkennung der Bedeutung der internationalen Zusammenarbeit für die Verbesserung der Lebensbedingungen der Menschen mit Behinderungen in allen Ländern, insbesondere den Entwicklungsländern,

m) in Anerkennung des wertvollen Beitrags, den Menschen mit Behinderungen zum allgemeinen Wohl und zur Vielfalt ihrer Gemeinschaften leisten und leisten können, und in der Erkenntnis, dass die Förderung des vollen Genusses der Menschenrechte und Grundfreiheiten durch Menschen mit Behinderungen sowie ihrer uneingeschränkten Teilhabe ihr Zugehörigkeitsgefühl verstärken und zu erheblichen Fortschritten in der menschlichen, sozialen und wirtschaftlichen Entwicklung der Gesellschaft und bei der Beseitigung der Armut führen wird,

n) in der Erkenntnis, wie wichtig die individuelle Autonomie und Unabhängigkeit für Menschen mit Behinderungen ist, einschließlich der Freiheit, eigene Entscheidungen zu treffen,

o) in der Erwägung, dass Menschen mit Behinderungen die Möglichkeit haben sollen, aktiv an Entscheidungsprozessen über politische Konzepte und über Programme mitzuwirken, insbesondere wenn diese sie unmittelbar betreffen,

p) besorgt über die schwierigen Bedingungen, denen sich Menschen mit Behinderungen gegenübersehen, die mehrfachen oder verschärften Formen der Diskriminierung aufgrund der Rasse, der Hautfarbe, des Geschlechts, der Sprache, der Religion, der politischen oder sonstigen Anschauung, der nationalen, ethnischen, indigenen oder sozialen Herkunft, des Vermögens, der Geburt, des Alters oder des sonstigen Status ausgesetzt sind,

q) in der Erkenntnis, dass Frauen und Mädchen mit Behinderungen sowohl innerhalb als auch außerhalb ihres häuslichen Umfelds oft in stärkerem Maße durch Gewalt, Verletzung oder Missbrauch, Nichtbeachtung oder Vernachlässigung, Misshandlung oder Ausbeutung gefährdet sind,

r) in der Erkenntnis, dass Kinder mit Behinderungen gleichberechtigt mit anderen Kindern alle Menschenrechte und Grundfreiheiten in vollem Umfang genießen sollen, und unter Hinweis auf die zu diesem Zweck von den Vertragsstaaten des Übereinkommens über die Rechte des Kindes eingegangenen Verpflichtungen,

s) nachdrücklich darauf hinweisend, dass es notwendig ist, bei allen Anstrengungen zur Förderung des vollen Genusses der Menschenrechte und Grundfreiheiten durch Menschen mit Behinderungen die Geschlechterperspektive einzubeziehen,

t) unter besonderem Hinweis darauf, dass die Mehrzahl der Menschen mit Behinderungen in einem Zustand der Armut lebt, und diesbezüglich in der Erkenntnis, dass die nachteiligen Auswirkungen der Armut auf Menschen mit Behinderungen dringend angegangen werden müssen,

u) in dem Bewusstsein, dass Frieden und Sicherheit auf der Grundlage der uneingeschränkten Achtung der in der Charta der Vereinten Nationen enthaltenen Ziele und Grundsätze sowie der Einhaltung der anwendbaren Übereinkünfte auf dem Gebiet der Menschenrechte unabdingbar sind für den umfassenden Schutz von Menschen mit Behinderungen, insbesondere in bewaffneten Konflikten oder während ausländischer Besetzung,

v) in der Erkenntnis, wie wichtig es ist, dass Menschen mit Behinderungen vollen Zugang zur physischen, sozialen, wirtschaftlichen und kulturellen Umwelt, zu Gesundheit und Bildung sowie zu Information und Kommunikation haben, damit sie alle Menschenrechte und Grundfreiheiten voll genießen können,

w) im Hinblick darauf, dass der Einzelne gegenüber seinen Mitmenschen und der Gemeinschaft, der er angehört, Pflichten hat und gehalten ist, für die Förderung und Achtung der in der Internationalen Menschenrechtscharta anerkannten Rechte einzutreten,

x) in der Überzeugung, dass die Familie die natürliche Kernzelle der Gesellschaft ist und Anspruch auf Schutz durch Gesellschaft und Staat hat und dass Menschen mit Behinderungen und ihre Familienangehörigen den erforderlichen Schutz und die notwendige Unterstützung erhalten sollen, um es den Familien zu ermöglichen, zum vollen und gleichberechtigten Genuss der Rechte der Menschen mit Behinderungen beizutragen,

y) in der Überzeugung, dass ein umfassendes und in sich geschlossenes internationales Übereinkommen zur Förderung und zum Schutz der Rechte und der Würde von Menschen mit Behinderungen sowohl in den Entwicklungsländern als auch in den entwickelten Ländern einen maßgeblichen Beitrag zur Beseitigung der tiefgreifenden sozialen Benachteiligung von Menschen mit Behinderungen leisten und ihre Teilhabe am bürgerlichen, politischen, wirtschaftlichen, sozialen und kulturellen Leben auf der Grundlage der Chancengleichheit fördern wird —

HABEN FOLGENDES VEREINBART:

Artikel 1

Zweck

Zweck dieses Übereinkommens ist es, den vollen und gleichberechtigten Genuss aller Menschenrechte und Grundfreiheiten durch alle Menschen mit Behinderungen zu fördern, zu schützen und zu gewährleisten und die Achtung der ihnen innewohnenden Würde zu fördern.

Zu den Menschen mit Behinderungen zählen Menschen, die langfristige körperliche, seelische, geistige oder Sinnesbeeinträchtigungen haben, welche sie in Wechselwirkung mit verschiedenen Barrieren an der vollen, wirksamen und gleichberechtigten Teilhabe an der Gesellschaft hindern können.

Artikel 2

Begriffsbestimmungen

Im Sinne dieses Übereinkommens

schließt „Kommunikation" Sprachen, Textdarstellung, Brailleschrift, taktile Kommunikation, Großdruck, leicht zugängliches Multimedia sowie schriftliche, auditive, in einfache Sprache übersetzte, durch Vorleser zugänglich gemachte sowie ergänzende und alternative Formen, Mittel und Formate der Kommunikation, einschließlich leicht zugänglicher Informations- und Kommunikationstechnologie, ein;

schließt „Sprache" gesprochene Sprachen sowie Gebärdensprachen und andere nicht gesprochene Sprachen ein;

bedeutet „Diskriminierung aufgrund von Behinderung" jede Unterscheidung, Ausschließung oder Beschränkung aufgrund von Behinderung, die zum Ziel oder zur Folge hat, dass das auf die Gleichberechtigung mit anderen gegründete Anerkennen, Genießen oder Ausüben aller Menschenrechte und Grundfreiheiten im politischen, wirtschaftlichen, sozialen, kulturellen, bürgerlichen oder jedem anderen Bereich beeinträchtigt oder vereitelt wird. Sie umfasst alle Formen der Diskriminierung, einschließlich der Versagung angemessener Vorkehrungen;

bedeutet „angemessene Vorkehrungen“ notwendige und geeignete Änderungen und Anpassungen, die keine unverhältnismäßige oder unbillige Belastung darstellen und die, wenn sie in einem bestimmten Fall erforderlich sind, vorgenommen werden, um zu gewährleisten, dass Menschen mit Behinderungen gleichberechtigt mit anderen alle Menschenrechte und Grundfreiheiten genießen oder ausüben können;

bedeutet „universelles Design“ ein Design von Produkten, Umfeldern, Programmen und Dienstleistungen in der Weise, dass sie von allen Menschen möglichst weitgehend ohne eine Anpassung oder ein spezielles Design genutzt werden können. „Universelles Design“ schließt Hilfsmittel für bestimmte Gruppen von Menschen mit Behinderungen, soweit sie benötigt werden, nicht aus.

Artikel 3

Allgemeine Grundsätze

Die Grundsätze dieses Übereinkommens sind:

a) die Achtung der dem Menschen innewohnenden Würde, seiner individuellen Autonomie, einschließlich der Freiheit, eigene Entscheidungen zu treffen, sowie seiner Unabhängigkeit;

b) die Nichtdiskriminierung;

c) die volle und wirksame Teilhabe an der Gesellschaft und Einbeziehung in die Gesellschaft;

d) die Achtung vor der Unterschiedlichkeit von Menschen mit Behinderungen und die Akzeptanz dieser Menschen als Teil der menschlichen Vielfalt und der Menschheit;

e) die Chancengleichheit;

f) die Zugänglichkeit;

g) die Gleichberechtigung von Mann und Frau;

h) die Achtung vor den sich entwickelnden Fähigkeiten von Kindern mit Behinderungen und die Achtung ihres Rechts auf Wahrung ihrer Identität.

Artikel 4

Allgemeine Verpflichtungen

(1) Die Vertragsstaaten verpflichten sich, die volle Verwirklichung aller Menschenrechte und Grundfreiheiten für alle Menschen mit Behinderungen ohne jede Diskriminierung aufgrund von Behinderung zu gewährleisten und zu fördern. Zu diesem Zweck verpflichten sich die Vertragsstaaten,

a) alle geeigneten Gesetzgebungs-, Verwaltungs- und sonstigen Maßnahmen zur Umsetzung der in diesem Übereinkommen anerkannten Rechte zu treffen;

b) alle geeigneten Maßnahmen einschließlich gesetzgeberischer Maßnahmen zur Änderung oder Aufhebung bestehender Gesetze, Verordnungen, Gepflogenheiten und Praktiken zu treffen, die eine Diskriminierung von Menschen mit Behinderungen darstellen;

c) den Schutz und die Förderung der Menschenrechte von Menschen mit Behinderungen in allen politischen Konzepten und allen Programmen zu berücksichtigen;

d) Handlungen oder Praktiken, die mit diesem Übereinkommen unvereinbar sind, zu unterlassen und dafür zu sorgen, dass die staatlichen Behörden und öffentlichen Einrichtungen im Einklang mit diesem Übereinkommen handeln;

e) alle geeigneten Maßnahmen zur Beseitigung der Diskriminierung aufgrund von Behinderung durch Personen, Organisationen oder private Unternehmen zu ergreifen;

f) Forschung und Entwicklung für Güter, Dienstleistungen, Geräte und Einrichtungen in universellem Design, wie in Artikel 2 definiert, die den besonderen Bedürfnissen von Menschen mit Behinderungen mit möglichst geringem Anpassungs- und Kostenaufwand gerecht werden, zu betreiben oder zu fördern, ihre Verfügbarkeit und Nutzung zu fördern und sich bei der Entwicklung von Normen und Richtlinien für universelles Design einzusetzen;

g) Forschung und Entwicklung für neue Technologien, die für Menschen mit Behinderungen geeignet sind, einschließlich Informations- und Kommunikationstechnologien, Mobilitätshilfen, Geräten und unterstützenden Technologien, zu betreiben oder zu fördern sowie ihre Verfügbarkeit und Nutzung zu fördern und dabei Technologien zu erschwinglichen Kosten den Vorrang zu geben;

h) für Menschen mit Behinderungen zugängliche Informationen über Mobilitätshilfen, Geräte und unterstützende Technologien, einschließlich neuer Technologien, sowie andere Formen von Hilfe, Unterstützungsdiensten und Einrichtungen zur Verfügung zu stellen;

i) die Schulung von Fachkräften und anderem mit Menschen mit Behinderungen arbeitendem Personal auf dem Gebiet der in diesem Übereinkommen anerkannten Rechte zu fördern, damit die aufgrund dieser Rechte garantierten Hilfen und Dienste besser geleistet werden können.

(2) Hinsichtlich der wirtschaftlichen, sozialen und kulturellen Rechte verpflichtet sich jeder Vertragsstaat, unter Ausschöpfung seiner verfügbaren Mittel und erforderlichenfalls im Rahmen der internationalen Zusammenarbeit Maßnahmen zu treffen, um nach und nach die volle Verwirklichung dieser Rechte zu erreichen, unbeschadet derjenigen Verpflichtungen aus diesem Übereinkommen, die nach dem Völkerrecht sofort anwendbar sind.

(3) Bei der Ausarbeitung und Umsetzung von Rechtsvorschriften und politischen Konzepten zur Durchführung dieses Übereinkommens und bei anderen Entscheidungsprozessen in Fragen, die Menschen mit Behinderungen betreffen, führen die Vertragsstaaten mit den Menschen mit Behinderungen, einschließlich Kindern mit Behinderungen, über die sie vertretenden Organisationen enge Konsultationen und beziehen sie aktiv ein.

(4) Dieses Übereinkommen lässt zur Verwirklichung der Rechte von Menschen mit Behinderungen besser geeignete Bestimmungen, die im Recht eines Vertragsstaats oder in dem für diesen Staat geltenden Völkerrecht enthalten sind, unberührt. Die in einem Vertragsstaat durch Gesetze, Übereinkommen, Verordnungen oder durch Gewohnheitsrecht anerkannten oder bestehenden Menschenrechte und Grundfreiheiten dürfen nicht unter dem Vorwand beschränkt oder außer Kraft gesetzt werden, dass dieses Übereinkommen derartige Rechte oder Freiheiten nicht oder nur in einem geringeren Ausmaß anerkenne.

(5) Die Bestimmungen dieses Übereinkommens gelten ohne Einschränkung oder Ausnahme für alle Teile eines Bundesstaats.

Artikel 5

Gleichberechtigung und Nichtdiskriminierung

(1) Die Vertragsstaaten anerkennen, dass alle Menschen vor dem Gesetz gleich sind, vom Gesetz gleich zu behandeln sind und ohne Diskriminierung Anspruch auf gleichen Schutz durch das Gesetz und gleiche Vorteile durch das Gesetz haben.

(2) Die Vertragsstaaten verbieten jede Diskriminierung aufgrund von Behinderung und garantieren Menschen mit Behinderungen gleichen und wirksamen rechtlichen Schutz vor Diskriminierung, gleichviel aus welchen Gründen.

(3) Zur Förderung der Gleichberechtigung und zur Beseitigung von Diskriminierung unternehmen die Vertragsstaaten alle geeigneten Schritte, um die Bereitstellung angemessener Vorkehrungen zu gewährleisten.

(4) Besondere Maßnahmen, die zur Beschleunigung oder Herbeiführung der tatsächlichen Gleichberechtigung von Menschen mit Behinderungen erforderlich sind, gelten nicht als Diskriminierung im Sinne dieses Übereinkommens.

Artikel 6

Frauen mit Behinderungen

(1) Die Vertragsstaaten anerkennen, dass Frauen und Mädchen mit Behinderungen mehrfacher Diskriminierung ausgesetzt sind, und ergreifen in dieser Hinsicht Maßnahmen, um zu gewährleisten, dass sie alle Menschenrechte und Grundfreiheiten voll und gleichberechtigt genießen können.

(2) Die Vertragsstaaten treffen alle geeigneten Maßnahmen zur Sicherung der vollen Entfaltung, der Förderung und der Stärkung der Autonomie der Frauen, um zu garantieren, dass sie die in diesem Übereinkommen genannten Menschenrechte und Grundfreiheiten ausüben und genießen können.

Artikel 7

Kinder mit Behinderungen

(1) Die Vertragsstaaten treffen alle erforderlichen Maßnahmen, um zu gewährleisten, dass Kinder mit Behinderungen gleichberechtigt mit anderen Kindern alle Menschenrechte und Grundfreiheiten genießen können.

(2) Bei allen Maßnahmen, die Kinder mit Behinderungen betreffen, ist das Wohl des Kindes ein Gesichtspunkt, der vorrangig zu berücksichtigen ist.

(3) Die Vertragsstaaten gewährleisten, dass Kinder mit Behinderungen das Recht haben, ihre Meinung in allen sie berührenden Angelegenheiten gleichberechtigt mit anderen Kindern frei zu äußern, wobei ihre Meinung angemessen und entsprechend ihrem Alter und ihrer Reife berücksichtigt wird, und behinderungsgerechte sowie altersgemäße Hilfe zu erhalten, damit sie dieses Recht verwirklichen können.

Artikel 8

Bewusstseinsbildung

(1) Die Vertragsstaaten verpflichten sich, sofortige, wirksame und geeignete Maßnahmen zu ergreifen, um

a) in der gesamten Gesellschaft, einschließlich auf der Ebene der Familien, das Bewusstsein für Menschen mit Behinderungen zu schärfen und die Achtung ihrer Rechte und ihrer Würde zu fördern;

b) Klischees, Vorurteile und schädliche Praktiken gegenüber Menschen mit Behinderungen, einschließlich aufgrund des Geschlechts oder des Alters, in allen Lebensbereichen zu bekämpfen;

c) das Bewusstsein für die Fähigkeiten und den Beitrag von Menschen mit Behinderungen zu fördern.

(2) Zu den diesbezüglichen Maßnahmen gehören

a) die Einleitung und dauerhafte Durchführung wirksamer Kampagnen zur Bewusstseinsbildung in der Öffentlichkeit mit dem Ziel,

i) die Aufgeschlossenheit gegenüber den Rechten von Menschen mit Behinderungen zu erhöhen,

ii) eine positive Wahrnehmung von Menschen mit Behinderungen und ein größeres gesellschaftliches Bewusstsein ihnen gegenüber zu fördern,

iii) die Anerkennung der Fertigkeiten, Verdienste und Fähigkeiten von Menschen mit Behinderungen und ihres Beitrags zur Arbeitswelt und zum Arbeitsmarkt zu fördern;

b) die Förderung einer respektvollen Einstellung gegenüber den Rechten von Menschen mit Behinderungen auf allen Ebenen des Bildungssystems, auch bei allen Kindern von früher Kindheit an;

c) die Aufforderung an alle Medienorgane, Menschen mit Behinderungen in einer dem Zweck dieses Übereinkommens entsprechenden Weise darzustellen;

d) die Förderung von Schulungsprogrammen zur Schärfung des Bewusstseins für Menschen mit Behinderungen und für deren Rechte.

Artikel 9

Zugänglichkeit

(1) Um Menschen mit Behinderungen eine unabhängige Lebensführung und die volle Teilhabe in allen Lebensbereichen zu ermöglichen, treffen die Vertragsstaaten geeignete Maßnahmen mit dem Ziel, für Menschen mit Behinderungen den gleichberechtigten Zugang zur physischen Umwelt, zu Transportmitteln, Information und Kommunikation, einschließlich Informations- und Kommunikationstechnologien und -systemen, sowie zu anderen Einrichtungen und Diensten, die der Öffentlichkeit in städtischen und ländlichen Gebieten offenstehen oder für sie bereitgestellt werden, zu gewährleisten. Diese Maßnahmen, welche die Feststellung und Beseitigung von Zugangshindernissen und -barrieren einschließen, gelten unter anderem für

a) Gebäude, Straßen, Transportmittel sowie andere Einrichtungen in Gebäuden und im Freien, einschließlich Schulen, Wohnhäusern, medizinischer Einrichtungen und Arbeitsstätten;

b) Informations-, Kommunikations- und andere Dienste, einschließlich elektronischer Dienste und Notdienste.

(2) Die Vertragsstaaten treffen außerdem geeignete Maßnahmen,

a) um Mindeststandards und Leitlinien für die Zugänglichkeit von Einrichtungen und Diensten, die der Öffentlichkeit offenstehen oder für sie bereitgestellt werden, auszuarbeiten und zu erlassen und ihre Anwendung zu überwachen;

b) um sicherzustellen, dass private Rechtsträger, die Einrichtungen und Dienste, die der Öffentlichkeit offenstehen oder für sie bereitgestellt werden, anbieten, alle Aspekte der Zugänglichkeit für Menschen mit Behinderungen berücksichtigen;

c) um betroffenen Kreisen Schulungen zu Fragen der Zugänglichkeit für Menschen mit Behinderungen anzubieten;

d) um in Gebäuden und anderen Einrichtungen, die der Öffentlichkeit offenstehen, Beschilderungen in Brailleschrift und in leicht lesbarer und verständlicher Form anzubringen;

e) um menschliche und tierische Hilfe sowie Mittelspersonen, unter anderem Personen zum Führen und Vorlesen sowie professionelle Gebärdensprachdolmetscher und -dolmetscherinnen, zur Verfügung zu stellen mit dem Ziel, den Zugang zu Gebäuden und anderen Einrichtungen, die der Öffentlichkeit offenstehen, zu erleichtern;

f) um andere geeignete Formen der Hilfe und Unterstützung für Menschen mit Behinderungen zu fördern, damit ihr Zugang zu Informationen gewährleistet wird;

g) um den Zugang von Menschen mit Behinderungen zu den neuen Informations- und Kommunikationstechnologien und -systemen, einschließlich des Internets, zu fördern;

h) um die Gestaltung, die Entwicklung, die Herstellung und den Vertrieb zugänglicher Informations- und Kommunikationstechnologien und -systeme in einem frühen Stadium zu fördern, sodass deren Zugänglichkeit mit möglichst geringem Kostenaufwand erreicht wird.

Artikel 10

Recht auf Leben

Die Vertragsstaaten bekräftigen, dass jeder Mensch ein angeborenes Recht auf Leben hat, und treffen alle erforderlichen Maßnahmen, um den wirksamen und gleichberechtigten Genuss dieses Rechts durch Menschen mit Behinderungen zu gewährleisten.

Artikel 11

Gefahrensituationen und humanitäre Notlagen

Die Vertragsstaaten ergreifen im Einklang mit ihren Verpflichtungen nach dem Völkerrecht, einschließlich des humanitären Völkerrechts und der internationalen Menschenrechtsnormen, alle erforderlichen Maßnahmen, um in Gefahrensituationen, einschließlich bewaffneter Konflikte, humanitärer Notlagen und Naturkatastrophen, den Schutz und die Sicherheit von Menschen mit Behinderungen zu gewährleisten.

Artikel 12

Gleiche Anerkennung vor dem Recht

(1) Die Vertragsstaaten bekräftigen, dass Menschen mit Behinderungen das Recht haben, überall als Rechtssubjekt anerkannt zu werden.

(2) Die Vertragsstaaten anerkennen, dass Menschen mit Behinderungen in allen Lebensbereichen gleichberechtigt mit anderen Rechts- und Handlungsfähigkeit genießen.

(3) Die Vertragsstaaten treffen geeignete Maßnahmen, um Menschen mit Behinderungen Zugang zu der Unterstützung zu verschaffen, die sie bei der Ausübung ihrer Rechts- und Handlungsfähigkeit gegebenenfalls benötigen.

(4) Die Vertragsstaaten stellen sicher, dass zu allen die Ausübung der Rechts- und Handlungsfähigkeit betreffenden Maßnahmen im Einklang mit den internationalen Menschenrechtsnormen geeignete und wirksame Sicherungen vorgesehen werden, um Missbräuche zu verhindern. Diese Sicherungen müssen gewährleisten, dass bei den Maßnahmen betreffend die Ausübung der Rechts- und Handlungsfähigkeit die Rechte, der Wille und die Präferenzen der betreffenden Person geachtet werden, es nicht zu Interessenkonflikten und missbräuchlicher Einflussnahme kommt, dass die Maßnahmen verhältnismäßig und auf die Umstände der Person zugeschnitten sind, dass sie von möglichst kurzer Dauer sind und dass sie einer regelmäßigen Überprüfung durch eine zuständige, unabhängige und unparteiische Behörde oder gerichtliche Stelle unterliegen. Die Sicherungen müssen im Hinblick auf das Ausmaß, in dem diese Maßnahmen die Rechte und Interessen der Person berühren, verhältnismäßig sein.

(5) Vorbehaltlich dieses Artikels treffen die Vertragsstaaten alle geeigneten und wirksamen Maßnahmen, um zu gewährleisten, dass Menschen mit Behinderungen das gleiche Recht wie andere haben, Eigentum zu besitzen oder zu erben, ihre finanziellen Angelegenheiten selbst zu regeln und gleichen Zugang zu Bankdarlehen, Hypotheken und anderen Finanzkrediten zu haben, und gewährleisten, dass Menschen mit Behinderungen nicht willkürlich ihr Eigentum entzogen wird.

Artikel 13

Zugang zur Justiz

(1) Die Vertragsstaaten gewährleisten Menschen mit Behinderungen gleichberechtigt mit anderen wirksamen Zugang zur Justiz, unter anderem durch verfahrensbezogene und altersgemäße Vorkehrungen, um ihre wirksame unmittelbare und mittelbare Teilnahme, einschließlich als Zeugen und Zeuginnen, an allen Gerichtsverfahren, auch in der Ermittlungsphase und in anderen Vorverfahrensphasen, zu erleichtern.

(2) Um zur Gewährleistung des wirksamen Zugangs von Menschen mit Behinderungen zur Justiz beizutragen, fördern die Vertragsstaaten geeignete Schulungen für die im Justizwesen tätigen Personen, einschließlich des Personals von Polizei und Strafvollzug.

Artikel 14

Freiheit und Sicherheit der Person

(1) Die Vertragsstaaten gewährleisten,

a) dass Menschen mit Behinderungen gleichberechtigt mit anderen das Recht auf persönliche Freiheit und Sicherheit genießen;

b) dass Menschen mit Behinderungen gleichberechtigt mit anderen die Freiheit nicht rechtswidrig oder willkürlich entzogen wird, dass jede Freiheitsentziehung im Einklang mit dem Gesetz erfolgt und dass das Vorliegen einer Behinderung in keinem Fall eine Freiheitsentziehung rechtfertigt.

(2) Die Vertragsstaaten gewährleisten, dass Menschen mit Behinderungen, denen aufgrund eines Verfahrens ihre Freiheit entzogen wird, gleichberechtigten Anspruch auf die in den internationalen Menschenrechtsnormen vorgesehenen Garantien haben und im Einklang mit den Zielen und Grundsätzen dieses Übereinkommens behandelt werden, einschließlich durch die Bereitstellung angemessener Vorkehrungen.

Artikel 15

Freiheit von Folter oder grausamer, unmenschlicher oder erniedrigender Behandlung oder Strafe

(1) Niemand darf der Folter oder grausamer, unmenschlicher oder erniedrigender Behandlung oder Strafe unterworfen werden. Insbesondere darf niemand ohne seine freiwillige Zustimmung medizinischen oder wissenschaftlichen Versuchen unterworfen werden.

(2) Die Vertragsstaaten treffen alle wirksamen gesetzgeberischen, verwaltungsmäßigen, gerichtlichen oder sonstigen Maßnahmen, um auf der Grundlage der Gleichberechtigung zu verhindern, dass Menschen mit Behinderungen der Folter oder grausamer, unmenschlicher oder erniedrigender Behandlung oder Strafe unterworfen werden.

Artikel 16

Freiheit von Ausbeutung, Gewalt und Missbrauch

(1) Die Vertragsstaaten treffen alle geeigneten Gesetzgebungs-, Verwaltungs-, Sozial-, Bildungs- und sonstigen Maßnahmen, um Menschen mit Behinderungen sowohl innerhalb als auch außerhalb der Wohnung vor jeder Form von Ausbeutung, Gewalt und Missbrauch, einschließlich ihrer geschlechtsspezifischen Aspekte, zu schützen.

(2) Die Vertragsstaaten treffen außerdem alle geeigneten Maßnahmen, um jede Form von Ausbeutung, Gewalt und Missbrauch zu verhindern, indem sie unter anderem geeignete Formen von das Geschlecht und das Alter berücksichtigender Hilfe und Unterstützung für Menschen mit Behinderungen und ihre Familien und Betreuungspersonen gewährleisten, einschließlich durch die Bereitstellung von Informationen und Aufklärung darüber, wie Fälle von Ausbeutung, Gewalt und Missbrauch verhindert, erkannt und angezeigt werden können. Die Vertragsstaaten sorgen dafür, dass Schutzdienste das Alter, das Geschlecht und die Behinderung der betroffenen Personen berücksichtigen.

(3) Zur Verhinderung jeder Form von Ausbeutung, Gewalt und Missbrauch stellen die Vertragsstaaten sicher, dass alle Einrichtungen und Programme, die für Menschen mit Behinderungen bestimmt sind, wirksam von unabhängigen Behörden überwacht werden.

(4) Die Vertragsstaaten treffen alle geeigneten Maßnahmen, um die körperliche, kognitive und psychische Genesung, die Rehabilitation und die soziale Wiedereingliederung von Menschen mit Behinderungen, die Opfer irgendeiner Form von Ausbeutung, Gewalt oder Missbrauch werden, zu fördern, auch durch die Bereitstellung von Schutzeinrichtungen. Genesung und Wiedereingliederung müssen in einer Umgebung stattfinden, die der Gesundheit, dem Wohlergehen, der Selbstachtung, der Würde und der Autonomie des Menschen förderlich ist und geschlechts- und altersspezifischen Bedürfnissen Rechnung trägt.

(5) Die Vertragsstaaten schaffen wirksame Rechtsvorschriften und politische Konzepte, einschließlich solcher, die auf Frauen und Kinder ausgerichtet sind, um sicherzustellen, dass Fälle von Ausbeutung, Gewalt und Missbrauch gegenüber Menschen mit Behinderungen erkannt, untersucht und gegebenenfalls strafrechtlich verfolgt werden.

Artikel 17

Schutz der Unversehrtheit der Person

Jeder Mensch mit Behinderungen hat gleichberechtigt mit anderen das Recht auf Achtung seiner körperlichen und seelischen Unversehrtheit.

Artikel 18

Freizügigkeit und Staatsangehörigkeit

(1) Die Vertragsstaaten anerkennen das gleiche Recht von Menschen mit Behinderungen auf Freizügigkeit, auf freie Wahl ihres Aufenthaltsorts und auf eine Staatsangehörigkeit, indem sie unter anderem gewährleisten, dass

a) Menschen mit Behinderungen das Recht haben, eine Staatsangehörigkeit zu erwerben und ihre Staatsangehörigkeit zu wechseln, und dass ihnen diese nicht willkürlich oder aufgrund von Behinderung entzogen wird;

b) Menschen mit Behinderungen nicht aufgrund von Behinderung die Möglichkeit versagt wird, Dokumente zum Nachweis ihrer Staatsangehörigkeit oder andere Identitätsdokumente zu erhalten, zu besitzen und zu verwenden oder einschlägige Verfahren wie Einwanderungsverfahren in Anspruch zu nehmen, die gegebenenfalls erforderlich sind, um die Ausübung des Rechts auf Freizügigkeit zu erleichtern;

c) Menschen mit Behinderungen die Freiheit haben, jedes Land einschließlich ihres eigenen zu verlassen;

d) Menschen mit Behinderungen nicht willkürlich oder aufgrund von Behinderung das Recht entzogen wird, in ihr eigenes Land einzureisen.

(2) Kinder mit Behinderungen sind unverzüglich nach ihrer Geburt in ein Register einzutragen und haben das Recht auf einen Namen von Geburt an, das Recht, eine Staatsangehörigkeit zu erwerben, und soweit möglich das Recht, ihre Eltern zu kennen und von ihnen betreut zu werden.

Artikel 19

Unabhängige Lebensführung und Einbeziehung in die Gemeinschaft

Die Vertragsstaaten dieses Übereinkommens anerkennen das gleiche Recht aller Menschen mit Behinderungen, mit gleichen Wahlmöglichkeiten wie andere Menschen in der Gemeinschaft zu leben, und treffen wirksame und geeignete Maßnahmen, um Menschen mit Behinderungen den vollen Genuss dieses Rechts und ihre volle Einbeziehung in die Gemeinschaft und Teilhabe an der Gemeinschaft zu erleichtern, indem sie unter anderem gewährleisten, dass

a) Menschen mit Behinderungen gleichberechtigt die Möglichkeit haben, ihren Aufenthaltsort zu wählen und zu entscheiden, wo und mit wem sie leben, und nicht verpflichtet sind, in besonderen Wohnformen zu leben;

b) Menschen mit Behinderungen Zugang zu einer Reihe von gemeindenahen Unterstützungsdiensten zu Hause und in Einrichtungen sowie zu sonstigen gemeindenahen Unterstützungsdiensten haben, einschließlich der persönlichen Assistenz, die zur Unterstützung des Lebens in der Gemeinschaft und der Einbeziehung in die Gemeinschaft sowie zur Verhinderung von Isolation und Absonderung von der Gemeinschaft notwendig ist;

c) gemeindenahe Dienstleistungen und Einrichtungen für die Allgemeinheit Menschen mit Behinderungen auf der Grundlage der Gleichberechtigung zur Verfügung stehen und ihren Bedürfnissen Rechnung tragen.

Artikel 20

Persönliche Mobilität

Die Vertragsstaaten treffen wirksame Maßnahmen, um für Menschen mit Behinderungen persönliche Mobilität mit größtmöglicher Unabhängigkeit sicherzustellen, indem sie unter anderem

a) die persönliche Mobilität von Menschen mit Behinderungen in der Art und Weise und zum Zeitpunkt ihrer Wahl und zu erschwinglichen Kosten erleichtern;

b) den Zugang von Menschen mit Behinderungen zu hochwertigen Mobilitätshilfen, Geräten, unterstützenden Technologien und menschlicher und tierischer Hilfe sowie Mittelspersonen erleichtern, auch durch deren Bereitstellung zu erschwinglichen Kosten;

c) Menschen mit Behinderungen und Fachkräften, die mit Menschen mit Behinderungen arbeiten, Schulungen in Mobilitätsfertigkeiten anbieten;

d) Hersteller von Mobilitätshilfen, Geräten und unterstützenden Technologien ermutigen, alle Aspekte der Mobilität für Menschen mit Behinderungen zu berücksichtigen.

Artikel 21

Recht der freien Meinungsäußerung, Meinungsfreiheit und Zugang zu Informationen

Die Vertragsstaaten treffen alle geeigneten Maßnahmen, um zu gewährleisten, dass Menschen mit Behinderungen das Recht auf freie Meinungsäußerung und Meinungsfreiheit, einschließlich der Freiheit, Informationen und Gedankengut sich zu beschaffen, zu empfangen und weiterzugeben, gleichberechtigt mit anderen und durch alle von ihnen gewählten Formen der Kommunikation im Sinne des Artikels 2 ausüben können, unter anderem indem sie

a) Menschen mit Behinderungen für die Allgemeinheit bestimmte Informationen rechtzeitig und ohne zusätzliche Kosten in zugänglichen Formaten und Technologien, die für unterschiedliche Arten der Behinderung geeignet sind, zur Verfügung stellen;

b) im Umgang mit Behörden die Verwendung von Gebärdensprachen, Brailleschrift, ergänzenden und alternativen Kommunikationsformen und allen sonstigen selbst gewählten zugänglichen Mitteln, Formen und Formaten der Kommunikation durch Menschen mit Behinderungen akzeptieren und erleichtern;

c) private Rechtsträger, die, einschließlich durch das Internet, Dienste für die Allgemeinheit anbieten, dringend dazu auffordern, Informationen und Dienstleistungen in Formaten zur Verfügung zu stellen, die für Menschen mit Behinderungen zugänglich und nutzbar sind;

d) die Massenmedien, einschließlich der Anbieter von Informationen über das Internet, dazu auffordern, ihre Dienstleistungen für Menschen mit Behinderungen zugänglich zu gestalten;

e) die Verwendung von Gebärdensprachen anerkennen und fördern.

Artikel 22

Achtung der Privatsphäre

(1) Menschen mit Behinderungen dürfen unabhängig von ihrem Aufenthaltsort oder der Wohnform, in der sie leben, keinen willkürlichen oder rechtswidrigen Eingriffen in ihr Privatleben, ihre Familie, ihre Wohnung oder ihren Schriftverkehr oder andere Arten der Kommunikation oder rechtswidrigen Beeinträchtigungen ihrer Ehre oder ihres Rufes ausgesetzt werden. Menschen mit Behinderungen haben Anspruch auf rechtlichen Schutz gegen solche Eingriffe oder Beeinträchtigungen.

(2) Die Vertragsstaaten schützen auf der Grundlage der Gleichberechtigung mit anderen die Vertraulichkeit von Informationen über die Person, die Gesundheit und die Rehabilitation von Menschen mit Behinderungen.

Artikel 23

Achtung der Wohnung und der Familie

(1) Die Vertragsstaaten treffen wirksame und geeignete Maßnahmen zur Beseitigung der Diskriminierung von Menschen mit Behinderungen auf der Grundlage der Gleichberechtigung mit anderen in allen Fragen, die Ehe, Familie, Elternschaft und Partnerschaften betreffen, um zu gewährleisten, dass

a) das Recht aller Menschen mit Behinderungen im heiratsfähigen Alter, auf der Grundlage des freien und vollen Einverständnisses der künftigen Ehegatten eine Ehe zu schließen und eine Familie zu gründen, anerkannt wird;

b) das Recht von Menschen mit Behinderungen auf freie und verantwortungsbewusste Entscheidung über die Anzahl ihrer Kinder und die Geburtenabstände sowie auf Zugang zu altersgemäßer Information sowie Aufklärung über Fortpflanzung und Familienplanung anerkannt wird und ihnen die notwendigen Mittel zur Ausübung dieser Rechte zur Verfügung gestellt werden;

c) Menschen mit Behinderungen, einschließlich Kindern, gleichberechtigt mit anderen ihre Fruchtbarkeit behalten.

(2) Die Vertragsstaaten gewährleisten die Rechte und Pflichten von Menschen mit Behinderungen in Fragen der Vormundschaft, Pflegschaft, Personen- und Vermögenssorge, Adoption von Kindern oder ähnlichen Rechtsinstituten, soweit das innerstaatliche Recht solche kennt; in allen Fällen ist das Wohl des Kindes ausschlaggebend. Die Vertragsstaaten unterstützen Menschen mit Behinderungen in angemessener Weise bei der Wahrnehmung ihrer elterlichen Verantwortung.

(3) Die Vertragsstaaten gewährleisten, dass Kinder mit Behinderungen gleiche Rechte in Bezug auf das Familienleben haben. Zur Verwirklichung dieser Rechte und mit dem Ziel, das Verbergen, das Aussetzen, die Vernachlässigung und die Absonderung von Kindern mit Behinderungen zu verhindern, verpflichten sich die Vertragsstaaten, Kindern mit Behinderungen und ihren Familien frühzeitig umfassende Informationen, Dienste und Unterstützung zur Verfügung zu stellen.

(4) Die Vertragsstaaten gewährleisten, dass ein Kind nicht gegen den Willen seiner Eltern von diesen getrennt wird, es sei denn, dass die zuständigen Behörden in einer gerichtlich nachprüfbaren Entscheidung nach den anzuwendenden Rechtsvorschriften und Verfahren bestimmen, dass diese Trennung zum Wohl des Kindes notwendig ist. In keinem Fall darf das Kind aufgrund einer Behinderung entweder des Kindes oder eines oder beider Elternteile von den Eltern getrennt werden.

(5) Die Vertragsstaaten verpflichten sich, in Fällen, in denen die nächsten Familienangehörigen nicht in der Lage sind, für ein Kind mit Behinderungen zu sorgen, alle Anstrengungen zu unternehmen, um andere Formen der Betreuung innerhalb der weiteren Familie und, falls dies nicht möglich ist, innerhalb der Gemeinschaft in einem familienähnlichen Umfeld zu gewährleisten.

Artikel 24

Bildung

(1) Die Vertragsstaaten anerkennen das Recht von Menschen mit Behinderungen auf Bildung. Um dieses Recht ohne Diskriminierung und auf der Grundlage der Chancengleichheit zu verwirklichen, gewährleisten die Vertragsstaaten ein integratives Bildungssystem auf allen Ebenen und lebenslanges Lernen mit dem Ziel,

a) die menschlichen Möglichkeiten sowie das Bewusstsein der Würde und das Selbstwertgefühl des Menschen voll zur Entfaltung zu bringen und die Achtung vor den Menschenrechten, den Grundfreiheiten und der menschlichen Vielfalt zu stärken;

b) Menschen mit Behinderungen ihre Persönlichkeit, ihre Begabungen und ihre Kreativität sowie ihre geistigen und körperlichen Fähigkeiten voll zur Entfaltung bringen zu lassen;

c) Menschen mit Behinderungen zur wirklichen Teilhabe an einer freien Gesellschaft zu befähigen.

(2) Bei der Verwirklichung dieses Rechts stellen die Vertragsstaaten sicher, dass

a) Menschen mit Behinderungen nicht aufgrund von Behinderung vom allgemeinen Bildungssystem ausgeschlossen werden und dass Kinder mit Behinderungen nicht aufgrund von Behinderung vom unentgeltlichen und obligatorischen Grundschulunterricht oder vom Besuch weiterführender Schulen ausgeschlossen werden;

b) Menschen mit Behinderungen gleichberechtigt mit anderen in der Gemeinschaft, in der sie leben, Zugang zu einem integrativen, hochwertigen und unentgeltlichen Unterricht an Grundschulen und weiterführenden Schulen haben;

c) angemessene Vorkehrungen für die Bedürfnisse des Einzelnen getroffen werden;

d) Menschen mit Behinderungen innerhalb des allgemeinen Bildungssystems die notwendige Unterstützung geleistet wird, um ihre erfolgreiche Bildung zu erleichtern;

e) in Übereinstimmung mit dem Ziel der vollständigen Integration wirksame individuell angepasste Unterstützungsmaßnahmen in einem Umfeld, das die bestmögliche schulische und soziale Entwicklung gestattet, angeboten werden.

(3) Die Vertragsstaaten ermöglichen Menschen mit Behinderungen, lebenspraktische Fertigkeiten und soziale Kompetenzen zu erwerben, um ihre volle und gleichberechtigte Teilhabe an der Bildung und als Mitglieder der Gemeinschaft zu erleichtern. Zu diesem Zweck ergreifen die Vertragsstaaten geeignete Maßnahmen; unter anderem

a) erleichtern sie das Erlernen von Brailleschrift, alternativer Schrift, ergänzenden und alternativen Formen, Mitteln und Formaten der Kommunikation, den Erwerb von Orientierungs- und Mobilitätsfertigkeiten sowie die Unterstützung durch andere Menschen mit Behinderungen und das Mentoring;

b) erleichtern sie das Erlernen der Gebärdensprache und die Förderung der sprachlichen Identität der Gehörlosen;

c) stellen sie sicher, dass blinden, gehörlosen oder taubblinden Menschen, insbesondere Kindern, Bildung in den Sprachen und Kommunikationsformen und mit den Kommunikationsmitteln, die für den Einzelnen am besten geeignet sind, sowie in einem Umfeld vermittelt wird, das die bestmögliche schulische und soziale Entwicklung gestattet.

(4) Um zur Verwirklichung dieses Rechts beizutragen, treffen die Vertragsstaaten geeignete Maßnahmen zur Einstellung von Lehrkräften, einschließlich solcher mit Behinderungen, die in Gebärdensprache oder Brailleschrift ausgebildet sind, und zur Schulung von Fachkräften sowie Mitarbeitern und Mitarbeiterinnen auf allen Ebenen des Bildungswesens. Diese Schulung schließt die Schärfung des Bewusstseins für Behinderungen und die Verwendung geeigneter ergänzender und alternativer Formen, Mittel und Formate der Kommunikation sowie pädagogische Verfahren und Materialien zur Unterstützung von Menschen mit Behinderungen ein.

(5) Die Vertragsstaaten stellen sicher, dass Menschen mit Behinderungen ohne Diskriminierung und gleichberechtigt mit anderen Zugang zu allgemeiner Hochschulbildung, Berufsausbildung, Erwachsenenbildung und lebenslangem Lernen haben. Zu diesem Zweck stellen die Vertragsstaaten sicher, dass für Menschen mit Behinderungen angemessene Vorkehrungen getroffen werden.

Artikel 25

Gesundheit

Die Vertragsstaaten anerkennen das Recht von Menschen mit Behinderungen auf das erreichbare Höchstmaß an Gesundheit ohne Diskriminierung aufgrund von Behinderung. Die Vertragsstaaten treffen alle geeigneten Maßnahmen, um zu gewährleisten, dass Menschen mit Behinderungen Zugang zu geschlechtsspezifischen Gesundheitsdiensten, einschließlich gesundheitlicher Rehabilitation, haben. Insbesondere

a) stellen die Vertragsparteien Menschen mit Behinderungen eine unentgeltliche oder erschwingliche Gesundheitsversorgung in derselben Bandbreite, von derselben Qualität und auf demselben Standard zur Verfügung wie anderen Menschen, einschließlich sexual- und fortpflanzungsmedizinischer Gesundheitsleistungen und der Gesamtbevölkerung zur Verfügung stehender Programme des öffentlichen Gesundheitswesens;

b) bieten die Vertragsstaaten die Gesundheitsleistungen an, die von Menschen mit Behinderungen speziell wegen ihrer Behinderungen benötigt werden, soweit angebracht, einschließlich Früherkennung und Frühintervention, sowie Leistungen, durch die, auch bei Kindern und älteren Menschen, weitere Behinderungen möglichst gering gehalten oder vermieden werden sollen;

c) bieten die Vertragsstaaten diese Gesundheitsleistungen so gemeindenah wie möglich an, auch in ländlichen Gebieten;

d) erlegen die Vertragsstaaten den Angehörigen der Gesundheitsberufe die Verpflichtung auf, Menschen mit Behinderungen eine Versorgung von gleicher Qualität wie anderen Menschen angedeihen zu lassen, namentlich auf der Grundlage der freien Einwilligung nach vorheriger Aufklärung, indem sie unter anderem durch Schulungen und den Erlass ethischer Normen für die staatliche und private Gesundheitsversorgung das Bewusstsein für die Menschenrechte, die Würde, die Autonomie und die Bedürfnisse von Menschen mit Behinderungen schärfen;

e) verbieten die Vertragsstaaten die Diskriminierung von Menschen mit Behinderungen in der Krankenversicherung und in der Lebensversicherung, soweit eine solche Versicherung nach innerstaatlichem Recht zulässig ist; solche Versicherungen sind zu fairen und angemessenen Bedingungen anzubieten;

f) verhindern die Vertragsstaaten die diskriminierende Vorenthaltung von Gesundheitsversorgung oder -leistungen oder von Nahrungsmitteln und Flüssigkeiten aufgrund von Behinderung.

Artikel 26

Habilitation und Rehabilitation

(1) Die Vertragsstaaten treffen wirksame und geeignete Maßnahmen, einschließlich durch die Unterstützung durch andere Menschen mit Behinderungen, um Menschen mit Behinderungen in die Lage zu versetzen, ein Höchstmaß an Unabhängigkeit, umfassende körperliche, geistige, soziale und berufliche Fähigkeiten sowie die volle Einbeziehung in alle Aspekte des Lebens und die volle Teilhabe an allen Aspekten des Lebens zu erreichen und zu bewahren. Zu diesem Zweck organisieren, stärken und erweitern die Vertragsstaaten umfassende Habilitations- und Rehabilitationsdienste und -programme, insbesondere auf dem Gebiet der Gesundheit, der Beschäftigung, der Bildung und der Sozialdienste, und zwar so, dass diese Leistungen und Programme

a) im frühestmöglichen Stadium einsetzen und auf einer multidisziplinären Bewertung der individuellen Bedürfnisse und Stärken beruhen;

b) die Einbeziehung in die Gemeinschaft und die Gesellschaft in allen ihren Aspekten sowie die Teilhabe daran unterstützen, freiwillig sind und Menschen mit Behinderungen so gemeindenah wie möglich zur Verfügung stehen, auch in ländlichen Gebieten.

(2) Die Vertragsstaaten fördern die Entwicklung der Aus- und Fortbildung für Fachkräfte und Mitarbeiter und Mitarbeiterinnen in Habilitations- und Rehabilitationsdiensten.

(3) Die Vertragsstaaten fördern die Verfügbarkeit, die Kenntnis und die Verwendung unterstützender Geräte und Technologien, die für Menschen mit Behinderungen bestimmt sind, für die Zwecke der Habilitation und Rehabilitation.

Artikel 27

Arbeit und Beschäftigung

(1) Die Vertragsstaaten anerkennen das gleiche Recht von Menschen mit Behinderungen auf Arbeit; dies beinhaltet das Recht auf die Möglichkeit, den Lebensunterhalt durch Arbeit zu verdienen, die in einem offenen, integrativen und für Menschen mit Behinderungen zugänglichen Arbeitsmarkt und Arbeitsumfeld frei gewählt oder angenommen wird. Die Vertragsstaaten sichern und fördern die Verwirklichung des Rechts auf Arbeit, einschließlich für Menschen, die während der Beschäftigung eine Behinderung erwerben, durch geeignete Schritte, einschließlich des Erlasses von Rechtsvorschriften, um unter anderem

a) Diskriminierung aufgrund von Behinderung in allen Angelegenheiten im Zusammenhang mit einer Beschäftigung gleich welcher Art, einschließlich der Auswahl-, Einstellungs- und Beschäftigungsbedingungen, der Weiterbeschäftigung, des beruflichen Aufstiegs sowie sicherer und gesunder Arbeitsbedingungen, zu verbieten;

b) das gleiche Recht von Menschen mit Behinderungen auf gerechte und günstige Arbeitsbedingungen, einschließlich Chancengleichheit und gleichen Entgelts für gleichwertige Arbeit, auf sichere und gesunde Arbeitsbedingungen, einschließlich Schutz vor Belästigungen, und auf Abhilfe bei Missständen zu schützen;

c) zu gewährleisten, dass Menschen mit Behinderungen ihre Arbeitnehmer- und Gewerkschaftsrechte gleichberechtigt mit anderen ausüben können;

d) Menschen mit Behinderungen wirksamen Zugang zu allgemeinen fachlichen und beruflichen Beratungsprogrammen, Stellenvermittlung sowie Berufsausbildung und Weiterbildung zu ermöglichen;

e) für Menschen mit Behinderungen Beschäftigungsmöglichkeiten und beruflichen Aufstieg auf dem Arbeitsmarkt sowie die Unterstützung bei der Arbeitssuche, beim Erhalt und der Beibehaltung eines Arbeitsplatzes und beim beruflichen Wiedereinstieg zu fördern;

f) Möglichkeiten für Selbständigkeit, Unternehmertum, die Bildung von Genossenschaften und die Gründung eines eigenen Geschäfts zu fördern;

g) Menschen mit Behinderungen im öffentlichen Sektor zu beschäftigen;

h) die Beschäftigung von Menschen mit Behinderungen im privaten Sektor durch geeignete Strategien und Maßnahmen zu fördern, wozu auch Programme für positive Maßnahmen, Anreize und andere Maßnahmen gehören können;

i) sicherzustellen, dass am Arbeitsplatz angemessene Vorkehrungen für Menschen mit Behinderungen getroffen werden;

j) das Sammeln von Arbeitserfahrung auf dem allgemeinen Arbeitsmarkt durch Menschen mit Behinderungen zu fördern;

k) Programme für die berufliche Rehabilitation, den Erhalt des Arbeitsplatzes und den beruflichen Wiedereinstieg von Menschen mit Behinderungen zu fördern.

(2) Die Vertragsstaaten stellen sicher, dass Menschen mit Behinderungen nicht in Sklaverei oder Leibeigenschaft gehalten werden und dass sie gleichberechtigt mit anderen vor Zwangs- oder Pflichtarbeit geschützt werden.

Artikel 28

Angemessener Lebensstandard und sozialer Schutz

(1) Die Vertragsstaaten anerkennen das Recht von Menschen mit Behinderungen auf einen angemessenen Lebensstandard für sich selbst und ihre Familien, einschließlich angemessener Ernährung, Bekleidung und Wohnung, sowie auf eine stetige Verbesserung der Lebensbedingungen und unternehmen geeignete Schritte zum Schutz und zur Förderung der Verwirklichung dieses Rechts ohne Diskriminierung aufgrund von Behinderung.

(2) Die Vertragsstaaten anerkennen das Recht von Menschen mit Behinderungen auf sozialen Schutz und den Genuss dieses Rechts ohne Diskriminierung aufgrund von Behinderung und unternehmen geeignete Schritte zum Schutz und zur Förderung der Verwirklichung dieses Rechts, einschließlich Maßnahmen, um

a) Menschen mit Behinderungen gleichberechtigten Zugang zur Versorgung mit sauberem Wasser und den Zugang zu geeigneten und erschwinglichen Dienstleistungen, Geräten und anderen Hilfen für Bedürfnisse im Zusammenhang mit ihrer Behinderung zu sichern;

b) Menschen mit Behinderungen, insbesondere Frauen und Mädchen sowie älteren Menschen mit Behinderungen, den Zugang zu Programmen für sozialen Schutz und Programmen zur Armutsbekämpfung zu sichern;

c) in Armut lebenden Menschen mit Behinderungen und ihren Familien den Zugang zu staatlicher Hilfe bei behinderungsbedingten Aufwendungen, einschließlich ausreichender Schulung, Beratung, finanzieller Unterstützung sowie Kurzzeitbetreuung, zu sichern;

d) Menschen mit Behinderungen den Zugang zu Programmen des sozialen Wohnungsbaus zu sichern;

e) Menschen mit Behinderungen gleichberechtigten Zugang zu Leistungen und Programmen der Altersversorgung zu sichern.

Artikel 29

Teilhabe am politischen und öffentlichen Leben

Die Vertragsstaaten garantieren Menschen mit Behinderungen die politischen Rechte sowie die Möglichkeit, diese gleichberechtigt mit anderen zu genießen, und verpflichten sich,

a) sicherzustellen, dass Menschen mit Behinderungen gleichberechtigt mit anderen wirksam und umfassend am politischen und öffentlichen Leben teilhaben können, sei es unmittelbar oder durch frei gewählte Vertreter oder Vertreterinnen, was auch das Recht und die Möglichkeit einschließt, zu wählen und gewählt zu werden; unter anderem

   i) stellen sie sicher, dass die Wahlverfahren, -einrichtungen und -materialien geeignet, zugänglich und leicht zu verstehen und zu handhaben sind;

   ii) schützen sie das Recht von Menschen mit Behinderungen, bei Wahlen und Volksabstimmungen in geheimer Abstimmung ohne Einschüchterung ihre Stimme abzugeben, bei Wahlen zu kandidieren, ein Amt wirksam innezuhaben und alle öffentlichen Aufgaben auf allen Ebenen staatlicher Tätigkeit wahrzunehmen, indem sie gegebenenfalls die Nutzung unterstützender und neuer Technologien erleichtern;

   iii) garantieren sie die freie Willensäußerung von Menschen mit Behinderungen als Wähler und Wählerinnen und erlauben zu diesem Zweck im Bedarfsfall auf Wunsch, dass sie sich bei der Stimmabgabe durch eine Person ihrer Wahl unterstützen lassen;

b) aktiv ein Umfeld zu fördern, in dem Menschen mit Behinderungen ohne Diskriminierung und gleichberechtigt mit anderen wirksam und umfassend an der Gestaltung der öffentlichen Angelegenheiten mitwirken können, und ihre Mitwirkung an den öffentlichen Angelegenheiten zu begünstigen, unter anderem

   i) die Mitarbeit in nichtstaatlichen Organisationen und Vereinigungen, die sich mit dem öffentlichen und politischen Leben ihres Landes befassen, und an den Tätigkeiten und der Verwaltung politischer Parteien;

   ii) die Bildung von Organisationen von Menschen mit Behinderungen, die sie auf internationaler, nationaler, regionaler und lokaler Ebene vertreten, und den Beitritt zu solchen Organisationen.

Artikel 30

Teilhabe am kulturellen Leben sowie an Erholung, Freizeit und Sport

(1) Die Vertragsstaaten anerkennen das Recht von Menschen mit Behinderungen, gleichberechtigt mit anderen am kulturellen Leben teilzunehmen, und treffen alle geeigneten Maßnahmen, um sicherzustellen, dass Menschen mit Behinderungen

a) Zugang zu kulturellem Material in zugänglichen Formaten haben;

b) Zugang zu Fernsehprogrammen, Filmen, Theatervorstellungen und anderen kulturellen Aktivitäten in zugänglichen Formaten haben;

c) Zugang zu Orten kultureller Darbietungen oder Dienstleistungen, wie Theatern, Museen, Kinos, Bibliotheken und Tourismusdiensten, sowie, so weit wie möglich, zu Denkmälern und Stätten von nationaler kultureller Bedeutung haben.

(2) Die Vertragsstaaten treffen geeignete Maßnahmen, um Menschen mit Behinderungen die Möglichkeit zu geben, ihr kreatives, künstlerisches und intellektuelles Potenzial zu entfalten und zu nutzen, nicht nur für sich selbst, sondern auch zur Bereicherung der Gesellschaft.

(3) Die Vertragsstaaten unternehmen alle geeigneten Schritte im Einklang mit dem Völkerrecht, um sicherzustellen, dass Gesetze zum Schutz von Rechten des geistigen Eigentums keine ungerechtfertigte oder diskriminierende Barriere für den Zugang von Menschen mit Behinderungen zu kulturellem Material darstellen.

(4) Menschen mit Behinderungen haben gleichberechtigt mit anderen Anspruch auf Anerkennung und Unterstützung ihrer spezifischen kulturellen und sprachlichen Identität, einschließlich der Gebärdensprachen und der Gehörlosenkultur.

(5) Mit dem Ziel, Menschen mit Behinderungen die gleichberechtigte Teilnahme an Erholungs-, Freizeit- und Sportaktivitäten zu ermöglichen, treffen die Vertragsstaaten geeignete Maßnahmen,

a) um Menschen mit Behinderungen zu ermutigen, so umfassend wie möglich an breitensportlichen Aktivitäten auf allen Ebenen teilzunehmen, und ihre Teilnahme zu fördern;

b) um sicherzustellen, dass Menschen mit Behinderungen die Möglichkeit haben, behinderungsspezifische Sport- und Erholungsaktivitäten zu organisieren, zu entwickeln und an solchen teilzunehmen, und zu diesem Zweck die Bereitstellung eines geeigneten Angebots an Anleitung, Training und Ressourcen auf der Grundlage der Gleichberechtigung mit anderen zu fördern;

c) um sicherzustellen, dass Menschen mit Behinderungen Zugang zu Sport-, Erholungs- und Tourismusstätten haben;

d) um sicherzustellen, dass Kinder mit Behinderungen gleichberechtigt mit anderen Kindern an Spiel-, Erholungs-, Freizeit- und Sportaktivitäten teilnehmen können, einschließlich im schulischen Bereich;

e) um sicherzustellen, dass Menschen mit Behinderungen Zugang zu Dienstleistungen der Organisatoren von Erholungs-, Tourismus-, Freizeit- und Sportaktivitäten haben.

Artikel 31

Statistik und Datensammlung

(1) Die Vertragsstaaten verpflichten sich zur Sammlung geeigneter Informationen, einschließlich statistischer Angaben und Forschungsdaten, die ihnen ermöglichen, politische Konzepte zur Durchführung dieses Übereinkommens auszuarbeiten und umzusetzen. Das Verfahren zur Sammlung und Aufbewahrung dieser Informationen muss

a) mit den gesetzlichen Schutzvorschriften, einschließlich der Rechtsvorschriften über den Datenschutz, zur Sicherung der Vertraulichkeit und der Achtung der Privatsphäre von Menschen mit Behinderungen im Einklang stehen;

b) mit den international anerkannten Normen zum Schutz der Menschenrechte und Grundfreiheiten und den ethischen Grundsätzen für die Sammlung und Nutzung statistischer Daten im Einklang stehen.

(2) Die im Einklang mit diesem Artikel gesammelten Informationen werden, soweit angebracht, aufgeschlüsselt und dazu verwendet, die Umsetzung der Verpflichtungen aus diesem Übereinkommen durch die Vertragsstaaten zu beurteilen und die Hindernisse, denen sich Menschen mit Behinderungen bei der Ausübung ihrer Rechte gegenübersehen, zu ermitteln und anzugehen.

(3) Die Vertragsstaaten übernehmen die Verantwortung für die Verbreitung dieser Statistiken und sorgen dafür, dass sie für Menschen mit Behinderungen und andere zugänglich sind.

Artikel 32

Internationale Zusammenarbeit

(1) Die Vertragsstaaten anerkennen die Bedeutung der internationalen Zusammenarbeit und deren Förderung zur Unterstützung der einzelstaatlichen Anstrengungen für die Verwirklichung des Zwecks und der Ziele dieses Übereinkommens und treffen diesbezüglich geeignete und wirksame Maßnahmen, zwischenstaatlich sowie, soweit angebracht, in Partnerschaft mit den einschlägigen internationalen und regionalen Organisationen und der Zivilgesellschaft, insbesondere Organisationen von Menschen mit Behinderungen. Unter anderem können sie Maßnahmen ergreifen, um

a) sicherzustellen, dass die internationale Zusammenarbeit, einschließlich internationaler Entwicklungsprogramme, Menschen mit Behinderungen einbezieht und für sie zugänglich ist;

b) den Aufbau von Kapazitäten zu erleichtern und zu unterstützen, unter anderem durch den Austausch und die Weitergabe von Informationen, Erfahrungen, Ausbildungsprogrammen und vorbildlichen Praktiken;

c) die Forschungszusammenarbeit und den Zugang zu wissenschaftlichen und technischen Kenntnissen zu erleichtern;

d) soweit angebracht, technische und wirtschaftliche Hilfe zu leisten, unter anderem durch Erleichterung des Zugangs zu zugänglichen und unterstützenden Technologien und ihres Austauschs sowie durch Weitergabe von Technologien.

(2) Dieser Artikel berührt nicht die Pflicht jedes Vertragsstaats, seine Verpflichtungen aus diesem Übereinkommen zu erfüllen.

Artikel 33

Innerstaatliche Durchführung und Überwachung

(1) Die Vertragsstaaten bestimmen nach Maßgabe ihrer staatlichen Organisation eine oder mehrere staatliche Anlaufstellen für Angelegenheiten im Zusammenhang mit der Durchführung dieses Übereinkommens und prüfen sorgfältig die Schaffung oder Bestimmung eines staatlichen Koordinierungsmechanismus, der die Durchführung der entsprechenden Maßnahmen in verschiedenen Bereichen und auf verschiedenen Ebenen erleichtern soll.

(2) Die Vertragsstaaten unterhalten, stärken, bestimmen oder schaffen nach Maßgabe ihres Rechts- und Verwaltungssystems auf einzelstaatlicher Ebene für die Förderung, den Schutz und die Überwachung der Durchführung dieses Übereinkommens eine Struktur, die, je nachdem, was angebracht ist, einen oder mehrere unabhängige Mechanismen einschließt. Bei der Bestimmung oder Schaffung eines solchen Mechanismus berücksichtigen die Vertragsstaaten die Grundsätze betreffend die Rechtsstellung und die Arbeitsweise der einzelstaatlichen Institutionen zum Schutz und zur Förderung der Menschenrechte.

(3) Die Zivilgesellschaft, insbesondere Menschen mit Behinderungen und die sie vertretenden Organisationen, wird in den Überwachungsprozess einbezogen und nimmt in vollem Umfang daran teil.

Artikel 34

Übereinkommen über die Rechte von Menschen mit Behinderungen

(1) Es wird ein Ausschuss für die Rechte von Menschen mit Behinderungen (im Folgenden als „Ausschuss" bezeichnet) eingesetzt, der die nachstehend festgelegten Aufgaben wahrnimmt.

(2) Der Ausschuss besteht zum Zeitpunkt des Inkrafttretens dieses Übereinkommens aus zwölf Sachverständigen. Nach sechzig weiteren Ratifikationen oder Beitritten zu dem Übereinkommen erhöht sich die Zahl der Ausschussmitglieder um sechs auf die Höchstzahl von achtzehn.

(3) Die Ausschussmitglieder sind in persönlicher Eigenschaft tätig und müssen Persönlichkeiten von hohem sittlichen Ansehen und anerkannter Sachkenntnis und Erfahrung auf dem von diesem Übereinkommen erfassten Gebiet sein. Die Vertragsstaaten sind aufgefordert, bei der Benennung ihrer Kandidaten oder Kandidatinnen Artikel 4 Absatz 3 gebührend zu berücksichtigen.

(4) Die Ausschussmitglieder werden von den Vertragsstaaten gewählt, wobei auf eine gerechte geografische Verteilung, die Vertretung der verschiedenen Kulturkreise und der hauptsächlichen Rechtssysteme, die ausgewogene Vertretung der Geschlechter und die Beteiligung von Sachverständigen mit Behinderungen zu achten ist.

(5) Die Ausschussmitglieder werden auf Sitzungen der Konferenz der Vertragsstaaten in geheimer Wahl aus einer Liste von Personen gewählt, die von den Vertragsstaaten aus dem Kreis ihrer Staatsangehörigen benannt worden sind. Auf diesen Sitzungen, die beschlussfähig sind, wenn zwei Drittel der Vertragsstaaten vertreten sind, gelten diejenigen Kandidaten oder Kandidatinnen als in den Ausschuss gewählt, welche die höchste Stimmenzahl und die absolute Stimmenmehrheit der anwesenden und abstimmenden Vertreter beziehungsweise Vertreterinnen der Vertragsstaaten auf sich vereinigen.

(6) Die erste Wahl findet spätestens sechs Monate nach Inkrafttreten dieses Übereinkommens statt. Spätestens vier Monate vor jeder Wahl fordert der Generalsekretär der Vereinten Nationen die Vertragsstaaten schriftlich auf, innerhalb von zwei Monaten ihre Benennungen einzureichen. Der Generalsekretär fertigt sodann eine alphabetische Liste aller auf diese Weise benannten Personen an, unter Angabe der Vertragsstaaten, die sie benannt haben, und übermittelt sie den Vertragsstaaten.

(7) Die Ausschussmitglieder werden für vier Jahre gewählt. Ihre einmalige Wiederwahl ist zulässig. Die Amtszeit von sechs der bei der ersten Wahl gewählten Mitglieder läuft jedoch nach zwei Jahren ab; unmittelbar nach der ersten Wahl werden die Namen dieser sechs Mitglieder von dem oder der Vorsitzenden der in Absatz 5 genannten Sitzung durch das Los bestimmt.

(8) Die Wahl der sechs zusätzlichen Ausschussmitglieder findet bei den ordentlichen Wahlen im Einklang mit den einschlägigen Bestimmungen dieses Artikels statt.

(9) Wenn ein Ausschussmitglied stirbt oder zurücktritt oder erklärt, dass es aus anderen Gründen seine Aufgaben nicht mehr wahrnehmen kann, ernennt der Vertragsstaat, der das Mitglied benannt hat, für die verbleibende Amtszeit eine andere sachverständige Person, die über die Befähigungen verfügt und die Voraussetzungen erfüllt, die in den einschlägigen Bestimmungen dieses Artikels beschrieben sind.

(10) Der Ausschuss gibt sich eine Geschäftsordnung.

(11) Der Generalsekretär der Vereinten Nationen stellt dem Ausschuss das Personal und die Einrichtungen zur Verfügung, die dieser zur wirksamen Wahrnehmung seiner Aufgaben nach diesem Übereinkommen benötigt, und beruft seine erste Sitzung ein.

(12) Die Mitglieder des nach diesem Übereinkommen eingesetzten Ausschusses erhalten mit Zustimmung der Generalversammlung der Vereinten Nationen Bezüge aus Mitteln der Vereinten Nationen zu den von der Generalversammlung unter Berücksichtigung der Bedeutung der Aufgaben des Ausschusses zu beschließenden Bedingungen.

(13) Die Ausschussmitglieder haben Anspruch auf die Erleichterungen, Vorrechte und Immunitäten der Sachverständigen im Auftrag der Vereinten Nationen, die in den einschlägigen Abschnitten des Übereinkommens über die Vorrechte und Immunitäten der Vereinten Nationen vorgesehen sind.

Artikel 35

Berichte der Vertragsstaaten

(1) Jeder Vertragsstaat legt dem Ausschuss über den Generalsekretär der Vereinten Nationen innerhalb von zwei Jahren nach Inkrafttreten dieses Übereinkommens für den betreffenden Vertragsstaat einen umfassenden Bericht über die Maßnahmen, die er zur Erfüllung seiner Verpflichtungen aus dem Übereinkommen getroffen hat, und über die dabei erzielten Fortschritte vor.

(2) Danach legen die Vertragsstaaten mindestens alle vier Jahre und darüber hinaus jeweils auf Anforderung des Ausschusses Folgeberichte vor.

(3) Der Ausschuss beschließt gegebenenfalls Leitlinien für den Inhalt der Berichte.

(4) Ein Vertragsstaat, der dem Ausschuss einen ersten umfassenden Bericht vorgelegt hat, braucht in seinen Folgeberichten die früher mitgeteilten Angaben nicht zu wiederholen. Die Vertragsstaaten sind gebeten, ihre Berichte an den Ausschuss in einem offenen und transparenten Verfahren zu erstellen und dabei Artikel 4 Absatz 3 gebührend zu berücksichtigen.

(5) In den Berichten kann auf Faktoren und Schwierigkeiten hingewiesen werden, die das Ausmaß der Erfüllung der Verpflichtungen aus diesem Übereinkommen beeinflussen.

Artikel 36

Prüfung der Berichte

(1) Der Ausschuss prüft jeden Bericht; er kann ihn mit den ihm geeignet erscheinenden Vorschlägen und allgemeinen Empfehlungen versehen und leitet diese dem betreffenden Vertragsstaat zu. Dieser kann dem Ausschuss hierauf jede Information übermitteln, die er zu geben wünscht. Der Ausschuss kann die Vertragsstaaten um weitere Angaben über die Durchführung dieses Übereinkommens ersuchen.

(2) Liegt ein Vertragsstaat mit der Vorlage eines Berichts in erheblichem Rückstand, so kann der Ausschuss dem betreffenden Vertragsstaat notifizieren, dass die Durchführung dieses Übereinkommens im betreffenden Vertragsstaat auf der Grundlage der dem Ausschuss zur Verfügung stehenden zuverlässigen Informationen geprüft werden muss, falls der Bericht nicht innerhalb von drei Monaten nach dieser Notifikation vorgelegt wird. Der Ausschuss fordert den betreffenden Vertragsstaat auf, bei dieser Prüfung mitzuwirken. Falls der Vertragsstaat daraufhin den Bericht vorlegt, findet Absatz 1 Anwendung.

(3) Der Generalsekretär der Vereinten Nationen stellt die Berichte allen Vertragsstaaten zur Verfügung.

(4) Die Vertragsstaaten sorgen für eine weite Verbreitung ihrer Berichte im eigenen Land und erleichtern den Zugang zu den Vorschlägen und allgemeinen Empfehlungen zu diesen Berichten.

(5) Der Ausschuss übermittelt, wenn er dies für angebracht hält, den Sonderorganisationen, Fonds und Programmen der Vereinten Nationen und anderen zuständigen Stellen Berichte der Vertragsstaaten, damit ein darin enthaltenes Ersuchen um fachliche Beratung oder Unterstützung oder ein darin enthaltener Hinweis, dass ein diesbezügliches Bedürfnis besteht, aufgegriffen werden kann; etwaige Bemerkungen und Empfehlungen des Ausschusses zu diesen Ersuchen oder Hinweisen werden beigefügt.

Artikel 37

Zusammenarbeit zwischen den Vertragsstaaten und dem Ausschuss

(1) Jeder Vertragsstaat arbeitet mit dem Ausschuss zusammen und ist seinen Mitgliedern bei der Erfüllung ihres Mandats behilflich.

(2) In seinen Beziehungen zu den Vertragsstaaten prüft der Ausschuss gebührend Möglichkeiten zur Stärkung der einzelstaatlichen Fähigkeiten zur Durchführung dieses Übereinkommens, einschließlich durch internationale Zusammenarbeit.

Artikel 38

Beziehungen des Ausschusses zu anderen Organen

Um die wirksame Durchführung dieses Übereinkommens und die internationale Zusammenarbeit auf dem von dem Übereinkommen erfassten Gebiet zu fördern,

a) haben die Sonderorganisationen und andere Organe der Vereinten Nationen das Recht, bei der Erörterung der Durchführung derjenigen Bestimmungen des Übereinkommens, die in ihren Aufgabenbereich fallen, vertreten zu sein. Der Ausschuss kann, wenn er dies für angebracht hält, Sonderorganisationen und andere zuständige Stellen einladen, sachkundige Stellungnahmen zur Durchführung des Übereinkommens auf Gebieten abzugeben, die in ihren jeweiligen Aufgabenbereich fallen. Der Ausschuss kann Sonderorganisationen und andere Organe der Vereinten Nationen einladen, ihm Berichte über die Durchführung des Übereinkommens auf den Gebieten vorzulegen, die in ihren Tätigkeitsbereich fallen;

b) konsultiert der Ausschuss bei der Wahrnehmung seines Mandats, soweit angebracht, andere einschlägige Organe, die durch internationale Menschenrechtsverträge geschaffen wurden, mit dem Ziel, die Kohärenz ihrer jeweiligen Berichterstattungsleitlinien, Vorschläge und allgemeinen Empfehlungen zu gewährleisten sowie Doppelungen und Überschneidungen bei der Durchführung ihrer Aufgaben zu vermeiden.

Artikel 39

Bericht des Ausschusses

Der Ausschuss berichtet der Generalversammlung und dem Wirtschafts- und Sozialrat alle zwei Jahre über seine Tätigkeit und kann aufgrund der Prüfung der von den Vertragsstaaten eingegangenen Berichte und Auskünfte Vorschläge machen und allgemeine Empfehlungen abgeben. Diese werden zusammen mit etwaigen Stellungnahmen der Vertragsstaaten in den Ausschussbericht aufgenommen.

Artikel 40

Konferenz der Vertragsstaaten

(1) Die Vertragsstaaten treten regelmäßig in einer Konferenz der Vertragsstaaten zusammen, um jede Angelegenheit im Zusammenhang mit der Durchführung dieses Übereinkommens zu behandeln.

(2) Die Konferenz der Vertragsstaaten wird vom Generalsekretär der Vereinten Nationen spätestens sechs Monate nach Inkrafttreten dieses Übereinkommens einberufen. Die folgenden Treffen werden vom Generalsekretär alle zwei Jahre oder auf Beschluss der Konferenz der Vertragsstaaten einberufen.

Artikel 41

Verwahrer

Der Generalsekretär der Vereinten Nationen ist Verwahrer dieses Übereinkommens.

Artikel 42

Unterzeichnung

Dieses Übereinkommen liegt für alle Staaten und für Organisationen der regionalen Integration ab dem 30. März 2007 am Sitz der Vereinten Nationen in New York zur Unterzeichnung auf.

Artikel 43

Zustimmung, gebunden zu sein

Dieses Übereinkommen bedarf der Ratifikation durch die Unterzeichnerstaaten und der förmlichen Bestätigung durch die unterzeichnenden Organisationen der regionalen Integration. Es steht allen Staaten oder Organisationen der regionalen Integration, die das Übereinkommen nicht unterzeichnet haben, zum Beitritt offen.

Artikel 44

Organisationen der regionalen Integration

(1) Der Ausdruck „Organisation der regionalen Integration" bezeichnet eine von souveränen Staaten einer bestimmten Region gebildete Organisation, der ihre Mitgliedstaaten die Zuständigkeit für von diesem Übereinkommen erfasste Angelegenheiten übertragen haben. In ihren Urkunden der förmlichen Bestätigung oder Beitrittsurkunden erklären diese Organisationen den Umfang ihrer Zuständigkeiten in Bezug auf die durch dieses Übereinkommen erfassten Angelegenheiten. Danach teilen sie dem Verwahrer jede erhebliche Änderung des Umfangs ihrer Zuständigkeiten mit.

(2) Bezugnahmen auf „Vertragsstaaten" in diesem Übereinkommen finden auf solche Organisationen im Rahmen ihrer Zuständigkeit Anwendung.

(3) Für die Zwecke des Artikels 45 Absatz 1 und des Artikels 47 Absätze 2 und 3 wird eine von einer Organisation der regionalen Integration hinterlegte Urkunde nicht mitgezählt.

(4) Organisationen der regionalen Integration können in Angelegenheiten ihrer Zuständigkeit ihr Stimmrecht in der Konferenz der Vertragsstaaten mit der Anzahl von Stimmen ausüben, die der Anzahl ihrer Mitgliedstaaten entspricht, die Vertragsparteien dieses Übereinkommens sind. Diese Organisationen üben ihr Stimmrecht nicht aus, wenn einer ihrer Mitgliedstaaten sein Stimmrecht ausübt, und umgekehrt.

Artikel 45

Inkrafttreten

(1) Dieses Übereinkommen tritt am dreißigsten Tag nach Hinterlegung der zwanzigsten Ratifikations- oder Beitrittsurkunde in Kraft.

(2) Für jeden Staat und jede Organisation der regionalen Integration, der beziehungsweise die dieses Übereinkommen nach Hinterlegung der zwanzigsten entsprechenden Urkunde ratifiziert, förmlich bestätigt oder ihm beitritt, tritt das Übereinkommen am dreißigsten Tag nach Hinterlegung der eigenen Urkunde in Kraft.

Artikel 46

Vorbehalte

(1) Vorbehalte, die mit Ziel und Zweck dieses Übereinkommens unvereinbar sind, sind nicht zulässig.

(2) Vorbehalte können jederzeit zurückgenommen werden.

Artikel 47

Änderungen

(1) Jeder Vertragsstaat kann eine Änderung dieses Übereinkommens vorschlagen und beim Generalsekretär der Vereinten Nationen einreichen. Der Generalsekretär übermittelt jeden Änderungsvorschlag den Vertragsstaaten mit der Aufforderung, ihm zu notifizieren, ob sie eine Konferenz der Vertragsstaaten zur Beratung und Entscheidung über den Vorschlag befürworten. Befürwortet innerhalb von vier Monaten nach dem Datum der Übermittlung wenigstens ein Drittel der Vertragsstaaten eine solche Konferenz, so beruft der Generalsekretär die Konferenz unter der Schirmherrschaft der Vereinten Nationen ein. Jede Änderung, die von einer Mehrheit von zwei Dritteln der anwesenden und abstimmenden Vertragsstaaten beschlossen wird, wird vom Generalsekretär der Generalversammlung der Vereinten Nationen zur Genehmigung und danach allen Vertragsstaaten zur Annahme vorgelegt.

(2) Eine nach Absatz 1 beschlossene und genehmigte Änderung tritt am dreißigsten Tag nach dem Zeitpunkt in Kraft, zu dem die Anzahl der hinterlegten Annahmeurkunden zwei Drittel der Anzahl der Vertragsstaaten zum Zeitpunkt der Beschlussfassung über die Änderung erreicht. Danach tritt die Änderung für jeden Vertragsstaat am dreißigsten Tag nach Hinterlegung seiner eigenen Annahmeurkunde in Kraft. Eine Änderung ist nur für die Vertragsstaaten, die sie angenommen haben, verbindlich.

(3) Wenn die Konferenz der Vertragsstaaten dies im Konsens beschließt, tritt eine nach Absatz 1 beschlossene und genehmigte Änderung, die ausschließlich die Artikel 34, 38, 39 und 40 betrifft, für alle Vertragsstaaten am dreißigsten Tag nach dem Zeitpunkt in Kraft, zu dem die Anzahl der hinterlegten Annahmeurkunden zwei Drittel der Anzahl der Vertragsstaaten zum Zeitpunkt der Beschlussfassung über die Änderung erreicht.

Artikel 48

Kündigung

Ein Vertragsstaat kann dieses Übereinkommen durch eine an den Generalsekretär der Vereinten Nationen gerichtete schriftliche Notifikation kündigen. Die Kündigung wird ein Jahr nach Eingang der Notifikation beim Generalsekretär wirksam.

Artikel 49

Zugängliches Format

Der Wortlaut dieses Übereinkommens wird in zugänglichen Formaten zur Verfügung gestellt.

Artikel 50

Verbindliche Wortlaute

Der arabische, der chinesische, der englische, der französische, der russische und der spanische Wortlaut dieses Übereinkommens sind gleichermaßen verbindlich.

ZU URKUND DESSEN haben die unterzeichneten, von ihren Regierungen hierzu gehörig befugten Bevollmächtigten dieses Übereinkommen unterschrieben.

ANHANG II

ERKLÄRUNG BETREFFEND DIE ZUSTÄNDIGKEITEN DER EUROPÄISCHEN GEMEINSCHAFT IN BEZUG AUF DIE DURCH DAS ÜBEREINKOMMEN DER VEREINTEN NATIONEN ÜBER DIE RECHTE VON MENSCHEN MIT BEHINDERUNGEN ERFASSTEN ANGELEGENHEITEN

(Erklärung gemäß Artikel 44 Absatz 1 des Übereinkommens)

Artikel 44 Absatz 1 des Übereinkommens der Vereinten Nationen über die Rechte von Menschen mit Behinderungen (nachstehend „Übereinkommen" genannt) sieht vor, dass eine Organisation der regionalen Integration in ihrer Urkunde zur förmlichen Bestätigung oder Beitrittsurkunde den Umfang ihrer Zuständigkeiten in Bezug auf die durch dieses Übereinkommen erfassten Angelegenheiten zu erklären hat.

Mitglieder der Europäischen Gemeinschaft sind derzeit das Königreich Belgien, die Republik Bulgarien, die Tschechische Republik, das Königreich Dänemark, die Bundesrepublik Deutschland, die Republik Estland, Irland, die Hellenische Republik, das Königreich Spanien, die Französische Republik, die Italienische Republik, die Republik Zypern, die Republik Lettland, die Republik Litauen, das Großherzogtum Luxemburg, die Republik Ungarn, die Republik Malta, das Königreich der Niederlande, die Republik Österreich, die Republik Polen, die Portugiesische Republik, Rumänien, die Republik Slowenien, die Slowakische Republik, die Republik Finnland, das Königreich Schweden sowie das Vereinigte Königreich Großbritannien und Nordirland.

Die Europäische Gemeinschaft stellt fest, dass der Begriff „Vertragsstaaten" für die Zwecke des Übereinkommens auf Organisationen der regionalen Integration im Rahmen von deren Zuständigkeiten Anwendung findet.

Das Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen gilt, was die Zuständigkeit der Europäischen Gemeinschaft anbelangt, für die Gebiete, in denen der Vertrag zur Gründung der Europäischen Gemeinschaft Anwendung findet, nach Maßgabe dieses Vertrags, insbesondere von Artikel 299.

Nach Artikel 299 gilt diese Erklärung nicht für die Gebiete der Mitgliedstaaten, in denen der genannte Vertrag keine Anwendung findet, und berührt nicht Rechtsakte oder Standpunkte, die die betreffenden Mitgliedstaaten im Rahmen des Übereinkommens im Namen und im Interesse dieser Gebiete verabschieden.

In dieser Erklärung ist gemäß Artikel 44 Absatz 1 des Übereinkommens für die von dem Übereinkommen betroffenen Bereiche angegeben, welche Zuständigkeiten die Mitgliedstaaten der Gemeinschaft nach Maßgabe des Vertrags zur Gründung der Europäischen Gemeinschaft übertragen haben.

Der Umfang und die Ausübung der Gemeinschaftszuständigkeiten entwickeln sich naturgemäß ständig weiter; deshalb wird die Gemeinschaft diese Erklärung erforderlichenfalls im Einklang mit Artikel 44 Absatz 1 des Übereinkommens ergänzen oder ändern.

In einigen Angelegenheiten verfügt die Europäische Gemeinschaft über die ausschließliche Zuständigkeit, in anderen ist die Zuständigkeit zwischen ihr und den Mitgliedstaaten geteilt. Die Mitgliedstaaten sind weiterhin für alle Angelegenheiten zuständig, für die keine Zuständigkeit auf die Europäische Gemeinschaft übertragen worden ist.

Gegenwärtig:

1. Die Gemeinschaft verfügt über die ausschließliche Zuständigkeit hinsichtlich der Vereinbarkeit staatlicher Beihilfen mit dem gemeinsamen Markt und dem gemeinsamen Zolltarif.

   Soweit Bestimmungen des Gemeinschaftsrechts von den Bestimmungen des Übereinkommens berührt werden, liegt die ausschließliche Zuständigkeit für die Übernahme entsprechender Verpflichtungen für die eigene öffentliche Verwaltung bei der Europäischen Gemeinschaft. In diesem Zusammenhang erklärt die Gemeinschaft, dass sie für folgende Bereiche zuständig ist: Regelung von Einstellung, Arbeitsbedingungen, Besoldung, Fortbildung usw. für nicht gewählte Beamte nach dem Statut und den diesbezüglichen Durchführungsbestimmungen ([1]).

2. Die Gemeinschaft und die Mitgliedstaaten verfügen über geteilte Zuständigkeit in Bezug auf Maßnahmen zur Bekämpfung von Diskriminierungen aufgrund einer Behinderung, den freien Waren-, Personen-, Dienstleistungs- und Kapitalverkehr, die Landwirtschaft, den Eisenbahn-, Straßen-, See- und Luftverkehr, Steuern, den Binnenmarkt, gleiches Entgelt für Männer und Frauen, die Politik der transeuropäischen Netze sowie die Statistik.

([1]) Verordnung (EWG, Euratom, EGKS) Nr. 259/68 des Rates vom 29. Februar 1968 zur Festlegung des Statuts der Beamten der Europäischen Gemeinschaften und der Beschäftigungsbedingungen für die sonstigen Bediensteten dieser Gemeinschaften (ABl. L 56 vom 4.3.1968, S. 1).

Die Europäische Gemeinschaft besitzt hinsichtlich des Beitritts zu dem Übereinkommen in Bezug auf diese Angelegenheiten nur insofern ausschließliche Zuständigkeit, als die Bestimmungen des Übereinkommens oder die aufgrund des Übereinkommens erlassenen Rechtsvorschriften gemeinsame Vorschriften berühren, die vorab von der Europäischen Gemeinschaft festgelegt wurden. Bestehen Gemeinschaftsvorschriften, die jedoch unberührt bleiben, insbesondere Gemeinschaftsvorschriften, die lediglich Mindeststandards festlegen, so sind, unbeschadet der Zuständigkeit der Europäischen Gemeinschaft, in diesem Bereich tätig zu werden, die Mitgliedstaaten zuständig. In den übrigen Fällen bleiben die Mitgliedstaaten zuständig. Ein Verzeichnis der einschlägigen von der Europäischen Gemeinschaft angenommenen Rechtsakte ist als Anlage beigefügt. Die sich aus diesen Rechtsakten ergebende Zuständigkeit der Europäischen Gemeinschaft ist aufgrund des genauen Inhalts des einzelnen Rechtsakts und insbesondere danach zu beurteilen, inwieweit darin gemeinsame Regeln festgelegt werden.

3. Die folgenden EG-Politikbereiche können auch für das VN-Übereinkommen von Bedeutung sein: Die Mitgliedstaaten und die Gemeinschaft arbeiten auf die Entwicklung einer koordinierten Beschäftigungsstrategie hin. Die Gemeinschaft trägt zur Entwicklung einer qualitativ hoch stehenden Bildung bei, indem sie die Zusammenarbeit zwischen den Mitgliedstaaten fördert und die Tätigkeit der Mitgliedstaaten erforderlichenfalls unterstützt und ergänzt. Die Gemeinschaft führt eine Politik der beruflichen Bildung durch, welche die Maßnahmen der Mitgliedstaaten unterstützt und ergänzt. Die Gemeinschaft entwickelt und verfolgt weiterhin ihre Politik zur Stärkung ihres wirtschaftlichen und sozialen Zusammenhalts, um eine harmonische Entwicklung der Gemeinschaft als Ganzer zu fördern. Die Gemeinschaft verfolgt, unbeschadet der jeweiligen Zuständigkeiten der Mitgliedstaaten, eine Politik der Entwicklungszusammenarbeit und der wirtschaftlichen, finanziellen und technischen Zusammenarbeit mit Drittländern.

Anlage

RECHTSAKTE DER GEMEINSCHAFT ZU DEN DURCH DAS ÜBEREINKOMMEN ERFASSTEN ANGELEGENHEITEN

Die im Folgenden aufgeführten gemeinschaftlichen Rechtsakte veranschaulichen den Umfang des Zuständigkeitsbereichs der Gemeinschaft entsprechend den Bestimmungen des Vertrags zur Gründung der Europäischen Gemeinschaft. In einigen Angelegenheiten verfügt die Europäische Gemeinschaft über die ausschließliche Zuständigkeit, in anderen ist die Zuständigkeit zwischen ihr und den Mitgliedstaaten geteilt. Die sich aus diesen Rechtsakten ergebende Zuständigkeit der Gemeinschaft ist aufgrund des genauen Inhalts des einzelnen Rechtsakts und insbesondere danach zu beurteilen, inwieweit darin gemeinsame Regeln festgelegt werden, die durch die Bestimmungen des Übereinkommens berührt werden.

— im Bereich Zugänglichkeit

Richtlinie 1999/5/EG des Europäischen Parlaments und des Rates vom 9. März 1999 über Funkanlagen und Telekommunikationsendeinrichtungen und die gegenseitige Anerkennung ihrer Konformität (ABl. L 91 vom 7.4.1999, S. 10).

Richtlinie 2001/85/EG des Europäischen Parlaments und des Rates vom 20. November 2001 über besondere Vorschriften für Fahrzeuge zur Personenbeförderung mit mehr als acht Sitzplätzen außer dem Fahrersitz und zur Änderung der Richtlinien 70/156/EWG und 97/27/EG (ABl. L 42 vom 13.2.2002, S. 1).

Richtlinie 96/48/EG des Rates vom 23. Juli 1996 über die Interoperabilität des transeuropäischen Hochgeschwindigkeitsbahnsystems (ABl. L 235 vom 17.9.1996, S. 6), geändert durch die Richtlinie 2004/50/EG des Europäischen Parlaments und des Rates (ABl. L 164 vom 30.4.2004, S. 114).

Richtlinie 2001/16/EG des Europäischen Parlaments und des Rates vom 19. März 2001 über die Interoperabilität des konventionellen transeuropäischen Eisenbahnsystems (ABl. L 110 vom 20.4.2001, S. 1), geändert durch die Richtlinie 2004/50/EG des Europäischen Parlaments und des Rates (ABl. L 164 vom 30.4.2004, S. 114).

Richtlinie 2006/87/EG des Europäischen Parlaments und des Rates vom 12. Dezember 2006 über die technischen Vorschriften für Binnenschiffe und zur Aufhebung der Richtlinie 82/714/EWG des Rates (ABl. L 389 vom 30.12.2006, S. 1).

Richtlinie 2003/24/EG des Europäischen Parlaments und des Rates vom 14. April 2003 zur Änderung der Richtlinie 98/18/EG des Rates über Sicherheitsvorschriften und -normen für Fahrgastschiffe (ABl. L 123 vom 17.5.2003, S. 18).

Richtlinie 2007/46/EG des Europäischen Parlaments und des Rates vom 5. September 2007 zur Schaffung eines Rahmens für die Genehmigung von Kraftfahrzeugen und Kraftfahrzeuganhängern sowie von Systemen, Bauteilen und selbstständigen technischen Einheiten für diese Fahrzeuge (Rahmenrichtlinie) (ABl. L 263 vom 9.10.2007, S. 1).

Entscheidung 2008/164/EG der Kommission vom 21. Dezember 2007 über die technische Spezifikation für die Interoperabilität bezüglich eingeschränkt mobiler Personen im konventionellen transeuropäischen Eisenbahnsystem und im transeuropäischen Hochgeschwindigkeitsbahnsystem (ABl. L 64 vom 7.3.2008, S. 72).

Richtlinie 95/16/EG des Europäischen Parlaments und des Rates vom 29. Juni 1995 zur Angleichung der Rechtsvorschriften der Mitgliedstaaten über Aufzüge (ABl. L 213 vom 7.9.1995, S. 1), geändert durch die Richtlinie 2006/42/EG des Europäischen Parlaments und des Rates über Maschinen und zur Änderung der Richtlinie 95/16/EG (ABl. L 157 vom 9.6.2006, S. 24).

Richtlinie 2002/21/EG des Europäischen Parlaments und des Rates vom 7. März 2002 über einen gemeinsamen Rechtsrahmen für elektronische Kommunikationsnetze und -dienste (Rahmenrichtlinie) (ABl. L 108 vom 24.4.2002, S. 33).

Richtlinie 2002/22/EG des Europäischen Parlaments und des Rates vom 7. März 2002 über den Universaldienst und Nutzerrechte bei elektronischen Kommunikationsnetzen und -diensten (Universaldienstrichtlinie) (ABl. L 108 vom 24.4.2002, S. 51).

Richtlinie 97/67/EG des Europäischen Parlaments und des Rates vom 15. Dezember 1997 über gemeinsame Vorschriften für die Entwicklung des Binnenmarktes der Postdienste der Gemeinschaft und die Verbesserung der Dienstequalität (ABl. L 15 vom 21.1.1998, S. 14), geändert durch die Richtlinie 2002/39/EG des Europäischen Parlaments und des Rates vom 10. Juni 2002 zur Änderung der Richtlinie 97/67/EG im Hinblick auf die weitere Liberalisierung des Marktes für Postdienste in der Gemeinschaft (ABl. L 176 vom 5.7.2002, S. 21) und durch die Richtlinie 2008/6/EG des Europäischen Parlaments und des Rates vom 20. Februar 2008 zur Änderung der Richtlinie 97/67/EG im Hinblick auf die Vollendung des Binnenmarktes der Postdienste der Gemeinschaft (ABl. L 52 vom 27.2.2008, S. 3).

Verordnung (EG) Nr. 1083/2006 des Rates vom 11. Juli 2006 mit allgemeinen Bestimmungen über den Europäischen Fonds für regionale Entwicklung, den Europäischen Sozialfonds und den Kohäsionsfonds und zur Aufhebung der Verordnung (EG) Nr. 1260/1999 (ABl. L 210 vom 31.7.2006, S. 25).

Richtlinie 2004/17/EG des Europäischen Parlaments und des Rates vom 31. März 2004 zur Koordinierung der Zuschlagserteilung durch Auftraggeber im Bereich der Wasser-, Energie- und Verkehrsversorgung sowie der Postdienste (ABl. L 134 vom 30.4.2004, S. 1).

Richtlinie 2004/18/EG des Europäischen Parlaments und des Rates vom 31. März 2004 über die Koordinierung der Verfahren zur Vergabe öffentlicher Bauaufträge, Lieferaufträge und Dienstleistungsaufträge (ABl. L 134 vom 30.4.2004, S. 114).

Richtlinie 92/13/EWG des Rates vom 25. Februar 1992 zur Koordinierung der Rechts- und Verwaltungsvorschriften für die Anwendung der Gemeinschaftsvorschriften über die Auftragsvergabe durch Auftraggeber im Bereich der Wasser-, Energie- und Verkehrsversorgung sowie im Telekommunikationssektor (ABl. L 76 vom 23.3.1992, S. 14), geändert durch die Richtlinie 2007/66/EG des Europäischen Parlaments und des Rates vom 11. Dezember 2007 zur Änderung der Richtlinien 89/665/EWG und 92/13/EWG des Rates im Hinblick auf die Verbesserung der Wirksamkeit der Nachprüfungsverfahren bezüglich der Vergabe öffentlicher Aufträge (ABl. L 335 vom 20.12.2007, S. 31).

Richtlinie 89/665/EWG des Rates vom 21. Dezember 1989 zur Koordinierung der Rechts- und Verwaltungsvorschriften für die Anwendung der Nachprüfungsverfahren im Rahmen der Vergabe öffentlicher Liefer- und Bauaufträge (ABl. L 395 vom 30.12.1989, S. 33), geändert durch die Richtlinie 2007/66/EG des Europäischen Parlaments und des Rates vom 11. Dezember 2007 zur Änderung der Richtlinien 89/665/EWG und 92/13/EWG des Rates im Hinblick auf die Verbesserung der Wirksamkeit der Nachprüfungsverfahren bezüglich der Vergabe öffentlicher Aufträge (ABl. L 335 vom 20.12.2007, S. 31).

— in den Bereichen selbstständige Lebensführung, soziale Eingliederung, Arbeit und Beschäftigung

Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf (ABl. L 303 vom 2.12.2000, S. 16).

Verordnung (EG) Nr. 800/2008 der Kommission vom 6. August 2008 zur Erklärung der Vereinbarkeit bestimmter Gruppen von Beihilfen mit dem Gemeinsamen Markt in Anwendung der Artikel 87 und 88 EG-Vertrag (Allgemeine Gruppenfreistellungsverordnung) (ABl. L 214 vom 9.8.2008, S. 3).

Verordnung (EWG) Nr. 2289/83 der Kommission vom 29. Juli 1983 zur Durchführung der Artikel 70 bis 78 der Verordnung (EWG) Nr. 918/83 des Rates über das gemeinschaftliche System der Zollbefreiungen (ABl. L 220 vom 11.8.1983, S. 15).

Richtlinie 83/181/EWG des Rates vom 28. März 1983 zur Festlegung des Anwendungsbereichs von Artikel 14 Absatz 1 Buchstabe d der Richtlinie 77/388/EWG hinsichtlich der Mehrwertsteuerbefreiung bestimmter endgültiger Einfuhren von Gegenständen (ABl. L 105 vom 23.4.1983, S. 38).

Richtlinie 2006/54/EG des Europäischen Parlaments und des Rates vom 5. Juli 2006 zur Verwirklichung des Grundsatzes der Chancengleichheit und Gleichbehandlung von Männern und Frauen in Arbeits- und Beschäftigungsfragen (ABl. L 204 vom 26.7.2006, S. 23).

Verordnung (EWG) Nr. 918/83 des Rates vom 28. März 1983 über das gemeinschaftliche System der Zollbefreiungen (ABl. L 105 vom 23.4.1983, S. 1).

Richtlinie 2006/112/EG des Rates vom 28. November 2006 über das gemeinsame Mehrwertsteuersystem (ABl. L 347 vom 11.12.2006, S. 1), geändert durch die Richtlinie 2009/47/EG des Rates vom 5. Mai 2009 zur Änderung der Richtlinie 2006/112/EG in Bezug auf ermäßigte Mehrwertsteuersätze (ABl. L 116 vom 9.5.2009, S. 18).

Verordnung (EG) Nr. 1698/2005 des Rates vom 20. September 2005 über die Förderung der Entwicklung des ländlichen Raums durch den Europäischen Landwirtschaftsfonds für die Entwicklung des ländlichen Raums (ELER) (ABl. L 277 vom 21.10.2005, S. 1).

Richtlinie 2003/96/EG des Rates vom 27. Oktober 2003 zur Restrukturierung der gemeinschaftlichen Rahmenvorschriften zur Besteuerung von Energieerzeugnissen und elektrischem Strom (ABl. L 283 vom 31.10.2003, S. 51).

— im Bereich persönliche Mobilität

Richtlinie 91/439/EWG des Rates vom 29. Juli 1991 über den Führerschein (ABl. L 237 vom 24.8.1991, S. 1).

Richtlinie 2006/126/EG des Europäischen Parlaments und des Rates vom 20. Dezember 2006 über den Führerschein (ABl. L 403 vom 30.12.2006, S. 18).

Richtlinie 2003/59/EG des Europäischen Parlaments und des Rates vom 15. Juli 2003 über die Grundqualifikation und Weiterbildung der Fahrer bestimmter Kraftfahrzeuge für den Güter- oder Personenkraftverkehr und zur Änderung der Verordnung (EWG) Nr. 3820/85 des Rates und der Richtlinie 91/439/EWG des Rates sowie zur Aufhebung der Richtlinie 76/914/EWG des Rates (ABl. L 226 vom 10.9.2003, S. 4).

Verordnung (EG) Nr. 261/2004 des Europäischen Parlaments und des Rates vom 11. Februar 2004 über eine gemeinsame Regelung für Ausgleichs- und Unterstützungsleistungen für Fluggäste im Fall der Nichtbeförderung und bei Annullierung oder großer Verspätung von Flügen und zur Aufhebung der Verordnung (EWG) Nr. 295/91 (ABl. L 46 vom 17.2.2004, S. 1).

Verordnung (EG) Nr. 1107/2006 des Europäischen Parlaments und des Rates vom 5. Juli 2006 über die Rechte von behinderten Flugreisenden und Flugreisenden mit eingeschränkter Mobilität (ABl. L 204 vom 26.7.2006, S. 1).

Verordnung (EG) Nr. 1899/2006 des Europäischen Parlaments und des Rates vom 12. Dezember 2006 zur Änderung der Verordnung (EWG) Nr. 3922/91 des Rates zur Harmonisierung der technischen Vorschriften und der Verwaltungsverfahren in der Zivilluftfahrt (ABl. L 377 vom 27.12.2006, S. 1).

Verordnung (EG) Nr. 1371/2007 des Europäischen Parlaments und des Rates vom 23. Oktober 2007 über die Rechte und Pflichten der Fahrgäste im Eisenbahnverkehr (ABl. L 315 vom 3.12.2007, S. 14).

Verordnung (EG) Nr. 1370/2007 des Europäischen Parlaments und des Rates vom 23. Oktober 2007 über öffentliche Personenverkehrsdienste auf Schiene und Straße und zur Aufhebung der Verordnungen (EWG) Nr. 1191/69 und (EWG) Nr. 1107/70 des Rates (ABl. L 315 vom 3.12.2007, S. 1).

Verordnung (EG) Nr. 8/2008 der Kommission vom 11. Dezember 2007 zur Änderung der Verordnung (EWG) Nr. 3922/91 des Rates in Bezug auf gemeinsame technische Vorschriften und Verwaltungsverfahren für den gewerblichen Luftverkehr mit Flächenflugzeugen (ABl. L 10 vom 12.1.2008, S. 1).

— im Bereich Zugang zu Informationen

Richtlinie 2001/83/EG des Europäischen Parlaments und des Rates vom 6. November 2001 zur Schaffung eines Gemeinschaftskodexes für Humanarzneimittel (ABl. L 311 vom 28.11.2001, S. 67), geändert durch die Richtlinie 2004/27/EG des Europäischen Parlaments und des Rates (ABl. L 136 vom 30.4.2004, S. 34).

Richtlinie 2007/65/EG des Europäischen Parlaments und des Rates vom 11. Dezember 2007 zur Änderung der Richtlinie 89/552/EWG des Rates zur Koordinierung bestimmter Rechts- und Verwaltungsvorschriften der Mitgliedstaaten über die Ausübung der Fernsehtätigkeit (ABl. L 332 vom 18.12.2007, S. 27).

Richtlinie 2000/31/EG des Europäischen Parlaments und des Rates vom 8. Juni 2000 über bestimmte rechtliche Aspekte der Dienste der Informationsgesellschaft, insbesondere des elektronischen Geschäftsverkehrs, im Binnenmarkt (Richtlinie über den elektronischen Geschäftsverkehr) (ABl. L 178 vom 17.7.2000, S. 1).

Richtlinie 2001/29/EG des Europäischen Parlaments und des Rates vom 22. Mai 2001 zur Harmonisierung bestimmter Aspekte des Urheberrechts und der verwandten Schutzrechte in der Informationsgesellschaft (ABl. L 167 vom 22.6.2001, S. 10).

Richtlinie 2005/29/EG des Europäischen Parlaments und des Rates vom 11. Mai 2005 über unlautere Geschäftspraktiken im binnenmarktinternen Geschäftsverkehr zwischen Unternehmen und Verbrauchern und zur Änderung der Richtlinie 84/450/EWG des Rates, der Richtlinien 97/7/EG, 98/27/EG und 2002/65/EG des Europäischen Parlaments und des Rates sowie der Verordnung (EG) Nr. 2006/2004 des Europäischen Parlaments und des Rates (Richtlinie über unlautere Geschäftspraktiken) (ABl. L 149 vom 11.6.2005, S. 22).

— im Bereich Statistik und Datenerhebung

Richtlinie 95/46/EG des Europäischen Parlaments und des Rates vom 24. Oktober 1995 zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten und zum freien Datenverkehr (ABl. L 281 vom 23.11.1995, S. 31).

Verordnung (EG) Nr. 577/98 des Rates vom 9. März 1998 zur Durchführung einer Stichprobenerhebung über Arbeitskräfte in der Gemeinschaft (ABl. L 77 vom 14.3.1998, S. 3) und dazugehörige Durchführungsverordnungen

Verordnung (EG) Nr. 1177/2003 des Europäischen Parlaments und des Rates vom 16. Juni 2003 für die Gemeinschaftsstatistik über Einkommen und Lebensbedingungen (EU-SILC) (ABl. L 165 vom 3.7.2003, S. 1) und dazugehörige Durchführungsverordnungen

Verordnung (EG) Nr. 458/2007 des Europäischen Parlaments und des Rates vom 25. April 2007 über das Europäische System integrierter Sozialschutzstatistiken (ESSOSS) (ABl. L 113 vom 30.4.2007, S. 3) und dazugehörige Durchführungsverordnungen

Verordnung (EG) Nr. 1338/2008 des Europäischen Parlaments und des Rates vom 16. Dezember 2008 zu Gemeinschaftsstatistiken über öffentliche Gesundheit und über Gesundheitsschutz und Sicherheit am Arbeitsplatz (ABl. L 354 vom 31.12.2008, S. 70).

— im Bereich internationale Zusammenarbeit

Verordnung (EG) Nr. 1905/2006 des Europäischen Parlaments und des Rates vom 18. Dezember 2006 zur Schaffung eines Finanzierungsinstruments für die Entwicklungszusammenarbeit (ABl. L 378 vom 27.12.2006, S. 41).

Verordnung (EG) Nr. 1889/2006 des Europäischen Parlaments und des Rates vom 20. Dezember 2006 zur Einführung eines Finanzierungsinstruments für die weltweite Förderung der Demokratie und der Menschenrechte (ABl. L 386 vom 29.12.2006, S. 1).

Verordnung (EG) Nr. 718/2007 der Kommission vom 12. Juni 2007 zur Durchführung der Verordnung (EG) Nr. 1085/2006 des Rates zur Schaffung eines Instruments für Heranführungshilfe (IPA) (ABl. L 170 vom 29.6.2007, S. 1).

ANHANG III

VORBEHALT DER EUROPÄISCHEN GEMEINSCHAFT ZU ARTIKEL 27 ABSATZ 1 DES VN-ÜBEREINKOMMENS ÜBER DIE RECHTE VON MENSCHEN MIT BEHINDERUNGEN

Die Europäische Gemeinschaft erklärt, dass nach dem Gemeinschaftsrecht (insbesondere der Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf) die Mitgliedstaaten gegebenenfalls eigene Vorbehalte zu Artikel 27 Absatz 1 des Übereinkommens über die Rechte von Menschen mit Behinderungen einbringen können, da sie gemäß Artikel 3 Absatz 4 der Richtlinie des Rates vorsehen können, dass diese Richtlinie hinsichtlich Diskriminierungen wegen einer Behinderung nicht für die Beschäftigung in den Streitkräften gilt. Daher erklärt die Gemeinschaft, dass sie das Übereinkommen unbeschadet des obengenannten Rechts, das ihren Mitgliedstaaten nach dem Gemeinschaftsrecht zusteht, abschließt.

Fakultativprotokoll zum Übereinkommen über die Rechte von Menschen mit Behinderungen

Die Vertragsstaaten dieses Protokolls haben Folgendes vereinbart:

Artikel 1

(1) Jeder Vertragsstaat dieses Protokolls („Vertragsstaat“) anerkennt die Zuständigkeit des Ausschusses für die Rechte von Menschen mit Behinderungen („Ausschuss“) für die Entgegennahme und Prüfung von Mitteilungen, die von oder im Namen von seiner Hoheitsgewalt unterstehenden Einzelpersonen oder Personengruppen eingereicht werden, die behaupten, Opfer einer Verletzung des Übereinkommens durch den betreffenden Vertragsstaat zu sein.

(2) Der Ausschuss nimmt keine Mitteilung entgegen, die einen Vertragsstaat des Übereinkommens betrifft, der nicht Vertragspartei dieses Protokolls ist.

Artikel 2

Der Ausschuss erklärt eine Mitteilung für unzulässig,

a) wenn sie anonym ist;

b) wenn sie einen Missbrauch des Rechts auf Einreichung solcher Mitteilungen darstellt oder mit den Bestimmungen des Übereinkommens unvereinbar ist;

c) wenn dieselbe Sache bereits vom Ausschuss untersucht worden ist oder in einem anderen internationalen Untersuchungs- oder Streitregelungsverfahren geprüft worden ist oder geprüft wird;

d) wenn nicht alle zur Verfügung stehenden innerstaatlichen Rechtsbehelfe erschöpft worden sind. Dies gilt nicht, wenn das Verfahren bei der Anwendung solcher Rechtsbehelfe unangemessen lange dauert oder keine wirksame Abhilfe erwarten lässt;

e) wenn sie offensichtlich unbegründet ist oder nicht hinreichend begründet wird oder

f) wenn die der Mitteilung zugrunde liegenden Tatsachen vor dem Inkrafttreten dieses Protokolls für den betreffenden Vertragsstaat eingetreten sind, es sei denn, dass sie auch nach diesem Zeitpunkt weiterbestehen.

Artikel 3

Vorbehaltlich des Artikels 2 bringt der Ausschuss jede ihm zugegangene Mitteilung dem Vertragsstaat vertraulich zur Kenntnis. Der betreffende Vertragsstaat übermittelt dem Ausschuss innerhalb von sechs Monaten schriftliche Erklärungen oder Darlegungen zur Klärung der Sache und der gegebenenfalls von ihm getroffenen Abhilfemaßnahmen.

Artikel 4

(1) Der Ausschuss kann jederzeit nach Eingang einer Mitteilung und bevor eine Entscheidung in der Sache selbst getroffen worden ist, dem betreffenden Vertragsstaat ein Gesuch zur sofortigen Prüfung übermitteln, in dem er aufgefordert wird, die vorläufigen Maßnahmen zu treffen, die gegebenenfalls erforderlich sind, um einen möglichen nicht wieder gutzumachenden Schaden für das oder die Opfer der behaupteten Verletzung abzuwenden.

(2) Übt der Ausschuss sein Ermessen nach Absatz 1 aus, so bedeutet das keine Entscheidung über die Zulässigkeit der Mitteilung oder in der Sache selbst.

Artikel 5

Der Ausschuss berät über Mitteilungen aufgrund dieses Protokolls in nichtöffentlicher Sitzung. Nach Prüfung einer Mitteilung übermittelt der Ausschuss dem betreffenden Vertragsstaat und dem Beschwerdeführer gegebenenfalls seine Vorschläge und Empfehlungen.

Artikel 6

(1) Erhält der Ausschuss zuverlässige Angaben, die auf schwerwiegende oder systematische Verletzungen der in dem Übereinkommen niedergelegten Rechte durch einen Vertragsstaat hinweisen, so fordert der Ausschuss diesen Vertragsstaat auf, bei der Prüfung der Angaben mitzuwirken und zu diesen Angaben Stellung zu nehmen.

(2) Der Ausschuss kann unter Berücksichtigung der von dem betreffenden Vertragsstaat abgegebenen Stellungnahmen sowie aller sonstigen ihm zur Verfügung stehenden zuverlässigen Angaben eines oder mehrere seiner Mitglieder beauftragen, eine Untersuchung durchzuführen und ihm sofort zu berichten. Sofern geboten, kann die Untersuchung mit Zustimmung des Vertragsstaats einen Besuch in seinem Hoheitsgebiet einschließen.

(3) Nachdem der Ausschuss die Ergebnisse einer solchen Untersuchung geprüft hat, übermittelt er sie zusammen mit etwaigen Bemerkungen und Empfehlungen dem betreffenden Vertragsstaat.

(4) Der Vertragsstaat unterbreitet innerhalb von sechs Monaten nach Eingang der vom Ausschuss übermittelten Ergebnisse, Bemerkungen und Empfehlungen dem Ausschuss seine Stellungnahmen.

(5) Eine solche Untersuchung ist vertraulich durchzuführen; die Mitwirkung des Vertragsstaats ist auf allen Verfahrensstufen anzustreben.

Artikel 7

(1) Der Ausschuss kann den betreffenden Vertragsstaat auffordern, in seinen Bericht nach Artikel 35 des Übereinkommens Einzelheiten über Maßnahmen aufzunehmen,

die als Reaktion auf eine nach Artikel 6 dieses Protokolls durchgeführte Untersuchung getroffen wurden.

(2) Sofern erforderlich, kann der Ausschuss nach Ablauf des in Artikel 6 Absatz 4 genannten Zeitraums von sechs Monaten den betreffenden Vertragsstaat auffordern, ihn über die als Reaktion auf eine solche Untersuchung getroffenen Maßnahmen zu unterrichten.

Artikel 8

Jeder Vertragsstaat kann zum Zeitpunkt der Unterzeichnung oder Ratifikation dieses Protokolls oder seines Beitritts dazu erklären, dass er die in den Artikeln 6 und 7 vorgesehene Zuständigkeit des Ausschusses nicht anerkennt.

Artikel 9

Der Generalsekretär der Vereinten Nationen ist Verwahrer1 dieses Protokolls.

Artikel 10

Dieses Protokoll liegt für die Staaten und die Organisationen der regionalen Integration, die das Übereinkommen unterzeichnet haben, ab dem 30. März 2007 am Sitz der Vereinten Nationen in New York zur Unterzeichnung auf.

Artikel 11

Dieses Protokoll bedarf der Ratifikation durch die Unterzeichnerstaaten des Protokolls, die das Übereinkommen ratifiziert haben oder ihm beigetreten sind. Es bedarf der förmlichen Bestätigung durch die Organisationen der regionalen Integration, die das Protokoll unterzeichnet haben und das Übereinkommen förmlich bestätigt haben oder ihm beigetreten sind. Das Protokoll steht allen Staaten oder Organisationen der regionalen Integration zum Beitritt offen, die das Übereinkommen ratifiziert beziehungsweise förmlich bestätigt haben oder ihm beigetreten sind und die das Protokoll nicht unterzeichnet haben.

Artikel 12

(1) Der Ausdruck „Organisation der regionalen Integration“ bezeichnet eine von souveränen Staaten einer bestimmten Region gebildete Organisation, der ihre Mitgliedstaaten die Zuständigkeit für von dem Übereinkommen und diesem Protokoll erfasste Angelegenheiten übertragen haben. In ihren Urkunden der förmlichen Bestätigung oder Beitrittsurkunden erklären diese Organisationen den Umfang ihrer Zuständigkeiten in Bezug auf die durch das Übereinkommen und dieses Protokoll erfassten Angelegenheiten. Danach teilen sie dem Verwahrer2 jede maßgebliche Änderung des Umfangs ihrer Zuständigkeiten mit.

(2) Bezugnahmen auf „Vertragsstaaten“ in diesem Protokoll finden auf solche Organisationen im Rahmen ihrer Zuständigkeit Anwendung.

(3) Für die Zwecke des Artikels 13 Absatz 1 und des Artikels 15 Absatz 2 wird eine von einer Organisation der regionalen Integration hinterlegte Urkunde nicht mitgezählt.

(4) Organisationen der regionalen Integration können in Angelegenheiten ihrer Zuständigkeit ihr Stimmrecht bei dem Treffen der Vertragsstaaten mit der Anzahl von Stimmen ausüben, die der Anzahl ihrer Mitgliedstaaten entspricht, die Vertragsparteien dieses Protokolls sind. Diese Organisationen üben ihr Stimmrecht nicht aus, wenn einer ihrer Mitgliedstaaten sein Stimmrecht ausübt, und umgekehrt.

Artikel 13

(1) Vorbehaltlich des Inkrafttretens des Übereinkommens tritt dieses Protokoll am dreißigsten Tag nach Hinterlegung der zehnten Ratifikations- oder Beitrittsurkunde in Kraft.

(2) Für jeden Staat und jede Organisation der regionalen Integration, der beziehungsweise die dieses Protokoll nach Hinterlegung der zehnten entsprechenden Urkunde ratifiziert, förmlich bestätigt oder ihm beitritt, tritt das Protokoll am dreißigsten Tag nach Hinterlegung der eigenen Urkunde in Kraft.

Artikel 14

(1) Vorbehalte, die mit Ziel und Zweck dieses Protokolls unvereinbar sind, sind nicht zulässig.

(2) Vorbehalte können jederzeit zurückgenommen werden.

Artikel 15

(1) Jeder Vertragsstaat kann eine Änderung dieses Protokolls vorschlagen und beim Generalsekretär der Vereinten Nationen einreichen. Der Generalsekretär übermittelt jeden Änderungsvorschlag den Vertragsstaaten mit der Aufforderung, ihm zu notifizieren, ob sie die Einberufung eines Treffens der Vertragsstaaten zur Beratung und Entscheidung über den Vorschlag befürworten. Befürwortet innerhalb von vier Monaten nach dem Datum der Übermittlung wenigstens ein Drittel der Vertragsstaaten die Einberufung eines solchen Treffens, so beruft der Generalsekretär das Treffen unter der Schirmherrschaft der Vereinten Nationen ein. Jede Änderung, die von einer Mehrheit von zwei Dritteln der anwesenden und abstimmenden Vertragsstaaten beschlossen wird, wird vom Generalsekretär der Generalversammlung der Vereinten Nationen zur Genehmigung und danach allen Vertragsstaaten zur Annahme vorgelegt.

(2) Eine nach Absatz 1 beschlossene und genehmigte Änderung tritt am dreißigsten Tag nach dem Zeitpunkt in Kraft, zu dem die Anzahl der hinterlegten Annahmeurkunden zwei Drittel der Anzahl der Vertragsstaaten zum Zeitpunkt der Beschlussfassung über die Änderung erreicht. Danach tritt die Änderung für jeden Vertragsstaat am dreißigsten Tag nach Hinterlegung seiner eigenen Annahmeurkunde in Kraft. Eine Änderung ist nur für die Vertragsstaaten, die sie angenommen haben, verbindlich.

Artikel 16

Ein Vertragsstaat kann dieses Protokoll durch eine an den Generalsekretär der Vereinten Nationen gerichtete schriftliche Notifikation kündigen. Die Kündigung wird ein Jahr nach Eingang der Notifikation beim Generalsekretär wirksam.

Artikel 17

Der Wortlaut dieses Protokolls wird in zugänglichen Formaten zur Verfügung gestellt.

Artikel 18

Der arabische, der chinesische, der englische, der französische, der russische und der spanische Wortlaut dieses Protokolls sind gleichermaßen verbindlich.

Zu Urkund dessen haben die unterzeichneten, von ihren jeweiligen Regierungen hierzu gehörig befugten Bevollmächtigten dieses Protokoll unterschrieben.

COUNCIL OF THE EUROPEAN UNION

Brussels, 7 June 2011

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SOC 460
COHOM 156

NOTE

from:	The Commission
to:	COUNCIL (Employment, Social Policy, Health and Consumer Affairs)
Subject:	Ratification and implementation of the UN Convention on the Rights of People with Disabilities - Information from the Commission (Any other business item)

Delegations will find attached a note from the Commission in preparation for the EPSCO Council meeting on 17 June.

Information Note from the European Commission
on progress in implementing the UN Convention
on the Rights of Persons with Disabilities to the EPSCO Council

1. Introduction

This note is based on the 4th Disability High Level Group Report[1] and reports on progress in ratifying and implementing the UN Convention on the Rights of Persons with Disabilities. It provides an update of developments in the national implementation of the Convention, with a more detailed reference to the governance structures required by Article 33 of the UNCRPD. The report of this year also examines the interface between implementation of the UNCRPD and the headline targets set in the context of the Europe 2020 Strategy for education, employment and poverty.

The annual progress reporting by the Disability High-Level Group was triggered by the Council Conclusions adopted under the German Presidency in 2007. The first joint Report was discussed by the ministers responsible for disability issues on 22 May 2008 under the Slovenian Presidency. The second Report responded to the Council's request in the Resolution adopted under the Slovenian Presidency for an assessment as to how national actions reflect the commitments entered into by the European Union and the Member States with a view to implementing the UNCRPD. The Report identified seven priority areas where collaboration at EU level could be useful and highlighted progress in the nine priorities for joint action that were identified in the first report. The second Report also highlighted the importance of four key matters for the implementation of the UNCRPD that were presented at the ESPSCO Council in June 2009. The third Report was presented on 19 May 2010 at the third informal ministerial meeting on disability issues organised under the Spanish Presidency in Zaragoza. It complemented the two previous Reports but also had a stronger focus on procedural matters and governance aspects.

[1] Available online at: http://ec.europa.eu/social/BlobServlet?docId=6851&langId=en

2. Ratification/formal confirmation/accession

Since the previous Report from the Disability High Level Group (March 2010), further progress has been achieved, three additional Member States having ratified the Convention,[2] and three Member States having ratified the Optional Protocol.[3] In addition, one Member State has finished the internal ratification procedure for the Convention and the Optional Protocol and is awaiting deposit with the UN.[4] One Member State[5] signed the Optional Protocol. Moreover, in 2010, the EU formally confirmed the Convention.

The current situation is as follows:

All Member States and the EU have signed the Convention,
22 Member States have signed the Optional Protocol,
17 Member States have ratified the Convention, (Austria, Belgium, Czech Republic, Denmark, Germany, France, Hungary, Italy, Latvia, Lithuania, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK),
1 Member State has finished the internal ratification procedure for the Optional Protocol and the Convention and is in the process of depositing the ratification instruments at the UN Headquarters (Cyprus),
14 Member States have ratified the Optional Protocol (Austria, Belgium, France, Germany, Hungary, Italy, Latvia, Lithuania, Portugal, Slovakia, Slovenia, Spain, Sweden, UK), and
The EU has formally confirmed the Convention.

On 26 November 2009 the Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities was adopted (Decision 2010/48/EC). Before final confirmation of the Convention on behalf of the EU, the Commission, Council and Member States needed to agree on a Code of Conduct (see Article 3 and 4 of the Council Decision) setting out the framework for implementation of the Convention within the EU and, *inter alia,* the applicable coordination, representation, voting and speaking arrangements in the UN.

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2 Lithuania, Slovakia, Romania.
3 Latvia, Lithuania, Slovakia.
4 Cyprus.
5 Greece.

The Code of Conduct was agreed on the 2 December 2010,[6] enabling the EU to complete the procedure of conclusion of the Convention by depositing its instruments of formal confirmation with the UN Secretary General in New York on 23 December 2010.

The Convention entered into force with respect to the EU on 22 January 2011. The EU is bound by the Convention to the extent of its competences as these are listed in an Annex to the Decision 2010/48/EC. The EU will have to submit its first Report to the UN Committee in Geneva by 22 January 2013.

With respect to the Representation of the EU *vis-à-vis* the UN in UNCPRD matters within EU competence, the Member States and the EU are bound by the principle of loyal cooperation and the principle of unity of external representation and these principles should permeate their cooperation. It is essential to build up good cooperation practices in line with the provisions of the Code of Conduct.

The proposal for EU accession to the Optional Protocol, adopted by the Commission on 29 August 2008[7] and transmitted to the European Parliament and the Council is still with the Council. Before pursuing the discussion on the Optional Protocol, it was decided to give priority to the procedure of formal confirmation of the Convention and to the adoption of a Code of Conduct. Now that these two procedures have been completed, the Commission considers that the process of accession of the EU to the Optional Protocol should be continued.

The process of ratification of the Convention is ongoing in 9 Member States. As the UN Convention came into force on 3 May 2008 the Commission encourages its swift ratification by the remaining Member States.

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6 Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the EU relating to the UNCRPD, Council of the European Union, 16243/10.

7 COM (2008) 530 final. The proposal was endorsed by the European Parliament on 24 April 2009.

3. Progress on implementation and monitoring of the UNCRPD

The effective implementation of the UNCRPD requires a proper *governance structure*. To that end, Article 33.1 UNCRPD directly obliges the State Parties, to designate one or more focal points within government for matters relating to the implementation of the UNCRPD, and to give due consideration to the establishment of a coordination mechanism to facilitate related action in different sectors and at different levels. The efforts to put effective governance structures in place in the Member States are ongoing and advancing. Some Member States have very recently established structures and processes, while others are at the beginning or in the midst of the implementation process.

It was therefore very timely that the first Work Forum, organised in November 2010, focused on the implementation of Article 33 of the UNCRPD, and on the involvement of persons with disabilities in those structures. The Work Forum provided examples of good practices such as: effective methods of involvement and consultation with people with disabilities, action plans which work across Ministries, consultative structures, legislative instruments and multi annual funding programs.

Most Member States have designated the Focal Point within their Ministry of Welfare, Labour or Social Affairs while it is interesting to note that in a recent report of the UN-OHCHR there was a recommendation to nominate the Focal Point in the Ministry of Justice.

The establishment of a *Coordination Mechanism* is optional, but a majority of the Member States has chosen to establish such a mechanism.[8] Many Member States combine the lead for the Coordination Mechanism and Focal Point into one body.

[8] AT, BE, CY, CZ, DK, DE, ES, FR, HU, IT, IE, LU, LV, NL, PT, RO, SE, UK.

For the EU the European Commission is the Focal Point[9]. Certain aspects of the coordination between the Council, the Member States and the Commission in the implementation of the Convention are covered by the Code of Conduct, adopted on 2 December 2010. The Code contains provisions on representation of the EU *vis-à-vis* the UN in UNCRPD matters, how to coordinate the establishment of positions (point 6), speaking arrangements (points 7 and 9), voting arrangements (point 8), nominations (point 10) reporting and monitoring (point 12).

Article 33.2 of the UNCRPD obliges State Parties to maintain, strengthen, designate or establish a framework, including one or more independent mechanism, to promote, protect and monitor the implementation of the Convention in accordance with their legal and administrative systems.

A majority of the Member States having ratified report that they have established an independent mechanism. While all Member States recognise the importance of involving civil society in developing and implementing laws relating to persons with disabilities, only some of them have arrangements for involving civil society in the monitoring process.

At the EU level, the Commission has announced that it will present during 2011 its proposal on a framework for the purposes of Article 33 UNCPRD.

4. The interface between implementation of the UNCRPD and Europe 2020

The fourth Disability High Level Group Report highlights the link between the implementation of the UNCRPD and the goals of the Europe 2020 Strategy for education, employment and poverty reduction. The three relevant headline targets are: raising to 75% the **employment rate** for women and men aged 20-64; **improving education levels**, in particular by aiming to reduce school drop-out rates to less than 10% and by increasing the share of 30-34 years old having completed tertiary or equivalent education to at least 40%; and promoting **social inclusion**, in particular through the reduction of poverty, by aiming to lift at least 20 million people out of the risk of poverty and exclusion.

[9] Article 3, Decision 2010/48/EC, point 11, Code of Conduct.

On the basis of the EU Statistics on Income and Living Conditions (SILC) from 2008, it is estimated that the percentage of persons with disabilities having completed tertiary education or equivalent in the age group 30-34 is around 19%, while for those without disabilities the figure is around 31%. The employment rate (from the same source) among those between 20-64 years old with disabilities is 45 % compared to 73% for persons without disabilities. The poverty risk for persons with disabilities older than sixteen years is 21% while for those without disabilities it is about 15%. The situation of persons with disabilities therefore has to improve in order to contribute to reaching the headline targets. This means that the Member States should include measures addressing the situation of persons with disabilities when they prepare their programmes aiming to reach the Europe 2020 headline targets.

In this respect, the Disability High Level Group Report shows some interesting examples and practices, for example involving the Member State's UNCRPD focal point in the preparation of the National Reform Programmes (NRP), and setting specific targets for persons with disabilities in the NRP. The overall picture so far, however, is that few NRPs contain specific measures for persons with disabilities. Moreover, the existing measures and national plans do not appear to address disability mainstreaming objectives in the actions designed to reach the three headline targets. Member States are therefore encouraged to mainstream disability concerns in their general measures but also to consider the inclusion of specific measures in their NRPs to improve the situation of persons with disabilities. This process could be underpinned by the setting of national disability targets in these three areas, in order to strengthen the disability-relevant contribution to the policies aimed at reaching the headline targets.

In order to be able to monitor progress as regards the position of persons with disabilities in the context of these three headline targets, it is of great importance that the Member States and the EU improve their relevant data and statistics. While some efforts are being made, the Member States' answers to the questionnaire reveal that there are insufficient statistics and data on disability-related issues with regard to the three above-mentioned headline targets.

While there is a need for more and better disability related data from the Member States, the European Commission will use annual SILC data to report regularly on the situation of persons with disabilities in education, employment and poverty, compared to the figures for the rest of the population.

At the same time, the Member States are encouraged to improve their data collection, statistics and the development of disability related indicators.

FIFTH DISABILITY HIGH LEVEL GROUP REPORT
ON THE IMPLEMENTATION OF THE UN CONVENTION
ON THE RIGHTS OF PERSONS WITH DISABILITIES

(May 2012)

Disclaimer

This report has only been very partially edited.

A large part of this document is based on contributions written in English mainly by non native authors. The Commission did not have the time or sufficient translating resources to correct linguistic imperfections. This linguistic reservation applies even more to most parts of the report dealing with Belgium and France. Parts of these contributions have been included in the report in the original French version.

The Report takes account of developments until approximately 1 April 2012.

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INTRODUCTION

This Report gives an overview of progress made in ratifying and implementing the UN Convention on the Rights of Persons with Disabilities in the EU and its Member States. It is prepared on the basis of replies to questionnaires and updates received from 27 Member States and various non governmental stakeholders. The Report can be particularly useful in helping to identify good practices.

It provides an update of developments in the national and EU implementation of the Convention, with detailed reference to the governance structures required by Article 33 of the UNCRPD. The report of this year also examines the legal and regulatory framework for accessibility, and changes introduced as a consequence of UNCRPD implementation.

The first chapter summarises the updated information on the process of signature and ratification of the Convention and its Optional Protocol by the Member States and the EU, as well as on reservations and declarations. The second chapter focuses on progress in the national implementation and monitoring of the UNCRPD. The third chapter provides an overview of accessibility legislation, regulations and standards implementing Article 9 of the UN Convention – which stipulates that "State Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications […] and to other facilities and services open or provided to the public".

These three chapters are complemented by three annexes with practical information. Annex 1 presents, in a table, the state of signatures, reporting and ratifications/formal confirmation of the UNCRPD and the Optional Protocol by the Member States and the Union. Annex 2 lists details of identified responsible authorities, focal points, coordination mechanisms and contact points. Annex 3 provides links to websites where more information on the UNCRPD can be found, including national translations of the text of the UNCRPD and the Optional Protocol.

1. STATE OF PLAY ON SIGNATURE AND RATIFICATION OF THE CONVENTION AND OPTIONAL PROTOCOL IN THE EU AND THE MEMBER STATES

On 30 March 2007, the day of opening for signature, the UN Convention on the Rights of Persons with Disabilities was signed by the European Community and twenty two Member States. Seventeen of those Member States also signed the Optional Protocol.

As of March 2012 the UN CRPD has been signed by the European Community (now the European Union) and all its Member States. The Optional Protocol has been signed by 22 Member States.

The EU deposited the instruments of conclusion/formal confirmation at the UN the 23 December 2010 so the Convention entered into force for the EU on 22 January 2011. Twenty Members States have ratified the UN CRPD: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Germany, Denmark, Spain, France, Hungary, Italy, Lithuania, Luxembourg, Latvia, Portugal, Romania, Slovenia, Sweden, Slovakia, United Kingdom. The Optional Protocol has been ratified by sixteen Member States: Austria, Belgium, France, Cyprus, Germany, Hungary, Italy, Latvia, Lithuania, Portugal, Slovakia, Slovenia, Spain, Sweden, UK.

Ratifications

The ratification procedures are in most cases complicated and provide for various stages involving several institutions.

Austria signed the UN Disability Rights Convention and the Optional Protocol on 30 March 2007 in New York. The Convention and the Protocol were ratified on 6 August 2008 and entered into force on 26 October 2008. There has been a translation of the Convention and the Protocol into German language and into an easy-to-read version for people with learning disabilities.

In Belgium the statement of the reasons (Exposé des Motifs) was finalised on 21 March 2008. It was presented to the meeting of the Council of Ministers (Conseil des Ministres) by mid 2008. The Council of Ministers addressed it to the State Council (Conseil d'Etat) before presenting the file to the Parliament for a vote. The same procedure was followed at eight various levels of competent authority (federal state, the Communities and the Regions). Belgium ratified the Convention and the Optional Protocol on 2 July 2009. They became executive on 1 August 2009.

Bulgaria ratified the Convention on 26.01.2012. Bulgaria also signed the Optional Protocol on 18.12.2008. The UN Convention has been translated and will be published in Bulgarian language. The UN Convention entered into force in Republic of Bulgaria on 21 April 2012.

In Cyprus, the ratification of the UNCRPD and the Protocol were enabled by Law 8(III)/2011 of 4 March 2011. The instruments of ratification were deposited at the UN on 27 June 2011 and the Convention and the Protocol entered into force in the Republic of Cyprus on 27 July 2011.

The Czech Republic ratified the Convention on the Rights of Persons with Disabilities in September 2009. That important event influenced the preparation and form of a new National Plan in the field of disability, i.e. National Plan for Promoting Equal Opportunities for Persons with Disabilities 2010–2014 approved by Resolution of the Government of the Czech Republic No 253 of 29 March 2010. The Czech Republic has not ratified the Optional Protocol yet, however, the National Plan for the Creation of Equal Opportunities for Persons with Disabilities 2010–2014[1] takes into account the preparation of a draft for its ratification by the end of 2012.

Denmark launched a comprehensive consultation process in the autumn of 2008, encompassing all ministries, organisations and the general public and aimed at assessing any legal and financial preconditions for and implications of ratifying the UN Convention on the Rights of Persons with Disabilities. The comprehensive consultation process formed the basis of the government's continued work. As the coordinating ministry of disability aspects, the Ministry of Social Welfare[2], established an inter-ministerial working group in autumn 2008 tasked with identifying implications and preconditions for Denmark's ratification of the UN Convention. The inter-ministerial working group held its first meeting on 4 September 2008. The meeting reviewed the obligations of the Convention and concluded that it needed, in particular, to study the scope of obligations inherent in the non-discrimination provisions under Article 5, obligations under the provisions of accessibility under Article 9 and obligations under the provision of education under Article 24. This conclusion led to the set up of three subgroups each charged with performing a detailed analysis of one of the mentioned problem areas. The Ministry of Social Welfare headed up the subgroups on non-discrimination provisions and accessibility, while the Ministry of Education was in charge of the subgroup on education. The subgroups on anti-discrimination and accessibility held two meetings, supplemented by several written consultation rounds. Concurrently with the work in the inter-ministerial working group, Denmark adopted Act no. 1347 of 19 December 2008 amending the Parliamentary Election Act, the Danish European Parliament Elections Act and the Local and Regional Government Election Act. The amended Act ensures that Denmark meet the provisions of Article 29 of the Convention, which require state parties to guarantee persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others. In addition to the amendments made to the elections legislation, the inter-ministerial working group concluded that no further legislation was needed before Denmark could ratify the Convention. The analyses carried out by the subgroups and the inter-ministerial working group were presented to the Government on 11 March 2009 and constituted the basis for preparing a motion for resolution to ratify the Convention. The draft motion for resolution underwent an external consultation round and was uploaded to the public consultation portal, www.borger.dk, on 23 March 2009, the deadline for comments being 6 April 2009. Stakeholder organisations were able to monitor the ratification process constantly at the Ministry of Social Welfare website and later at the Ministry of the Interior and Social Affairs website and were also able throughout the process to contact the Ministry directly. The final resolution was presented in the Danish parliament on 22 April 2009 and adopted on 28 May 2009. In close cooperation with the Ministry of Foreign Affairs, the Ministry of the Interior and Social Affairs subsequently launched the preparation of the ratification instruments for the formal ratification of the UN Disability Convention. The

[1] Approved by Resolution of the Government of the Czech Republic on 29 March 2010 No. 253.

[2] The ministry has changed name three times since then: first to the Ministry of the Interior and Social Affairs, then to the Ministry of Social Affairs, and latest to the Ministry of Social Affairs and Integration.

ratification instrument was deposited on 23 July 2009. The Convention has formally been in force for Denmark since 23 August 2009. The ministry regularly briefed the organisations for people with disabilities in Denmark throughout the entire ratification process. Additionally, four meetings were held with these organisations in Denmark, at which the Convention and the ratification process were discussed and reviewed.

Estonia: The Parliament of Estonia has adopted the Act of ratification of the UNCRPD and endorsed the accession to the Optional Protocol in March 2012. The President of Estonia has proclaimed the Act. The instrument of ratification is prepared but not deposited yet and ratification has not entered into force (May 2012). Estonia made an interpretative declaration upon ratification about Article 12.

A detailed analysis of the articles of the UNCRPD was done and the compliance of Estonian legislation with them was assessed beforehand to determine whether full implementation of every particular obligation is already ensured. The Ministry of Social Affairs consulted with people with disabilities on the impact of the UNCRPD on individuals, businesses and others. The articles of the UNCRPD were also discussed with other ministries, associations of local governments, the Estonian Chamber of People with Disabilities and Estonian Institute of Human Rights. Many issues requiring further clarification also emerged during the preparation of ratification and that prolonged the ratification process. However, it was concluded that no amendments of legislation were needed in order to proceed.

In Finland, the main part of the legislation already complies with the requirements of the Convention. The Ministry of Social Affairs and Health is preparing the legislative amendments needed for the ratification of the Convention. A new Act on the use of coercion on persons with intellectual disabilities and dementia will be required by Article 14 of the Convention (Liberty and security of person). A working group to prepare the legislation was set up in July 2010. In relation to the right of persons with disabilities in need of institutional or residential care to move from one municipality to another, Article 18 (Liberty of movement and nationality) and Article 19 (living independently and being included in the community) required changes in the Municipality of Residence Act and the Social Welfare Act. The legislative amendments necessitated by Articles 18 and 19 were completed during 2010 and the relevant Acts entered into force on 1 January 2011.

Additional issues requiring further clarification or specification of legislation may also emerge during the preparation for ratification. Finland has currently no mechanism that has been, or could as such be, designated to attend to the tasks referred to Article 33.2 of the UN Convention. Thus, the ratification of the Convention will necessitate either the establishment of a new mechanism or the transformation or some existing mechanism into such a mechanism. All in all, preparation of the legislative amendments will still take time and Finland would be prepared to ratify the Convention during the current Government's term of office.

The Ministry for Foreign Affairs has, in May 2011, set up a working group to prepare the measures necessitated by the ratification of the Convention and its Optional Protocol in Finland. The working group is comprised of representatives of the public administration and the local and regional authorities, as well as the National Council on Disability (VANE), the Finnish Disability Forum and the Center for Human Rights of Persons with Disabilities (VIKE). The work of the working group and the preparation of the legislative amendments is still ongoing. The intention is to ratify the Convention during the current Government's term of office (2011-2015).

France: The ratification of the UNCRPD and the Optional Protocol were enabled by Law 2009-1791 of 31 December 2009. The instruments of ratification were deposited at the UN on 18 February 2010. Consequently, the Convention and the Optional Protocol entered into force in France on 20 March 2010.

Germany: The German Bundestag passed the law with the consent of the Bundesrat which was necessary for ratifying the Convention and the Optional Protocol. The law entered into force on 1 January 2009. Germany ratified both the Convention and the Optional Protocol. The instruments of ratification were deposited 24 February 2009 at the UN Headquarters. Germany has translated both the Convention and the Protocol into sign and easy-to-read versions.

Greece signed the UNCRPD on 30th March 2007 and the Optional Protocol on 27th September 2010. On 11 April 2012 the Greek Parliament enacted Law 4074 / 2012 ratifying the Convention on the Rights of Persons with Disabilities and the Optional Protocol thereto. The instrument of ratification of both the Convention and the Optional Protocol is expected to be deposited with the Depositary of the Convention within the current month.

Hungary has ratified the Convention and the Optional Protocol on the 20th July 2007 by the Act No 92 of 2007.

Ireland signed, subject to ratification, the UNCRPD on its opening for signature on 30 March 2007. It is the Government of Ireland's intention to ratify the UNCRPD as quickly as possible, taking into account the need to ensure that all necessary requirements under the Convention are being met. There will be no undue delay in the State's ratification of it; however, Ireland does not become party to treaties until it is first in a position to comply with the obligations imposed by the treaty in question, including by amending domestic law as necessary. The National Disability Strategy (NDS) of Ireland in many respects comprehends many of the provisions of the UNCRPD. A high-level Interdepartmental Committee advises on and monitors legislative, policy and administrative actions required to enable the State to ratify the UNCRPD. This Committee has developed a Work Programme to (i) address any elements of the National Disability Strategy that require alignment with the Convention and (ii) address any matters that fall outside the NDS which are required to enable Ireland to ratify. This programme is being progressed across the relevant Government Departments. At the Committee's request, the National Disability Authority, the lead statutory agency for the sector, has independently assessed the remaining requirements for ratification so as to ensure conclusively that all such issues will be addressed. The Committee will also closely examine the Optional Protocol to the Convention in consultation with the Department of Foreign Affairs and the Office of the Attorney General (the Government's legal advisers). The Optional Protocol will be addressed by the Government at the time of ratification of the Convention.

Italy: On November 28th, 2008, the Italian Government approved the ratification proposal for the UN Convention and Optional Protocol, which was passed by the Parliament on February 24th, 2009. By law no. 18 of 3 March 2009, the Italian Parliament has ratified the UN Convention and the Protocol. On 15 May 2009 Italy deposited its instruments of ratification with the depositary of the Convention.

The ratification decision also established the new National Observatory on the condition of persons with disabilities, which met for its first official meeting on 16 December 2010. The Observatory is responsible for the implementation of the UNCRPD in close co-operation with the inter-ministerial Committee on Human Rights (CIDU) of the Italian Ministry of Foreign Affairs. It will also assure the monitoring activities provided by Article 33.2 of the UN Convention.

Latvia: On 28 January 2010 the Parliament of Latvia finalised the ratification of the Convention at the national level. In accordance with the Depositary Notification communicated by the Secretary-General of the United Nations, the ratification was completed on 1 March 2010. The Convention entered into force for Latvia on 31 March 2010 in accordance with its Article 45(2). Furthermore, on 3 June 2010 the Parliament of Latvia has ratified at the national level also the Optional Protocol to the Convention. The ratification of the Optional Protocol was completed on 31 August 2010 and it entered into force for Latvia on 30 September 2010.

Lithuania: On 30 March 2007, the Minister of Social Security and Labour of Lithuania signed the UNRCPD and its Optional Protocol in New York. On 27 June 2007, by Order No. A1-176, the Minister of Social Security and Labour initiated an inter-institutional taskforce to deliver the analysis of relevance and feasibility for ratification of these international instruments. The taskforce involved representatives from the Ministry of Culture, the Ministry of Health, the Ministry of Education and Science, the Ministry of Transport and Communication, the Ministry of Social Security and Labour, the Ministry of Foreign Affairs, the Ministry of National Defence, the Ministry of Environment, the Office of Equal Opportunities Ombudsperson, the Department of Physical Education and Sports under the Government of the Republic of Lithuania and representatives of NGOs.

The analysis of the relevance and feasibility of ratifying the UNCRPD encompassed the conformity of the Lithuanian legal framework with the provisions of the Convention as well as the possibility of ratifying all articles of the Convention and the Protocol. On 27 May 2010, seeking to become a full-fledged member of the international community pursuing the equal opportunities mainstreaming policy effectively, Lithuania ratified the UN Convention and its Optional Protocol (Republic of Lithuania Law on the Ratification of the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol, Official Gazette, 2010, No.67-3350).

Luxembourg: After analysing the compatibility of national legislation with the Convention - in order to identify potential conflicting laws or regulations - Luxembourg started the official ratification procedure in May 2010 and finally ratified the Convention and the Optional Protocol on 13th July 2011 (Law of 28th July 2011). The date of the deposit of the instrument of ratification at the UN Headquarters is the 26 September 2011. The Convention entered into force for Luxemburg on October 26, 2011.

In Malta, a Disability Matters Bill was approved by Parliament on 26 March 2012. It will come into effect in mid-April. In light of these legislative changes, fresh consideration is being given to the ratification by Malta of the Convention and the Optional Protocol.

The Netherlands is carrying out a study of the nature and scope of the obligations of the UN Convention as a preliminary step for an impact assessment of the financial consequences of the Convention. The results are expected in spring 2012. Based on the results, the draft

version of the Approval and Introductory Act will be finalised. These Acts contain all changes necessary in Dutch laws to implement the Convention. Civil society is actively involved in these legal analyses and in the drafting of the Approval and Introductory Act.

The Netherlands expect to start the consultation process with civil society of the drafts of the Approval and Introductory Act in spring 2012. The proposals for the Approval and Introductory Act will then be submitted to the Council of State. Upon receipt of the advisory opinion of the Council of State the proposals will be submitted to the Parliament. It is expected that this will take place in 2012. The ratification process will be concluded when both Chambers of Parliament have consented to the proposals for legislation.

Poland: For international agreements concerning human rights, the Polish Constitution requires "a major ratification process", which means that the Council of Ministers has to adopt a draft Act on the ratification and submit it to the Parliament for consideration and approval, before the President can ratify the agreement. Ratified agreements are promulgated in the Official Journal of Laws and only then constitute part of the domestic legal order.

The assessment of compatibility of national legislation with the Convention, carried out by the Ministry of Labour and Social Policy, in collaboration with relevant ministries, resulted in the proposal on ratification of the Convention in July 2011. Extensive consultations with social partners and NGOs took place. Consideration of the proposal by the Council of Ministers, foreseen for August 2011, has been suspended to make additional consultations with the Minister of Finance.
The process was slowed down because of the parliamentary election which took place on 9 October 2011 (a new Government's term of office started on 8 November 2011).
On 27 March 2012 the Council of Ministers considered the proposal on ratification of the Convention, revised following the adoption of new legislation since August 2011, and decided to submit a draft Act on the ratification to the Parliament for consideration.

Portugal: The UNCRPD was ratified in 2009 and since then it is part of the Portuguese legal system. Both the first Action Plan for Persons with Disabilities (2006-2009) and the National Strategy for Disability (2011-2013) develop and implement the Principles and obligations defined in the Convention. According to the latest Government proposal, the National Institute for Rehabilitation (INR, I.P.) will be designated the national coordination mechanism within the government and it will elaborate the national report to submit to the Committee on the Rights of Persons with Disabilities in 2012. The civil society has been consulted in the beginning of current year. According to the latest Government proposal, the independent mechanism will be designated in 2012.

In Romania, the Ratification Law of the UNCRPD was promulgated by the President of Romania in November 2010 (Law 221/2010 for the Ratification of the Convention regarding the Rights of the Persons with Disabilities) and the instruments of ratification were deposited 31 January 2011. Depositing the instrument of ratification of the Convention by Romania was announced by the Secretary General of the United Nations - as depositary of the Convention on the Rights of Persons with Disabilities - on January 31, 2011. In accordance with Article 45, paragraph 2 of the Convention, it entered into force for Romania on 2nd of March 2011.

Slovak Republic: The National Council of the Slovak Republic expressed its agreement with the Convention and the Optional Protocol in its Resolution no. 2048 of 9 March 2010 and decided that it constitutes an international agreement which, pursuant to Article 7 (5) of the

Constitution of the Slovak Republic, has precedence over national laws. The President of the Slovak Republic ratified the Convention and the Optional Protocol on 28 April 2010. On 26 May 2010 the Deed of Ratification was deposited with the Secretary General of the United Nations.

The Convention became binding for the Slovak Republic on 25 June 2010 in accordance with Article 45 (2) and also the Optional Protocol entered into force on 25 June 2010.

Slovenia: The Act on Ratification of the Convention and the Protocol was adopted in the Parliament on April 2, 2008. The Convention and the Protocol were published in the Official Journal of the Republic in Slovenia. The Ministry of Foreign Affairs sent the documents to the UN Permanent Mission of Slovenia, which handed in the documents at the UN on 24 April 2008. The UN Convention and the Protocol were officially translated, submitted to the UN and published on the UN web page by 2007. In 2008, the Convention was printed in Slovenian in both the usual and the accessible formats for persons with disabilities, namely the easy-to-read, Braille and sign language versions.

Spain signed the UNCRPD and the Optional Protocol on 30 March 2007 in New York. The instruments of ratification were deposited at the UN on 3 December 2007 and were published into the Spanish Official State Gazette (BOE) on 21 April 2008. Consequently, they entered into force in Spain on 3 May 2008.

Sweden: An investigator within the Government's office examined Swedish legislation in order to see if it is in harmony with the UN Convention's requirements and those of the Optional Protocol. This work has been published in a report and referred to stakeholders for further consideration. This report formed the basis of a bill to the Parliament. The ratification of the Convention requires a parliamentary resolution. Sweden ratified the UN Convention and its Optional Protocol on 15 December 2008. According to the above mentioned examination, the Swedish legislation is in harmony with the UN Convention's requirements. The translation into Swedish can be found at www.sweden.gov.se.

The United Kingdom ratified the Convention on 8 June 2009 and the Optional Protocol on 7 August 2009. The UK developed reporting and monitoring arrangements, including the establishment of an independent mechanism comprising the UK's four equality and human rights commissions. The UK submitted its initial report to the UN on 24 November 2011.

The European Union signed the Convention the 30 March 2007. On the 26 November 2009 the Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities was adopted (Decision 2010/48/EC).[3]

As required by Articles 3 and 4 of this Decision, a Code of Conduct needed to be adopted before the deposit of the instrument of formal confirmation on behalf of the European Union could take place. On 2 December 2010, the Code of Conduct between the Council, the Member States and the Commission was agreed, setting out internal arrangement for the implementation ad representation of the EU relating to the UNCRPD.[4] Following this, the

[3] Decision 2010/48/EC http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:023:0035:0061:EN:PDF

[4] **http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:340:0011:0015:EN:PDF, 2010/C 340/08**

EU deposited the instruments of ratification on 23 December 2010. The UNCPRD entered into force with respect to the EU on 22 January 2011.

In August 2008, the Commission adopted a proposal for a Council Decision on the EU accession to the Optional Protocol (COM(2008) 530 final/2). However, it was decided within the Council to give priority to negotiations on the Decision on the Conclusion of the Convention, and then on the Code of Conduct. Now that the Code of Conduct has been agreed in December 2010, and the EU has concluded the Convention, it is up to the Council Presidency to act on the Commission's Draft Decision on the Optional Protocol.

Declarations and Reservations

The majority of the Member States do not foresee any reservation as regards to the matter of application of the Convention or of the Optional Protocol. Even though the need for reservations after finalising the screening of the national legislation may arise, most countries express a strong political will to ratify the entire Convention and its Optional Protocol.

As exception, at the signing ceremony the Dutch Ambassador had a statement on several articles. It is not known now whether the need for new reservations or explanations will arise.

During the ratification of the Convention on 27th of May, 2010, the Lithuanian Government has made a statement regarding the Article 25 (a). The Parliament of the Republic of Lithuania stated that the concept "sexual and reproductive health" can't be interpreted as establishing new human rights and constituting relevant international obligations for the Republic of Lithuania. In the content of this concept is not included support, promotion or advertising of disabled peoples abortions and sterilization and medical procedures which could lead to discrimination based on genetic characteristics.

The Maltese Government has also already made an interpretative statement regarding the phrase "sexual and reproductive health" in Article 25(a) to the effect that Malta understands that this phrase does not constitute recognition of any new international law obligation, does not create any abortion rights and cannot be interpreted to constitute support, endorsement, or promotion of abortion. Malta further understands that the use of this phrase is intended exclusively to underline the point where health services are provided, they are provided without discrimination on the basis of disability. Malta has also made a reservation pursuant to Article 29(a)(i) and (iii) of the Convention. While declaring its full commitment to ensure the effective and full participation of persons with disabilities in political and public life, including the right to vote by secret ballot in elections and referenda, and to stand for elections, with regard to Article 29(a)(i), Malta reserved the right to continue to apply its current electoral legislation in so far as voting procedures, facilities and materials are concerned and with regard to (a)(iii) Malta reserved the right to continue to apply its current electoral legislation in so far as assistance to voting procedure is concerned. It is envisaged that both the above-mentioned interpretative statement and reservation will be confirmed on ratification.

France has not made any reservations; however, it made a declaration on the term 'consent' in Article 15. France will interpret this term in conformity with international instruments such as the Council of Europe Convention on Human Rights and Biomedicine and its Additional Protocol on Biomedical Research, as well as on its national legislation which is already consistent with the latter instruments.

Poland submitted a reservation concerning article 23.1 (b) and 25 (a) (reproductive health). International law of treaties asks for the confirmation at the moment of submitting ratification documents. This point will be decided at the moment of ratifying the Convention. Currently it is planned to slightly modify the original text of this reservation and submit an additional one concerning article 23.1 (a) (on marriage of a disabled person whose disability results from a mental illness or mental disability), as well as an interpretative declaration concerning article 12 (on application of the incapacitation).

When depositing the Deed of Ratification, the Slovak Republic expressed a reservation in respect of the provision of Article 27 (1), a) of the Convention on the Rights of Persons with Disabilities in accordance with its Article 46, in the following wording: "The Slovak Republic shall apply the provisions of Article 27 (1) a) provided that implementation of prohibition of discrimination on the basis of disability when determining the conditions of recruitment, hiring and continuance of employment shall not apply to hiring of members of armed forces, armed state security services, armed corps, National Security Authority, Slovak Information Service and Fire Brigade and Rescuers."

The UK has introduced a proportionate system of review for social security benefit appointees and therefore removed its reservation in respect of Equal Recognition before the Law (Convention Article 12.4) when it submitted its initial report to the UN. The reservations in respect of Work and Employment (Convention Article 27 mainly); and Liberty of Movement (Convention Article 18); and an interpretative declaration and a reservation in respect of Education (Convention Article 24, Clause 2 (a) and 2 (b) remain in place.

Cyprus has submitted a reservation on Article 27 of the Convention regarding employment.

The EU in the Decision concerning the conclusion of the UNCRPD states that it concludes the Convention without prejudice to the right, conferred on its Member States by virtue of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, to exclude non-discrimination on the grounds of disability with respect to employment in the armed forces from the scope of the Directive. Therefore the Member States may, if appropriate, enter their own reservations to Article 27(1) of the Disabilities Convention to the extent that Article 3(4) of the said Council Directive.

2. ACTIONS UNDERTAKEN BY THE MEMBER STATES, EUROPEAN UNION AND STAKEHOLDERS TO IMPLEMENT AND MONITOR THE UNCRPD

Austria

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

In Austria, the Federal Ministry of Labour, Social Affairs and Consumer Protection is the Focal point at federal level. The Ministry of Labour, Social Affairs and Consumer Protection is also responsible for coordinating the implementation of the UN Disability Rights Convention in Austria. In 2012 the government has foreseen a decision on a National Action Plan (NAP) on the implementation of the UN Disability Rights Convention 2012 to 2020 ("**NAP Behinderung**"). The National Disability Action will promote the objectives of the UN Disability Rights Convention and contain the guidelines and strategies for the Austrian policy for persons with disabilities in the upcoming years (from 2012 to 2020).

2.1.2. National strategies to implement the UNCRPD

In accordance with Article 35 para. 1 of the UNCRPD, Austria drew up its **First State Report** for the United Nations in October 2010. On the basis of numerous contributions from governmental and non-governmental organisations, this comprehensive report reflects the measures taken to fulfil the obligations from the agreement. The main purpose of the **National Action Plan 2012 to 2020** is to promote and to implement the aims of the UNCRPD. The Plan is built on the basis of the First State Report of the Austrian Government required by the UNCRPD, submitted in 2010.

The Federal Ministry of Labour, Social Affairs and Consumer Protection, in its function to coordinate disability policy in Austria, was responsible to set up the National Action Plan. The draft of the Action Plan was presented in January 2012. The Federal Disability Advisory Board was involved in the process of setting up the plan from the beginning. In order to involve all stakeholders, the plan was established in close cooperation with civil society. There will be a further broad discussion with stakeholders, civil society and NGOs at the end of February 2012. After that the Action Plan is expected to be adopted by the Federal Government in spring 2012.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The 2008 amendment to the Federal Disability Act established the Independent Monitoring Committee. The Monitoring Committee is also represented in the Federal Disability Advisory Board at the Federal Ministry of Labour, Social Affairs and Consumer Protection with representatives from the federal government, the nine "Länder" as regional authorities, the social insurance institutions, disability organisations, social partners and the Disability Ombudsman.

The Independent Monitoring Committee has started to work on implementing the UNCRPD in 2008. Since December 2008 the Committee has held 37 meetings (one per month). Every 6 months ca. a public meeting is organized. The latest public meeting took place in November 2011. One meeting was held at the Austrian Parliament in November 2009. About 40 individual complaints were raised until now. The Independent Monitoring Committee regularly gives a written and published expert opinion on a current disability policy issue (e.g. inclusive education, occupational and work therapy, violence and abuse, personal assistance, legal capacity and supported decision-making) and makes recommendations. Although the Independent Monitoring Committee is only responsible for the federal level, it also deals with requests at the regional level if no other monitoring unit is in charge.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

The Independent Monitoring Committee is solely composed of members from civil society. In fact, the members of the Committee are representatives from disability organizations, human rights organizations, development organizations and representatives of academic institutions.

Representatives of disability organisations are involved in many boards of the Federal government (for example protection against dismissal of people with disabilities, most second level authorities in matters of people with disabilities).

The Federal Disability Advisory Board has to be heard by the Federal Minister of Labour, Social Affairs and Consumer Protection in all important issues concerning people with disabilities.

Furthermore, there are various tools and methods used in Austria to foster the empowerment of people with disabilities:

- Experts' opinions on laws
- Support in all questions about equal rights
- Raising public awareness: events, campaigns, reports, brochures
- Brochures in 'Easy-to-read'-versions
- Empowerment-programmes financed by the Federal Ministry of Labour, Social Affairs and Consumer Protection
- Working groups with representatives from all stakeholders, including the disability NGOs
- 'Peer-Groups'

2.2.3. Collecting statistics and/or developing indicators (Art. 31)

The National Action Plan 2012-2020 refers to the necessity to set up further disability statistics in Austria. The plan also contains some disability indicators such as the unemployment quota of people with disabilities.

Belgium

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

In Belgium, the Federal Public Service Social Security is the focal point at the federal level and also the coordinating mechanism (interfederal: for the national level and the level of the Regions and Communities). In each administration at the federal level, a contact point is or will be designated.

Focal points were also established in the various regions and communities:

- *Flemish* region: the team 'Equal Opportunities in Flanders' (*Gelijke Kansen in Vlaanderen*);
- Walloon region: the Agency for Integration of Persons with Disabilities (*Agence Wallonne pour l'Intégration des Personnes handicapées*);
- *Brussels-Capital* region: the "Equal Opportunities and Diversity" body *(cel Gelijke Kansen en Diversiteit);*
- Commission of the *French-speaking* Community (*Commission communautaire française - COCOF*): the PHARE Service (*Personne Handicapée Autonomie Recherchée*) ;
- *Joint Community Commission* (*Commission communautaire commune - COCOM*): the COCOM Administration;
- *French-speaking community:* the WBI Multilateral World Service (*Wallonie-Bruxelles International – Service multilatéral mondial*) ;
- German-speaking community: the Office for People with Disabilities (*Dienststelle für Personen mit Behinderung*).

2.1.2. National strategies to implement the UNCRPD

Belgium ratified the Convention and the Optional Protocol on 2 July 2009. They became binding on 1 August 2009.

In accordance with article 35, § 1 of the UNCRPD, Belgium drew up its **First State Report** for the United Nations in July 2011. On the basis of numerous contributions from governmental organisations at the federal level and at the level of the Regions and Communities and with implication of the civil society, this comprehensive report reflects the measures taken to fulfil the obligations of the UNCRPD.

Both on the federal and on the regional level, governments work on a mainstreaming policy for the inclusion of persons with disabilities.

Flanders published its strategic framework on disability 2012-2014 in December 2011. The strategic and operational goals will be translated into concrete action plans during 2012. The evaluation of the framework strategy will be handled via indicators, deliverable from January 2012 on.

Wallonia is busy to prepare its strategic framework on disability 2012-2017. It will be translated into concrete action plans during the last six months of 2012. The first action of this

plan is nominated 'A more inclusive society'. The evaluation of the framework strategy will be handled via indicators in link with UNCRPD.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

On 12th July 2011 Belgium designed the Centre for Equal Opportunities and Opposition to Racism (the Centre) as independent mechanism to promote, protect and monitor the implementation of the Convention.

The Centre was established in 1993. Following the extension of its mandate in 2003 and 2007, it became Belgium's national equality body. It provides advice to government on disability issues and handles complaints of discriminations against persons with disabilities. The Centre is currently a national human rights institution with B-Status.

Both the federal state and the federated entities (Communities and Regions) have agreed to designate the Centre. The operation of the independent mechanism has been defined through individual agreements between the Centre and the federal state and the seven federated entities. This includes the establishment of a CRPD Unit and of a CRPD Commission.

On the one hand, the CRPD Unit, a permanent expertise and administrative cell composed of five persons, amongst whom a head of unit has been created to promote, protect and monitor the implementation of the CRPD. The CRPD Unit works in close cooperation with the other branches of the Centre and is in permanent contact with public authorities, national institutions, DPOs, NGOs, independent mechanisms abroad and international organisations.

On the other hand, the Disability Commission is a non-permanent body composed of 23 members chosen by their knowledge, experience and interest in the disability sector, among which a President elected by his/her peers. Members emanate from: DPOs (10), universities (6) and labour unions (7). The Disability Commissions approves the annual and triennial strategic plans of the independent mechanism and follows its daily activities.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

At national level
The Belgian Disability Forum (BDF) and the national higher Council of disabled persons monitor the work on the implementation of the Convention. The BDF expressed opinions during the implementation of the ratification process and will follow the application of the Convention.

The BDF is an ASBL comprising 20 associations of disabled persons. The ASBL aims to inform its members regarding the repercussions of supranational regulation on the rights of disabled persons. The ASBL also endeavors to make the political, economic and social Belgian actors aware of the need to incorporate the disabled needs of persons into their discussion and decision process. The BDF is the official representative of Belgium within the European Disability Forum.

At federal level
The national higher Council of disabled persons is in charge of examining all the problems relating to disabled persons, falling within the federal competence. The Council is entitled, through its own initiative or at the request of the relevant Ministers, to deliver opinions or to make proposals on these subjects, inter alia for rationalisation and of the coordination of the legal and regulatory provisions. The Council is composed of 20 members, specially qualified through their participation in activities of organizations of persons with disabilities or through social or scientific activities.

At regional and community level
People with disabilities and the organizations/associations representing them are members of the management Board of the Office of the German-speaking Community for People with Disabilities. They are therefore directly involved in important decision-making processes during the formation of the policymaking for the disabled in the German-speaking Community.
There is also an annual plenary meeting attended by the disabled and all the organizations/associations representing them. The aim is to discuss common concerns and questions and work out joint responses to outstanding issues.

In Flanders, the umbrella organization "Toegankelijkheidsoverleg Vlaanderen" ('Accessibility consultation Flanders') represents people with disabilities concerning the accessibility-topic. They are consulted with regards to the accessibility policy that the Flemish Equal Opportunities unit works on.

With regards to disability, there is no regional board or council representing people with disabilities. But "Equal opportunities in Flanders" actively consults civil society when setting their policy targets via the open method of coordination. Representative organizations are not only involved when elaborating the transversal equal opportunities policy. Even at the level of the different departments and policy fields structures are created to guarantee the participation of people with disabilities in the policy preparation and execution (for e.g. the working group 'Integrale Jeugdhulp', the advisory committee at the Flemish Agency for Disabled Persons (VAPH), Flemish Platform for organizations with disabilities, commission diversity at SERV, etc.). Furthermore, ad hoc consultations will be organized when deemed necessary (for e.g. in regard to the first report on the CRPD).

In 2011, a research project was set up to examine the possibilities, conditions and approach of participation of people with disabilities in policy preparation and execution (Nothing about us without us. Policy participation of people with disabilities). Its aim is to end up with a formula for an advisory, communication and consultation structure for the Flemish Government.

For the territory of the Walloon Region, a Walloon Advisory Board for Persons with Disabilities was created. This council aims to ensure the participation of persons with disabilities and of their associations to the development of the measures which concern them. To this end, the council:
- represents all the associations representative of persons and can ensure coordination of them;
- Gives to the Walloon regional Council and to the Government, upon their request or own initiative, opinions on the guidelines of the policy for persons with disabilities, and on the practical methods of its implementation;

- delivers its opinion on the operation of the Agency and the way in which it carries out the missions which are entrusted to it

Various tools and methods are used in Belgium to foster empowerment of people with disabilities, both at federal and local level.

The associative sector regularly organizes debates, dialogue and training. For example, training intended mainly for the professionals, including the professionals of the associative sector, is organized by the SPF Social Security. In the German speaking Community each disabled person who contacts the Office for People with Disabilities is given individual assistance in the form of an Individual Service Plan (*Individueller Dienstleistungsplan* - IDP) specifying the measures necessary for their social integration and full participation. Furthermore, awareness-raising measures are also being continually organised to increase the general public's awareness of the needs of the disabled. Regular training courses are also available for disabled people. The people concerned and the organisations representing them are actively involved in a working group for monitoring the implementation of the UN Convention on the Rights of Persons with Disabilities and the Action Plan 2006 – 2015 of the Council of Europe. People with disabilities and their respective organisations were involved when drafting the first report on the implementation of the CRPD. They will certainly be involved when drafting the action plan, even if the form has not been determined yet.

In Wallonia, pursuant to Article 120 a) of the new communal law, it is possible for the communes of to establish an Advisory Board of disabled persons.
These communal Advisory Boards of disabled persons aim to:
- Incorporate the needs of disabled persons into local authorities' urban and communal policies.
- Strengthen or establish regular co-operation and dialogue mechanisms enabling disabled persons, by the channel of their representative organizations, to contribute to planning, implementation, follow-up and the evaluation of each action of the political and social field aiming at equality and inclusion.

– All reception and accommodation services approved by the AWIPH are required to create a "Council of the users" representing those and, if necessary, their legal representatives, comprising at least three members including an elected President at its centre. Its members can under no circumstances form part of the organizing service power.

Since February 2011, due to his first “Equal Chances Plan”, an “Equal Chances public agent” will be designated in all communes and cities of Wallonia.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

Since there is no single definition of 'disability' in Belgium, certain persons with disabilities may not be recorded by various data collection mechanisms, and due to the structure of the Belgian State and of legislation on the protection of privacy, it is not possible to globalize the various statistics. For example, at federal level, there are statistics on the benefits and on medical certificates allowing for granting benefits as well as various social and tax advantages.

In the Walloon Region, the indicators currently used are those relating to the management Contract of the Walloon Agency for the Integration of Persons with Disabilities. Indeed, certain main principles of this contract relate to a number of articles of the Convention.

In Flanders, indicators are being drawn up to measure the progress made within the framework of the Open Method of Coordination. These indicators will be available from January 2012 on.

Bulgaria

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The focal point is the Integration of People with Disabilities Department, in the Ministry of Labour and Social Policy.

Bulgaria is currently in the process of establishing a coordination mechanism foreseen in Article 33 (1) of the UN Convention. Representatives of the NGOs of and for people with disabilities which are members of the National Council for Integration of People with Disabilities are involved in that discussion and also in the same process of establishment of the coordination mechanism. There is a draft of amendment of legislation in relation to the establishment of the coordination mechanism foreseen in 33 (1) of the CRPD.

2.1.2. National strategies to implement the UNCRPD

- At the beginning of 2011, an expert group was set up with the task to prepare a comprehensive plan for preparing Bulgaria for implementation of the UN CRPD. Representatives of the national representative NGOs of and for people with disabilities take part of the mentioned expert group. The outcome of that expert group was presented to the Council for Integration of People with Disabilities and it was taken into account for ratification of the CRPD.

- In 2012, following ratification, the Ministry of Labour and Social Policy will prepare a biannual action plan for the implementation of the UN Convention by the expert group draft.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

During the work of the expert group preparing the comprehensive plan for Bulgaria's implementation of the UN CRPD, the issues of a framework for promoting/protecting/ monitoring CRPD will be discussed.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

The National Council of Integration of People with Disabilities has been set up with the Council of Ministers. The National Council was established when the new "Integration of People with Disabilities Act" was adopted and came into force 1 January 2005. The National Council is functioning according to the "Regulation of Procedure of the National Council for the Integration of People with Disabilities" and the criteria for representation of organizations of people with disabilities and organizations for people with disabilities, adopted by the Council of Ministers, in Ordinance No 346 from 17 December 2004. The mentioned Regulation lays down the criteria for representation of the organizations of and for people with disabilities which are members of the National Council. In accordance with the Integration of People with Disabilities Act, it is responsible for the cooperation in the policy

development and conduct in the field of disability. It is an advisory body which includes representatives of the state, named by the Council of Ministers, representative organizations of and for people with disabilities, representative organizations of workers and employees, representative organizations of employers and the National Association of Municipalities.

Representatives of NGOs of and for people with disabilities are members of the National Council for Integration of People with Disabilities, which gives a preliminary stand before the statutory instruments for people with disabilities are adopted.

Currently 20 non-governmental organizations of and for people with disabilities in Bulgaria are members of that National Council. Members of the National Council which represent children and adults with disabilities are also involved in drafting the national strategy, action plans, pieces of legislation and also expert group for preparing Bulgaria for the implementation of the UN CRPD.

There is a National strategy for ensuring equal opportunities for people with disabilities and a biannual Action plan for implementation of the strategy. The Bulgarian Government is confident of the great importance of implementation of UN CRPD and it always expresses its willingness to discuss with civil society the problems related to the ratification of the UNCRPD in the framework of the National Council for integration of people with disabilities. In 2012 the Bulgarian disability strategy will be updated to be brought in line with the European Union Disability Strategy and the UN Convention for persons with disabilities.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

During the work of the expert group responsible for preparing the comprehensive plan for Bulgaria's implementation of the UN CRPD, the issue of developing indicators will be discussed.

Cyprus

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

In Cyprus, the Department for Social Inclusion of Persons with Disabilities has been nominated as the focal point for the implementation of the Convention.

As coordination mechanism for the ratification, implementation and monitoring of the Convention was nominated the Pancyprian Council for Persons with Disabilities which is the highest consultative body for the issues of persons with disabilities. The role of the Council is to consult the government as to the formulation, monitoring and implementation of social policies for persons with disabilities. The Chairman of the Council is the Minister of Labour and Social Insurance and its members are representatives of co-responsible for disability issues Ministries, Organisations of persons with disabilities, social partners (trade unions and organisations of employers) as well as independent persons.

In order to strengthen the coordination procedures regarding the implementation of the UNCRPD the establishment of thematic sub-committees under the Council with the participation of a liaison officer to be nominated by each responsible Ministry dealing with disability issues is in process. The whole coordination mechanism will be supported administratively by the Department for Social Inclusion of Persons with Disabilities.

2.1.2. National strategies to implement the UNCRPD

Strategy guidelines, aims, policies and measures promoted on disability issues are already included in the Governance Programme 2008-2013, the Strategic Development Plan 2007-2013, the National Strategy on Social Protection and Social Inclusion, the National Employment Strategy and others. Taking into account the new European Disability Strategy the Council of Ministers has decided to assign to the Department for Social Inclusion of Persons with Disabilities the coordination of the formulation of a National Disability Action Plan.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

By a Council of Ministers Decision on the 9th of May 2012, the Ombudsman and Commissioner for the Protection of Human Rights being also the Equality Authority in Cyprus has been nominated as the independent mechanism pursuant to Article 33.2 of the UN Convention.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

The representatives of the disability movement are involved in the monitoring process through the Pancyprian Council for Persons with Disabilities. In addition, the representatives of the Cyprus Confederation of Organisations of Persons with Disabilities will participate in a

consultative committee to cooperate with the Ombudsman and Commissioner for the Protection of Human Rights.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

There in no central Disability Database for the time being. Each state service collects its own statistical data according to the services provided to persons with disabilities. The Statistical Service also collects and issues data related to employment and social protection of persons with disabilities according to Eurostat requirements and standards.

Recognising the need for the establishment of National Records on persons with disabilities in Cyprus in order to be able to formulate the appropriate policies, programmes and measures, the Ministry of Labour and Social Insurance has prepared a plan for the creation of a new System for the Assessment of Disability and Functioning based on the International Classification of Functionality, Disability and Health of the World Health Organisation. The new System aims to provide credible and reliable information to all public services related to the needs and capabilities of persons with disabilities. The disability database will also enable the collection of statistics and the development of indicators related to the application of Article 31 of the Convention.

Czech Republic

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

In the Czech Republic, the Convention has entered into force on 12 February 2010, so the relevant bodies have started working. The Ministry of Labour and Social Affairs was appointed as the national focal point for the issues relating to the implementation of the Convention.

2.1.2. National strategies to implement the UNCRPD

A new National Plan for Promoting Equal Opportunities for Persons with Disabilities 2010–2014 was approved by Resolution of the Government of the Czech Republic No 253 of 29 March 2010. The basic format of the new Plan, its content and structure, draw on the general principles on which the Convention is based. In the development of the document, only those articles of the Convention which are most important and relevant for the next five years in terms of promoting an equal and non-discriminatory environment for persons with disabilities were selected.

The National Plan is divided into separate chapters corresponding to the individual articles of the Convention. Each chapter contains a quotation of the relevant article of the Convention, brief explanation of the field in question, the desirable target situation to be achieved, and clearly formulated measures specifying the competent department and the proposed deadline for fulfilment.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

In the Czech Republic, the Ministry of Labour and Social Affairs is the focal point as it is responsible for its implementation pursuant to legal regulations. Based on the current practice and experience of other State Parties to the Convention, the establishment of another focal point is not considered at present.

The process of creating monitoring mechanisms to implement the Convention was initiated in 2010. In the Czech Republic, no institution has been established yet that would systematically deal with the issues of human rights (national institution to protect and promote human rights consistent with Paris Principles), although the Ombudsman conducts an informal review of state administration. However, the Ombudsman's principal task is to observe the performance of state administration in pursuance of good governance principles.

On account of this situation, it was not possible to use existing institutions to monitor the Convention, and other options had to be found to comply with the provisions of the Convention. A suitable solution may be one of the alternatives, the Monitoring Committee. This alternative is also accepted by organizations of persons with disabilities. Nevertheless, consensus regarding the composition of such Committee, the number of its members and its

legal form has not been reached yet. However, the negotiations and consultations conducted to date have brought numerous ideas and suggestions which will be processed and used in the preparation of the statute and rules of procedure of the referred Monitoring Committee.

A comprehensive draft on measures taken to give effect to the Convention and its monitoring at the national level according to Article 33 will be prepared in cooperation with the organizations of persons with disabilities and social partners. The Government of the Czech Republic should approve it no later than in the 1st half of 2012.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

The involvement of civil society is guaranteed by the Government Board for People with Disabilities and other formal and informal mechanisms of cooperation, e.g. with the Czech National Disability Council. The Government Board for People with Disabilities was established by the resolution of the Czech Government (1991) as its advisory body for the issues of disability. The Board cooperates with the public administration authorities as well as with the non - governmental sphere. It consists of Government representatives and ministries, as well as representatives of associations of persons with disabilities and their employers.

Organisations representing persons with disabilities play an important role, not to say the most important, in the policy planning and decision-making process concerning disability issues. One of them is for example the Czech National Disability Council, an umbrella organisation which associates about 114 organisations of persons with disabilities. The Council has its representatives in the Government Board for People with Disabilities.

Also other representative organisations are invited to take active part in the policy planning, for example through participation in working groups established to deal with any disability-related issues (preparation of new legislation, proposals for amendments of the existing legislation, creation of disability policy plans and concepts etc.).

At local level, municipalities are supposed to take into account the views and opinions of persons with disabilities and their representative organisations when planning disability policy measures (in the field of social services, accessibility etc.). Most municipalities welcome the possibility of discussing the key issues with the organisations and individuals through public hearings, debates, surveys etc.

As far as awareness-raising activities are concerned, several conferences, debates, workshops, seminars etc. are organised in order to mainstream disability issues and to foster active participation of persons with disabilities in public life.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

There are several resources of statistical data, e.g. in 2007, the Czech Statistical Office was given a task to propose a system of statistical information collection related to persons with disabilities and their needs. The results of its work and first comprehensive report on the situation of persons with disabilities with statistical data were published in 2008.

Denmark

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The Ministry of Social Affairs and Integration is appointed as the national focal point for issues related to implementing the Convention. The reason for the appointment is that the Ministry of Social Affairs and Integration is the coordinating ministry for disability matters. The appointment was made by parliamentary decision B 194, which adopted the ratification of the convention. As the coordinating ministry for disability matters, the Ministry exercises its function as the national focal point in close contact and coordination with the other parts of the government and organisations in the disability area.

The Ministry of Social Affairs and Integration heads The Inter-ministerial Committee of Civil Servants on Disability Matters which is tasked with facilitating the coordination of government disability policy.

2.1.2. National strategies to implement the UNCRPD

Since Denmark's ratification of the UN Convention on the Rights of Persons with Disabilities in 2009, the UNCRPD has set the framework for goals and specific initiatives in the disability field, including the progressive realization of economic, social and cultural rights.

No comprehensive national action plan encompassing all ministries has yet been finalised, but a wide range of initiatives has been carried out within the individual ministries in order to implement the UNCRPD progressively. The Ministry of Social Affairs yearly reviews and reports on the Government's disability policy initiatives to the Parliamentary Ombudsman, and has made the first report to the UN Committee on the Rights of Persons with Disabilities on measures taken with a view to implementing the UN Convention of 13 December 2006 on the Rights of Persons with Disabilities. These reports give a good introduction to the comprehensive work put in the follow up on the ratification.

New action plan for the disability area
The government has launched the work of a new long-term, multi-disciplinary action plan for the disability area. The action plan work will be divided into two phases, briefly described below.

The first phase consists of an analysis to map trends and challenges in the disability area, the aim being to determine the key challenges and priority action areas. The analysis will be conducted with participation of relevant key players in the area.

In the second phase, the above analysis will be used to prepare a new action plan for the disability area. The action plan will have a 5-10-year perspective.

The action plan must contribute to setting up clear political and economic priorities for disability-policy initiatives across policy areas and must function as a framework for the continued work of implementing the UN Convention on the Rights of Persons with Disabilities.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

Parliamentary decision B 15 of 2010 established "The Danish Institute for Human Rights" as the independent mechanism for the promotion, protection and monitoring of the implementation of the UNCRPD. The Danish Institute for Human Rights carries out its mandate in accordance with the principles relating to the status and functioning of national institutions for protection and promotion of human rights (Paris Principles). The Danish Government will present legislation in 2012 which turns the Danish Institute for Human Rights (which is currently part of the Danish Center for International Studies and Human Rights) into an independent institution in order to strengthen and clarify the Institute's position as Denmark's National Human Rights Institution. The legislative proposal contains changes in the composition of the board of the Institute, i.a. in order to ensure that one of the board members is appointed upon nomination of the Disabled Peoples Organisations Denmark. In this way the Government of Denmark intends to ensure the involvement and participation of representatives of disabled people in the monitoring process according to article 33.2 of the UNCRPD.

The Danish Disability Council is a Government-funded body made up of representatives of people with disabilities, nominated by the Danish Council of Organisations of Disabled People, and from the labour market parties as well as representatives from relevant fields of research. The task of the Council is to monitor the situation of people with disabilities in society and to act as an advisory body to the Government and Parliament on issues relating to disability policy.

The Danish Parliamentary Ombudsman "Folketingets Ombudsmand" is tasked with monitoring the equal treatment of persons with disability within his area of competence.

Together the Danish Institute for Human Rights, the Danish Disability Council and the Danish Parliamentary Ombudsman constitute the framework for the promotion, protection and monitoring of the UNCRPD in accordance with article 33.2 of the UNCRPD.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

Civil society, specifically organisations of people with disability, will be involved in the monitoring process in accordance with the relevant provisions of the UNCRPD.

The organisations of persons with disability will be closely consulted in the work of the Danish Institute for Human Rights.

The umbrella organisation Danish Council of Organisations of People with Disabilities (Danske Handicaporganisationer) is consulted on a regular basis on relevant matters and during all stages of the policy-making process. The Danish Council of Organisations of People with Disabilities is also strongly represented in the Danish Disability Council

Furthermore, dialogue through consultation with civil society/disability organisations at all stages of new initiatives, financial support to disability organisations, public funds

(satspuljen) support of training schemes, awareness raising activities etc. are used to foster empowerment of people with disability.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

Denmark uses the UN Standard Rules on equal opportunities and treatment of people with disabilities, in which the concept of "disability" covers loss or impairment of a person's ability to participate fully and effectively in society on an equal basis with others. The definition is intended to focus on the obstacles in surroundings that prevent persons with disabilities from participating on an equal basis with others. As the concept of disability is environment-related, it cannot be defined more unambiguously and there is no single definition of disability.

Furthermore as a result of the principle of sector accountability, the individual sector ministry is responsible for collecting data in the individual area. No common norm exists for data processing of specific statistics in the disability area, and no permanent norms exist in terms of highlighting the disability aspect in relation to statistics on the individual sectors.

General disability-related statistics are available via Statistics Denmark and the National Social Appeals Board as statements and reports on the extent of social benefits and services. These are categorised in compliance with relevant statutory provisions. Hence, Denmark does not centrally register data on private individuals. Instead, Denmark conducts national surveys that can be merged with registered data with a view to stressing the trend in, e.g., employment of persons with disabilities in relation to the population in general. The Danish National Institute of Social Research conducts such surveys, and the institute performs various surveys and analyses in the area of social welfare, including the disability area. The results of the surveys are accessible to the public and constitute a significant part of the public debate on the development of social welfare in general.

At present, there is no complete list of relevant disability data and statistics, but work is being undertaken under the auspices of the Interministerial Committee of Civil Servants on Disability Matters to prepare one.

A documentation project to improve social statistics has been launched in the area of disability. The objective of the project is to make specific recommendations for improving, renewing and simplifying the ongoing documentation of local activities and their effects. Project participants are Local Government Denmark, Statistics Denmark, Danish Regions, the Ministry of Finance and the Ministry of Social Affairs (chairman). The project group aims at preparing an agreement comprising a proposal for introducing a reporting system that is based on the civil registration number and builds on the electronic transfer of data generated in local casework. Short term, the purpose is to establish better basic documentation in the area so that developments in the disability area can be monitored. The long-term objective is to measure the effects of central and local government disability policy. In addition, other national players contribute to collecting and communicating information in the area.

The Social Services Gateway is a freely accessible Internet-based portal where authorities, providers and citizens can seek information about local, regional and private services for persons with disabilities (and other disadvantaged groups). The gateway was established in 2007 to reinforce the foundation for individual citizens' choice of specific services and with a view to generating general openness and transparency in the services existing in the area. Today, local and regional councils report information to the Social Services Gateway about a

vast number of different aspects of individual services, including target groups, number of places, services and methods of treatment, rates, staff, physical conditions, evaluations of conditions, food and eating conditions, resident activities, etc. The Social Services Gateway is run by the National Board of Social Services under the Ministry of Social Affairs.

Moreover, various national research and evaluation institutions contribute new knowledge and data collection in the disability area. From 2009 through 2010, the Danish National Centre for Social Research – an independent national research centre under the Ministry of Social Affairs and Integration– released 24 publications on disability. The Danish Evaluation Institute for Local Governments (KREVI) and the Institute of Local Government Studies (AKF) each released two publications in the area during the same period.

Estonia

2.1. National implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The Ministry of Social Affairs (especially Social Welfare Department) is responsible for the implementation of the UNCRPD. In the future, the Ministry of Social Affairs shall become the focal point and also coordination mechanism. It cooperates with other ministries and the Estonian Chamber of Disabled People[5] for implementation.

2.1.2. National strategies to implement the UNCRPD

After ratification of the UNCRPD, a strategy will be elaborated for effective and comprehensive implementation of the Convention.

Right now the disability policy of Estonia is based on three main documents: the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (the abridged and adjusted version of the UN General Assembly Resolution 48/96); the Recommendation of the Committee of Ministers to Member States on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society (improving the quality of life of people with disabilities in Europe 2006-2015); and the European Disability Strategy 2010-2020.

All the mentioned documents follow the principles of the UNCRPD. Estonia will continue to work within an anti-discriminatory and human rights framework to enhance independence, freedom of choice and the quality of life of people with disabilities and to raise awareness of disabilities as a part of human diversity. Estonian disability policy acknowledges the basic principle that society has a duty towards all its citizens, to ensure that the difficulties related to disability are minimised through active supporting of healthy lifestyle, adequate health care, rehabilitation, supportive services and supportive communities.

The following tools and methods are used in Estonia to foster the implementation of the UNCRPD:

- Dialogue with other ministries (working groups, councils, written statements) to promote awareness about the UNCRPD, protect the rights of persons with disabilities and enhance collaboration between ministries;
- Dialogue and collaboration with the Estonian Chamber of Disabled People (projects and seminars about the implementation of the UNCRPD, awareness-raising campaigns, workshops etc. for general public, ministries and local governments as well as for organisations of people with disabilities);
- Financing and supporting activities of non-governmental organisations, e.g. projects that promote and protect the rights of persons with disabilities, enhance awareness etc.

[5] The Estonian Chamber of Disabled People is the national umbrella organisation of persons with disabilities in Estonia. This umbrella body was established in 1993 and has continuously gained new members since then. Right now the Chamber has 47 member organisations. It is also a member of European Disability Forum.

Civil society has been involved in the ratification process and it will be involved in the implementation process after the ratification as well. The Memorandum of principles of cooperation has been signed recently between the Government and the Estonian Chamber of Disabled People. A multidisciplinary high-level workgroup that includes relevant ministries, local governments and non-governmental organizations to implement the UNCRPD will be established after ratification. The workgroup will also remain in constant contact with people with disabilities through their representative organisations by the implementation of the UNCRPD.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/protecting/monitoring (Article 33.2)

A mechanism pursuant to Article 33.2 of the UNCRPD is not established yet, but it will be formed by the Estonian Chamber of Disabled People[6] in the coming months, following the ratification of the UNCRPD.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

Estonia is using different means and methods to foster empowerment of people with disabilities, such as meetings, conferences, dialogue, collaboration, awareness raising and training. The Government also consults civil society when working on legislation, strategies or other important documents related to disability.

In the context of establishing an independent monitoring mechanism according to Article 33.2 of the UNCRPD, special attention should be paid to the need to ensure that civil society, in particular persons with disabilities and their respective organisations are included in the monitoring work of the mechanism. A multidisciplinary working group that includes several representative organisations of persons with disabilities, human rights organisations etc. for monitoring the implementation of the UNCRPD in different fields and levels will be established after the ratification of the UNCRPD. The working group will discuss its observations and statements with people with disabilities.

Civil society was involved in the ratification process and will be involved in the implementation and monitoring process after the ratification as well. The main partner is the Estonian Chamber of Disabled People. It is the national co-operation and co-ordination body for people with disabilities in Estonia. The Chamber was established in 1993 and now has 47 member organisations. The goal of the Chamber is to facilitate the improvement in the quality of life of persons with disabilities. For this purpose, the Chamber co-operates with governmental bodies and social partners in order to secure that Estonian legislation and enforcement of it also considers the disability perspective.

One of the tasks of the Chamber is also to monitor the implementation of the UN Standard Regulations in Estonia. Other tasks of the Chamber are:

– To participate in elaboration of national social policy, special initiation of the elaboration and implementation of laws and other drafts of legal acts, development plans, programmes and projects related to persons with disabilities;

[6] http://www.epikoda.ee/index.php?op=2&path=IN+ENGLISH

– To support social and working activity of persons with disabilities;
– To support the development and professional growth of member organizations;
– To promote awareness of society about the issues related to persons with disabilities and to form positive public opinion on issues related to them;
– To improve the collection and generalization of information and statistical data related to persons with disabilities, supporting the activity and research of the respective branches of science.

For an efficient execution of these tasks, the Chamber has established four commissions: the education commission, the health care and rehabilitation commission, the employment commission, and the organizational development commission.

2.2.3. Collecting statistics and/or developing indicators (Art. 31)

The Estonian government is collecting appropriate statistics which can be used for monitoring the implementation of the UNCRPD. The existing indicators will be reviewed and new ones will be applied under the strategy of persons with disabilities which will be elaborated after the ratification of the UNCRPD.

Throughout the past years, many surveys have been carried out. The aim of these surveys was to identify the changes that have taken place in the situation of independent living, employment, provision of services and thereby to evaluate the implementation and effectiveness of relevant policies and measures taken.

Finland

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

Finland has signed both the UN Convention and its Optional Protocol on 30 March 2007. The Ministry for Foreign Affairs has, in May 2011, set up a working group to prepare the measures necessitated by the ratification of the Convention and its Optional Protocol in Finland. However, the work of the working group and other related work are still ongoing. Therefore neither focal points nor a coordination mechanism have yet been specifically designated. Information on the UN CRPD is spread by the Ministry for Foreign Affairs, the Ministry of Social Affairs and Health, the National Council on Disability and by disabled people's organisations. The Threshold Association, a disabled people's organisation, created an internet-based contact point.

2.1.2. National strategies to implement the UNCRPD

In 2010, the Ministry of Social Affairs and Health prepared a specific Disability Policy Programme in order to guarantee equal treatment of persons with disabilities. The programme outlines the concrete disability policy actions for the next few years (2010–2015). The social development to achieve sustainable and accountable disability policy is outlined in the same context. The objective of the programme is to create a strong foundation for human rights, non-discrimination, equality and inclusion. The programme was prepared in cooperation with the different administrative sectors, expert bodies, NGOs, DPOs and other stakeholders.

The Disability Policy Programme contains concrete proposals on how to promote and implement the UN Convention in different sectors. Areas that are covered include: independent living, social inclusion, building, transport, education, employment, social protection, health and rehabilitation, safety, culture, international cooperation and statistics. The main content of the Disability Policy Programme are measures to ensure the following objectives:

1. Preparation and implementation of the legislative amendments necessitated by the ratification of the UN Convention on the Rights of Persons with Disabilities;
2. Improving the socioeconomic status of persons with disabilities and combating poverty;
3. The availability and high quality of special services and support measures will be ensured across the country;
4. Accessibility in society will be strengthened and increased;
5. Disability research will be reinforced, the information base improved, and diversified high-quality methods developed in support of disability policy and monitoring.

The National Council on Disability (VANE) is responsible for monitoring the implementation of the Disability Policy Programme. More information in English is available at http://www.vane.to/vampo_eng.html

Furthermore, there have been major developments related to the priorities for action described in the previous reports in relation to independent living (point 4 of the 2nd HLG report),

namely, the legislative reform on personal assistance services and moving into community-based settings.

Background
There are 336 municipalities in Finland that are in charge of providing *e.g.* social and health services, including services for persons with disabilities, to their inhabitants. Services are funded by a block grant subsidy from the state, municipal taxes and by service users. The services for persons with disabilities are mostly free of charge.

In Finland the starting point is that services are provided to all citizens on an equal basis. In addition, special services tailored to the needs of persons with disabilities are provided in accordance with the Act on Services and Support for the Disabled and the Special Care Act for Persons with Intellectual Disabilities. According to these Acts, severely disabled persons have a subjective right to the following services: transportation services, service housing, daily activities, personal assistance and alterations and assistive devices in housing. In this connection a subjective right means that the municipality is obliged to provide the service as soon as the criteria set out in the legislation are fulfilled irrespectively of the financial situation of the municipality.

Legislative reform concerning interpretation services for persons with disabilities
A revised Act on interpretation services for deaf-blind, hard of hearing people and persons with a speech disorder entered into force on 1 September 2010. In effect, the responsibility for organising and financing these services was transferred from the municipalities to the Social Insurance Institution of Finland. It means that the state now takes full responsibility for financing the interpretation services.

The new Act did not change the existing rights to interpretation services, but only changed the administration and financing responsibility of those services. Deaf-blind persons have by law the right to obtain a minimum of 360 hours and persons with hearing and speech impairments a minimum of 180 hours of interpretation services a year. The amount of interpretation services may vary according to the person's individual needs.

In 2010, the total number of people with disabilities receiving interpretation services was 4500.

A new housing programme for intellectually disabled persons
In January 2010, the Finnish Government issued a Resolution on a programme to organise housing and related services for people with intellectual disabilities in 2010–2015.

The goal is to provide persons with intellectual disabilities individual housing solutions in regular housing environments and to reinforce their inclusion and equal treatment in the community and society.

The development objectives for disability legislation laid down in the Government Programme, the guidelines of the Finnish Disability Policy Programme, and the UN Convention on the Rights of Persons with Disabilities define good housing as one of the prerequisites for independent living and inclusion.

The programme aims at giving people with intellectual disabilities who are moving out of institutions or their childhood homes the opportunity of individual housing in an accessible

and functioning home in a regular housing environment. At the same time, the number of institutional care places for persons with intellectual disabilities is reduced systematically and in a controlled way.

The programme also aims at producing about 1,500 homes for persons with intellectual disabilities moving from institutions and about 2,000 homes for grown-up persons moving out of their childhood homes. Once implemented, the programme will reduce the number of places in institutions, from 2,000 long-term places of the year 2010 to about 500 places by the end of 2015. Implementation of the programme is ongoing. In 2010-2011, the construction of over 1000 dwellings has been started, financed by investment grants from the Housing Finance and Development Centre of Finland (ARA).

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The work of the working group set up to prepare the measures necessitated by the ratification and other related work is still ongoing. Thus, a framework including one or more independent mechanisms pursuant to Article 33.2 of the UN Convention has not yet been established. However, in the context of nominating/establishing a mechanism referred to in Article 33.2 of the UN Convention, particular attention will be paid to the need to ensure that civil society, in particular persons with disabilities and their respective organisations are involved in the monitoring process.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

In Finland, there is already a well-established practice to cooperate and involve civil society and other organisations in all stages of reforming legislation. Also, in its existing human rights reporting practice, the Finnish Government encourages civil society to actively participate in the reporting to the international organisations. Usually, when a periodic report is prepared, civil society is asked to provide views on the information to be included in the report, and the interested civil society representatives are invited to attend a discussion on the draft report before its finalisation. Civil society is also encouraged to participate in the so called "shadow reporting", i.e., to send parallel reports to the human rights treaty monitoring bodies.

The organisations of persons with disabilities have actively participated in international processes related to the human rights of persons with disabilities, in particular in relation to the drafting of the UN Convention. Organisations of persons with disabilities and the National Council on Disability have also been consulted on the legislative amendments needed for the ratification of the UN Convention. In addition to the representatives of the public administration and the local and regional authorities, the National Council on Disability (VANE), the Finnish Disability Forum and the Centre for Human Rights of Persons with Disabilities (VIKE) are members of the working group set up to prepare the measures necessitated by the ratification of the Convention and its Optional Protocol.

The organisations of persons with disabilities and the National Council on Disability are also consulted in relation to the overall human rights policy of Finland, which includes a focus on the rights of persons with disabilities.

In connection with awareness-raising, organisations of persons with disabilities have been notified in various contexts of the legislative amendments necessitated by the ratification of UNCRPD.

The preparation of the Government Disability Policy Programme was based on a process of active participation of persons with disabilities and their organisations. This included - among other activities - a series of ten open seminars in different parts of the country, where both representatives of the key ministries and persons with disabilities met and debated on the challenges of promoting "a society for all".

2.2.3. Collecting statistics and/or developing indicators (Article 31)

The collection of statistics has not yet been linked to the Convention. Statistics on disability are collected mainly by the National Institute for Health and Welfare, Statistics Finland and the Social Insurance Institution of Finland.

In general, statistics are based on national legislation. However, since disability is not used as a variable in population surveys, it is impossible to gather comprehensive data on persons with disabilities in Finland. Statistics Finland collects disability statistics only according to EU legislation through different EU surveys (for example Labour Force Survey's ad hoc module 2011 on employment of people with disabilities) for which the definitions and specifications are given by Eurostat.

Statistics on disability describe mostly services provided to persons with disabilities. SOTKAnet Indicator Bank (www.sotkanet.fi) operated by the National Institute for Health and Welfare (THL) is an information service that offers key population welfare and health data from Finnish municipalities since 1990. Disability data is collected by several different indicators that fall under the following five categories: services for persons with disabilities, housing services for people with intellectual disabilities, sheltered work for disabled people, statutory services and assistance for disabled people and other disability services and benefits. Social Insurance Institution of Finland provides annual statistics about the benefits it grants to persons with disabilities.

A monitoring group on barrier-free communications services chaired by the Ministry of Transport and Communications will this year start to develop concrete indicators for a barrier-free information society. The Ministry of Transport and Communications have published a study that presents a number of justifications and suggestions for actions that could be applied in promoting information society accessibility and are based on well planned usage of indicators and measured data.

France

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

Since disability policy is of cross-cutting nature, it is expected that rather than nominating a single focal point, the government will designate all ministerial bodies directly involved in disability policy. Depending on the organization mechanisms of the different ministries, the focal point will either be an administration, a bureau or even a mission.

Since the dissemination of knowledge on the Convention onto the entire country is necessary for its effective implementation, focal points could perhaps be put in place at the level of decentralized services and regional authorities. The practical details of such a designation still require further analysis, so as to respect the constitutional principle of free administration of regional authorities.

Sans être officiellement désignées comme « points focaux locaux » au sens de la convention de l'ONU – car, placées sous l'autorité des présidents de Conseil général dont les collectivités départementales qu'ils dirigent sont régies par le principe constitutionnel de libre administration des collectivités territoriales- , les maisons départementales des personnes handicapées (MDPH) constituent de facto autant de relais locaux pour l'application des dispositions de la convention, telles qu'elles s'expriment dans notre législation nationale. Pour mémoire, les MDPH sont administrées par une commission qui réunit le département, l'Etat, les organismes locaux de sécurité sociale et, pour un quart de ses membres, les représentants d'associations de personnes handicapées. Elles sont présentes dans chacune des 100 collectivités départementales et exercent une mission d'accueil, d'information et de conseil des personnes handicapées et de leurs familles. Elles reçoivent et procèdent à l'évaluation de toutes les demandes de reconnaissance de droit (prestations, orientations) qui relèvent d'une décision de la commission des droits et de l'autonomie des personnes handicapées (CDAPH) ; elles assurent également l'accompagnement et le suivi de la mise en œuvre desdites décisions. Elles ont enfin une mission de sensibilisation de tous les citoyens au handicap. Elles sont donc « un carrefour incontournable » et un interlocuteur privilégié de la personne handicapée : elles doivent l'aider et lui simplifier toutes les démarches nécessaires à la réalisation de son projet de vie. Réciproquement, elles sont pour tous, un lieu de référence local pour l'ensemble des questions touchant au handicap.

La coordination de l'activité des MDPH est assurée au niveau national par la Caisse Nationale de Solidarité pour l'Autonomie (CNSA). Cette caisse a été créée en 2004-2005 pour collecter et distribuer les financements nécessaires aux prestations, services et établissements qui contribuent à l'autonomie des personnes handicapées et des personnes âgées. Elle rassemble elle aussi des représentants de l'Etat, des départements, des partenaires sociaux (employeurs et syndicats), des personnes handicapées et des personnes âgées, ainsi que des institutions spécialisées (établissements et services).

Parmi ses missions, cette caisse anime le réseau des MDPH, sans pour autant exercer une autorité hiérarchique sur ses maisons, chacune d'elles étant autonome et relevant de son département d'implantation. Par la contribution au financement de leur fonctionnement, par l'échange de bonnes pratiques, par la diffusion d'informations et de recommandations, par la signature de conventions de qualité de services, par l'organisation de formations, la caisse

contribue à faire converger les pratiques des maisons afin d'assurer une égalité de traitement des personnes handicapées sur tout le territoire national.

Even though the coordination mechanism is deemed voluntary according to the Convention, France has decided to yet put in place such a mechanism. The Interministerial Commitee of Disability (Comité interministériel du handicap (CIH)), established by the decree nr. 2009-1367 of 6 November 2009, will be responsible for setting up this mechanism. By appointing the interministerial CIH as the coordination mechanism, the French Government wishes to highlight that it regards disability policy as a political priority.

Moreover, the CIH's secretary general will be able to appoint and call together the focal points as deemed necessary. The secretary general has already set up meetings with responsible persons and administration on several occasions ever since its creation, even though they have not yet been officially appointed as focal points for the implementation of the UNCRPD.

The French Government also expresses its wish to establish close relations between the coordination mechanism and the representatives of persons with disabilities. Therefore, the government asked the CIH secretary general to also exercise the duties of the secretary of the National Advisory Council for Persons with Disabilities (Conseil National Consultatif des Personnes Handicapées), in order to establish an institutional link between both bodies.

2.1.2. National strategies to implement the UNCRPD

The implementation of the obligations arising from the UN CRPD and its Optional Protocol has been foreseen through the law nr. 2005-102 of 11 February 2005. Through its adoption, the adaptation of the French national legislation to the UN Convention will be very limited. The law of 11 February 2005 moreover goes further than the UN Convention on certain points, and thereby it gives a functional nature to most general obligations in the UN CRPD.

As the Convention sets out the establishment of a national action plan, the law of 11 February 2005 requires the holding of a national conference on disability every three years. These conferences will gather representatives of organizations of persons with disabilities, social/medical institutions or services working with persons with disabilities, social insurance institutions, trade unions and employer organizations and other bodies relevant in disability policy.

In order to prepare the conference, the law maintains that the Government has to deposit a report on the implementation and future developments of the national disability policy at the parliamentary assemblies' bureau, after a consultation with the National Advisory Council for Persons with Disabilities.

The first conference was held on 10 June 2008. It gave the opportunity to the French President to present his action plan in relation to persons with disabilities. The Plan consisted of seven objectives:

- To allow residential homes for persons with disabilities to fully fulfil their mission;
- To further develop benefits for persons with disabilities in the light of the establishment of a fifth risk of social welfare (un cinquième risque de protection sociale);
- To turn benefits for adults with disabilities (l'allocation aux adultes handicapés (AAH)) into a tool to increase resources and facilitate persons with disabilities' access to the labour market;

- To conclude a National Employment Pact for persons with disabilities;
- To decide upon an annual plan to support employment of persons with severe disabilities
- To increase and improve the accessibility to all aspects of city life;
- To allow all children with disabilities to have access to education adapted to their needs.

Une seconde Conférence nationale sur le handicap s'est tenue le 8 juin 2011, avec comme thème central une « société inclusive à tous les âges de la vie ».

Six ans après le vote de la loi du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées, la deuxième Conférence nationale du handicap du 8 juin 2011 a procédé au bilan d'application de cette loi fondamentale pour la pleine insertion des personnes handicapées dans la société.

Elle s'inscrit dans la continuité de la Conférence de juin 2008 qui a dressé un constat encourageant de l'action des pouvoirs publics en matière d'égalité des droits et des chances, de participation et d'accès à la citoyenneté des personnes handicapées. L'effort de solidarité nationale, quels que soient les contributeurs publics et privés, envers ces citoyens a fortement progressé au fil des années, notamment en termes de compensation du handicap, d'accessibilité à la Cité, d'emploi et de ressources, avec notamment une forte revalorisation de l'allocation pour adultes handicapés, mais aussi dans les champs de la recherche, la prévention et la formation.

Depuis la première Conférence nationale du handicap de 2008, le travail réalisé par l'ensemble des parties prenantes (services de l'État, collectivités locales, associations, opérateurs publics et privés), témoigne d'une mobilisation sans précédent de chaque acteur pour que soit prise en compte la thématique du handicap dans toutes les composantes de la société et s'attacher à ancrer au quotidien les droits que la Nation reconnait aux personnes handicapées.

Les mesures phares présentées lors de la conférence du 8 juin 2011 sont les suivantes :

- Un effort sans précédent des pouvoirs publics pour l'accessibilité :

- Un plan pluriannuel de mise en accessibilité des lieux de travail dans les trois fonctions publiques, les écoles de service public et les petites communes ;
- Un plan d'accessibilité numérique des sites internet de l'Etat et du Gouvernement;

- Des moyens pour garantir un accès aux savoirs de qualité, répondant aux besoins de tous les enfants et de tous les étudiants handicapés :

Dès la rentrée 2011, recrutement d'auxiliaires de scolarisation qualifiés, sous contrat de droit public, afin de faire face à la montée en charge de la scolarisation en milieu ordinaire et qu'aucun enfant ne reste sans solution d'accompagnement

- Un nouveau plan pour l'emploi des travailleurs handicapés :

- La création de 1000 postes supplémentaires chaque année dans les entreprises adaptées pendant 3 ans, soit 3000 postes supplémentaires ;
- Les jeunes en situation de handicap inscrits comme publics prioritaires des contrats Etat/régions pour l'apprentissage ;

- Une mission spécifique confiée au service public de l'orientation pour les jeunes handicapés, notamment issus des établissements médico-sociaux ;
- Des mesures pour améliorer l'information des salariés sur les formations accessibles dans chaque région

- Faire du handicap un des axes stratégiques de la recherche en France :

- En prenant en compte le handicap dans l'actualisation de la stratégie nationale de recherche et en impliquant les associations de personnes handicapées dans ces travaux.

- Des réponses spécifiques pour les plus fragiles

- Un abondement pluriannuel des fonds départementaux de compensation ;
- L'établissement de conventions d'objectifs et de moyens avec les MDPH, afin de stabiliser leur financement et leur personnel et d'améliorer le service rendu aux usagers ;
- Renforcer l'aide à la garde d'enfants pour les parents lourdement handicapés : il s'agit de majorer de 30 % le complément de libre choix de mode de garde, pour apporter un soutien à domicile aux parents lourdement handicapés dans la garde de leur enfant.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The establishment of a mechanism to protect, promote and monitor the implementation of the Convention, is currently being considered in the light of the recent reform that brings together several bodies of fundamental rights protection under the authority of a *Défenseur des Droits,* without prejudice to the powers of the National Advisory Council for Human Rights (*Commission Nationale Consultative des Droits de l'Homme* (CNCDH).

Le Défenseur des droits est une autorité constitutionnelle indépendante présidée depuis le 22 juin 2011 par M. Dominique Baudis. Il est nommé par le Président de la République pour un mandat de 6 ans non renouvelable et non révocable. Cette autorité, qui regroupe notamment les missions antérieures du Médiateur de la République, du Défenseur des enfants, de la Haute Autorité de Lutte contre les Discriminations et pour l'Egalité (HALDE) est chargée de veiller à la protection des droits, des libertés et de promouvoir l'égalité en particulier pour l'ensemble des personnes handicapées, quel que soit leur âge.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

Co-operation with disabled persons is ensured by the Advisory national Board of disabled persons (CNCPH).

The law of 17 January 2002 had created the CNCPH to ensure the participation of disabled persons in the development and in the implementation of the policies related to disability (article L. 146-1 of the CASF). The CNCPH links the public authorities and civil society. Indeed, it assembles the following institutions: organizations for persons with disabilities and their relatives, administrative bodies, bodies financing social protection of disabled persons or

relevant research projects, trade-unions, professional organizations, the representatives of territorial authorities.

The law of 11 February 2005 widened the scope of responsibility of the CNCPH beyond its right of initiative or the optional rights granted by the Government, by giving it the responsibility to assess the situation of persons with disabilities. It is given the role to analyse whether the situation corresponds to the national principle of solidarity. According to Government's proposals it shall be granted this responsibility "by continuous multi-annual programming". Especially, the last article of the 2005 law envisages an obligatory consultation of the CNCPH for all regulatory texts of application of the law of 11 February 2005.

The CNCPH plays therefore an essential role for both, in the implementation of the law and in the evaluation and development of policies dealing with disability.

The CNCPH organized the work of its Committees as to examine the most complex decrees and foster the co-operation with the administrations, which allowed for a smooth development of certain draft texts. Thus, the CNCPH was not an advisory body solely responsible for approving or disapproving. Rather, it could play an active role in the development of regulation. In 90 % of the cases, the application texts of the 11 February 2005 law were given favorable comments by the CNCPH.

The CNCPH discussed several topics which developed into a report on disabled persons in situation of dependence and on the granting of minimal incomes. The Minister of Labour, Solidarity and the Civil Service, and the secretary of State responsible for Solidarity also contributed to the report on the development of "trade plans".

The CNCPH is responsible for "coordinating" the Departmental Advisory Boards of Disabled Persons (CDCPH) provided for in article L. 146-2, evaluating the departmental implementation of disability policy and the situation of disabled persons. To facilitate their analyses, the CDCPH gather information on the activities of the Departmental Houses of Disabled Persons (MDPH) and of the contents and the application of the Departmental Programmes for the Inclusion of Disabled Workers (PDITH). They moreover have access to the data of the Committee of the Rights of Autonomy of Persons with Disabilities (CDAPH) and of the institutions working with persons with disabilities.

2.2.3. Collecting statistics and/or developing indicators (Art. 31)

In accordance with Article 31 of the UN Convention, France has to set up a statistical mechanism specifically for monitoring the implementation of the UNCRPD. Currently, France does not yet have this type of mechanism. However numerous tools used on a national level for collecting information on persons with disabilities could be used to this end. For instance, once may refer to the survey on disability and dependence (HID), which relates to all persons residing or being looked after in special facilities or living in ordinary homes. The HID survey is being updated since April 2008, carried out with 40,000 participants. Numerous statistics are also available in the field of employment.

Moreover, an interministerial Observatory for accessibility and universal conception has been established on 11 February 2010, with the mission to monitor the developments, identify the challenges to the implementation of accessibility, disseminate good practice and create

monitoring indicators. The first progress report will be presented in 2011 during the national disability conference. The Observatory is composed of construction and transportation experts and representatives of organizations for persons with disabilities. The secretary general of the interministerial committee for disability issues is in charge of its secretariat.

L'Observatoire insiste tout particulièrement sur l'objectif final d'une Cité conçue pour tous. Afin d'accompagner la mise en mouvement de la société française et en particulier de la filière industrielle dans cette voie, il est important de rendre concrète et opérationnelle la notion de « conception universelle ». À cet effet, il a organisé, le 9 décembre 2011, une journée technique visant à promouvoir cette nouvelle approche en France à partir d'actions qui la déclinent actuellement sur le territoire et d'exemples relevés dans d'autres pays

Monsieur Philippe BAS, ancien ministre délégué à la Sécurité sociale, aux Personnes âgées, aux Personnes handicapées et à la Famille, sénateur de la Manche, préside l'Observatoire depuis le 10 novembre 2011. Cette instance s'est réunie le 9 février 2012 pour évoquer ses principales missions et faire un point d'étape au regard de l'objectif d'accessibilité fixé par la loi de 2005.

At the same time, numerous studies carried out for Community coordination use indicators which are also relevant to disability-related issues (employment, fight against exclusion, social welfare…) and could therefore be used for collecting statistics of developing indicators.

Germany

2.1. National implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Art. 33.1)

Germany highlights the importance of national implementation and monitoring structures as a precondition for an effective implementation. Due to the federal structure of Germany, an important part of the implementation of the Convention lies with the German Länder.

The Federal Ministry for Labour and Social Affairs (www.bmas.bund.de) is appointed focal point according to Article 33. Some of the Länder have appointed focal points on their level as well. Others work with a comparable structure.

The Federal Government Commissioner for Matters relating to Persons with Disabilities (www.behindertenbeauftragter.de) is appointed Coordination Mechanism according to Article 33. In September 2010, the Commissioner has appointed in close cooperation with the German Disability Council (www.deutscher-behindertenrat.de) an advisory board called "Inclusion Committee", in order to ensure a long-term and strategic consultation process with civil society, particularly with organisations of and for persons with disabilities in the implementation process of the Convention. For this reason, the Committee consists mainly of people with different disabilities. In addition, the Committee installs four thematic working groups to integrate the broader civil society in the process and enable the development of technical input to specific themes and topics.

2.1.2. National strategies to implement the UNCRPD

The UN Convention is the international equivalent to the change of paradigms, which was initiated in Germany especially by the Ninth Book of the Social Code and the Equality Act for Persons with Disabilities. The Federal Government will use the UN Convention to strengthen and promote new developments in disability policy in order to further advance a self-determined and discrimination-free participation in Germany.

In the Coalition Agreement of the Federal Government for the 17th legislative period it was agreed to draw up a National Action Plan (NAP) to implement the UN Convention. This Plan, adopted by the Federal Government on 15 June 2011, draws up a long-term overall strategy for the implementation of the Convention. It is a package of measures rather than a legislative package and is, in particular, aimed at closing existing gaps between the legal situation and the practice. More than 200 plans, projects and activities show that inclusion is a process that covers all areas of life.

The federal government's action plan is supplemented by other action plans of the federal states, municipalities, rehabilitation providers, disability and social organisations as well as providers of services for persons with disabilities and private sector companies. Most of the Länder have developed or still are developing own action plans. Also cities and enterprises and institutions like the German Social Accident Insurance have brought on action plans.

The voice of the civil society, especially of organisations of and for persons with disabilities, has been and is streamlined in a special advisory board. The closest cooperation with persons

with disabilities and their organisations is not only postulated by the UN Convention. It is also of tremendous importance for the Federal Ministry and the Federal Commissioner.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The Federal Government's Cabinet decision of 1 October 2008 initiating the legislative procedure for ratifying the Convention and the Optional Protocol entrusted the Deutsche Institut für Menschenrechte e.V. (German Institute for Human Rights) with the monitoring task under Article 33(2) UNCRPD.

The Institute is an independent body operating on the basis of the United Nations Paris Principles, to which Article 33(2) refers. It is currently financed by the Federal Ministry of Justice, the Foreign Ministry and the Federal Ministry of Economic Cooperation and Development and its independence is guaranteed via its legal form and the articles of association. It started work in 2001 and was recognised internationally as the national human rights institution with an A-status in 2003. To comply with the monitoring task under UNCRPD, a separate department within the Institute for the tasks under Article 33(2) has been set up. The Federal Ministry for Labour and Social Affairs provides some 430 000 EUR a year to support the independent body.

The Monitoring Body has six staff members – besides the head, the body is comprised of two research and policy professionals (one law, one social science), one assistant, one public relations and communications and one for administrative matters. The existing budget of the National Monitoring Body provides additional resources to organise conferences, to cover travel costs and conferences fees, and to commission research to some minor extend.

The German Institute started to set up the National Monitoring Body in May 2009, which is under full operation since November the same year. Since then, it has developed a great number of activities, e.g. it holds regular consultations with civil society organisations, has started a publication series with elements in easy to read, organised public conferences.

For up-to-date information on the work of and events organised by the Mechanism see its website www.institut-fuer-menschenrechte.de/de/monitoring-stelle.html (German only).

2.2.2. The involvement of civil society in the monitoring process (Art. 33.3)

All three pillars involve civil society in the implementation and/or monitoring process:

1) Federal Ministry of Labour and Social Affairs as focal point

Civil society was consulted during the ratification process, for the implementation of the Convention by means of a national action plan these consultations were continued with several workshops, bi- and multilateral meetings and via the online-portal www.einfach-teilhaben.de. and a special advisory board with civil society representatives. Members of the special advisory board are representatives from disability organizations, social partners, charity organizations, the Federal Government Commissioner for Matters relating to Persons with Disabilities and a representative of an academic institution.

As mentioned above, the closest cooperation with persons with disabilities and their organisations is not only postulated by the UN CRPD. It is also of tremendous importance for the Federal Ministry and the Federal Commissioner.

Furthermore and with a view to implementing the UN CRPD, the Federal Ministry of Labour and Social Affairs takes – among others - the following measures to inform the public about the Convention:

- broad public awareness campaign to implement the UN CRPD;
- regular lectures for civil society and other institutions;
- translation of the convention into accessible formats (easy-to-read language and sign language) and distribution of all versions via brochures, dvd and/or the internet;
- Handbook for persons with disabilities: the handbook is the Ministry's most important publication in the area of disability policy. The new version will include the text of the Convention and provide information on it;
- Online portal www.einfach-teilhaben.de, which gathers information for persons with disabilities, their families, enterprises and administration.

2) Federal Government Commissioner for Matters relating to Persons with Disabilities as coordinating mechanism

In order to ensure a long-term and strategic consultation process with civil society, particularly with organisations of and for persons with disabilities, the Commissioner established a council. One of the main tasks of the council is to advise the federal government in questions related to the national action plan to implement the UN CRPD. In addition, the Commissioner established a consultative committee with members only from organisations of and for persons with disabilities. The Commissioner also launched a website that includes participatory elements of web 2.0 in order to ensure the participation of individuals. In addition, the coordinating mechanism informs the public in expert meetings and campaigns on all relevant aspects of the implementation of the Convention.

3) Monitoring Body at the German Institute for Human Rights:

The National Monitoring Body has underlined in public statements that monitoring the implementation is a task involving a number of non-state actors besides the National Monitoring Body, such as the UN Committee on the Rights of Persons with Disabilities at the international level and civil society, in particular persons with disabilities and their representative organisations within Germany. Consequently, the collaboration of these actors is of great importance. Thus, the German civil society organisations have the standing invitation to participate in the regular consultations with the National Monitoring Body. These meetings take place twice or three times a year. Although the National Monitoring Body does neither have the mandate nor the resources to handle complaints, it is open to receive individual communications and to learn from them, since individual cases might indicate deficits in structural terms.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

Statistics on the population, labour market and housing situation in Germany are collected by the Federal Statistics Office and the Regional Statistical Offices under the *Mikrozensusgesetz*

(Micro-Census Act). The micro-census is a multiple random sample survey which provides detailed information on the economic and social situation of the population and answers questions about employment, the labour market and training.

On the basis of *§131 SGB IX* a statistical survey of persons with severe disabilities, which started as early as 1979, is carried out every two years.

In addition to the evaluation of existing data, part of the action plan will be the establishment of a better data basis on the situation of persons with disabilities in Germany. A pre-study with suggestions for a respective roadmap was presented in February 2011. The work on the report is on progress. It will be published end of 2012.

Greece

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

Until the governance structure is established, all ministries are called to take the provisions of the UNCRPD into consideration when working on questions related to disability.

2.1.2. National strategies to implement the UNCRPD

Until now, no concrete measures were taken for the implementation of the Convention. Greece is in the stage of examining relevant methods, processes and policies. One of the main priorities for all government-owned mechanisms involved in the issue of disability is also adapting the existing legal framework to the requirements of the Convention. The review of the existing legal framework in relation to the UN CRPD provisions as well as the establishment of new or additional regulations are considered necessary for the implementation of the Convention. The establishment of a central mechanism that will examine the subject of disability in all the dimensions will strengthen the effort for a united and completed approach to disability.

In terms of major developments, deinstitutionalisation is a basic pillar in the area of health and social care. Within this aim, 35 structures (small houses with a limited number of patients and staff) have been established, where people with disabilities are under constant care from specialized personnel (nurses, psychologists etc.). The aim is to increase the number of these establishments in the next few years. (See HLG-Report 2008, chapter 4 on Independent living).

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Art. 33.2)

As required by Article 33.2 of the UN CRPD, a monitoring body should be defined to facilitate and supervise the application of the Convention in different sectors and on different levels. In Greece, such a body has not yet been defined. All ministries are thus reminded to recall the provisions of the Convention until a new body is established.

2.2.2. The involvement of civil society in the monitoring process (Art. 33.3)

The national organizations of people with disabilities are much consulted by the governmental bodies. They offer essential advice and support the rights of people with disability. After the development of an independent mechanism, the participation of organizations of people with disabilities is considered as essential. They will fully participate in the process of monitoring the implementation of the Convention.

The role of the National Confederation of Disabled People (ESAMEA) and the National Confederation of Parents and Tutors of Disabled People (POSGAMEA), the most representative NGOs of people with disabilities, may participate in the dialogue with the

Ministries' services for the determination and implementation of the UN Convention and also for the nomination of the monitoring body.

People with disabilities and their representative organisations participate as full members in several committees and working groups at national, regional and local level contributing in the formulation of policies relating to people with disabilities. In addition, they are members of political parties on an equal basis with ordinary members and to several non-profit organisations.

According to Law 2430/1997, every year on the 3rd December – which is the International Day of People with Disabilities - several events take place under the aegis of the Greek Parliament, the Ministry of Health and Social Solidarity and the National Confederation of Disabled People (ESAMEA) with the aim to raise awareness of the human and social rights of people with disabilities in Greece. On the same day, each year, ESAMEA submits a report on the situation of people with disabilities in Greece to the president of the Greek Parliament.

It is a priority for all authorities, ministries and unions of people with disabilities to raise awareness of issues related to disability and to participate in dialogue to implement related programmes and actions more effectively.

Seminars, lectures and conferences are organized on a regular basis, covering subjects that are related to disability. They are not only relevant for people with disabilities but for the society as a whole. These meetings, seminars and conferences are organised each year throughout the country by the Secretariat General of Communication/ Secretariat General of Information with the aim to promote positive attitudes towards people with disabilities. Advertising campaigns are also promoted by the government authorities or by non-governmental organisations, aiming at the sensitization of society in the subject of disability, showing ways of improving the lives of people with disabilities.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

The central administration - mainly governmental bodies and the ministries – meet on a regular basis to exchange information and statistical data on people with disabilities so that they have a complete overview of the issue in the whole of Greece.

As an institution assembling individual statistical indicators, the national statistical service produces regularly centralized statistical bulletins with regard to disability. Thereby, it is possible to locate weaknesses and omissions concerning the obligations mentioned in the UNCRPD. Consequently, adequate policies can be developed in order to effectively implement the Convention.

Hungary

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The National Council on Disability Affairs (NCD) was established by the act on the rights of people with disabilities in 1998. The NCD is an advisory body to the Government with the following rights:

- To take initiatives, make proposals, and provide consultation and co-ordination in all decisions related to persons with disabilities;
- To carry out analysis and evaluation in the process of implementing such decisions;
- To comment on draft legislation concerning persons with disabilities;
- To make proposals for decisions, programs and legislation affecting persons with disabilities;
- To be involved in co-ordinating activities related to the affairs of persons with disabilities;
- To brief the Government regularly about the situation of persons with disabilities;
- To elaborate the National Disability Program and monitor the implementation thereof.

According to the Statutes of the Ministry of National Resources, the tasks related to the implementation of human rights conventions belong to the Ministry's responsibility, and the Constitution on Operation of the Ministry assigns the international issues connected to disability to the Department of Disability. This way the appointment of the central governmental actor is indirectly deducible, although no concrete, specified appointment has been done.

2.1.2. National strategies to implement the UNCRPD

The Hungarian Parliament adopted the National Disability Action Plan in 2006 for 2007-2013. In order to implement the DAP the Government adopted the midterm Action Plan for 2007-2010. Although these legal and policy instruments were adopted before the ratification of the UNCRPD, in great part they comply with the principles and main targets of the Convention. The new Action Plan for 2011-2013 was elaborated in February 2011. In the work process the UNCRPD is identified also formally as a main point of reference.

Furthermore, the following developments have taken place in relation to the implementation:

- The Hungarian Parliament adopted the Act No 125 in 2009 on the Hungarian Sign Language and the use of Hungarian Sign Language. This Act implements Article 9 subsection 1.b), Article 21, Article 24 subsections 3.b), 3.c), 4.
- The Ministry of National Resources coordinates the interministerial discussions on the legislation concerning the strategy and the tasks of the Government regarding the implementation of the transition from institutional care of disabled people (deinstitutionalisation). That will implement Article 19 UNCRPD. With the governmental decree 1257/2011, the Hungarian Government has adopted the Strategy of the replacement of the large social institutions providing nursing and caring for persons with disabilities with community based settings (Deinstitutionalisation) 2011 – 2041 (hereinafter referred to as Strategy). Based on the decree, the Minister of National Resources has established the National Body for Deinstitutionalisation (hereinafter referred to as Body). The Body is in

charge of coordinating the tasks defined in the Strategy. Every three years, the Minister of National Resources proposes an Action Plan encompassing the realization of the Strategy scheduled for the three-year-period to the Government, which is also outlined by the Body. The first Action Plan has to be submitted on March 31 2012. The realization of the task is supported by the EU development resource Code TIOP 3.4.1, which amounts to 7 billion HUF and aims at the deinstitutionalisation of 1500 capacities.

- On the assignment of the legal predecessor of the Ministry of National Resources, a National Autism Strategy was adopted in July 2008, under the technical guidance of the Hungarian Autistic Society. This five-year comprehensive plan for the development of services for people living with autism sets out medium-term targets and tasks in the field of diagnostics, professional staff training, education, development, employment, adult training and family support.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

Taking into account that the NCD already had the right and duty to follow up and comment governmental activities related to persons with disabilities as well as to monitor the implementation of the National Disability Program, the Government Decree No 1065 of 2008 (X.14.) assigned to the NCD the task to promote, protect and monitor the UNCRPD.

Nevertheless this solution is not fully in line with the UNCRPD since the NCD is not considered as an independent body because it is constituted by representatives of the relevant ministries and governmental organisations as well as representatives of the civil society.

It is also important to mention that in 2009 the Hungarian Ombudsman for civil rights carried out an ex officio thematic review about the effectiveness of the rights of people with disabilities.

The first deadline for the compilation of the report required by Article 35 UNCRPD was 3 May 2010 for Hungary. Due to the governmental restructuring the contributions from the different ministries arrived with a great delay, so Hungary asked for the extension of deadline until 15 October 2010. The National Report has been prepared by that deadline and Hungary submitted it through the UN High Commissioner for Human Rights to the UN Commission on Human Rights. The Committee on the Rights of Persons with Disabilities reviewed the Hungarian report on the implementation of the Convention and adopted a 31-item list of issues requesting supplementary information on April 20 2012. The written replies of Hungary to the list of issues have to be submitted within a month. The consideration of the report will take place on September 20-21 2012 in Geneva.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

Civil society takes part in the monitoring process mainly through the National Council on Disability Issues, since it was officially appointed by the Government Decree mentioned above for the task of monitoring. In the NCD, the elected civil members and the national civil society organisations representing various branches of disability as permanent representatives take part, therefore civil society is fully involved in the process. The NCD consists of two

main parts, namely, the governmental and non-governmental side. Within this constellation, the non-governmental side itself has a dual composition. On the one hand, the representatives of the main branches of organisations advocating the rights of persons with disabilities are permanent members of the Council. On the other hand, there are also elected members from the non-governmental sector. They win their seats during a delegating meeting arranged on the basis of legislative regulation where the participants are exclusively those non-governmental organisations working for the benefit of persons with disabilities that do not have permanent seats in the Council. Thus, the NGOs elect these members from amongst themselves.

Every policy document, proposal, draft, etc. which deals with disability issues or may have an impact on people with disabilities, has to be submitted to the Council for further comments. Besides, during the elaboration of such documents, the relevant civil organisations are consulted about the draft proposals and provisions.

The National Council on Disability Issues has the right to discuss, comment all policy documents and draft legislation dealing with disability and/or having any impact on people with disabilities.

Apart from the above mentioned involvement, drafts of new legislation related to disability is discussed separately also with the professional and interest representation organisations mainly concerned.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

In the course of a national census there are always questions concerning the status of being disabled and the type of it. Regarding the fact that disability and information related to it are so called sensitive data, the declaration on it is voluntary, this means that the validity of statistics compiled on this base is doubtful. For measuring the implementation of international conventions, including mainly the UNCRPD, the legal predecessor of the Ministry of National Resources developed a specific system of indicators. By using this set of tools it is considered possible to get a more realistic view on the social process affecting people living with disabilities.

Ireland

2.1. National implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

Focal point and coordination arrangements pursuant to Article 33.1 will be settled in due course following Ireland's ratification of the UNCRPD.

The Disability Policy Division (DPD) of the Department of Justice and Equality co-ordinates both the implementation of the National Disability Strategy and the work of the Interdepartmental Committee on the UNCRPD, which are the primary elements at present in meeting the requirements of the UNCRPD.

2.1.2. National strategies to implement the UNCRPD

The Irish Government launched its National Disability Strategy (NDS) in September 2004 to underpin the participation of people with disabilities in Irish society. The NDS builds on existing policy and legislation, including the policy of mainstreaming public services for people with disabilities, and comprehends many of the provisions of the UNCRPD.

The NDS continues to be the focus of Government policy and the Programme for Government 2011-2016 commits to publishing "following wide consultation, a realistic implementation plan for the National Disability Strategy (NDS), including sectoral plans with achievable time scales and targets within available resources and ensuring whole of government involvement and monitoring of the Strategy, in partnership with the disability sector". The Minister for Disability, Equality, Mental Health and Older people has established a new National Disability Strategy Implementation Group to guide the development of this plan and monitor its subsequent implementation. This Group replaces the former National Disability Strategy Stakeholder Monitoring Group.

Implementation of the NDS, which is ongoing in spite of current economic circumstances, also provides the basis for implementation of the UNCRPD.

The key elements of the National Disability Strategy are:

- the Disability Act 2005
- Sectoral Plans for services prepared by six Government Departments
- the Citizens Information Act 2007 which provides for a personal advocacy service for people with disabilities
- the Education for Persons with Special Educational Needs Act 2004
- a multi-annual investment programme 2006-2009 targeted at high-priority disability support services.

The Disability Act 2005 is designed to support the provision of disability-specific services and improve access to mainstream public services for people with disabilities. In accordance with the Act, a review of its operation was carried out in 2010. Under the Act, six Government Departments published Sectoral Plans in December 2006 that set out the programme of measures to be taken in relation to the provision and mainstreaming of services for people with specified disabilities. The relevant Departments are those with the functions

of Employment [7] ; Health [8] ; Transport [9] ; Social Protection [10] ; Environment [11] ; and Communications. The Disability Act also requires the preparation of reports relating to the progress made in the implementation of the Sectoral Plans not more than three years after their publication. These Reports were approved for publication by Government in February 2010. The general finding was one of significant and substantial progress by all six Departments.

In terms of the UNCRPD, the NDS is complemented by a high-level Interdepartmental Committee on the UNCRPD which advises on and monitors legislative, policy and administrative actions required to enable the State to ratify the UNCRPD. The committee is chaired by Disability Policy Division of the Department of Justice and Equality and contains officials from the six Sectoral Plan Departments as well as other relevant Government Departments and the Office of Public Works. It has developed a Work Programme to address (i) any elements of the NDS that require alignment with the Convention; and (ii) any matters outside the NDS required for ratification. This programme is being progressed across the relevant Government Departments. At the Committee's request, the National Disability Authority, the lead statutory agency for the sector, has independently assessed the remaining requirements for ratification so as to ensure conclusively that all such issues will be addressed.

An example of what is required for ratification of the UNCRPD is the enactment of mental capacity legislation. The Government's Legislation Programme as announced on 11 January 2012, indicates that the Mental Capacity Bill is expected to be published in the current Parliamentary session. The Bill will replace the Wards of Court system with a modern statutory framework governing decision-making on behalf of adults who lack capacity. The passage of this Bill will add substantially to the overall progress on implementation of the requirements towards ratification of the Convention.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The role of the Interdepartmental Committee on the UNCRPD was outlined at 2.1.2. It is likely that this committee will continue to monitor the process towards implementation following Ireland's ratification.

The National Disability Strategy (NDS), as also outlined at 2.1.2, comprehends many of the provisions of the UNCRPD. Progress on its implementation is driven by the Senior Officials Group on Disability (SOGD), which reports to the Cabinet Committee on Social Policy.

Progress on the overall implementation of the NDS is monitored by the National Disability Strategy Implementation Group, which provides a means of facilitating dialogue between all parties involved. Membership of the Group is made up of representatives of the Senior Officials

[7] Sectoral Plan is at *www.entemp.ie/labour/strategy/sectoralplan.pdf*
[8] www.dohc.ie/publications/fulltext/disability_sectoral_plan/
[9] www.transport.ie/upload/general/7760-0.htm
[10] w.ww.welfare.ie/EN/Policy/CorporatePublications/HowWeWork/Disability%20Sectoral%20Plan/Pages/index.aspx
[11] www.environ.ie/en/LocalGovernment/LocalGovernmentAdministration/SectoralPlan/PublicationsDocuments/FileDownLoad,2011,en.pdf

Group on Disability (SOGD) [12] ; County and City Managers Association; the Disability Stakeholder Group (DSG)[13]; and the National Disability Authority.

The National Disability Authority (NDA) is the lead state agency on disability issues and is under the aegis of the Department of Justice and Equality. It develops and monitors standards in services for people with disabilities and advises Government on disability policy and practice. The NDA is actively involved with the implementation of important aspects of the National Disability Strategy and supports Government Departments and agencies in meeting relevant objectives.

2.2.2. The involvement of civil society in the monitoring process (Art. 33.3)

The purpose of the National Disability Strategy Implementation Group is to maintain a constructive relationship with stakeholders, provide them with a forum to raise issues and a means of facilitating dialogue between all parties involved in the NDS. Membership of the NDSIG (see also 2.2.1. above) includes the Disability Stakeholder Group, which represents the sector, its organisations and service users.

The Interdepartmental Committee on the UNCRPD consults with people with disabilities through their representative organisations and has prepared Irish language and Braille versions of the UNCRPD.

People with disabilities, their families, carers, advocates and service providers were consulted on the Sectoral Plans before they were completed. Each plan includes arrangements for complaints, monitoring and review procedures. The DSG, apart from being part of the NDSIG, is in ongoing consultation with relevant Government Departments in relation to Sectoral Plans and all aspects of disability.

Disability organisations were also consulted in respect of the review of the operation of the Disability Act (see also 2.1.2.). A consultation event was held with the assistance of and in the headquarters of the National Disability Authority (NDA). Presentations were made and discussions held at the event on the context of the review; clarification of its purpose in examining the operation of the Act; and an overview of each Part of the Act under review and how it operates at present. Following the event, an official invitation was extended to all stakeholders to make submissions on the review.

2.3. Collecting statistics and/or developing indicators (Art. 31)

The Central Statistics Office (CSO) is the national statutory body with responsibility for the collection, compilation, extraction and dissemination for statistical purposes of information

[12] The SOGD comprises officials from the Departments of Health; Social Protection; Transport, Tourism and Sport; Environment, Community and Local Government; Jobs, Enterprise and Innovation; Communications, Energy and Natural Resources; Arts, Heritage and the Gaeltacht; Agriculture, Fisheries and Food; Education and Skills; Children and Youth Affairs and Public Expenditure and Reform.

[13] The DSG comprises representatives from Disability Federation of Ireland; Inclusion Ireland; Mental Health Reform; National Federation of Voluntary Bodies; National Service Users Executive and Not for Profit Business Association. It also includes a number of service users who are serving as individuals in a personal capacity.

relating to economic, social and general activities and conditions in the State14. CSO surveys with particular relevance in providing statistics on people with disabilities include:

- the Census of Population
- the National Disability Survey
- the Quarterly National Household Survey
- the annual Survey on Income and Living Conditions (SILC)

The National Disability Authority has a statutory remit to undertake, commission or collaborate in disability research and to contribute to the development of statistical information relating to programmes and services for people with disabilities. The NDA fulfils this remit in a number of ways, including:

- the production and dissemination of disability research on a wide range of policy and service related issues;
- contributing expertise to national research and development initiatives - such as the Central Statistics Office's National Disability Survey, the Health Research Board's National Disability Databases (see below), and projects in partnership with agencies such as the National Women's Council, the Council for Ageing and Older People, the Equality Authority and many others;
- hosting the NDA Annual Disability Research Conference;
- the NDA Database of Disability Research in Ireland;
- funding research at grassroots level through the Research Promotion Scheme (RPS); and
- funding postgraduate research through the NDA Disability Research Scholarships

There are two national service-planning databases in Ireland for persons with disabilities managed by the Health Research Board: the National Intellectual Disability Database and the National Physical and Sensory Disability Database. These databases inform decision-making in relation to the planning of specialised health and personal social services for people with intellectual, physical or sensory disabilities.

[14] www.cso.ie

Italy

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Art. 33.1)

The Ministry of Labour and Social Policies, Directorate-General for inclusion and social policies serves as the focal point for Italy, in co-ordination with other relevant ministries and departments, as well as regional and local authorities.

2.1.2. National strategies to implement the UNCRPD

The tasks assigned to the National Observatory aim at giving new and constant inputs regarding public policies in the field of disability and can be summarized as follows:

a. implementation of the UN Convention on the Rights of Persons with Disabilities, also through a detailed report on the measures taken, as provided by Article 35 of the Convention, in close co-operation with the Inter-ministerial Committee on Human Rights;
b. to set up of a two-year plan of action for the promotion of the rights and integration of people with disabilities, as provided by national and international provisions;
c. to collect statistical data on the situation of people with disabilities, with reference to the local peculiarities;
d. to set up a national report on the implementation of policies in the field of disabilities (as provided in national Law n. 104/1992);
e. to promote studies and researches that can contribute to the identification of priority areas of actions and programs for the promotion of the rights of people with disabilities.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The ratification act of the UN Convention was adopted by the Italian Parliament by national Law n. 18/2009, also providing the establishment of a National Observatory in order to monitor the condition of people with disabilities. The National Observatory, which met for its official session on December 16th, 2010, will also ensure the implementation of the activities provided by Article 33.2 of the UN Convention.

The Observatory is a collective body that will facilitate the constant link between government and people with disabilities and their families and supporting organizations, and the discussion on the various needs of people with disabilities in order to identify proper and joint solutions, based on an effective coordination of policies and programs.

The Scientific and Technical Committee (CTS) within the Observatory deals with scientific analysis in relation to the activities and tasks of the Observatory itself. The Committee meets regularly since the first meeting of the Observatory; in 2011 it produced the methodological guidelines on the Observatory's several activities and functions.
On July 2011 six working groups were formed in order to deal with all major areas of reference set by the UN Convention on the Rights of Persons with Disabilities. It was thus

confirmed that the research and analysis of the working groups, whose members are, by a large number, representatives of associations of people with disabilities, will contribute to the report under Article 35 of the UN Convention, in order to give maximum importance to the Convention provisions on the full participation of civil society and organizations representing people with disabilities throughout the monitoring process (art.33.3).

2.2.2. The involvement of civil society in the monitoring process (Art. 33.3)

In the Observatory the following entities are represented: the administrative departments from the national level involved in the definition and implementation of policies in favour of persons with disabilities; regions and autonomous provinces of Trento and Bolzano; the local autonomies, i.e. provinces and municipalities; the national Institutes of social provisions and protection; the national institute of statistics; trade unions representing persons with disabilities, workers, retired people and employers; national associations representing persons with disabilities; organizations from the non profit sector dealing with disability issues.

The national organisations and federations representing people with disabilities have been involved in the decision-making processes on disability issues, at national, regional and local level. In 1992 the law n. 104/1992 introduced a National Conference on the policies for disability with the active participation of people with disabilities and their representative organisations. Organised every three years, the last Conference was held in Turin in October 2009. The law provides a Communication to the Parliament on the conclusions of the National Conference.

Until the ratification of the UN Convention, Italy lacked an institutional body for the permanent consultation of persons with disabilities. However, thanks to the National Observatory for monitoring the condition of people with disabilities, established by the national law for the ratification of UN Convention (Law 18/2009), mainstreaming strategy on disability issues will be thoroughly discussed there. It has to be underlined that within the Observatory 14 members out of 40 are representatives of organisations and federations of people with disabilities.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

A specific data collection related to the implementation of the Convention has not been launched yet. However, at www.disabilitaincifre.it, a website promoted by the Ministry of Labour and Social Policies in co-operation with ISTAT, the national institute for statistics, various data on Persons with Disabilities are available. The website is currently under development on the basis of a Protocol among the Ministry of Labour and Social Policies and ISTAT.

In December 2011 the General Directorate for inclusion and social policies of the Ministry of Labour and Social Policies, in accordance with the CTS guidelines, signed an agreement with the National Institute of Statistics (ISTAT) in order to fully comply with the provisions on statistics of art. 31. The agreement covers a series of activities such as, for example, the analysis of the life conditions of people with disabilities; an experimental analysis of the disability condition of children (0-17 years) through the inclusion of specific questions; a feasibility study for the preparation of a national registry of persons with disabilities, listed by gender, age, residence, type of disability to be used for statistical purposes; a system of

specific indicators to monitor the level of social inclusion of people with disabilities, in accordance with the provisions of the UN Convention, and new statistical tools for mental and intellectual disabilities.

Latvia

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The Ministry of Welfare of Latvia is directly responsible for disability policy in the area of social protection and at the same time in charge of monitoring the implementation and development of equal opportunities policy for disabled people in Latvia at large; as such, this ministry is the official focal point for matters relating to the implementation of the Convention.

According to the Law on Convention on the Rights of Persons with Disabilities from 28/01/2010, passed in the follow-up to ratification, the Ministry of Welfare is appointed as coordinating body for the implementation of the Convention).

This task is carried out by gathering information from other ministries and preparing respective annual reports, by keeping track of developments of other ministries' policy related to disability, and by taking into consideration complaints and ideas for the improvement of legislation in different areas. These are proposed by NGOs. The ministry then tries to solve these problems in cooperation with other involved ministries.

The National Council of Disability Affairs (NCDA), established by the Cabinet of Ministers, is used as a forum to carry out coordination and monitoring of the Convention. Chairman of the NCDA is the Minister of Welfare, and the Ministry of Welfare carries out the secretariat's function for the National Council of Disability Affairs (it plans the content and coordinates the work). The NCDA is an advisory institution that takes part in development and implementation of integration policy of disabled people. NCDA involves line ministers, Chairperson of the Latvian Association of Local and Regional Governments, Ombudsman, Chairperson of Public Utilities Commission, Director of Society Integration Foundation, President of Free Trade Union Confederation of Latvia and also representatives of key non-governmental organizations. Starting from 2009 the progress and challenges of implementation of the Convention has been discussed in every NCDA meeting. Every year specific items of the Convention, article by article, are included in every NCDA meeting’s agenda.

Specific working groups are being established to carry out in-depth analysis, prepare reports and generate solutions and recommendations to be presented to the responsible ministries for further implementation. Working groups on legal capacity, employment matters, tackling accessibility matters have been established. The task of the latest working group will be finding bottlenecks and generating solutions of problems related to all kinds of accessibility and presenting results at the NCDA meetings on regular basis.

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Coordination of implementation of the Convention is carried out also through several working groups formed by the Ministry of Welfare under policy guidelines and strategic plans.

Information about all NCDA meetings and relevant working groups is available at the Ministry of Welfare home page www.lm.gov.lv (in Latvian).

2.1.2. National strategies to implement the UNCRPD

Several strategic documents or advanced plans for a strategy directly devoted to the disability policy matters are already in place:

- Different ministries carry out implementation of the concept paper „Equal opportunities for all" (adopted by the Cabinet in 1998). The concept paper covers actions until 2010 within the following fields: health, education, employment, proper environment and social security. Planned actions for the implementation of this concept paper have to be included in the annual action plans of ministries. The Ministry of Welfare prepares each year the report on progress and presents it at the NCDA meeting. After 2010 an evaluation report has been prepared stating that the economic crisis that hit Latvia in 2008 particularly hard has negatively affected the implementation of several activities that were requesting additional public means. Nevertheless some progress can be observed and objectives that have not been reached are to be included in coming policy papers.
- The „Basic Principles on Policy for Elimination of Disability and its Consequences, 2005-2015" elaborated by the Ministry of Welfare has been adopted by the Cabinet in 2005. This strategic document contains guidelines for preventing disabilities and the basic principles, objectives and priorities of state social protection policy for persons with disabilities. The implementation of this strategy is supported by the „Action Plan for Implementing the Basic Principles on Policy for Elimination of Disability and its Consequences 2005-2015", adopted by the Cabinet in 2006. An aim determined in the Action Plan is to eliminate or to reduce the risk of disability for persons with threatened/prognosticated disability, to reduce the effect of a disability on persons with disability and to reduce the risk of social exclusion for all those persons. The Ministry of Welfare prepares each year the report on progress and submits it to the Cabinet.
- The UNCRPD Implementation Action Plan 2010-2012, adopted by the Cabinet in October 2009, envisages initial steps for promoting the implementation of the Convention. Due to the significant financial restrictions caused by the recession, this plan includes only short term activities where additional financing is not required, or reduced to a minimum, or supported by EU financial instruments. One of the tasks of this Action plan is to elaborate the UNCRPD implementation programme for 2013-2019 which will be a comprehensive strategy to reach the UNCRPD objectives.
- Currently the strategic document (policy guidelines) "Basic Principles of Implementation of the Convention on the Rights of Persons with Disabilities for 2013-2019" is being elaborated. This strategy will replace previous policy guidelines and plans and thus create one comprehensive policy planning document.

All above mentioned documents as well as annual reports on their implementation are available at the Ministry of Welfare home page www.lm.gov.lv (in Latvian).

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

According to the above mentioned Law on the Convention on the Rights of Persons with Disabilities, the Ombudsman office as the independent institution ensures monitoring of the implementation of the Convention. Representatives of the Ombudsman office participate in

the above mentioned NCDA and in all working groups for the implementation of the Convention.

As the ministry is responsible for disability policy at large, it is also responsible for monitoring the implementation of the Convention. All line ministries are responsible for the implementation of their specific activities, according to their respective sphere of competence

2.2.2. The involvement of civil society in the monitoring process (Art. 33.3)

Civil society, in particular persons with disabilities and their representative organizations, shall be involved through the NCDA and the above mentioned working groups. Starting from 2007, on a regular basis, the Ministry of Welfare organises meetings with DPO's to discuss practical and political issues.

Information about all monthly meetings with NGOs is available at the Ministry of Welfare home page www.lm.gov.lv (in Latvian).

NGOs representing persons with disabilities have the opportunity to participate in the process of policy planning as well as monitoring of implementation. DPO's are involved in all working groups established by the ministry; they provide expertise and opinion on national legal acts and planned services. During the preparation of draft laws and regulations, and the development of amendments on existing legislation (for example, Policy Guidelines for Reduction of Disability and its Consequences, draft law On Disability and its sub laws, the conformity assessment of national legal acts to the United Nation Convention), the NGOs have played and continue to play a significant role.

The future strategic document "Basic Principles of Implementation of the Convention on the Rights of Persons with Disabilities for 2013-2019" is being elaborated in close cooperation with line ministries and DPO's.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

In Latvia the statistical data which cover also disability maters, are collected and available in several institutions, depending on the respective policy area. It should be mentioned at this stage that the Ministry of Welfare has subordinate institutions (the State Social Insurance Agency, the State Employment Agency, the State Medical Expertise Commission of Health and Capacity for Work (Expertise Commission)) whose regular statistics are used to monitor disability policy. Besides, relevant data related to disability statistics are collected also by other ministries (for instance the Ministry of Education and Science, the Ministry of Health, the Ministry of Transport etc.) and, of course, by the Central Statistical Bureau (CSB). Some statistics are provided in the annual public reports of respective ministries, or institutions, via their home pages, and in the CSB publications. Data is mostly longitudinal.

The definition of disability in Latvia is related to the level of impairment and thus all the public services and entitlements are provided to the persons with disability status that is granted by the Expertise Commission. Accordingly whenever the statistics on disabled persons are collected they include persons with disability status. An exception are provisions for technical aids, which persons with different kinds of functional disorders are entitled to, not only persons with disability status.

The improvement of data collection for the total number of persons with disability is in progress: during the 2004-2006 EU structural funds' planning period the Expertise Commission, involving ERDF co-financing, created the disability information system, i.e. a unified database of disabled people. To continue the development of this database during the 2007-2013 EU structural funds' planning period the Expertise Commission, involving ERDF co-financing, has started a new project, “Digitalization of the archive data bases and implementation of e-services”. One of the outputs of this project is an improved disability information system, which allows to obtain comprehensive and detailed statistical data distributed by gender, age, administrative region, as well as by diagnosis, covering all persons with disabilities (and also persons with anticipated disability), including also historical data, which previously was mostly available only in paper form.

In general, the above mentioned data sources are successfully used for policy formulation and monitoring of implementation. However, it is not sufficient for monitoring the implementation of the Convention because the available data cover multidimensional and multidisciplinary area of the Convention only partially.

The monitoring mechanism of the implementation of the Convention, including Article 31, is not yet adjudicated. Therefore in a view of ensuring both the monitoring of implementation of the Convention and preparation of reports on progress (in accordance with the article 35, paragraph 1 of the Convention) the development of indicators will be discussed during the forthcoming meeting of the working group for preparation of the strategic document “Basic Principles of Implementation of the Convention on the Rights of Persons with Disabilities for 2013-2019”. The working group will start its activities in March 2010 and in parallel to the elaboration of the strategic document for 2013-2019, all relevant ministries will be asked to make proposals for specific indicators which could support the analysis of the implementation of the Convention. After reaching an agreement on the indicators, the involved relevant ministries will be obliged to ensure collecting and maintenance of these specific statistical data.

Lithuania

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

As the UN Convention on the Rights of Persons with Disabilities was ratified on 27 May 2010, the coordination mechanism and focal points were designated by the Resolution of Government No. 1739 on 8th of December, 2010.

The Ministry of Social Security and Labour was designated as coordinating body and focal point for implementing the UN Convention. Other public authorities (the Ministry of Education and Science, the Ministry of Transport and Communications, the Ministry of Health, the Ministry of Environment, the Ministry of Economics, the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of the Interior, the Ministry of Culture, the Department of Physical Education and Sports under the Government of the Republic of Lithuania, the Department of Statistics and the Information Society Development Committee under the Ministry of Transport and Communications) were designated as sub-focal points for the implementation of UN Convention according to their competence.

2.1.2. National strategies to implement the UNCRPD

The main aims and objectives of the UN Convention and its implementation are included in the National Social Integration Programme for Persons with Disabilities 2010-2012 (hereinafter referred to as the Programme).

The main aim of the Programme is to achieve equal opportunities and improve the quality of life for people with disabilities in line with international and national public policy objectives and commitments.

The main objectives of the Programme are:

1. To increase aid to the families of people with disabilities (children, adults);
2. To develop services for people with disabilities in the community and improve their quality of life;
3. To improve the environment for people with disabilities, the legal framework, and accessibility;
4. To improve health care and medical rehabilitation services for people with disabilities and improve the quality of these services;
5. To increase and raise the effectiveness and accessibility for the disabled of education and training services;
6. To increase access to employment and labour market;
7. To strengthen legal protection;
8. To increase participation in public and political life;
9. To increase participation in physical education and sports activities;
10. To improve the management of the social inclusion process.

The Programme is coordinated and monitored by the Department for the Affairs of Disabled at the Ministry of Social Security and Labour.

It is noteworthy that after the ratification of the UN Convention, the Plan for Implementation of the National Social Integration Programme for Persons with Disabilities 2010-2012 was complemented with other measures proposed by public authorities and non-governmental organizations of disabled persons. The document was approved by the Minister of Social Security and Labour.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The Council for the Affairs of Disabled at the Ministry of Social Security and Labour (hereinafter referred to as the Council) and the Office of Equal Opportunities Ombudsperson perform the function of independent mechanism. The Office of Equal Opportunities Ombudsperson performs the function of protection and ensures that all the rights of disabled people are guaranteed. The Ombudsperson also takes actions so that violation of the rights of persons with disabilities are stopped: the Ombudsperson accepts complaints, investigates them, solves problems, and writes comments to the Courts. The Council monitors the implementation of the UN Convention and in particular:

- Assesses the human rights situation in respect to disabled persons;
- Draws public authorities' attention to the violation of disabled rights;
- Helps to foresee measures to protect from human rights violation;
- Makes proposals for improving legislation and seeking to properly implement the Convention;
- Analyzes how provisions of the UN Convention are implemented.

2.2.2 The involvement of civil society in the monitoring process (Article 33.3)

The rights of people with disabilities are defended and represented by the associations of disabled persons. Decisions are taken after including the opinions and experiences of persons with disabilities.

The Ministry of Social Security and Labour has several subordinated bodies: the Department for the Affairs of the Disabled, the Service for Establishing Disability and Capacity for Work, the Dispute Commission, and the Centre for Technical Assistance for People with Disabilities. They organize regular meetings with relevant NGOs in order to ensure closer cooperation, distribution of information as well as resolution of existing problems. Relevant problems related to the establishment of ability-for-work and disability, determination of the need for professional rehabilitation services, ensuring equal opportunities etc. are issues discussed at these meetings.

As mentioned above, disabled persons are involved in the process of monitoring the implementation of the provisions of the UN Convention through representatives of non-governmental organizations of disabled people who take part in the activities of the Council.

The Council analyzes the most important issues in relation to the social integration of people with disabilities and submits proposals to the Minister of Social Security and Labour regarding the implementation of social integration policy relating to the needs of people with disabilities (after the ratification of the UN Convention, the Council also monitors its implementation).

The Council is composed, on a voluntary basis and according to the principle of equal partnership rights, of state institutions and representatives delegated from the Lithuanian Union of Persons with Visual Impairment, the Lithuanian Society of Persons with Hearing Impairment, the Lithuanian Association of Disabled, the Lithuanian Union of Persons with Disabilities, "Viltis" Association for Care for People with Intellectual Disorders, the Lithuanian Association for Care for People with Mental Disorders and the Paralympic Committee of Lithuania. They each have one main representative, at the level of either the president, the vice-president or the chairman.

The members of the Council representing state institutions are chosen within the Ministry of Social Security and Labour, the Ministry of Health, the Ministry of Education and Science, the Ministry of Environment, the Ministry of Communications, the Ministry of Interior and the Ministry of the Economy. They have one representative each - the vice-minister.

The purpose of the Council is to examine the key issues of social integration of persons with disabilities and to assist the Minister of Social Security and Labour and other Ministers in the implementation of the social integration policy. Decisions by the Council inform and advise the Minister of Social Security and Labour.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

The Equal Opportunities Division of the Ministry of Social Security and Labour (MSSL), acting within the scope of its competence, collects, systematises and analyses information about the implementation of the equal opportunities policy in Lithuania and abroad.

The Department for the Affairs of the Disabled at the Ministry of Social Security and Labour collects, on an annual basis, information and statistics related to the social integration of people with disabilities from the state, local authorities and organizations of people with disabilities. It also systematises and summarises them before notifying the Ministry of Social Security and Labour, state and local authorities and organizations of people with disabilities.

The Service for Establishing Disability and Ability-for-Work under the Ministry of Social Security and Labour draws up statistical reports on persons with disabilities and submits them to the Ministry of Social Security and Labour and to the Department of Statistics. The Service for Establishing Disability and Ability-for-Work under the Ministry of Social Security and Labour exchanges information and collaborates with individual healthcare establishments, the National Labour Exchange under the Ministry of Social Security and Labour, the State Social Insurance Fund Board under the Ministry of Social Security and Labour, local authorities, state institutions and other organisations in accordance with the provisions of the Law on Legal Protection of Personal Data.

Luxembourg

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The Ministry of Family Affairs and Integration is the designated focal point within the Luxembourg Government for matters relating to the implementation of the Convention. It also fulfils a coordination role, cooperating closely, on matters relating to the Convention, with an ad hoc Steering Group representing different players within civil society.

2.1.2. National strategies to implement the UNCRPD

The 2009-2014 state agenda plans the development of an outline law on disability proposing a global concept of integration and non-discrimination of persons with disabilities. Simultaneously, the Ministry of Family Affairs and Integration is developing a national strategy to put in place the UNCRPD and the Optional Protocol to allow persons with disabilities to participate fully in all aspects of society.

The analysis of the national legislation in relation to the ratification of the Convention was meant to identify possible laws which may be at the source of discrimination against persons with disabilities. The main findings were related to the accessibility of public services, to higher education as well as adults' legal protection.

In order to raise public awareness about the situation of persons with disabilities and to provide information about the objectives of the Convention, the Family and Integration Ministry has developed an information and awareness campaign on the topic of the UNCRPD.

The principle objectives of the campaign are as follows:
- Informing persons with disabilities about the objectives of the Convention
- Raising awareness of the wider public on the rights of persons with disabilities, showing through various means (posters, adverts) that these rights equal general human rights.
- Providing information to the family members and officials from the social, education, health and care sectors on the UNCRPD.

This campaign was developed in close cooperation with Info-Handicap - Centre National d'Information et de Rencontre du Handicap - and various NGOs and other institutions dealing with disability and persons with disabilities.

Furthermore, the Ministry of Family and Integration is also cooperating closely, on matters relating to the UNCRPD, with an ad hoc Steering Group representing different players within civil society. Together with the Steering Group it is organizing, on a regular basis, working groups where persons with disabilities and all people interested in the subject can express their views freely and be directly involved in the decision making process related to the main subjects of the UNCPRD.

From March to December 2011, during four full-day Working Meetings, the Ministry of Family Affairs and Integration elaborated a national disability Action Plan. This was achieved

together with civil society and in close cooperation with the other Ministries. The Action Plan contains short and mid-term actions and announces modifications of the relevant bills that aim to implement most of the crucial provisions of the UNCRPD. The Government has accepted the 5-Year Action Plan on March 9, 2012. It has been officially presented to the public on March 28 by the Minister of Family Affairs and Integration together with representatives of the different working groups.. Thanks to the contributions of persons with disabilities, the document is now an Action Plan from persons with disabilities for persons with disabilities.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The 2011 act on the approval of the CRPD[15] allocates the task of promoting and monitoring the Convention to the Consultative Commission of Human Rights of the Grand Duchy of Luxembourg. It will carry out that task jointly with the Centre for Equal Treatment, while the task of protecting has been allocated to the National Ombudsman.

The mission of the Consultative Commission of Human Rights is to promote human rights throughout the Grand Duchy of Luxembourg *inter alia* for persons with disabilities, while the Ombudsman is mainly dealing with citizens' individual complaints. As for the Centre for Equal Treatment, its purpose is to promote, analyse and monitor equal treatment between all persons without discrimination on the basis of race, ethnic origin, sex, sexual orientation, religion or beliefs, disability or age.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

The "Conseil supérieur des personnes handicapées" is a national council which has its legal basis in the law of September 12, 2003 about the income of disabled people. It is composed of 11 members, of which five disabled persons, four representatives of organisations for persons with disabilities, one representative of the "Centre national d'information et de rencontre du handicap" and one of the Ministry of Family Affairs and Integration. It is allowed to take the initiative of giving advice on specific disability-related issues and it is bound to express its view on every single law or other disability-specific legal instruments and to advise the Minister on other issues on her request.

Furthermore, the Ministry of Family Affairs and Integration cooperates largely with Info-Handicap-Conseil National des Personnes Handicapées which represents Luxembourg in the European Disability Forum (EDF). It is a loose federation currently comprising more than 50 member organisations which are active in many different areas. Some members are major service providers, responsible for running large institutions, while others are very small self-help or support groups. One of Info-Handicap's main tasks is thus to identify shortcomings in these areas and seek solutions in cooperation with the authorities. It is also undertaking, on a regular basis, actions to raise awareness in the field of disability.

[15] Loi du 28 juillet 2011 portant 1. approbation de la Convention relative aux droits des personnes handicapées, faite à New York, le 13 décembre 2006; 2. approbation du Protocole facultatif à la Convention relative aux droits des personnes handicapées relatif au Comité des droits des personnes handicapées, fait à New York, le 13 décembre 2006; 3. désignation des mécanismes indépendants de promotion, de protection et de suivi de l'application de la Convention relative aux droits des personnes handicapées.

Consultations between the Ministry of Family and Integration and several organisations of and for disabled persons take place on a regular basis. This cooperation is of variable geometry depending on the questions and problems that need to be tackled.
The pillars of the policy for disabled persons are social inclusion and the participation at all levels as well as the maintenance and development of the personal autonomy and independence of persons with disabilities. An evaluation of the expectations and of the needs is necessarily carried out before the launch of a new project.

Another important tool used to foster empowerment of people with disabilities is the support of the Ministry of Family and Integration for umbrella organisations which coordinate the activities of a number of member organisations. For some years now, two of those organisations, namely Info-Handicap a.s.b.l. and "Solidarität mit Hörgeschädigten", have been benefiting from a convention (that guarantees them regular subsidies) with the Ministry of Family and Integration for their information, consultation and training services.

That same ministry is also cooperating closely, on matters relating to the UNCRPD, with an ad hoc Steering Group representing different players within civil society. Together with that "Steering Group" it is organizing, on a regular basis, task groups where persons with disabilities and other people interested in the subject can express their views freely and are directly involved in the decision making process related to the main subjects of the UNCPRD.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

The department for persons with disabilities of the Ministry of Family Affairs and Integration is reflecting upon and developing a common coherent strategy for a coordinated collection of statistical data. In the meantime, Luxembourg uses statistical data collected by different actors working with issues related to disability such as the *Service des Travailleurs Handicapés de l'Administration de l'Emploi*, the *Service de l'Education Différenciée*, *l'Assurance Dépendance et la Caisse Nationale des Prestations Familiales.* While collecting relevant data, the main problems encountered were the double citing of certain figures and the legal protection of specific data.

Malta

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Art. 33.1)

The Disability Matters Act was approved by the Maltese Parliament on 26 March 2012. It will come into effect in mid-April. It includes amendments to the Equal Opportunities (Persons with Disability) Act. These amendments include the identification of the Ministry responsible for Social Policy as the focal point for the Convention.

2.1.2. National strategies to implement the UNCRPD

No strategy is yet in place since Malta still has to ratify the Convention.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Art. 33.2)

The Disability Matters Bill currently being debated in Parliament includes amendments to the Equal Opportunities (Persons with Disability) Act. These amendments include the identification of the National Commission Persons with Disability as the independent mechanism for the Convention.

2.2.2 The involvement of civil society in the monitoring process (Art. 33.3)

To date, several seminars and conferences have been held with representatives of disability organisations and other stakeholders in order to disseminate information about the Convention. The text of the Convention has been produced in accessible formats through EU funding. To date, it is available in audio, Maltese, easy-to-read Maltese versions, and in Maltese Sign Language.

The National Commission for Persons with Disability (KNPD) has the legal capacity to promote and raise awareness of disability issues and has now been identified as the independent mechanism for the Convention. The Commission is composed of not less than fourteen members. Seven of the members shall be appointed from amongst such persons appearing to the Prime Minister to best represent the Ministries responsible for Social Policy, Labour, Health, Education, Housing and Economic Planning. Another seven of the members shall be appointed from among such persons who, in the opinion of the Prime Minister, best represent voluntary organisations working in the field of disability issues. Furthermore, half the board members must themselves be persons with disabilities, or family members of persons with a mental disability. Either the chairperson, or the vice chairperson must be disabled himself or he must be related to a person with a mental disability. More than half of the employees of the KNPD's secretariat have disabilities.

The KNPD has a comprehensive programme of empowering persons with disability. KNPD organises regular awareness-raising campaigns with the direct participation of persons with disability and often with EU funding. These include an annual national conference and the

Parliament of Persons with Disability. KNPD organises training for persons with disability to assume these roles and tasks, as well as disability studies and lectures, mainly for university students. These sessions always include the direct involvement of persons with disability, in both the curriculum design as well as lecture-delivery. Disability Equality Training is also provided to public and private organisations and community groups. KNPD, on a regular basis, includes persons with disability when participating in activities organised at EU level (e.g. annual Conference organised to mark the European Day of Persons with Disability in December).

2.2.3. Collecting statistics and/or developing indicators (Art. 31)

KNPD collects statistics but not with direct reference to the Convention. The information published in KNPD's Annual Equal Opportunities Act (Cap. 413) Report is relevant to this but may be limited in scope for this purpose.

In 2009, KNPD published statistics about the quality of life of disabled people in Malta, based on the 2005 National Census. This will be updated after the next Census due to take place in 2011.

Further information can be obtained from the KNPD website, www.knpd.org.

The Netherlands

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

It is proposed that after the ratification of the UNCRPD the focal point will be the Ministry of Health, Welfare and Sport. The coordination mechanism consists of an interministerial Steering Group in which all relevant government departments and other government levels (local and provincial) are represented.

2.1.2. National strategies to implement the UNCRPD

Equal treatment and mainstreaming of issues relevant for persons with disabilities are the basic conditions for policies on a local and national level. The Government and the Parliament also assess policies on this aspect. Apart from this, no comprehensive implementation plan for the Convention has yet been put in place.

However, in the course of preparing for the ratification of the UNCRPD, the government focal point (the Ministry of Health, Welfare and Sport) prepares and supports conferences and publications on the UNCRPD.
Moreover, some measures have already been taken for the implementation of the UNCRPD:

- The Ministry of the Interior and Kingdom Relations has issued an obligation for municipalities to provide for at least 25 percent of the polling stations in every region to be completely accessible. A detailed regulation will enter into force in 2012 providing for accessible public transport system. Most buses are already accessible and around 50% of the bus stops will be accessible in 2015. This regulation sets out different time schemes for different aspects of transport system. After finalization of the notification procedure in Brussels (European Commission, DG MOVE), the regulation will enter into force in the Netherlands by the beginning of 2012. On the labour market and domain of social affairs, the growing influx of young people into the scheme for young disabled is a worrying development. In order to increase the labour participation for young persons with disabilities a new Act came into force on 1st January 2010. Under this Act, young persons must be given the chance to look for a regular job or 'supported job' before they apply for a benefit. The Rutte Government has taken further steps to increase chances on labour participation. On 1st February 2012, the Government has proposed to Parliament a new law, the 'Working to capacity Act' (Wet werken naar vermogen), for a new system on work according to capacity. The proposal integrates several existing systems into one new system for different groups (among them young persons with disabilities) and will be executed by municipalities. Main features of the new system are a single benefit, a single reintegration budget, and (under certain conditions) dispensation from the statutory national minimum wage. The new Act will not apply to people who are permanently incapable to work and people who can only work in sheltered employment. For these groups the existing laws remain unchanged. The Dutch Government aims to put the new Act into effect on 1st January 2013.
- In the domain of education the equal treatment act is broadened to all aspects of primary, secondary and higher education.
- The equal treatment act on the basis of handicap and chronic illness has been made applicable in the field of primary and secondary education and housing and will be applicable with regard to public transport in the near future (halfway 2012). At the moment

further extension of the applicability of this act with respect to web-accessibility is being prepared.

At local level many municipalities have started different stimulating programs, such as Agenda 22 in the municipality of Utrecht. This is a working method that has been derived from the 22 rules that the United Nations drafted. This working method means that the city of Utrecht involves disabled people actively in its policy. This includes the accessibility of buildings, access to public transport and better readability and usability of various forms for people with intellectual disabilities. This agenda seeks to ensure that all people of Utrecht, with and without disabilities, can participate in society.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The Netherlands have designated the new National Human Rights Institute (NHRI) as the independent mechanism for promoting, protecting and monitoring the UNCRPD. To set up the NHRI, a draft law has been approved by Parliament. The law will enter into force by July 2012. The NHRI will then start its work.

2.2.2. The involvement of civil society in the monitoring process (Art. 33.3)

After ratification, the National Human Right Institute will involve civil society in the monitoring process.

Furthermore, civil society is monitoring the implementation of UNCRPD when asked for an opinion in the process of drafting new legislation and policies relevant to persons with disabilities. To this end, strong relations between several government departments and civil society have been formalized. Monitoring of UNCRPD also takes place within the ambit of several formal advisory bodies to the government in which civil society is represented. These bodies advise the government on major policy subjects. Civil society in the Netherlands is well organised and receives government funding for its work on empowering persons with disabilities, also with a view to monitoring governmental action.

On a local level, municipalities are legally obliged to establish a formal advisory and monitoring structure for persons with disabilities in the area of labour and social support. Furthermore, municipalities create “platforms” for persons with disabilities to advice local authorities, shopkeepers’ associations service providers etc. on any issue relevant for persons with disabilities. These platforms are supported by a national program funded by the government and aiming at the empowerment of persons with a disability.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

A “participation index” has been developed to measure the level of participation of persons with disabilities. This index includes indicators on education, labour, leisure, housing and the level of using mainstream provisions.

Poland

2.1. National Implementation of the UNCRD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

Poland has not ratified the Convention yet, so no "relevant structures, namely focal point, coordination mechanism and a framework including independent mechanism to protect, promote and monitor the UNCRPD pursuant to its Article 33" have been put in place.
Decisions concerning these issues will be taken at the moment of deciding on the ratification of the Convention, giving due consideration to the legal system in force, existing human rights protection structures and the Convention provisions.

2.1.2. National strategies to implement the UNCRPD

As Poland has not ratified the Convention yet, there is no formal obligation to implement it. Preparation for the ratification is carried out within the framework of the procedure applicable to the ratification of international agreements, set out by the Act on international agreements.
The adoption of any special strategy is not envisaged.

The same will apply to the implementation of the Convention once Poland ratifies it. Relevant Ministries apply the principle of disability mainstreaming and include disability issues into legislation, programmes and action plans.

The Polish Government and the self-government authorities have been called upon by the Sejm to undertake activities aiming at implementing the rights mentioned in the Resolution - Charter of the Rights of Persons with Disabilities passed on 1 August 1997. The implementation of these rights aims to enable persons with disabilities to lead an independent, self-reliant and active life and not to be discriminated in any area of life. These goals reflect the goals of the Convention. In the Resolution, the Sejm called upon the Government to submit annual reports on these activities. The reports are prepared in cooperation with various Ministries and central offices and presented to the Sejm by the Government Plenipotentiary for Disabled People, situated within the Ministry of Labour and Social Policy.

Several developments regarding to information on "Voting rights" have taken place in Poland, in relation to the last Report.

The Act-Election Code, adopted on 5 January 2011, replaced previous legal acts on conduct of various elections. It includes some provisions concerning persons with disabilities. But enjoyment of the right to vote by persons with disabilities has been further improved thanks to additional provisions regarding adaptation of the organisation of elections to the needs of people with various disabilities, provided in the Act of 27 May 2011 on the amendments to the Act-Election Code and to the Act implementing the Act-Election Code. The amended Act-Election Code came in force on 1 August 2011. The Act-Election Code lays down rules and procedure for nominating candidates, the conduct and the conditions of validity of the elections to the Sejm and the Senate of the Republic of Poland, of the President of the Republic of Poland, to the European Parliament in the Republic of Poland, to the proclaiming bodies of the local self-government units, as well as of mayors.

The Act grants special rights to disabled voters. A disabled voter is defined in the Act as a person with reduced physical, psychological, mental or sensory performance, which hinders participation in the election. But some provisions of the Act concern only voters with a severe or moderate degree of disability, within the meaning of the Act on Vocational and Social Rehabilitation and Employment of Persons with Disabilities.
People who have the right to vote shall be put down on the register of voters. A disabled voter, following a written request to the office of the municipality submitted not later than 14 days before the election, is added to the register of voters in the electoral district chosen by him from among electoral districts with polling stations adapted to the needs of disabled voters, in the municipality of his residence.
One can vote in person. A voter with a severe or moderate degree of disability, within the meaning of the Act on Vocational and Social Rehabilitation and Employment of Persons with Disabilities, may delegate somebody to vote on his behalf. This solution also applies to voters who turn 75 on election day at the latest. Authorisation for voting shall be granted before the wójt or another officer authorized by the wójt for the drafting of authorisation for voting. The document of authorisation for voting shall be prepared at the domicile of the voter, who grants authorisation for voting, or elsewhere, as requested by the authorising person.
During voting, a disabled voter may request for help of other person, excluding members of the electoral commission and the persons of trust.
According to the Election Code, voting is conducted in permanent and separate electoral districts established in the municipality. Separate electoral districts are formed, *inter alia,* in health care institutions and nursing homes. In these separate districts a second ballot box can be used.
Moreover, as concerns disabled voters, the Act provides, *inter alia,* for:

- the right to obtain information about the organisation of elections by telephone, by printed material sent on request, including in electronic form,
- placing of information, by the National Electoral Commission on its website, on the rights of disabled voters, in the form which takes into account the various types of disabilities and preparation of information in Braille about these rights and passing it on request to interested persons,
- the obligation of members of the district election commission to transmit verbally the content of election notices,
- ensuring the accessibility of polling stations for people with reduced mobility,
- the possibility of postal voting, according to the statutory defined procedure, by a voter with a severe or moderate degree of disability, within the meaning of the Act on Vocational and Social Rehabilitation and Employment of Persons with disabilities,
- voting using overlays to voting cards prepared in Braille (the overlay model has been defined by the National Electoral Commission).

The Regulation of the Minister of Infrastructure of 29 July 2011 on the polling stations adapted to the needs of voters with disabilities came into force on 1 August 2011.

2.2. Monitoring the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

In Poland an independent mechanism pursuant to Article 33.2 of the UN Convention will be nominated at the moment of ratifying the Convention. Poland has already well-established

administrative procedures for reporting on the application of different UN conventions concerning human rights and it intends to maintain them. Should there be a need for any adaptations, they will be considered at a later stage.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

Means ensuring involvement of civil society in the process of implementation and monitoring of the UNCRPD has not yet been defined. Common legal regulations which are already in force will continue to be applied.

According to the Act on access to public information, any person has the right to obtain information from public authorities and to request access to the official documents elaborated, inter alia, by the public authority bodies.

The representatives of people with disabilities are consulted within the framework of decision-making processes conducted with the participation of:

- the National Consultative Council for Disabled People (on the national level), which is an advisory body of the Government Plenipotentiary for Disabled People and acts as a platform of cooperation to the benefit of persons with disabilities between bodies of national administration, bodies of territorial self-government and non-governmental organisations. The scope of activities of the Council includes the submission to the Plenipotentiary of proposals for actions aimed at meeting the needs of people with disabilities. It also includes the submission, upon the Plenipotentiary's request, of opinions on the proposals for underlying principles of policy concerning employment and vocational and social rehabilitation of persons with disabilities and on legislative projects that can affect the situation of persons with disabilities, as well as informing on the need to establish or change the regulations in this respect;

- the voluntary voivodship councils for persons with disabilities (on the regional level), which are consultative and advisory bodies serving the marshals of voivodships; their task is to inspire actions aimed at vocational and social rehabilitation of persons with disabilities and exercising the rights by persons with disabilities, to issue opinions on the voivodship programmes of action for the benefit of persons with disabilities, to evaluate their implementation as well as to advise on draft resolutions and programmes prepared for adoption by the voivodship parliament from the perspective of their impact on persons with disabilities;

- the voluntary powiat (district) councils for persons with disabilities (on the local level), which are consultative and advisory bodies serving the starostas; the scope of their activity is powiat-wide and their tasks are similar to those of the voivodship councils.

Moreover, the Foundation "Regional Development Institute" and the Polish Disability Forum (an umbrella organisation in the field of disability) were involved in the assessment of compliance of the Polish legislation and the Convention provisions, which was carried out in 2008 as a part of a project co-financed by the State Fund for Rehabilitation of Persons with Disabilities. Their recommendations included in the report "Polish way to the Convention on the rights of persons with disabilities" are duly taken into consideration by governmental administration when considering the necessity of and elaborating proposals for amendments to national legislation prior to a decision on the ratification of the Convention.

Furthermore, consultative and participatory techniques are used to raise the awareness in terms of equal treatment and non-discrimination of persons with disabilities. Moreover they aim at supporting the incorporation of their needs in legislative and practical matters. The application of such techniques results in the participation of people with disabilities in the various evaluation and advisory bodies. It also results in promoting the integration of persons with disabilities in the upbringing and education (starting from pre-school age); organizing of seminars and conferences, media campaigns, events and other actions in order to integrate persons with disabilities into the local communities. It shall also raise awareness of the local self-governments on the needs of people with disabilities.
It should be mentioned that, according to the Resolution of the Sejm of the Republic of Poland - Charter of the Rights of Persons with Disabilities, the Government Plenipotentiary for People with Disabilities annually informs the Sejm on actions undertaken by the Polish Government and local authorities to implement the rights of persons with disabilities defined in the Resolution. This is followed by the Parliamentary debate on the developments in increasing the opportunities of persons with disabilities in the most important areas of daily life, and on questions of avoiding and eliminating any kinds of discrimination of people with disabilities.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

A more thorough examination of the Convention may reveal the need to collect statistical data which currently is not in place. At the moment, there is no particular need to collect additional statistical data or to develop indicators in view of monitoring the application of the Convention.

Portugal

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

Portugal ratified the UNCRPCD in September 2009. According to the latest Portuguese Government proposal, the Focal Point will be situated within the Ministry of Foreign Affairs and the Ministry of Solidarity and Social Security. The National Institute for Rehabilitation is going to be designated as Coordination Mechanism. And finally, the Ombudsman will be invited to be the Independent Mechanism at national level.

2.1.2. National strategies to implement the UNCRPD

The Portuguese Government approved the National Strategy for the Disability (2011-2013) by the Resolution of Ministers nº 97/2010 of 14th December 2010. This strategy is based on the UNCRPD and succeeds the Action Plan for the Integration of People with Disabilities or Impairments (2006-2009).

The National Institute for Rehabilitation (INR, I.P.) is responsible for the planning, execution and coordination of policies aimed to promote the fundamental rights of persons with disabilities. This Institute will monitor the implementation of the National Strategy for Disability. This strategy was a result of a public consultation and is intended to promote a wide partnership between public and private entities, central, regional or local administration, social partners, NGOs and civil society as well as people with disabilities. It establishes a set of measures, targets and indicators distributed by five strategic areas of action:

Axis nº1: Disability and multiple discrimination;
Axis nº2: Justice and exercise of rights;
Axis nº3: Autonomy and quality of life;
Axis nº4: Accessibility and design for all;
Axis nº5: Modernization of Administrative and Information systems.

Regarding axis nº1 and 2, the National Strategy for the Disability intends to:

- Promote awareness and information about domestic violence against persons with disabilities
- develop a program about UNCRPD at national level;
- make an assessment of national legislation verifying if Portuguese laws are meeting the requirements of UNCRPD;
- make the first national report regarding the UNCRPD implementation;
- review national laws concerning the accessibilities in buildings;
- promote public dissemination of rights, dignity and better health conditions for persons with disability;

Regarding axis nº3 and 4: The National Strategy for the Disability intends to:

- develop a national campaign on the employment of persons with disabilities
- Implement a National System of Intervention in Precocious Childhood
- Strengthen teachers skills in special education
- Develop initiatives addressed to persons with disability in order to increase their skills

- Increase the number of accessible beaches
- Increase the number of accessible public buildings
- Create a guide on good practices in accessible tourism
- Improve accessibility of public transports
- Reinforce school manuals and books in accessible formats

Regarding axis nº5: Administrative modernization and information systems intends to:

- develop a project that will allow public services to answer questions and doubts of persons with hearing impairments;
- Consolidate the accessibility of public services internet sites.

The National Strategy for Disability is intended to strength the disability public policy and to consolidate the previous Action Plan for the Integration of People with Disabilities. It develops a mainstreaming approach of disability and defines the measures that will be adopted and implemented in the different areas of public policy.

Annually the National Institute for Rehabilitation I.P. elaborates a report concerning the complaints based on the disability discrimination act. The complaint procedure is also available on the Institute's website.

The Portuguese Government approved the Decree-Law 163/2006, 08th August that establishes the technical norms of accessibility to public and collective equipments, public buildings and housing. This new law reinforces the accessibility rules as well as the sanctions that apply to public or private entities.

Portugal has also approved the National Plan for the Promotion of Accessibility (2006-2015) to provide to persons with disabilities, autonomy, equal opportunities and full participation. This plan incorporates a set of measures of accessibility in the built of environment, transportation and information and communication technologies (ICT) and supportive technologies (TA) to all citizens without exception.

In October 2010, the Disability Rights Promotion International (DRPI) project was launched in Portugal. This project involves the National Institute for Rehabilitation I.P., the Calouste Gulbenkian Foundation and the High Institute for Social and Political Sciences/Lisbon Technical University. The DRPI project will create an independent instrument to monitor the Convention on the Rights of Persons with Disabilities and is intended to promote the human rights of persons with disability and their empowerment. The DRPI project is an innovative approach that involves three institutions with knowledge in disability, human rights and social research areas. It is also intended to be freely used by the independent mechanism that monitors the Convention.

The National Strategy for Disability sets up some measures, namely, the creation of an Independent Mechanism responsible for the promotion and screening of the UNCRPD.

The National Institute for Rehabilitation also invested in research and manuals in specific areas such as multiple discrimination of women with disabilities, deinstitutionalization of children with disability, accessible tourism, the available information on disability produced in public administration data and the implementation of ICF in health and social security inquiries.

These studies were financed by the ESF and are available on the Institute's website (www.inr.pt). From 2010 to 2012 it has approved more research studies on the mental health of persons with intellectual disability, the violence against persons with disabilities and personal assistance services. Most of the studies were made by research centres of Portuguese Universities and created manuals and/or recommendations to implement good practices in different public and private services.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

Portugal has not yet nominated an independent mechanism as mentioned in Article 33.2 of the UN Convention. However, according to the latest Portuguese Government proposal, the Ombudsman will be invited to be the Independent Mechanism.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

The 38/2004 law ensures full participation of people with disabilities or their representative organisations in the drafting of legislation on disability, execution and evaluation of all policies mentioned in this law, so as to ensure their involvement in all situations of everyday life and society in general.

The technical and financing program of the National Institute for Rehabilitation, I.P. for NGOPD has been developed in the framework of the Convention on the Rights of Persons with Disabilities since 2009. This Financial Program has contributed to developing civil society activities in different areas as cultural and leisure activities, empowerment and awareness, accessible and easy to read information on human rights and technical seminars. The National Institute for Rehabilitation I.P. undertook some initiatives (i.e. conferences/seminars/presentations) in order to disseminate the UNCRPD and has a training program for specific groups (persons with disabilities, local communities' architects and social workers, journalists and public servants). It even published a children's version of the UN Convention and a manual for parliamentarians about the implementation of the Convention. All documentation is available and can be freely consulted on the institute's website institute (www.inr.pt).

The involvement of NGOs is also guaranteed through the National Council for the Rehabilitation and Integration of the People with Disabilities ("Conselho Nacional de Reabilitação e Integração das Pessoas com Deficiência" – CNRIPD), which is a consultative body of the Minister of Labour and Social Solidarity providing the Government with information used in deciding on matters related to the definition of the National Rehabilitation Policies. This body supports and includes representatives of all kinds of organizations of people with disabilities as well as social partners and public authorities. It issues opinions and presents proposals for measures related to the problems of rehabilitation and disability.

The State encourages and supports people with disabilities, their families and the disability movement throughout all measures taken for the prevention of disabilities, the rehabilitation and the social integration of people with disabilities.

In recent years, the disability movement has grown significantly and consolidated its form of acting. In some cases it has taken on an active role of claiming rights for the people with disabilities. The dialogue between the State and NGOs, and the logistical and financial support that the latter have received, has contributed to encouraging the social role played by associations.

In doing so, the Portuguese Government is adhering to both the principles contained in the Basic Law and to the international recommendations for the participation of people with disabilities in the definition and concretisation of effective related policies.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

The Portuguese Census 2011 will update the last Census 2001. It will include the Washington Group questions about Disability as well as questions about accessibility in the environment and private houses. However the results of Portuguese Census 2011 are not available yet.

In 2010 the National Institute for Rehabilitation made two studies about the available information on disability produced in public administration data and the implementation of ICF in health and social security inquiries. The National Statistic Institute also adopted a Recommendation about the use of ICF in national data collection systems.

Romania

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The focal point is the General Directorate for the Protection of Persons with Disabilities, within the Ministry of Labour, Family and Social Protection. It also acts as the coordination mechanism.

2.1.2. National strategies to implement the UNCRPD

Romania has not yet developed any comprehensive strategy to implement the UNCRPD.

However, the promotion and observance of the rights of disabled persons shall be, mainly, the duty of the local public administration authorities where the disabled person has his/her domicile or residence and, in subsidiary, and complementarily, of the central public administration authorities, civil society and the family or of the legal representative of the person.
Based on the principle of equality, the competent public authorities shall ensure the necessary financial resources, and take specific measures as to ensure the direct and unlimited access to services. The Ministry of Labour, Family and Social Protection through the General Directorate for the Protection of Persons with Disabilities and the other local and central public authorities shall ensure the necessary conditions for the social integration and inclusion of disabled persons.

2.2. Monitoring the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

Within the Law 221/2010 for the Ratification of the Convention the monitoring mechanism was established. The Ministry of Labor, Family and Social Protection through the General Directorate for the Protection of Persons with Disabilities is designated the central authority for the implementation of the UNCRPD, incorporating functions of both coordination mechanism and focal point. The independent monitoring mechanism is not established yet.

2.2.2 The involvement of civil society in the monitoring process (Art. 33.3)

Civil society will be involved through the independent mechanism to protect, promote and monitor the UNCRPD.

The NGOs of persons with disabilities are consulted in regard to all legislative measures for persons with disabilities in the following areas:

- For activities related to the protection and promotion of the rights of disabled persons, the Ministry of Labour, Family and Social Protection and the local and central public administration authorities maintain dialogue, collaboration and partnership relationships with the non-governmental organizations of persons with disabilities or

which represent their interests, and with the cult institutions recognized by law with activity in this field.

- The Council for the analysis of the problems of disabled persons is an advisory body attached to the General Directorate for the Protection of Persons with Disabilities, formed by representatives of central public administration authorities as well as representatives of civil society.

- The task of the Council is to analyze problems related to the protection of disabled persons, to propose measures regarding the improvement of their living conditions and to notify the competent bodies of the breach of the rights of disabled persons.

The Ministry of Labour, Family and Social Protection through the General Directorate for the Protection of Persons with Disabilities may conclude partnerships with non-governmental organizations of disabled persons, which represent their interests or perform activities in the field of promotion and defense of human rights.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

The Ministry of Labour, Family and Social Protection through the General Directorate for the Protection of Persons with Disabilities is collecting statistics on the number of persons with disabilities, the kinds of disabilities, the number of residential institutions and the living conditions they offer, the number and type of alternative services, data regarding the implementation of specific quality standards in residential institutions and data regarding the costs.

Slovakia

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

Currently, no contact point has been established in the Slovak Republic to deal with implementation of the Convention.

However, the discussion on the modalities of implementation of the Convention is very intense. Several meetings discussing the modalities concerning institutional infrastructure have already taken place: for instance a Round Table organized by the Slovak Disability Council, the umbrella organization for NGOs working for people with various types of disability (March 2011), whose recommendations were also introduced publicly at the constituting meeting of the Government Council for Human Rights, Minorities and Gender Equality (April 2011); the meeting of the representatives of the Ministry of Labour, Social Affairs and Family of the Slovak Republic and the Ministry of Foreign Affairs of the Slovak Republic (March 2011); the meeting of the representatives of the Ministry of Labour, Social Affairs and Family of the Slovak Republic and the Government's Office of the Slovak Republic (July 2011) to mention a few.

The core document in this respect is the "Proposal for the implementation of Article 33 of the Convention on the Rights of Persons with Disabilities", introduced by the Disability Rights Center on the second meeting of the Government Council for Human Rights, Minorities and Gender Equality on June 27th 2011. The document offered analysis of the resource and competence implications with respect to several governmental bodies (the Office of the Prime Minister, the Office of the Deputy Prime Minister for Human Rights and National Minorities, Ministry of Labour, Social Affairs and Family of the Slovak Republic) which are considered for the position of the Central Focal Point, as well as that of specialized (secondary) focal points at the respective ministries.

2.1.2. National strategies to implement the UNCRPD

No strategy on the Convention implementation has been developed so far. However, a new National Programme of developing the living conditions of persons with disabilities has been under preparation, based on the Convention on the Rights of Persons with Disabilities and could serve as a national strategy. By Resolution no. 158 of 2 March 2011, the Government approved the Statute of the Government Council for Human Rights, Minorities and Gender Equality and also abrogated the Council of the Government for people with disabilities. The role and functions of the Council of the Government for people with disabilities have been taken over by the Committee for People with Disabilities, a standing expert body of the newly established Government Council for Human Rights, Minorities and Gender Equality. The Statute of the Committee for People with Disabilities has been approved by the Council on June 27th 2011.

The newly constituted Committee for Persons with Disabilities made the finalization of the National Programme for the Development of living conditions of persons with disabilities its priority, in line of which the Committee established a specialised expert working group to deal with this issue in more detail. The deadline for completion of the National Programme

for the Development of living conditions of persons with disabilities is envisaged for the end of 2012.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The Slovak Republic has currently not established an unambiguous, independent mechanism for promoting, protecting and monitoring the Convention. Some conclusions in this respect can be however drawn from the recently approved Proposal for a Creation of the Nationwide Strategy on the Protection and Promotion of Human Rights in the Slovak Republic, which suggests mandating the current parliamentary ombudsman institution (The Public Defender of Rights) with the task of independent promotion, protection and monitoring of the rights of people with disabilities by creating a post of vice-ombudsman for disability issues. The finalization of the Strategy is set for the end of September 2012.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

Civil society, in particular persons with disabilities and their representative organisation (in accordance with Article 33 (3) of the Convention) have been preparing for the monitoring process through the National Council of Persons with Disabilities.

Apart from this, also the Statute of the Committee for People with Disabilities follows the principles of parity and direct participation, thus creating wide and relevant possibilities for people with disabilities to participate and influence the work of the Committee.

The Statute recognizes six different groups of organizations representing different types of disability - intellectual disability, chronic illness, mental and behavioral disorder, hearing impairment, physical disability, and visual impairment. According to the Statute, two representatives, elected by organisations representing different types of disability, became members of the Committee following a call for interest opened on July 4th 2011. In order to make the call widely accessible, it was marketed both on the internet and in one of the nationwide daily newspapers.

An initiative to create a nationwide coalition of organisations of people with disabilities and the independent monitoring mechanism shall be discussed during a thematic meeting of the Committee for People with Disabilities scheduled for February 21st 2012 (focusing on UNCRPD implementation process and related issues).

2.2.3. Collecting statistics and/or developing indicators (Article 31)

At present, there is no national coordination of disability research in Slovakia either in terms of research institutions or explored topics. The final available research products on issues related to disability and the lives of the disabled and their families are rather matter of individual research initiatives of various, mainly publicly-funded institutions. For working purposes, these can be divided into several groups:

- *Sectoral Disability Research* (these are mostly different research projects thematically linked to the selected topical issues addressed in the scope of individual sectoral Ministries, such as sector of Labour, Social Affairs and Family, sector/ of Education, Science, Research and Sport, Ministry of Culture, etc.)

- *Disability Research conducted by universities and the Slovak Academy of Sciences* (this refers to different research projects implemented with the support of national grant schemes, such as VEGA, and international grant schemes)

- *Research implemented by independent and civil society organizations* (such as IVO/Institute for Public Affairs, SOCIA Foundation, Slovak Disability Council etc.)

The Statistical Office of the Slovak Republic does not collect data regarding people with disabilities disaggregated by gender, age, education or various types of disability (physical, visual, auditory, intellectual/learning, mental, internal), the cause of the disability, level of independence, economic activity or whether they live in home/community-based environment/independent living or in institutional settings. In the framework of the ESSPROS methodology – European System of Integrated Social Protection Statistics, there are data on the number of recipients of disability pensions, including recipients of disability pension for youth, and data on expenditure on disability social benefits.

In 2009, the Statistical Office conducted a pilot project that aimed to prepare and test the Slovak version of the European Disability and Social Integration Module (EDSIM). Given the fact that testing of the Slovak version of questions of the module was carried out on a small sample, the results of the survey were not representative and were not published. Outputs from the project were provided to Eurostat.

Slovenia

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Art. 33.1)

The Ministry of Labour, Family and Social Affairs was designated as the focal point within government for matters relating to the implementation of the Convention in accordance with the Act on ratification of UNCRPD and the Protocol, in accordance with the Slovenian system of disability policy.

Within the National Assembly there is a special Committee on Labour, the Family, Social Policy and Disability and within the National Council of the Republic of Slovenia there is a special independent Commission for Social Care, Labour, Health and the Disabled (the current president of this commission is a person with a disability).

The framework of organisations which are also dealing with disability issues in Slovenia is composed of the National Council of Disabled People's Organisation of Slovenia (NSIOS) with its representative and other disabled people's organisation working on a national level and of several expert and governmental institutions.

2.1.2. National strategies to implement the UNCRPD

In 2006, the Slovenian Government accepted the Action Programme for Persons with Disabilities 2007-2013. The program is based on the Convention on the Rights of Persons with Disabilities, as well as on other UN documents, Action Programme of the EU for persons with disabilities and on the Action Programme of the Council of Europe. Slovenian Government approves a yearly report on implementation and control of the objectives and measures of APPD (report for 2010 – in Slovenian only).

The purpose of Slovenia's Action Programme for Persons with Disabilities is to promote, protect and ensure the full and equal enjoyment of all human rights by persons with disabilities, and to promote respect for their inherent dignity. The program comprises twelve fundamental objectives together with 124 measures, comprehensively governing all spheres of persons with disabilities life, and referring to the period 2007 – 2013.

The last section of Action Programme for Persons with Disabilities 2007-2013 (APPD) includes a list with several actions for the implementation and control of the objectives and measures laid down in the APPD. Participation of civil society is provided for in 2nd article: "ensuring that disabled people's organizations are fully involved in control procedures". Further to that a Disabled Organisations Act (article 4) prescribes that all the state institutions should consult with Disabled People's Organisations in all matters concerning the planning of national policy and actions to ensure equal opportunities and equal treatment of disabled people.

A special Governmental committee was established to control the implementation of actions laid down in the APPD and has the task to prepare an annual report to be send to the Ministry of Labour, Family and Social Affairs. Members of this committee are representatives of all

relevant ministries, institutions and of the NSIOS, as representatives of persons with disabilities.

The goals of the Action Programme for persons with disabilities 2007-2013 are to:

1. Expand awareness throughout society regarding persons with disabilities, their contribution to the development of society, rights, dignity and needs;
2. Ensure that all persons with disabilities have the right to decide, on an equal basis with others and without discrimination, where they wish to live and have the right to fully participate in community life;
3. Ensure that persons with disabilities have access to the physical environment, transport, information and communications;
4. Ensure, on an equal basis with others and without discrimination, an inclusive educational system at all levels and lifelong learning;
5. Ensure that persons with disabilities have access to work and employment without discrimination in a work environment that is open, inclusive and accessible;
6. Ensure that persons with disabilities have an adequate standard of living, financial assistance and social security;
7. Ensure to persons with disabilities effective health care;
8. Enable persons with disabilities' full inclusion in cultural activities and collaboration in the area of accessibility of cultural materials on an equal basis with others;
9. Ensure persons with disabilities' participation in sports and cultural activities;
10. Ensure that persons with disabilities can participate in the religious and spiritual activities of their communities on an equal basis with others;
11. Strengthen the position of organizations of persons with disabilities;
12. Detecting and preventing violence and discrimination against persons with disabilities.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

According to Article 28 of the Equalization of Opportunities for persons with Disabilities Act (Official Gazette, 94/2010), the Council for Persons with Disabilities of the Republic of Slovenia (hereinafter: Council) shall be an independent tripartite body; it shall be composed of representatives of DPOs, representatives of professional institutions in the field of protection of persons with disabilities and representatives of the Government of the Republic of Slovenia. The tasks of the Council shall include promotion and monitoring the implementation of the Act Ratifying the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention on the Rights of Persons with Disabilities, too.

The Act provides that “the ministry responsible for the protection of persons with disabilities shall perform professional, administrative and technical tasks for the Council” and that “funds for the work of the Council shall be provided from the budget of the Republic of Slovenia”.

Until the establishment of the Council in 2013, the Government Council for the Disabled will perform its functions.

Big efforts to protect, promote and monitor the UNCRPD are provided by NSIOS whose mission is the systemic implementation of human rights of disabled people and their legal representatives as well as full inclusion and equality of disabled people in all social areas. In this sense NSIOS is also constantly pursuing to examine Slovenian legislation and provide initiatives for its amendments in accordance with the interests of the disabled; to participate in the preparation of new legislation and to verify whether the interests of disabled people and their organisations are adequately taken into account in the proposed laws. NSIOS also encourages the provision of equal opportunities for disabled persons in the society and is always asserting the principle "nothing about disability without disabled".

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

Civil society and in particularly persons with disabilities and their representative organizations are involved and fully participate in the monitoring process through the Government Council for persons with disabilities of the Republic of Slovenia. They may also submit proposals directly to the drafts of Acts, to the Programmes and are participating at working groups.

The Government Council for Persons with Disabilities ensures that persons with disabilities are given due consideration in all national programme documents and gives expert opinions on proposed acts and implementing regulations.

Besides, the Council discusses all legal acts concerning the status of persons with disabilities in different stages of drawing up and adoption, it monitors the implementation of adopted legal acts and draws attention to problems and deficiencies that arise in the process. Within international cooperation the Council keeps itself informed of new developments in the EU concerning persons with disabilities (reports of ministries, NSIOS and representative organisations of persons with disabilities). The Council considers expert reports of institutions operating in the field of protection of persons with disabilities. It draws up opinions and positions on documents the relevant ministries prepare for the Government and on initiatives and proposals submitted to it by disability organisations, social economy organisations, professional institutions and individuals.

The Council is tripartite – it consists of representatives of representative disability organisations, Government representatives and experts. Of fifteen members, five are representatives of organisations of persons with disabilities.

Under the Slovenian Act on disability organizations adopted in 2002, Article 4 on Engagement to consult disability organisations provides that "Disability organizations participate in shaping the national policies and measures for providing equal opportunities and equal treatment of persons with disabilities. National authorities consult disability organizations on all matters from previous paragraph" Furthermore Article 10 states that, disability organizations among other define interests and defend the needs of persons with disabilities on all levels concerning the life of disabled persons and contribute to the awareness of general public and have an impact on changes in favour of disabled persons, plan, organize and perform program

Representative and other disability organizations functioning on national level can join into a national council of disability organizations - National Council of Organisations of Persons

with Disabilities. The goal of the Council is to coordinate the interests of all persons with disabilities in the country, respecting the autonomy of each disability organization and to represent them in the dialogue between professional associations, national authorities, public institutions and other stakeholders. The National Council proposes candidates for the representatives of persons with disabilities in the authorities of national institutions and authorities of international organizations and cooperation, and performs other commonly agreed activities.

The government and line ministries consistently respect this provision and consult the representatives of representative disability organizations on all important issues. Also public discussions on preparatory acts are being held at the same time.

2.3. Collecting statistics and/or developing indicators (Article 31)

Statistics and data are collected by different institutions, for example by Ministry of Labour, Family and Social Affairs; the Employment Service of Slovenia; the Pension and Disability Insurance Institute of the Republic of Slovenia; the Statistical Office of Republic of Slovenia; the Fund for the Promotion of the Employment of the Disabled; the Health Insurance Institute of Slovenia; the Social Protection Institute of the Republic of Slovenia; the University Rehabilitation Institute – Soča, etc.

Spain

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The focal point for the UNCRPD is the Ministry of Foreign Affairs and Cooperation as well as the Ministry of Health, Social Services and Equality, through the Directorate-General for Disability Support Policies, which is responsible for the coordination of both.

The government coordination mechanism to protect, promote and monitor compliance with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is the National Disabilities Council. The National Disabilities Council was designated in 2009 as the body of reference for the promotion and monitoring of international legal instruments in matters of the human rights of persons with disabilities, and in particular the implementation of the UNCRPD but it existed before that date and it was used by the government as an instrument for the coordination between all the Ministries.

This is a consulting body made up equally of representatives of all of the ministries and representatives of persons with disabilities. It was created in 2004 by Royal Decree 1865/2004[16], which regulates the National Disabilities Council. It is assigned to the Ministry of Education, Social Policy and Sport and formalises the participation of the associative movement of people with disabilities, their families and the General State Administration in the definition and coordination of a coherent disability policy.

In particular, promoting equal opportunities and non-discrimination of people with disabilities is the task of this Council. To do so, and on account of the adoption of tzhe UN Convention, the original responsibilities of the National Council on Disability have been modified and extended through Royal Decree 1468/2007[17], of 2 November by adding the functions of constituting reference body for promoting and monitoring legal international instruments regarding the human rights for people with disabilities. The last modifications of the National Council on Disability were introduced by the Royal Decree 1855/2009[18], of 4 December. Furthermore, the Commission on Integral Policies on Disabilities was created in the Congress of Deputies.

Spain is made up of Autonomous Communities. Considering the distribution of competences between the central government and the autonomous regions, the Ministry of Health, Social Services and Equality holds periodic meetings with the general directors responsible for disability policies in each autonomous region, through the Directorate-General for Disability Support Policies. The Ministry thereby ensures coordination between both levels of administration. The approval and operation of a mechanism such as that of the joint work methodology between the national government and the general directorates of the autonomous

[16] www.mtas.es/sgas/Discapacidad/ConsejoDisca/RD1865-04.htm
[17] http://www.mtas.es/sgas/Discapacidad/ConsejoDisca/RD1865_04modif.pdf
[18] http://www.boe.es/boe/dias/2009/12/26/pdfs/BOE-A-2009-20890.pdf

regions in matters of disability encourage the putting into practice of the focal points and the obligations set forth in the UN Convention at the Spanish regional government level.

2.1.2. National strategies to implement the UNCRPD

Spain ratified the UNCRPD and the Optional Protocol, and has been incorporated into national law.[19]

In Spanish Law, the evolution of disability towards a social model had already occurred before the coming into effect on 3 May 2008 of the Convention. This evolution started with the adoption of the Law 13/1982 of 7 April, on Social Integration of Disabled Persons (LISMI) and culminates with the adoption of the Law 51/2003, 2 December, on equal opportunities, non discrimination and universal accessibility of people with disabilities (LIONDAU) and its implementing rules.

The Law 26/2011 for the normative adaptation to the UN Convention made progress in many areas, amending regulations and modifying several Spanish laws in response to the Convention, and including important positive action measures in health, housing, employment and other areas.

The first step taken within the global strategy for implementing the UNCRPD, was the creation of an inter-ministerial working group to draw up an integral study of Spanish law, with the objective of adapting it to the Convention's provisions. This group was approved by the Council of Ministers on July 10, 2009. It was presided over by the Ministry of Health and Social Policies (currently the Ministry of Health, Social Services and Equality) and included all the ministries. It was advised by the CERMI (Spanish Committee of Representatives of Persons with Disabilities). The work group conclusions contained basic information for the first Spanish Report sent to the UN Committee of the CRPD on 3 May 2010.

A permanent inter-ministry work group continues working in different areas such as education, justice, culture, etc. Specific forums were created in these areas like the Inclusive Education Forum which is working in the modification of the university law and the Justice and Disabilities Forum which is analysing matters of the article 12 of the UNCRPD.

The UN Committee on the Rights of Persons with Disabilities considered the initial report of Spain (CRPD/C/ESP/1) at its 56th and 57th meetings, held on 20 September 2011, and adopted concluding observations at its 62nd meeting, held on 23 September 2011, that constitute a framework to continue with the work of implementing CRPD in Spain.

The Spanish Disability Strategy 2012-2020, approved in November 2011, has been elaborated taking into account the principal areas of concern and recommendations made by the Committee, as well as the general targets established in Europe 2020 and the specifics of the EU Disability Strategy 2010-2020.

The III Action Plan for Persons with Disabilities is still in force, and sets the government's strategy for 2009-2012 in matters of disabilities; this falls within the framework laid down by the UNCRPD.

[19] boe.es/aeboe/consultas/bases_datos/doc.php?id=BOE-A-2008-6996

The Spanish Strategy of Action for the Employment of People with Disabilities 2008-2012 is another governmental initiative in order to promote quality employment for persons with disabilities and prevent any kind of discrimination in the labour conditions.

The periodic meetings with the general directors of the autonomous regions' governments allow to promote the measures for compliance with the Convention within their areas of authority, as part of their action plans for persons with disabilities.

All of the mechanisms began early in their work of promoting, protecting and monitoring the UNCRPD. One reflection of this was the joint Declaration[20] supporting the UNCRPD, signed by the Ministry of Foreign Affairs and Cooperation, the Ministry of Labour and Social Affairs (currently the Ministry of Health, Social Policies and Equality), CERMI and the ONCE Foundation.

At the same time, the dissemination of the UNCRPD has been a priority in the actions undertaken. Thus, the Convention has been published and distributed in different accessible formats: Easy to read (Real Patronato de Discapacidad and the CNSE Foundation), audio format (ONCE Bibliographic Service), Spanish and Catalonian sign language (Real Patronato de Discapacidad and the CNSE Foundation) and in Braille. Likewise, it has been translated into all of the official languages: Spanish, Basque, Galician and Catalonian. All these formats are available at: http://www.convenciondiscapacidad.es/convencionESPANA.html

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The Royal Decree 1855/2009[21], which modified the regulation of the National Disabilities Council mentioned above, designates it as the body of reference for the promotion and monitoring of international legal instruments in matters of the human rights of persons with disabilities, and in particular the implementation of the UNCRPD. The National Disabilities Council created the CERMI (Spanish Committee of Representatives of Persons with Disabilities), applying the provisions of article 33.2, as the first independent civil society organization. This also fulfills the provisions of article 33.3, concerning the monitoring and follow-up of the Convention's application in Spain.

2.2.2 The involvement of civil society in the monitoring process (Article 33.3)

The Ministry of Health, Social Services and Equality works very closely with civil society and promotes its involvement. Different mechanisms have been created, both on the Ministry's initiative and by the principal organizations of representatives of persons with disabilities. Among them are:

- The participation of the academic sector, through Madrid's Carlos III University, in the elaboration of reports relative to Spanish legislation that needs to be adapted to the provisions of the UNCRPD.
- The permanent link with the European Disability Forum (EDF) through the Social and International Relations Area of the ONCE Foundation, headquartered in Brussels.

[20] http://sid.usal.es/idocs/F3/LYN10297/3-10297.pdf
[21] http://www.boe.es/boe/dias/2009/12/26/pdfs/BOE-A-2009-20890.pdf

- The web page[22] created by the CERMI to offer specialized information on the UNCRPD, which represents a fundamental instrument for promoting, disseminating and raising awareness of the principles of this agreement.

All projects on regulations and general plans concerning people with disabilities are consulted through the National Disability Council, in which organizations of people with disabilities and their families are represented.

People with disabilities have access to all public means of training that are of interest and likewise, they have programmes financed by Public Administrations and other collaborators that are undertaken by their organizations in order to favour their competence and skills.

Dialogue is open permanently by these Organizations and those who represent them.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

In Spain, the National Statistics Institute (INE in its Spanish initials) has been carrying out a macro survey on disabilities since 1986. The updated edition of this survey was published in 2008, under the title: Encuesta sobre Discapacidades, Autonomía personal y Situaciones de Dependencia[23] (Survey on Disabilities, Personal Autonomy and Dependent Situations).

As a consequence of Spain's ratification of the UNCRPD, and as relates to Article 31, the government initiated a project to include the disabilities indicator in all of the active population statistics produced by the INE.

A new yearly statistical operation called Employment of Persons with Disabilities (EPD 2008: Empleo de las Personas con Discapacidad[24]) was first published on 20 December 2010 as a pilot project. This data collection, elaborated by the Statistics National Institute of Spain (INE), focuses on the employment of people with disabilities, but also includes information about educational levels of people with disabilities aged 14-64. EPD is prepared through the exploitation of data from the Economically active population survey (EPA) and the National Database of people with disabilities (BEPD) with the collaboration of Spanish Committee of People with Disabilities and ONCE Foundation (Spanish National Organization of Blind).

The results became from the crossing statistics data of the two sources mentioned above (EPA and BEPD) so that it was possible to combine the socio-demographic and labour force information with the people who has recognized a legal disability situation equal or up to 33% in the Spanish legislation. The use of survey and administrative data have the advantage of less budget cost and also make less burden in the answers of the informers.

In December 2011, INE published the detail results for year 2009-2010 of the EPD statistical operation. INE also receives information about persons with disabilities and their situation

[22] http://www.convenciondiscapacidad.es

[23] http://www.ine.es/jaxi/menu.do?type=pcaxis&path=/t15/p418&file=inebase&L=0

[24] **http://www.ine.es/jaxi/menu.do?type=pcaxis&path=%2Ft22%2Fp320%2Fa2008%2F&file=pcaxis&N=&L=0**

through bodies like Observatorio Estatal de la Discapacidad [25], Real Patronato de la Discapacidad[26] and the information system named SID[27].

[25] http://www.observatoriodeladiscapacidad.es/
[26] http://www.rpd.es/
[27] http://sid.usal.es/

Sweden

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The Division for Family and Social Services of the Ministry of Health and Social Affairs is responsible for the co-ordination of disability policy within the Government and has been appointed as the national focal point for matters related to the United Nations Convention on the Rights of Persons with Disabilities.

The Family and Social Services Division of the Ministry of Health and Social Affairs is also leading a working group within the Government consisting of civil servants representing the following ministries: Ministry of Employment, Ministry of Culture, Ministry of Justice, Ministry of Education and Research, Ministry of Health and Social Affairs, Ministry of Finance and the Ministry of Enterprise Energy and Communication. The purpose of this group is to mainstream disability policy within the Government.

Furthermore, The Swedish Agency for Disability Policy Coordination (Handisam) plays an important role in co-ordinating, monitor and accelerating disability policy by supporting the sectoral authorities tasked with implementing the national plan for disability policy.

2.1.2. National strategies to implement the UNCRPD

The current disability policy was established already in the year of 2000 when the Swedish Parliament passed the Government Bill “From patient to citizen: a national action plan for disability policy”. This decision by the Parliament represented a step of fundamental importance for Swedish disability policy. Since then the objective of disability policy has been a society that makes it possible for disabled people to fully participate in the life of the community. The aim is to mainstream a disability perspective in all sectors of society by identifying and removing obstacles to full participation for people with disabilities. Another goal is to prevent and fight discrimination against people with disabilities and to make it possible for boys and girls, men and women to lead independent lives and to make their own decisions about their own lives.

The ten-year action plan ended in 2010. The Government has decided a strategy for the future disability policy during 2011. The implementation of the UNCRPD forms the basis of the future disability policy. In the strategy the Government presents a number of strategic objectives for disability policy in nine priority areas for the coming five-year period: physical accessibility, IT policy, social policy, education policy, labour market policy, the judicial system, transport policy, public health policy, and culture, media and sport policy.

Within these areas the strategy defines the direction and give concrete form to how society’s measures will be implemented, coordinated and consolidated, and continuously monitored in order to develop disability policy.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

In October 2010, the Delegation for Human Rights in Sweden presented its final report with proposals on, inter alia, how the system for national implementation of human rights can be strengthened. One of the proposals of the Delegation was the establishment of a national institution for human rights. According to the proposal, such an institution should be provided with a broad mandate to protect and promote human rights according to all human rights conventions ratified by Sweden, including the CRPD. The Delegation's report features contributions from a wide range of actors in society and has also been the topic of a consultation process during the autumn of 2011. At present, the Delegation's proposals are being considered within the Government Offices as part of the elaboration of Sweden's third human rights action plan, which is planned to be finalised during 2012. The proposal of establishing a national human rights institution with the mandate to protect and promote the rights under the CRPD and other human rights conventions is being considered within that context.

In the meantime the responsibility of protecting and promoting the rights proclaimed in the CRPD lies within existing state agencies in accordance with their respective mandates. In that context, the Family and Social Services Division of the Ministry of Health and Social Affairs and the Agency for Disability Policy Coordination (Handisam) play an important role.

2.2.2. The involvement of civil society in the monitoring process (Art. 33.3)

The Government has established a committee as a forum for mutual information and discussions (according to standard rules 17 and 18). The Minister for Elderly Care and Public Health at the Ministry of Health and Social Affairs, who is responsible for disability policies, is chairing the committee which is composed of members of the Swedish disability organisations together with State Secretaries from seven Ministries. Members of the committee meet four times a year and the agenda for the meetings are prepared jointly between the government and the disability movement.

The co-operation with people with disabilities and their representative organisations is of great importance. In an agreement between the Government, non-profit organisations in the social area and the Swedish Association of Local Authorities and regions, it is stated that the relationship between the Government and the non-profit organisations is to be characterised by responsibility and mutuality, be based on the circumstances of both and utilise the perspectives and expertise of both. The agreement also contains a description of the principles which should apply to cooperation between the disability movement and the Equality Ombudsman. At the moment the interacting between the Government and people with disabilities and their representative organisations are being under discussion in order to develop the dialogue in accordance with the Convention.

In almost all local municipalities there are local councils dealing with disability policies.
The Swedish Agency for Disability Policy Coordination (Handisam) has the task to raise awareness about the UN Convention amongst people with disabilities, authorities, politicians and stakeholders throughout the municipalities and county councils. In 2010 Handisam was granted slightly more than 190 000 EUR for this purpose.

The leading principle is dialogue and before any major step is taken in the policymaking process the dialogue intensifies with different kinds of public debates. In the governments public inquires civil society and disability organisations are among the respondents.
The Swedish Disability Federation has been granted 5,3 millions SEK from The Swedish Inheritance Fund to run a project with the purpose of raising awareness about the UN Convention amongst people with disabilities, authorities, politicians and stakeholders. Disability organisations are also frequently used as bodies to which a proposed measure is referred to for consideration. Civil society usually produces shadow reports in connection to the Governments reports, which are given high priority. In almost all local municipalities there are local councils dealing with disability policies.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

Statistics Sweden (SCB) is a governmental administrative agency under the Ministry of Finance. The agency supplies statistics for decision making, debate and research to ministries and other customers. Besides producing and communicating statistical data, it is tasked with supporting and coordinating the Swedish system for official statistics. The agency also produces national population studies. Another state agency that produces reports related to people with disabilities is the Swedish National Institute of Public Health. The Institute works to promote health and prevent ill health and injury, especially for population groups most vulnerable to health risks. The institute produces reports on public health on a regular basis.

The definition of disability in Sweden is related to the environment and not to the diagnoses or level of impairment of the individual. The statistics that are provided in the field of disability can therefore be seen as somewhat scattered or fragmentised. You would find rather precise statistics in connection to different support system or special support measures directed to a well defined group of persons. However, people with disabilities that are not entitled to, or chose not to receive support within the social service system or in the labour market, would be difficult to find within the existing statistics. Some groups within the disability sector, such as persons with minor cognitive disabilities or group of persons with psychiatric disabilities would therefore be very hard to define.

There are continuously a lot of individual studies made in the field of disability. This is of course an opportunity to extract trends or indication of problems also for a broader group of people. Still, there is a need to strengthen the provision of longitudinal statistics in the field of disability. One way of doing this is to use general population studies combined with a well defined screening process to distinguish if a person might be classified as a person with disability or not. Screening questions would probably also be able to roughly distinguish what kind of impairment is causing the disability.

To promote this work the government is planning to deal with related issues of methodology. The government is also considering ways to find indicators that will enable monitoring of this group and their performance/situation in those fields where statistics are underdeveloped.
The general strategy for Swedish disability policy is to include disability into all relevant political areas. Therefore there is also a need to measure the development of the society from the perspective of accessibility and inclusion of persons with disabilities. To promote this the governmental authority Handisam is developing a system of indicators that will measure the progress of accessibility for persons with disability in a broad range of areas.

There will always be a need for special studies as a complement to statistics based on the population. There have been initiatives to create a more holistic system for provision of statistics and data in the field of disability. A number of legal restrictions is however preventing interconnection of such a coherent statistical system. This is a difficult balance between protection of personal integrity and needs of data and a question that the government is continuously considering and investigating.

Furthermore, the Delegation for Human Rights and the Swedish Agency for Disability Policy Coordination have recently finished a project on indicators for the implementation of certain selected human rights. The project also includes indicators relating to the rights of persons with disabilities.

United Kingdom

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The Office for Disability Issues (ODI)[28] is the designated focal point within the United Kingdom Government for matters relating to implementation of the Convention. It also fulfils a coordination role, liaising closely with other Government Departments and the UK's Devolved Administrations, (in Northern Ireland, Scotland, and Wales), on matters relating to the Convention. For example, ODI coordinated the UK's report on implementation of the Convention and continues working with other Government Departments and the Devolved Administrations on coordination issues with a view to avoiding duplication, and using existing co-ordination structures where appropriate.

The responsibility for actively implementing the Convention in respect of areas that fall within their policy remits rests with individual Devolved Administrations and Government Departments.

Ministers, ODI and officials in other Government Departments, regularly meet disabled people and their organisations to discuss a wide variety of issues including the Convention. Similar arrangements operate in the Devolved Administrations.

2.1.2. National strategies to implement the UNCRPD

The UK Government is developing an overarching Disability Strategy to coordinate work towards disability equality. Disabled people's rights as set out in the Convention will be an integral part of the Strategy. The Strategy will demonstrate the UK Government's commitment to overcoming the barriers which prevent disabled people from fulfilling their potential and having opportunities to play a full role in society. It is likely to focus on three main areas identified by disabled people:

- Realising aspirations: ensuring appropriate support and intervention for disabled people at key life transitions, to realise disabled people's potential and aspirations for education, work and independent living.
- Individual control: enabling disabled people to make their own choices and have the right opportunities to live independently; and
- Changing attitudes and behaviours: promoting positive attitudes and behaviours towards disabled people to enable participation in work, community life and wider society, tackling discrimination and harassment wherever they occur.

The aim is for the Strategy to be published later in 2012.

The Disability Strategy will mainly apply to England, except where issues are not devolved to Wales, Scotland and Northern Ireland. The devolved administrations will adopt there own strategic approaches to the achievement of disability equality.

2.2. Monitoring the UNCRPD

[28] http://www.odi.gov.uk/

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Art. 33.2)

The UK's four equality and human rights commissions, i.e. the Equality and Human Rights Commission (EHRC), the Scottish Human Rights Commission (SHRC), the Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI)[29], have been designated as the independent element of the UK's framework to promote, protect and monitor implementation.
The four Commissions, as the independent element of the UK framework, are developing their plans in respect of promoting, protecting and monitoring implementation of the Convention in the UK. The four Commissions meet regularly and where they consider it appropriate to do so, co-ordinate their activities. For example, in January 2010 the SCHR ran an event on the Convention in conjunction with the EHRC's Scotland Office and the Scottish Government.

The EHRC has information on its website about the Convention, and how its work relates to the Convention and its role within the framework to promote, protect and monitor implementation. The EHRC had worked to promote the Convention, for example by: hosting conferences to raise awareness of the Convention; publishing their 'Hidden in plain sight – Inquiry into disability related harassment' report (August 2011); producing 'What does it mean for you?' guidance about what the Convention can mean for disabled people and their organisations (published Summer 2010); and working with legal professionals and legal advisors to increase awareness and use of the Convention.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

The UK government recognises that the involvement and participation, of disabled people and their organisations is crucial for the success of the Convention. Departments and Devolved Administrations are actively encouraged to involve disabled people in policy development.

The UK government is developing a new Disability Strategy aimed at enabling disabled people to fulfill their potential and have opportunities to play a full role in society.

The 'Fulfilling Potential' discussion document published on 1 December 2011 asked disabled people, their organisations and those who support disabled people to explore how the new disability Strategy should be framed and what actions would be both realistic and have the greatest impact. http://odi.dwp.gov.uk/odi-projects/fulfilling-potential.php

The Strategy will build on previous involvement of disabled people including the Independent Living Strategy in England and Wales and the Roadmap as reported in previous UK contributions to HLG reports.

Scotland and Northern Ireland have involved disabled people and their organisations in the development of their own disability strategies covering areas where powers are devolved.

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[29] www.equalityhumanrights.com/
http://www.nihrc.org/
http://scottishhumanrights.com/
http://www.equalityni.org/site/default.asp?secid=home

2.2.3. Collecting statistics and/or developing indicators (Article 31)

In December 2011 the UK has published the baseline results of fieldwork conducted between June 2009 and March 2011 on the Life Opportunities Survey (LOS). This survey aims to collect information on disabled and non-disabled people's life opportunities, covering areas such as work, education, social participation and the use of public services. It also aims to identify the reasons why people do not take part in work or leisure activities that they would like to, or why people experience difficulties with using public services. The information provided will be used to help target policies and resources where they are needed. http://odi.dwp.gov.uk/disability-statistics-and-research/life-opportunities-survey.php#how

European Union

2.1. Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

On 26 November 2009, the Council of the European Union adopted the Decision[30] concerning the conclusion, by the European Union, of the UNCRPD. It designates the European Commission as a focal point, both vis-à-vis Member States to the extent of Union competence as well as to the Union's institutions. On the 2 December 2010, the Council adopted the Code of Conduct, which further specifies internal arrangements for the implementation and the representation of the EU.[31] Point 11 in the Code of Conduct further elaborates the role of the EU focal point. The adoption of the Code of Conduct enabled the EU completing the procedure of conclusion of the Convention by depositing its instruments of formal confirmation with the UN Secretary General in New York on 23 December 2010. As a party to the Convention, it is currently working on implementing the UNCRPD to the extent of the EU's competences. It also works to promote a stronger and better coordination within its services, with the other EU institutions and with the Member States. Coordination for the implementation of the UN CRPD within the EU institutions takes place within the ad-hoc committee of CPAS. The Council within its relevant working group allows for coordination with the Member States, also with the possible involvement of the Disability High Level Group.

The Code of Conduct sets out certain aspects of the coordination between the EU and the Member States, especially with regard to the coordination in establishing positions relating to the UNCRPD (point 6), coordination of speaking and voting arrangements, and with respect to monitoring and reporting.

2.1.2. Strategies to implement the UNCRPD

On the 15 November 2010 the European Disability Strategy for the years 2010-2020 was adopted. It aims at ensuring effective implementation of the UN CRPD. It also marks a renewal of the EU's commitment to improve the situation of citizens with disabilities, sets the work plan and priorities for the coming years. The overall aim of the Strategy is to empower people with disabilities so that they can enjoy their full rights, and benefit fully from participating in society and in the European economy, notably through the Single market. It sets clear objectives to remove the barriers persons with disabilities meet in their everyday life.
The specific measures over the next decade are clustered around eight priority areas dealing with (1) Accessibility, (2) Participation, (3) Equality, (4) Employment, (5) Education and training, (6) Social protection, (7) Health, and (8) External Action.

The Strategy is accompanied by a Commission Staff Working Document that sets out a list of actions, with respect to each of the eight priority areas, for the first five years of the Strategy's

[30] Council Decision 2010/48/EC, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:023:0035:0061:EN:PDF

[31] Code of Conduct between the Council, the member States and the Commission setting out internal arrangements for the implementation by and representation of the EU relating to the UNCRPD

period (2010-2015).[32] Each action is also given an indicative timing. Progress in the implementation of those actions is subject to regular review, via the DHLG and the Commission's Inter-service group on Disability. The Commission will issue a progress report by the end of 2013. This, combined with the EU report to the UN Committee on the implementation of the Convention, due in 2013, will provide an opportunity to revise the Strategy and the actions. A further report is scheduled for 2016.

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

Paragraph 13 of the Code of Conduct[33] setting out the intra-EU arrangement for the implementation of the UN Convention provides that the Commission shall propose in due course an appropriate framework (for one or several independent mechanisms), taking into account all relevant EU institutions, bodies and agencies[34].

With a view to setting up a framework at EU level, the Commission has identified four separate existing EU institutions and bodies that currently exercise the tasks of promotion, protection and monitoring under their respective mandates:
- the European Parliament's Petitions Committee,
- the European Ombudsman,
- the European Commission,
- the EU Agency for Fundamental Rights (FRA).

They would form "**the EU framework**", together with the European Disability Forum (EDF), the EU wide representative organisation of persons with disabilities, in order to ensure the direct involvement of persons with disabilities and their representative organisations as required by art. 33.3 of the Convention[35].

The Commission's proposal was presented to the member states in COHOM on 25 January 2012 and is still under discussion after a second COHOM meeting on 16 May 2012.

The EU framework's mandate covers areas of EU competence, and it is a complement to the national frameworks and independent mechanisms which bear the main responsibility for the promotion, protection and monitoring of the UNCPRD in the Member States.

The EU framework will carry out its tasks with respect to:

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[32] SEC(2010) 1324 final

[33] Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities, OJ C 340, 15.12.2010, p. 11.

[34] Hereafter, the term "institution" will be used for simplicity, except where reference is made to the specific Treaty provisions.

[35] the Council, in point 23 of its conclusions on the European Disability Strategy, "*Support of the implementation of the European Disability Strategy 2010-2020"*, 3099th Employment, Social Policy, Health and Consumer Affairs Council meeting Luxembourg, 17 June 2011 invited the Commission to involve civil society, in particular persons with disabilities and their representative organisations, in the implementation of the Convention at the EU level, as well as in the required monitoring and reporting activities.

- EU legislation and policy[36] in those areas where the Member States have transferred competences to the EU. This will be the main area of the framework's actions;
- the implementation of the Convention by EU institutions in their capacity as Public Administration (for example in relation to their employees and in their interaction with the public).

The Commission's proposal aims to ensure a simple, efficient and practical framework which, while respecting the separation of competences between the EU and the Member States, acts in complementarity with the frameworks and Independent Mechanisms established at member states' level, maximises the synergies between the work of existing bodies and institutions, and avoids an undue administrative and financial burden[37].

Point 12 in the Code of Conduct sets out certain aspects of the monitoring and reporting, especially with regard to the respective competence of the EU and the Member States. It highlights the complementarity of EU and Member State reports and the need to work in the spirit of sincere cooperation. This means for instance providing each other with the reports for information, on a confidential basis, before submitting them to the Committee on the Right of Persons with Disabilities, and, on request, assisting each other with experts to the Delegations for the examination of the Reports by the Committee.

2.2 The involvement of civil society in the monitoring process (Article 33.3)

In line with the principle of the EU Disability Strategy: "nothing about people with disabilities without people with disabilities" as well as with the Convention's obligation[38] to consult and involve representative organisations of disabled people when implementing the UN Convention, the Commission ensures participation of persons with disabilities, their families, their European representatives and relevant stakeholders in the development and implementation of disability policies.

People with disabilities are consulted through different channels and tools, such as, communications, consultation documents or participation in expert groups. Representatives of civil society and in particular of EU-level disability organisations are full members of the High Level Group on Disability where they have the possibility to raise their concerns, contribute to discussions, and co-draft policy documents.

In the development of the European Disability Strategy 2010-2020 there was extensive consultation with civil society, in particular representative organisations of persons with disabilities at European level. Besides the consultation with civil society in the DHLG, all NGOs active in the field of disability that are co-financed through the EU PROGRESS programme were invited to put forward their views as well as to dedicate part of their annual work programmes to activities related to the preparation of the new strategy, there was a consultative workshop with the main stakeholders, with participants representing civil society, sectoral business representatives and the social partners and public online consultation, where 101 replies on behalf of a wide variety of civil society organisations were received.

[36] As illustrated in the EU declaration of competences annexed to Council Decision 2010/48 for conclusion of the Convention.
[37] As stated in the European Disability Strategy 2010-2020, Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions, "A renewed commitment to a barrier-free Europe", COM(2010) 636 final.
[38] Article 4.3

The yearly conference, the European Day of Persons with Disabilities, presents interested individuals and organisations advocating the rights of people with disabilities the opportunity to address their views to the European decision makers. In addition to the thematic discussion the conference expresses political commitment and offers networking possibilities. As the conference is organised by the Commission in partnership with EDF the positions of people with disabilities are considered at all stages. In 2011 the conference explored the way out of the financial and economic crisis from the perspective of persons with disabilities. Following up to the presentation of the Commission's proposals for the post-2013 Multiannual Financial Framework and the future of the EU's Cohesion Policy, it discussed how the European Union can support recovery for all in the context of Europe 2020. The European Day conference looked into how EU legislation, policies and funding can contribute both to promoting enjoinment of the rights enshrined in the UNCRPD and to finding a way out of the crisis.

The second edition of the Access City Award saw the participation of 114 cities from 23 EU countries – almost twice as many as for the inaugural edition in 2010. The project was endorsed by the EDF from the early phase of its preparation. Participation of civil society is an essential part of the Access City Award. First, the element of participation and involvement is reflected in the award criteria. One of the criteria looks at evidence of active involvement of people with disabilities, their representative organisations in the planning, implementation and maintenance of a city's accessibility policies and initiatives. In the selection procedure both at national level and also at the EU level, EDF representatives were actively involved.

The second Work Forum on the Implementation of the Convention of Persons with Disabilities, organised by the European Commission, took place in late October 2011. Civil society, DPO's in particular, was involved in the conception of the conference. The Forum focussed on the governance structures foreseen by Article 33, and in particular looked at how to coordinate the implementation of the Convention at both national and EU levels, analysing different aspects of coordination in three main sessions. The first session addressed implementation within the Member States; the second session was devoted to the coordination of the implementation at EU level; the third session, discussed issues of coordination in the process of reporting to the United Nations. The experience of the coordination with civil society in the preparation of parallel reports and the technical support provided by the International Disability Alliance were shared with participants.

The Work Forum benefited from active participation from a wide representation of Member States, from various Government Departments, NHRIs and a significant participation of people with disabilities largely through the European Disability Forum's (EDF) representative structures; it provided a platform for mutual learning, exchange of experience and provided an opportunity for constructive reflection and a dialogue on how to best involve persons with disabilities and their organisation.

The European Union also recognises that the empowerment of persons with disabilities needs sufficient financial support. The European Social Fund supports, among other things, projects to promote independent living, through staff training and modernising care systems. Furthermore, the Commission supports to running costs of various European organisations which have as their primary objectives to represent the interests of disabled people at Community level as well as organisations active in promoting equal opportunities for people with disabilities.

The European Union recognises the strength of European networks that lies in their capacity to gather and mobilise relevant members from different Member States into an open forum of discussion or exchange of expertise and experience able to inform and influence policy-making, as well as relaying EU action vis-à-vis network members.

Civil society has an important contribution to make towards effective implementation of the UN Convention. Making a difference requires a sustained, cohesive coalition capable of mobilising and analysing information, making that information available to key actors and mobilising many sources of influence. Representative organisations are in a central position to influence policy in the European Union and in the Member states through their national members. Influence is gained through the increased expertise and information which are important to policy formulation and implementation.

2.3. Collecting statistics and/or developing indicators (Article 31)

Based on data provided by Eurostat, the Commission estimates that there are up to 80 million EU citizens with disabilities. They constitute one of the largest categories of vulnerable citizens in the EU.

Presently the proportion of persons with disabilities tends to be in the order of 10%[39] of the working age population across the Member States, with current demographic trends likely to lead to a further increase.
Available evidence suggests that persons with disabilities suffer explicit or concealed discrimination or are at risk of discrimination.

1) They are socially and economically disadvantaged:
- Employment rates for persons with very severe and severe degrees of disability are respectively 19,5% and 44,1%
- Incidence of poverty for persons with disabilities is 70% higher than average[40]

2) The limitations to the ability of persons with disabilities to work carry a significant risk of isolation and exclusion
- The "benefit trap" appears to be a significant obstacle for labour market participation of the persons with disabilities.

3) The limitations of opportunities of persons with disabilities to participate fully in education carry a significant disadvantage for personal development
- Measures to facilitate full inclusion of persons with disabilities at all levels of education would considerably improve their standing in the labour market and their social inclusion

As the likelihood of having an impairment or a long-standing health problem increases with age, the current demographic trend is likely to lead to a further increase of the prevalence of

[39] According to the 2002 Labour Force Survey special module, Europe-wide average share of persons who see themselves as restricted in their functioning is 10.4% of the labour force. Further 5.2% have a long-standing health problem but do not see themselves as restricted. As incidence of disability increases with age, these proportions are higher among elderly persons.
[40] According to the 2004 EU-SILC data, over 17%of those aged 16-64 who were strongly limited in what they could do had income below the risk of poverty line compared to just over 10% of those not limited at all.

disability. Many areas mentioned above, such as content and structure of education, the norms for built environment and public spaces, leisure issues as well as social assistance are almost exclusively in the competence of the Member States. Often local authorities have a decisive role in monitoring these norms and delivering these services. The Member States are tackling these issues, but in different manners and to different degrees with very little coordination.

In order to ensure proper monitoring the collection of data is crucial. In this context and within Eurostat's annual work programme, activities in the European Statistical System (ESS)[41] will continue on further developing – through Partnership Health and in cooperation with international organisations – **Community statistics on disability and social integration** in order to provide the relevant and comparable statistical data needed to monitor the situation of people with disabilities.

More detailed statistical data on disability are also needed as part of health information in order to respond to the specific requirements inter alia those that result from the **Programme of Community Action in the field of Public Health (2003-2008)**[42]. Health information at Community level covers data ranging from health status - including disability – to health determinants, including demography, geography and socio-economic situations, personal and biological factors, and living, working and environmental conditions, paying special attention to inequalities in health. The development of the statistical element of health information is also integral part of Eurostat's annual work programme, with activities carried out in the context of Partnership Health and in cooperation with international organisations.
In general, the aim of producing comparable data on disability and on integration of people with disabilities into society can be achieved only by means of surveys that make use of common instruments. Health Interview Surveys (HIS) and Disability Interview Surveys (DIS) are widely accepted instruments that could provide comparable data for topics related to health, disability and social integration.

However, the main work related to disability statistics in 2007-2008 has been focused on development of the following initiatives:

European health and social integration survey (EHSIS)
The Council in its Resolution of 17 March 2008 on the situation of persons with disabilities in the European Union underlines that disability statistics are needed to establish a picture of the overall situation of persons with disabilities in Europe. Such statistical and research data allow informed disability policies to be formulated and implemented at the different levels of governance.

The Commission in its communication on a European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, {SEC(2010) 1323} {SEC(2010) 1324} emphasised that EU action will support and supplement Member States' efforts to collect statistics with a view to monitoring the situation of persons with disabilities. This action will be implemented through a call for tender (with 29/30 lots, one lot for each Member State, Norway and Iceland, plus a lot for coordination) to be launched in the second quarter of 2011.

[41] European Statistical System, see: http://epp.eurostat.ec.europa.eu/portal/page?_pageid=1153,47169267,1153_47183518&_dad=portal&_schema=PORTAL

[42] Decision No 1786/2002/EC of the European Parliament and of the Council of 23 September 2002 adopting a programme of Community action in the field of public health (2003-2008), OJEC L 271/10

2011 LFS ad-hoc module on employment of disabled people
The proposal was prepared by a Task Force. The aim of the module thus is to measure the extent of disabled people's participation in the labour market (and not to measure the prevalence of disabilities in general) following the current understanding of disability, in particular: 1) Limitation in work participation (in amount, type of work and transport to and from work) (3 variables), 2) Limitation in work participation related to health conditions or diseases (1 variables), 3) Limitation in work participation related to carrying out basic activities, 4) Use of or need for special assistance at work.

The common feature of these two actions is that the effort was made to incorporate/transfer the new concept of disability into questions and variables proposed. During the last three decades the conceptual approaches to the measurement of disability has changed. Three milestones in that evolution have to be mentioned 1) the medical model[43] ; 2) the social model[44] and 3) the biosocial model[45]. The biosocial model incorporated into the International Classification of Functioning, Disability and Health (ICF, WHO 2001) attempts to bridge the gap between the medical and social models. The biosocial concept was followed also by the UN Convention on the Rights of Persons with Disabilities.

ANED, Academic Network of Disability expert
The Commission supported in 2007 the establishment of an European Academic network of disability experts. The Network provides data collection, provides comments on policy papers and develops national and EU reports on the situation of persons with disabilities in Europe in a number of areas like employment, social inclusion and social protection, education, independent living, statistics and data collection. The network is also active on the development of indicators.

Particularly noteworthy are two key documents compiled by ANED, which have been thoroughly reviewed and updated in 2011:

- IDEE – Indicators of disability equality in Europe: the report includes presentation and discussion of 12 selected indicators; the main themes addressed are those of employment, post-compulsory education and household poverty. The study's key priorities were to populate and update a number of items of direct relevance to EU2020 indicators, and to present items of direct relevance to actions in the EU Disability Strategy (e.g. accessibility).

- Annotated review of European Union law and policy with reference to disability: the publication consists in a detailed review of EU legislation with reference to disability, from provisions in primary law to soft law instruments (Council recommendations, Parliament resolutions, or even studies or guidelines). The guiding principle for inclusion in the review was whether an instrument contributes to shaping European disability policy.

[43] Disability regarded as 'a restriction or lack of ability to perform normal activities, which has resulted from the impairment of a structure or function of the body or mind (concepts and definitions based on the medical model resulted in the International Classification of Impairments, Disabilities and Handicaps (ICIDH) in 1980
[44] Disability results from interaction between individuals and non-inclusive society
[45] The ICF (WHO 2001) states that disability is a complex phenomenon that is both a problem at the level of a person's body and a complex and primarily social phenomenon i.e. it is a disadvantage experienced by an individual resulting from barriers to independent living or educational, employment or other opportunities that impact on people with impairments, ill health or activity limitations (difficulty seeing, hearing, walking ..)

Furthermore, ANED is developing an online tool with an overview of European and national instruments relative to disability and the rights of persons with disability. The tool will allow to identify availability and contents of the main instruments needed for the implementation of the UNCRPD.

Civil society actions and strategies

2.1. Actions and strategies by civil society to implement the UNCRPD

The Confederation of Family Organisations in the European Union (COFACE) in 2011 dedicated several meetings of its working group *Inclusive policies for disabled and other dependent persons and their families* (COFACE-Disability) to the analysis of the UNCRPD. In particular, three policy positions were adopted:

- in April 2011, a policy position on the Family Dimension of the UN Convention on the Rights of Persons with Disabilities. The position undertakes a systematic analysis of the family dimension of the Convention, illustrating the main implications of the CRPD for the improvement of the rights and wellbeing of persons with disabilities and their families. The position intends to raise awareness on the scope and relevance of the Convention among family organisations, policy makers and other representatives of civil society. A factsheet and a book containing the position and the full text of the Convention were produced.
- COFACE identified guidelines for an effective implementation of the right to inclusive education and published a policy position on Inclusive education for persons with disabilities in line with Article 24 of the UN Convention.
- In December, COFACE released a policy position on Active ageing of Family Carers, in line with the European Year of Active Ageing and Intergenerational Solidarity. The position aims to stress the importance of the family carers and their specific needs, in line with the requirements of the Convention (among others in the Preamble and Art. 8 and Art. 28), to put families in the conditions of contributing to the full and equal realisation of the rights of persons with disabilities.

Some of COFACE member organisations (Unapei, UNAFTC, APF) also develop activities concerning the UNCRPD. Among them, APF and UNAFTC organised study days and held sessions (in other events such the Journées Nationales des Parents de l'APF) with a focus on the family dimension of the UN CRPD. Moreover, UNAPEI adopted an action plan to implement the UN CRPD and started to develop some awareness raising and information activities to implement the action plan.

The European Disability Forum (EDF) was active throughout the year at the European and international level and, in cooperation with its members, at the national level. In order to reinforce its capacity to promote the UNCRPD, it established an Advisory Group to the Board to provide technical expertise to the governing bodies on matters relating to implementation.

Governance of the Convention at the EU level
In May, EDF Annual General Assembly adopted the EDF strategy for implementation of the Convention. Implementation of *Article 33 CRPD "National implementation and monitoring"* has been identified as the main focus of EDF actions for 2011-2012.
Throughout 2011, EDF has held exchanges with the EU Fundamental Rights Agency, EQUINET, the European group of the National Human Rights Institutions, European Parliament, Commission, European Economic and Social Committee and NGOs, moving forward the agenda of good governance of the UNCPRD. EDF proposed the establishment of a European Disability Committee to replace and reinforce the current High Level Group as

coordination mechanism pursuant to article 33(1) of the UNCRPD. The EDF proposal was presented to the HLG members at one of the Group's meetings.
EDF also provided input to the EP resolution on the Disability Strategy 2010-2020, and contributed its expertise to the 2nd annual Work Forum on the implementation of the UNCRPD held in Brussels in October.

In December 2011, EDF was consulted by the Commission on its proposal for the establishment of the European independent monitoring framework pursuant to Article 33(2) CRPD. EDF found the proposal for a light-structured framework inadequate and voiced concerns that it would not comply with the CPRD standards and Paris Principles. At the same time, EDF drew the attention of the Council Human Rights Working Group (COHOM) to the shortcomings of the proposal and suggested a number of minimum conditions to be met.

In December, a High-Level Meeting on Disability was convened by the President of the Commission José Manuel Barroso. The meeting, co-chaired by the Commission and EDF Presidents, brought together the Presidents of the European Council and of the European Parliament, as well as EDF Executive Committee members. The meeting, to be reconvened in 2013, focused on the implementation of the Convention and ratification by the EU of the Optional Protocol, as well as the impact of the crisis on persons with disabilities.

UNCRPD article-specific work at the European level
In 2011, EDF started deepening its expertise of specific UNCRPD articles by contributing to legal debates at the international level: in January, it elaborated on UNCRPD *Articles 13 "Access to justice"* and *16 "Freedom from exploitation, violence and abuse"* in its third-party intervention to the European Court of Human Rights (ECtHR) on a case of disability hate crime; in July, it joined forces with other organisations to unwrap the protection standards of *Article 12 "Equal recognition before the law"* in a third-party intervention to the ECtHR on a case of forced sterilisations of women with disabilities; and in October, it addressed *Article 9 "Accessibility"* in a third-party intervention in a British Court of Appeal case on the rights of air passengers.

In May 2011, EDF joined forces with the European Network of Independent Living, International Disability Alliance, Mental Disability Advocacy Center, Open Society Foundation and Galway University to develop implementing guidelines for the right to live independently and being included in the community pursuant to *Article 19 UNCRPD*. Throughout the year, EDF participated in the activities of the expert group on transition from institutional to community–based services raising awareness on the right to live independently. It also discussed definition of community based services in its task force on service provision and quality control.

In March 2011, EDF and the European Trade Union Confederation co-organised a conference on the challenges in implementation of *Article 27 "Work and employment"*.

Throughout 2011, EDF campaigned in favour of legislation with regard to accessibility of websites for persons with disabilities, in order to implement *UNCRPD Articles 9 "Accessibility"* and *21 "Freedom of expression and opinion, and access to information"*.
Mainstreaming of Article 9 has been an important priority in 2011: EDF actively monitored the commitment of the European Commission to ensure that any legislation produced under the Digital Agenda for Europe flagship of Europe 2020 is CRPD-compliant.

Implementation of the existing European legislation in light of Article 9 was also monitored: EDF issued a Toolkit on the Telecoms package, which contains many provisions in relation to accessibility of electronic communication products and services, to support its members in the transposition and implementation process at national level. EDF also followed the creation and developments of European standards by providing inputs to the standardisation mandates 376 and 420 European Accessibility Requirements for Public Procurement of Products and Services in the ICT domain and built environment, respectively.
To implement *Article 30(1)(b) "Participation in cultural life, recreation, leisure and sport"*, EDF monitored the developments in the cross-border provision of accessible television programmes in relation to implementation of the Audiovisual media Services Directive.

Throughout the autumn, EDF participated in an NGO campaign based on *Article 29 "Participation in political and public life"* and organised in its framework a roundtable at the European Parliament.

EDF members' work at the national level

Governance of the Convention at the national level
In April, EDF launched a consultation with its members to better understand how the implementation of Article 33 UNCRPD was progressing in the Member States. The responses were received from organisations in 14 countries (Austria, Belgium, Czech Republic, Denmark, Germany, Hungary, Latvia, Lithuania, Romania, Slovakia, Slovenia, Spain and Sweden). The overall evaluation of the EDF members of the national efforts to set up an implementing and monitoring framework at the national level was rather negative. The focal points in most countries have been placed under the Ministry of Social Affairs and not allocated any additional resources to adequately do their work. The involvement of DPOs in the process has been described as inadequate; very few countries have taken steps to establish an independent mechanism that would be in full compliance with Paris Principles.

EDF participated and co-organised seminars on the implementation of the UNCRPD in Slovakia and Lithuania.

Disability mainstreaming in the UN system
EDF continued encouraging its members to make submissions to the international human right fora to mainstream disability issues throughout the UN system. This work is conducted in close cooperation with the International Disability Alliance. In 2011, EDF members from Austria, Denmark, Finland and Italy made written submissions to various UN Treaty Bodies and the Human Rights Council. These exercises have greatly improved the awareness of the EDF members about international human rights standards that can be used for the promotion of disability rights.

The European Association of Service providers for Persons with Disabilities (EASPD) and its member organizations across Europe have carried out several activities during 2011 with the purpose of promoting the implementation of the UN Convention on the Rights of Persons with Disabilities (UNCRPD).

The importance of the UNCRPD has been stressed during the Executive Committee meeting in March 2011 and in the general Assembly of July 2011, where the UNCRPD has been

indicated as a reference document in all the work of the EASPD, very high on the EASPD agenda. This reference is also a milestone of the EASPD strategic choices for 2011 -2014.

EASPD events and activities
EASPD has organized a number of events and activities during 2011with the objective of disseminating information on key articles of the UN Convention and facilitating the implementation at grassroots level. Among these are the following:

- 30th June-1st July 2011: EASPD organised a conference under the title *"Old? So what? Independent Living for Seniors with Disabilities"* bringing together stakeholders and experts from all over Europe to discuss independent living and individualized support in the mainstream services for elderly persons with disabilities.

- 3rd-4th October 2011 EASPD organized a closed seminar on the theme of deinstitutionalization in Western European countries. The seminar has been organized in cooperation with KVPS (the Service Foundation for Persons with Intellectual Disabilities) and was sponsored by Ray, Finland.

- 9th-10th November 2011: EASPD held in Brussels the final conference of the project *ImPaCT in Europe "Connect, Personalise, Care: Person Centred Technology for Greater Quality of Life",* bringing together key stakeholders from across Europe to demonstrate how assistive technology can significantly support independence for people with disabilities in a person-centred way.

- 9th November 2011: EASPD celebrated its 15th anniversary by inviting members and friends to the European Parliament and renewing its commitment to the UNCRPD.

- During 2011 EASPD organised Provider Fora in Bulgaria, Estonia, Poland, Romania, Slovakia and Slovenia. In all these, the UNCRPD was presented to stakeholders and service providers. Specific Articles of the Convention, particularly within the fields of employment, education and independent living, were explored further.

EASPD has been involved in a number of *projects* during 2011. Amongst them are ImPaCT in Europe which finished the 31st of December 2011, and Pathway to Inclusion:

- ImPaCT in Europe was a two-year project which aimed to "accelerate the effective participation of target groups at risk of exclusion and improving their quality of life" by facilitating the development and implementation of PCT, stimulating the effective use of ICT-enabled services and competence building of the end users of PCT.
- EASPD is the promoter of the "Pathway to Inclusion" project to develop a sustainable network of all those committed to inclusive education.
- EASPD is partner of the project *INCLUSION – GALILEO* consortium, focusing on accessible solutions for people with limited mobility. The project will develop a satellite navigation system that will empower wheelchair users.

Member organizations' events and activities for the implementation of the UNCRPD
EASPD is a European network of service providers for persons with disabilities and has a great number of members across Europe. In 2011 these members have supported the implementation of the UNCRPD through numerous activities. Common for the service

provider organizations is that the UNCRPD is used as a guideline in their daily work providing services for persons with disabilities.

In cooperation with its members BAG:WfbM (Bundesarbeitsgemeinschaft Werkstätten für Behinderte Menschen) and Unapei (Union Nationale Des Associations De Parents et Amis de Personnes Handicapées Mentales), in 2011 EASPD has worked on the report ”Analysis of the legal meaning of Article 27 of the UNCRPD”. The Report deals with the role of sheltered workshops in light of the UNCRPD.

The main work for organizations in countries where the UNCRPD has not yet been ratified has focused on lobbying activities towards governments for ratification. To better reach this objective, in 2011 EASPD enlarged its membership to the Turkish organisation Dolunay Association of Adult Disability.

In countries where the Convention has been ratified the organizations have worked on promoting a correct implementation as well as internal and external awareness raising activities. Unfortunately, only a few organizations have been asked for involvement in the NRP’s and few know the procedure of these.

Moreover EASPD developed a successful cooperation with AATE, the Association for the Advancement of Assistive Technology in Europe.

The European Platform for Rehabilitation (EPR) has undertaken a number of actions throughout 2011 that contribute to the implementation of the UN Convention on the rights of persons with disabilities (UNCRPD). EPR and its members have proactively engaged into the process of internalising the requirements and implications of the UN Convention in the delivery of services to persons with disabilities. At several occasions, the most relevant stakeholders at European and/or national level were involved in the discussions. EPR members are leading service providers to people with disabilities throughout Europe, and have undertaken actions to promote and implement the UNCRPD in practice.

- 2 March 2011: EPR organised in collaboration with Mrs. Frieda Brepoels, Member of the European Parliament, a Dinner Debate on ‘the cross-border dimension of health and social services’. The rights of people with disabilities as well as a guarantee to quality of services were the starting points for the various speeches and discussions.

- EPR drafted an analytical paper on the EU Disability Strategy 2010 – 2020. Most emphasis was put on the implementation of the UNCRPD, and its implications for service providers in the domains of health, education, long term care, independent living, employment and rehabilitation.

- 16-17 June 2011: EPR organised a strategic workshop for directors on ‘leadership in the rehabilitation sector’. The session highlighted different articles in the UN Convention, and looked into how directors and managers in the sector should use the Convention as overall guideline of their strategy and leadership.

- In the field of *Living independently and being included in the community* (Article 19), EPR promoted the International Classification of Functioning, Disability and Health (ICF) as a way to enhance a person’s functioning and maximize participation in society in

general and in community in particular. EPR organized a benchmarking group (5-6 May in Hasselt) on the implementation of ICF within organizations from Germany, Portugal, Slovenia, the Netherlands and Belgium.

- During a two day training seminar (hosted by INTRAS in Valladolid on 21-22 September), professionals reflected on the growing need for specialised services throughout Europe to assist people with mental health problems.

- In 2011 the EPR Annual Conference was dedicated to 'reintegration of young people with disabilities'. With a very high attendance of nearly 150 participants, this event – hosted by EPR Greek members in Athens - had a big impact on sharing experiences between rehabilitation professionals on the implementation of the UN Convention in this domain.

- Under the strand 'accessibility', the EPR organised as partner of the AEGIS project a final conference entitled "Accessibility Reaching Everywhere" (28 to 30 November in Brussels). The aim was to bring together people with disabilities as well as platform and application accessibility developers, representative organisations, the Assistive Technology industry, and policy makers.

3. ACCESSIBILITY LEGISLATION, REGULATIONS AND STANDARDS IMPLEMENTING ARTICLE 9 UNCRPD

Austria

The Austrian law contains no uniform competency regulation concerning disability. This is what is known as an overlap area. There are also several federal and regional laws containing legal rulings regarding accessibility which are of significance to persons with disabilities.

a. Accessibility legislation: its place in the legal and regulatory framework

On 6 July 2005 the Austrian Parliament adopted a disability equality package, including the Federal Disability Equality Act as well as Amendments to the Disability Employment Act and to the Federal Disability Act (in force since 1 January 2006). This anti-discrimination package offered for the first time enforceable protection against discrimination of people with disabilities and enshrines legal consequences if the prohibition of discrimination is violated (financial compensation).

One of the key elements of the Federal Disability Equality Act is the legal prohibition of discrimination on grounds of disability. If services, products, infrastructures, buildings or transport facilities/systems are not accessible, this may cause discrimination prohibited by law and can lead to financial compensation (for details see Chapter 1.9, 7 and 8 of "the Government Report on the Situation of People with Disabilities in Austria 2008, www.bmask.gv.at).

The Austrian construction law falls into the legal competence of the nine Länder, which are the regional authorities. Until now it was not possible to harmonize this regional law in the field of technical regulations which could bring a higher standard of accessibility all over Austria. In Austria there is quite a numerous range of standard regulations concerning barrier-free buildings and accessibility. These so called ÖNORMEN (Austrian Standards) are very important for people with disabilities because they give an answer to technical aspects (what has to be done in a concrete situation). Often they are part of a legal act and – in that case – are legally binding.

The Advisory council for architectural culture („Baukulturbeirat"), which is a task force of qualified architects and representatives of all federal ministries, published in June 2011 the recommendation „Barrier-free Construction – Design for all" (www.bka.gv.at/site/6992/default.aspx).

b. General law, technical regulations and standards

Please see points e. and c.

c. Role of national, European and international standards

The Austrian Standards Institute (www.as-institute.at/en) works out – in cooperation with disability experts – standards in the field of technical requirements on accessibility for people with disabilities. Observance of the Austrian standard „ÖNORM B 1600" (Standardisation principles on barrier-free construction and design) has become mandatory for erecting new buildings of the federal administration and, among other things, also for the adaptation of transport facilities of the Austrian Federal Railways to suit the needs of disabled people. Other „ÖNORMEN" apply to educational and training institutions, basic principles for planning special facilities for disabled or older people as well as barrier-free tourist facilities, technical aids, mobile wheelchair lifts, acoustic signals, tactile and visual platform paving and toilet facilities for people with disabilities. See the following list of outputs and publications, a rather complete list of Austrian Accessibility Standards:

- ÖNORM B 1600 „Barrierefreies Bauen – Planungsgrundlagen" („Barrier-free construction – Design principles");

- ÖNORM B 1601 „Spezielle Baulichkeiten für behinderte oder alte Menschen – Planungsgrundsätze" („Special buildings for disabled or elderly people – Design principles");

- ÖNORM B 1602 „Barrierefreie Schul- und Ausbildungsstätten und Begleiteinrichtungen" („Barrier-free schools and training centers and institutions associated");

- ÖNORM B 1603 „Barrierefreie Tourismuseinrichtungen – Planungsgrundlagen" („Barrier-free tourism institutions – Design principles");

- ÖNORM B 4970 „Anlagen für den öffentlichen Personennahverkehr – Planung" („Facilities for short distance public transport – Design");

- ÖNORM B 5410 „Sanitärräume im Wohnbereich – Planungsgrundlagen" („Sanitary facilities in residential areas – Design principles")

- ÖNORM EN 81-1 „Sicherheitsregeln für die Konstruktion und den Einbau von Aufzügen – Teil 1: Elektrisch betriebene Personen- und Lastenaufzüge" („Safety rules for the construction and installation of lifts – Part 1: Electric passenger and freight elevators");

- ÖNORM EN 81-2 „Sicherheitsregeln für die Konstruktion und den Einbau von Aufzügen – Teil 2: Hydraulisch betriebene Personen- und Lastenaufzüge" („Safety rules for the construction and installation of lifts – Part 2: Hydraulic lifts and hoists");

- ÖNORM EN 81-40 „Sicherheitsregeln für die Konstruktion und den Einbau von Aufzügen – Spezielle Aufzüge für den Personen- und Gütertransport – Teil 40: Treppenschrägaufzüge und Plattformaufzüge mit geneigter Fahrbahn für Personen mit Behinderung" („Safety rules for the construction and installation of lifts - Special lifts for the movement of people and goods – Part 40: Stairlifts and inclined platform lifts with inclined roadway for people with disabilities");

- ÖNORM EN 81-41 „Sicherheitsregeln für die Konstruktion und den Einbau von Aufzügen – Spezielle Aufzüge für den Personen- und Gütertransport – Teil 41: Vertikale Plattformaufzüge für Behinderte" („Safety rules for the construction and installation of lifts – Special lifts for the movement of people and goods - Part 41: Vertical platform lifts for disabled people");

- ÖNORM EN 81-72 „Sicherheitsregeln für die Konstruktion und den Einbau von Aufzügen – Besondere Anwendungen für Personen- und Lastenaufzüge – Teil 72: Feuerwehraufzüge" („Safety rules for the construction and installation of lifts – Particular applications for passengers and goods lifts – Part 72: Firefighters lifts");

- ÖNORM V 2104 „Technische Hilfen für blinde, sehbehinderte und mobilitätsbehinderte Menschen – Baustellen- und Gefahrenbereichsabsicherungen“ („Technical aids for blind, visually impaired and physically disabled people – construction and hazardous area hedges “);

- ISO 21542 „Building construction – Accessibility and usability of the built environment“.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

In Austria the implementation of the UN Convention has not directly led to changes in accessibility legislation/regulation. However the public awareness about accessibility has increased because of the UNCRPD.

In January 2012 the Federal Ministry of Labour, Social Affairs and Consumer Protection presented the draft of a new National Disability Action Plan 2012-2020. This plan includes reference to accessibility with an own comprehensive chapter.

e. Services regulated for accessibility

Principally all private services are regulated for accessibility in Austria: if they are offered in public, all consumer transactions and the acts of the federal public administration are regulated by the disability equality law. This is the case for website providers, restaurant owners, food discounters, transport providers, federal ministries, public institutions, social insurance institutions, hospitals, medical services, private insurance companies and so on.

For instance the Austrian E-Government Act requires that all public websites must be barrier-free and accessible. With that it is necessary to publish also easy-to-read versions and sign language.

f. Goods regulated for accessibility as part of a service

The relevant Federal Disability Equality Act does not state technical provisions on the accessibility of goods.

g. Goods regulated for accessibility

Please see points e. and f.

h. Enforcement of accessibility legislation

According to the Federal Disability Equality Act a person who feels discriminated can – after passing a mandatory conciliation procedure – enforce damages by court when the discrimination is based on a lack of accessibility.

i. Non-compliance and litigation

The core element of protection against disability discrimination is the possibility to get a compensation of the material or immaterial damage suffered. The assertion of claims in court has to be preceded, however, by obligatory conciliation proceedings at the Federal Social Office (a body of the Federal Ministry of Labour, Social Affairs and Consumer Protection). Taking legal action without an attempt at conciliation is inadmissible. The deadlines for the

assertion of claims due to discrimination are extended by the duration of the conciliation process. The purpose of conciliation is to promote an out-of-court settlement. This is intended to avoid long and possibly expensive court cases. The option of free mediation by independent mediators is available within the framework of this conciliation procedure.

An easing of the burden of proof (rules on evidence which have a similar effect to a reversal of the burden of proof) applies to court cases. In the case of important and lasting harm to the general interests of the group of persons protected by the disability equality law, the umbrella body of the Austrian disability organisations (Österreichische Arbeitsgemeinschaft für Rehabilitation – ÖAR, a member of EDF) can initiate a class action on the basis of a recommendation by the Federal Disability Advisory Board.

Since the coming into force of the Federal Disability Equality Act 2006 until the end of 2011 there have been more than 1.000 conciliation procedures in Austria.

The Federal Disability Ombudsman, which was introduced in 2006 in combination with the disability equality law, is an independent body. It has the task of advising and supporting people with disabilities in cases of discrimination as well as raising public awareness of problems in equality or accessibility issues.

Belgium

In Belgium, accessibility falls mainly within the competence of the federate entities. Any refusal to implement the reasonable accommodation for a person with disability is a form of discrimination in various legislations. The equality of treatment of persons with disabilities and the protection against discrimination are established in the Belgian Constitution (articles 10 and 11) and the laws made by the different levels of power.

a. Accessibility legislation: its place in the legal and regulatory framework

At the federal level, the anti-discrimination legislation is being implemented in the three anti-discrimination laws of the 10th of May 2007 tending to combat certain forms of discriminations:

- the general law anti-discrimination;
- the anti-racism law;
- the law on gender.

Article 9 of the law of 10 May 2007 refers to the combat against certain forms of discriminations and stipulates that any indirect distinction based on one of the protected criteria constitutes indirect discrimination unless, in the event of indirect distinction on the basis of a disability, it is shown that no reasonable accommodation can be set up. Reasonable accommodation are appropriate measures, taken according to requirements in a concrete situation, to make it possible for a disabled person to reach, to take part and progress in the fields for which this law is in force, except if these measures impose with regard to the person who has to adopt them a disproportionate charge. This charge is not disproportionate when it is compensated adequately by measures existing within the framework of the followed public policy concerning disabled persons.

For further information on the measures implemented by the federal government concerning the accessibility of transport (railway, aviation, and maritime transport) see the Belgian report on the UNCRPD.[46]

Flemish Region

- *The Flemish Urbanisation Regulation concerning the accessibility of public buildings of June 5th 2009 (in effect since March 1st 2010).*

[46] Article 9 : « Des mesures d'accessibilité relatives au droit à la mobilité personnelle des personnes handicapées sont stipulées dans les contrats de gestion entre l'Etat fédéral et les trois sociétés du Groupe **SNCB**. Celles-ci s'engagent de garantir un accès équitable et non discriminatoire au transport ferroviaire et d'assurer l'utilisation optimale de celui-ci. Ces mesures comprennent notamment celles relatives à l'accessibilité par ascenseurs, rampes ou dispositifs équivalents d'un ensemble de gares. En matière de **transport aérien**, le règlement (CE) N°1107/2006 du Parlement européen et du Conseil du 5 juillet 2006 concernant les droits des personnes handicapées et des personnes à mobilité réduite lorsqu'elles font des voyages aériens a été transposé dans la loi belge et établit des règles relatives à la protection et à l'assistance en faveur des personnes handicapées et des personnes à mobilité réduite. Quant au droit **maritime et fluvial belge**, il prévoit que les personnes handicapées ou à mobilité réduite jouissent d'un traitement non discriminatoire et de la fourniture gratuite d'une assistance spécialisée à leur intention, tant dans les terminaux portuaires qu'à bord des navires, ainsi qu'un dédommagement financier en cas de perte ou de dégradation de leur équipement de mobilité. »

This regulation replaces the federal law of 1975 and is a section of the framework decree on the built environment. It requires that the rules on accessibility are integrated in the procedures to obtain a building permit or urban authorization and non-compliance with these rules entails the refusal of the building permit. The Regulation applies to all building and/or renovating activities on publicly accessible constructions or parts thereof and when a building permit is required for the activity or a reporting duty exists.

The rules apply to new buildings, rebuilding, renovations or annexations of public buildings of public parts of buildings. Existing buildings are free of additional modifications as long as no changes are foreseen requiring a building permit. The legislation also foresees a compulsory advisory mechanism that will be implemented during 2012. To ensure a better congruity with common building practice, the regulation was slightly adapted in 2011.

- *The Decree holding the framework for the Flemish equal opportunities and equal treatment policy (July 10th 2008).*

This decree outlines the principles of the Flemish non-discrimination policy. It prohibits discrimination based on disability (among 18 other grounds), but also qualifies that the refusal of reasonable accommodations can be construed as discrimination.

In Flanders, several complementary measures were set in place to ensure a correct implementation of the accessibility legislation:

- distribution of a short brochure within the building and public sector
- organisation of trainings for architects and civil servants working in urbanisation
- the website www.toegankelijkgebouw.be contains the Flemish manual on accessibility.
- 'wenkenbladen': These shortlists provide concrete and specific tips on how to enhance the accessibility of buildings and services. Some examples of 'wenkenbladen' are: banks, libraries, hotels, cultural centres, parks, playgrounds, swimming pools, sidewalks etc.

The Flemish government also carries out general information and awareness-raising campaigns:

- The campaign 'Accessible Flanders': this campaign wants to raise awareness of accessibility of public buildings. The website www.toevla.be contains information regarding the accessibility both of buildings, premises and tourist facilities such as town and city halls, schools, hotels, museums, socio-cultural centres, sports centres, cycle paths, footpaths and other tourist facilities.
- Accessible events: 'Intro vzw' provides tailor-made advice for events (music festivals, sport manifestations, etc) and support in the practical build-up of the event. In cooperation with volunteers and specialised organizations they also provides services such as personal assistance, feeling chairs, "ringleiding" (type of hearing aid), etc.
- Information point Accessible Travels: at this agency and on the website www.accessinfo.be (in 4 languages) travellers can find reliable information on and propositions of accessible holidays.

Région Wallonne

Any form of direct or indirect discrimination on the basis of disability is prohibited by the Walloon Government's Decree of the 6th of November 2008, relating to the fight against

certain forms of discrimination (later completed by the Decree of March 19, 2009).[47] It stipulates, in its Article 13, that reasonable accommodations have to be carried out in order to guarantee the respect of the principle of equal treatment with regard to disabled persons.

Since February 1999, the Walloon code of Regional planning, of Town planning and of the Inheritance (CWATUP) also fixed, in Articles 414 and 415, a series of rules relating to the accessibility of persons with mobility reduced to spaces and buildings or parts of buildings open to the public or for collective use.

By the "*Code wallon de l'Action sociale et de la Santé*", of the 21st December 2011, the Walloon Government takes care to ensure the full and complete participation of disabled persons in social and economic life, some are the origin, nature or the degree of their disability. The Walloon Government also provides for the implementation of such programmes to « *rendre accessibles aux personnes handicapées les établissements et installations destinés au public, les lieux d'éducation, de formation et de travail ainsi que la voirie »*' (article 268). Furthermore, the "*Code wallon de l'Action sociale et de la Santé*" stipulates that disabled persons accompanied by assistance dogs are admitted everywhere except in places that have received an exemption from the authority.

By its decree of 4 February 2004, the Walloon Government laid down the conditions and the procedures of intervention of material aid to disabled persons' integration.

In concrete terms, the Walloon Agency for disabled persons' Integration (AWIPH) grants interventions for individual requests for installation of the residence and of the post and for technical aid encouraging the social and professional integration of disabled persons.

Disabled persons accompanied by assistance dogs are admitted everywhere except in the places having received an exemption from the authority[48].

Various associations published booklets and guides concerning the accessibility the majority of which received financial support from the Ministry of social Affairs and from the Health of the Walloon Region.[49] Moreover, the ASBL ANLH carries out a database on technical aid (Access AT: www.accesat.be)

Lastly, the AWIPH support of the initiatives intended to disseminate information on technical aid. Disabled persons can obtain this information while applying to the Regional office close to their residence but also to the CICAT (Coordination of Information and Councils in technical Aid).

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[47] Ce décret se base notamment sur les principes établis dans la directive européenne 2000/78/CE portant sur la création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail.

[48] Livre IV du Code wallon de l'Action sociale et de la Santé – volet decrétal

[49] As examples of publications:

- The event accessible by the ASBL Year 2000
- Tourism in Belgium for persons with mobility reduced by the Touring Club (2002)
- The dimension accessible by the architecture school of Cambre (March 2004)
- Accessibility by the cabinet of the Minister for social Affairs and of the Health of the Walloon Region
- Gardens accessible to persons with mobility reduced by the ASBL Nature and Progress (2004)
- Booklet of information on accessibility for the attention of the elected representatives, for the attention of the architects and for the attention of the contractors by the Cabinet of the Minister for social Affairs and of the Health of the Walloon Region (March 2004)
- Reference frame on accessibility by the (CAWAB) Collective Accessibilité Wallonnie Brussels comprising 21 associations representative of disabled persons.

The CICAT and regional offices work closely with resource and evaluation centres specializing in technical aids, so that disabled persons can make an informed choice based on their needs as well as offers available on the market.

German-speaking Community

There are two legal bases in the German-speaking community (both are currently under revision):

a. *Erlass der Regierung vom 12. Juli 2007 zur Festlegung der Bestimmungen zur behindertengerechten Gestaltung von bezuschussten Infrastrukturen* (Government Order of 12 July 2007 laying down the legal provisions governing facilities for the disabled in subsidised infrastructures): Since the effective date of the Order (2 December 2007), all projects covered by the Order must meet the technical requirements relating to facilities for the disabled if they are to be eligible for subsidies from the German-speaking Community.
b. *Dekret vom 19. März 2012 zur Bekämpfung bestimmter Formen von Diskriminierung* (Decree of 19 March 2012 for combating certain Forms of Discrimination): the Decree is intended to implement various European directives in the German-speaking Community. It goes beyond the requirements of the EU directives in that it follows federal Belgium legislation by including additional aspects of discrimination in its definition of discrimination and defining both direct and indirect discrimination.

The following guidelines are also available:

1. The DPB has prepared a set of guidelines, *Zugänglichkeit zum Wahlbüro!* (Access to the polling station), which uses text, drawings and photographs to describe requirements for parking spaces, access ways and polling booths.
2. Another set of guidelines is called *Praktischer Leitfaden für Ausrichter von öffentlichen Veranstaltungen* (Practical guidelines for organisers of public events), using drawings, photographs and text to explain how to make events accessible.
3. The *Eurecard-Label* is a service card that provides proof of a disabled person's entitlement to the cross-border use of services and concessions in the tourism, culture and sports sectors
4. The *Eurewelcome-Label* confirms accessibility in the sense of making visitors feel welcome (adopting a respectful, obliging and helpful attitude to all visitors, with or without special needs) and encourages greater accessibility through the voluntary reduction of physical barriers as an official label recognising the social benefits of a service as part of brand image.
5. The DPB published on its website detailed information on the accessibility of buildings and public events. This is a guideline for architects and event organisers on how to be accessible for an as large as possible group of people and in particular for people with disabilities.

In addition, the German-speaking Community also provides training in accessible construction for architects and their clients and craftspersons. The *Dienststelle für Personen mit Behinderung* (Office for People with Disabilities) inspects infrastructure projects to determine their accessibility.Continual efforts are also being made to raise awareness among private developers.

Brussels-Capital Region:
La Région de Bruxelles-Capitale a mis en place un coordinateur régional en matière d'accessibilité globale dans la cellule égalité des chances et la diversité du ministère de la région de Bruxelles-capitale. Ce coordinateur conseil le gouvernement bruxellois et doit développer un plan d'action sur l'accessibilité globale (avec un budget de 50 000 euros). Il travaille en collaboration avec une plate-forme qui regroupe un grand nombre d'acteurs concernés (autorités publiques, associations, …) et qui a pour tâche de relayer les informations en la matière et de coordonner les actions nécessaires.

b. General law, technical regulations and standards

Flemish Region

The requirements are found in the Flemish Urbanisation Regulation. This however only provides norms for those elements that can be read on a building plan (for e.g. height and width of doors, not the visual markings). The additional handbook however contains additional options and/or improvements (in order to go beyond what is legally required).

Walloon region

The requirements are found in the Walloon Code of Regional planning and heritage (CWATUPE, articles 414 and 415).

c. Role of national, European and international standards

Flemish Region

Accessibility legislation in the Flemish Region makes use of CEN, EN and BIN (Belgian norms) standards.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Flemish Region

No changes were made to the equality and antidiscrimination legislation.

The ratification however did inspire the equality mainstreaming policy; in the framework of objectives for disability mainstreaming (created via the open method of coordination) 2 important generic objectives were included:

1. the existing legislation will be examined on its conformity with the UN Convention on the Rights of Persons with Disabilities;
2. the impact of the UN Convention on the Rights of Persons with Disabilities will be examined for every policy domain within the Flemish Government.

This framework of objectives will be evaluated at the end of 2014, and will hopefully foster legislative and/or policy changes where necessary.

Région Wallonne

La Ministre de la Santé, de l'Action sociale et de l'Egalité des chances a été chargée par le Gouvernement wallon de réaliser un screening de la législation et de la réglementation wallonnes afin de vérifier que ces normes sont compatibles avec la Convention relative aux droits des personnes handicapées, adoptés à New York le 13 décembre 2006 et, le cas échéant, de procéder aux adaptations nécessaires comme le prévoit l'article 4 de ladite convention.

German-speaking Community

At the moment, the Government Order of the German-speaking Community dating 12 July 2007 is under revision in order to better meet the provisions of the UN Convention of the Right of Persons with Disabilities. The Parliament of the German-speaking Community has approved a decree to combat certain forms of discrimination. It prohibits discrimination based on disability (among several other reasons), but also defines the refusal of reasonable accommodations as a form of discrimination.

e. Services regulated for accessibility

Etat fédéral

Banques

Ces dernières années, les banques ont pris des mesures afin de rendre leurs services plus accessibles aux personnes handicapées :

Mesures pour les malvoyants

Pour les personnes ayant des problèmes de vue, des extraits de compte en braille sont prévus par plusieurs banques. Ensuite, certaines institutions ont adapté leurs systèmes de PC banking aux personnes malvoyantes, et proposent une application qui permet de relier le système de PC banking à un logiciel sonore spécial et des lecteurs de cartes vocaux adaptés. Cette application permet aussi d'agrandir les caractères se trouvant à l'écran.

Fin 2011 l'une de ces institutions a mis à la disposition de ses clients quelque 800 guichets automatiques avec accompagnement vocal pour les retraits d'argent. Ces guichets sont adaptés pour les clients ayant des problèmes de vue et qui ne peuvent donc utiliser les écrans tactiles. Les appareils dotés d'une technologie vocale sont reconnaissables à leur autocollant en braille.

Accessibilité des bâtiments

La législation régionale existante en la matière vise à améliorer l'accès des personnes à mobilité réduite aux bâtiments accessibles au public. Elle s'applique tant aux nouvelles constructions qu'aux rénovations nécessitant un permis d'urbanisme. L'obtention de celui-ci dépend du respect des dispositions de la législation en vigueur. Ainsi, un nouveau comptoir d'accueil doit comporter au moins une partie modulaire accessible à tous. Un espace doit être dégagé de part et d'autre du comptoir. Par ailleurs, une partie de celui-ci doit être plus basse.

De leur côté, de nombreux guichets automatiques respectent les normes ADA (Americans with Disabilities Act), lesquelles permettent une meilleure accessibilité de ces guichets aux

moins valides. Ces normes ont notamment trait à la hauteur du clavier et de l'écran des appareils. Elles sont prises en compte lors de la construction des guichets automatiques.

Chemins de fer

Conformément au contrat de gestion de la Société nationale des Chemins de fer belge (SNCB), la politique d'accessibilité est élaborée en concertation avec le Conseil supérieur national des personnes handicapées (CSNPH). Le CSNPH est le seul interlocuteur agréé en la matière. Le CSNPH mène un travail de fond afin d'amener la SNCB à rendre accessible son réseau et ses services. Il s'agit d'un "travail de fourmis" dont les aspects concrets sont discutés au sein d'un groupe de travail commun à la SNCB et au CSNPH

Aéroports

Au niveau des déplacements aériens, Brussels International Airport (BIA) relève de la compétence fédérale. Le Conseil Supérieur National des Personnes Handicapées (CSNPH) a profité de l'entrée en vigueur de la directive européenne EU1107 pour commencer à participer au groupe de travail Personnes à Mobilité Réduite, mis en place par BIA.

Flemish Region

The Flemish Urbanisation Regulation does not regulate services as such, only the accessibility of public buildings. There is however a subsidization regulation in vigour in certain policy domains within the Flemish government that has a specific focus on accessibility. For example, touristic facilities can receive governmental funding only when they comply with the accessibility norms. Another example exists in elderly care. Elderly homes can get a specific accreditation when in compliance with accessibility norms. This accreditation is however not compulsory.

Région Wallonne

Le gouvernement wallon prévoit la mise en œuvre des programmes visant notamment à '*rendre accessibles aux personnes handicapées les établissements et installations destinés au public, les lieux d'éducation, de formation et de travail ainsi que la voirie*' (article 8 du décret du 06 avril 1995 relatif à l'intégration des personnes handicapées).

L'Agence wallonne pour l'intégration des personnes handicapées (AWIPH) a mis en place un programme d'initiatives spécifiques destiné au financement de projets développés par des services experts en matière d'accessibilité et de mobilité. Ce programme a notamment pour objectif l'information, la sensibilisation et la promotion de l'accessibilité et de la mobilité auprès du grand public, des architectes, de la société civile, des entreprises, des hommes de métier et des autorités publiques.

Par ailleurs, ce sont les articles 414 et 415 du CWATUPE[50] qui définissent la liste des lieux soumis à la réglementation en faveur de l'accessibilité en Wallonie.

[50] http://dgo4.spw.wallonie.be/DGATLP/DGATLP/pages/DGATLP/Dwnld/CWATUPE.pdf

f. Goods regulated for accessibility as part of a service

Flemish Region

There is no regulation on accessibility of goods at the level of the Flemish Region.

Région Wallonne

Pour l'accessibilité aux bâtiments se référer à la question e.

Pour favoriser le degré d'accessibilité des média, depuis 2002, le gouvernement wallon s'est engagé à rendre la majorité des sites Web de la Région wallonne accessibles aux personnes déficientes visuelles. La mise en œuvre de cette politique a été intégrée en 2005 dans le volet wallon du Plan national de lutte contre la fracture numérique. On compte, pour l'instant, 27 sites symbolisés par le label « *AnySurfer* » ou « *BlindSurfer* ».

En matière de transports publics, le contrat de gestion 2005-2010 conclu entre la Région wallonne, la Société Régionale Wallonne du Transport (SRWT) et la Société de Transport en commun (TEC) prévoit, en termes d'objectifs spécifiques, la généralisation progressive des bus à plancher surbaissé et les quais adaptés aux personnes à mobilité réduite.

Plus particulièrement, le groupe TEC s'est engagé à exécuter le plan de renouvellement du matériel roulant, adopté par le Conseil d'administration de la SRWT du 7 octobre 2004, en acquérant notamment systématiquement des bus répondant aux normes d'accessibilité optimale.

g. Goods regulated for accessibility

Flemish Region

There is no compulsory regulation for the accessibility of manufactured goods. However EU-norms (BIN, EN and CEN) are enforced on a voluntary basis – with the exception of elevators in publicly accessible buildings, which are required to comply with EU-norms.

The Flemish Regulation on accessibility of public buildings does however foresee norms for doors as well as for parking places.

The '*wenkenbladen*' (documents that provide concrete and specific tips on how to enhance the accessibility of buildings and services) can be a useful tool. Some examples of '*wenkenbladen*' are: banks, libraries, hotels, cultural centres, parks, playgrounds, swimming pools, sidewalks etc.

h. Enforcement of accessibility legislation

Flemish Region

The regulation enforces certain criteria to obtain a building permit. If the building plans do not comply with the legislation, the permit is not granted. If later on it is shown that these adaptations with regards to accessibility were not put in place, the general sanctions of

building violations apply. These can be a financial penalty, administrative sanctions or remedial actions (restore the original state (break down) or execute certain adaptations).

Région Wallonne

Pour porter plainte pour discrimination ou simplement pour s'informer, il est possible de s'adresser directement à l'un des 12 Espaces Wallonie[51] qui sont désormais compétents pour entendre et traiter les plaintes pour discriminations en apportant une information claire et directe.

L'AWIPH analyse les contrats de gestion des autres Organismes d'Intérêt Public (OIP) wallons en termes de prise en compte des besoins des personnes handicapées. C'est ainsi que depuis peu, l'AWIPH a relevé que le service public wallon de l'emploi et de la formation (FOREM) a édité sur son site Web une page spécifique « Travail et Handicap » ; l'entièreté du site a obtenu le label '*AnySurfer'*. L'Agence wallonne à l'exportation et aux investissements étrangers (AWEX) dispose notamment d'un immeuble totalement accessible et de mobiliers de bureau adaptés. Le Fonds du Logement des familles nombreuses de Wallonie (FLW) a également obtenu le label '*AnySurfer'* pour son site Web.

Le Port automne de Liège a été attentif à l'accessibilité de ses dernières acquisitions immobilières. Des actions sont également entreprises afin d'améliorer l'accessibilité du port de plaisance. Dans le cadre de l'organisation de réunions avec les riverains des sites dont elle a la charge, la Société publique d'aide à la qualité de l'environnement (SPAQUE) reste attentive à trouver des lieux de réunion accessible à tous. L'ensemble des locaux de la Société wallonne des aéroports (SOWAER) est accessible aux personnes à mobilité réduite.

Dans le cadre du programme «Destination 2015» proposé par le Commissariat général au Tourisme et Wallonie-Bruxelles Tourisme apparait une action spécifique intitulée "Tourisme pour tous - Accessibilité pour les PMR". Cette action comporte un double enjeu: clarifier les informations et rendre le secteur touristique davantage accessible.

Par ailleurs, L'AWIPH et la Commission Wallonne de la Personne Handicapée ont participé activement aux consultations officielles opérées en 2011 et en 2012 dans le cadre des révisions du CWATUPE (Code wallon de l'Aménagement du Territoire, de l'Urbanisme, du Patrimoine et de l'Energie) et du Code wallon du logement.

Enfin, dans le cadre du plan global d'égalité des chances approuvé par le Gouvernement wallon le 24 février 2011, il a été prévu de désigner des personnes de contact dans chacune des administrations pour veiller à la prise en compte des besoins des personnes en situation de handicap, notamment en matière d'accessibilité.

German-speaking Community

An examination regarding the fulfilment of the accessibility requirements is conducted by a jury before granting the project. The jury consists of a representative of the '*Dienststelle für Personen mit Behinderung'* (DPB) and an external expert, both designated by the

[51] http://www.wallonie.be/vlw/n-14-decembre/les-essentiels/vous-etes-discrimine-e.html

management board of the DPB. An additional member is a civil servant of the Ministry of German-speaking Community.

i. Non-compliance and litigation

Flemish Region

Non-compliance with accessibility or the lack of reasonable accommodation can be construed as a manifestation of discrimination before the court on the basis of the decree holding the framework for the Flemish equal opportunities and equal treatment policy of 10 July 2008.

Bulgaria

In December 2007 the Council of Ministers of the Republic of Bulgaria adopted a strategy on providing equal opportunities for people with disabilities 2008 – 2015, which is consistent with the European tendencies regarding equal treatment. The main goals of the strategy served as a basis for the drafting of an action plan on providing equal opportunities for people with disabilities 2008 – 2009, including planned activities in the fields of rehabilitation and social integration, persons in charge and deadlines for implementation.

One of the goals of the strategy and the action plan is the establishment of an environment, adapted to the needs of people with disabilities, which includes rendering public, residential buildings, outdoor areas and workplaces wheelchair-accessible, provision of accessible transport and accessible information and communications.

a. Accessibility legislation: its place in the legal and regulatory framework

There are legal provisions in the Integration of people with disability Act, Spatial Development Act and Protection against Discrimination Act. There are norms in the fields of: architectural environment, accessible transport, tourism, and information and communications.

The Protection Against Discrimination Act, in article 5, states that "Harassment on the grounds referred to in Article 4 (1)[52], sexual harassment, incitement to discrimination, persecution and racial segregation, as well as the building and maintenance of an architectural environment hampering the access to public places of people with disabilities shall be considered discrimination."

The rules on the provision of an accessible living and architectural environment are regulated in detail in the Integration of People with Disabilities Act. The above mentioned law contains a section with rules on the spatial development of urban territories for the population, including people with disabilities. It is an obligation of the Ministry of Regional Development and Public Works to create conditions for accessible living for disabled people. It is an obligation of the Transport Ministry to make transport services wheelchair-accessible. Auxiliary means, devices and facilities as well as medical products for people with disabilities are provided by the Social Assistance Agency. One of the obligations of the State Agency for Youth and Sports and the Ministry of Education and Science is to create, in cooperation with the municipalities, the sport federations and the sport clubs, conditions for social integration of people with disabilities. The Culture Ministry, in cooperation with the municipalities, is obliged to provide conditions for integrating disabled people in the area of culture. The municipalities, within their competence, are responsible for providing accessible living and architectural environment, while the Bulgarian National Television, the Bulgarian National Radio and the Bulgarian News Agency are obliged to provide information, accessible for people with disabilities.

In connection with the provision of labour conditions and civil service positions for people with disabilities, the Civil Servants Act stipulates that the appointment body shall provide

[52] Article 4 (1) - Any direct or indirect discrimination on grounds of gender, race, nationality, ethnicity, human genome, citizenship, origin, religion or belief, education, convictions, political affiliation, personal or social status, disability, age, sexual orientation, marital status, property status, or on any other grounds established by law or by an international treaty to which the Republic of Bulgaria is a party, shall be banned.

access for people with disabilities to the buildings, where the administration works, by overcoming the respective architectural and other barriers. Six test centres have been established in the country: in the cities of Sofia, Varna, Plovdiv, Bourgas, Veliko Turnovo and Montana. The tests are computer-based and are held in real time. Candidates with visual impairment sit for the exam in specially-equipped halls with screen reader and speech synthesizer while sign language interpretation is provided for people with hearing impairment and the test is held in wheelchair accessible halls.

b. General law, technical regulations and standards

There are requirements in legislation like the Integration of people with disabilities Act, the Spatial Development Act, the Ordinance for accessible architectural environment with clear standards and also the Protection against discrimination Act.

The main guidelines in the Republic of Bulgaria regarding the provision of physical access to public buildings and areas as well as to residential buildings are contained in Ordinance No. 4 on the Provision of Accessible Environment in Urban Territories.

c. Role of national, European and international standards

The Republic of Bulgaria has undertaken all necessary measures at national level for the implementation of Regulation (EC) No. 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when traveling by air as administrative and criminal liability is envisaged for the people having violated the requirements of the regulation. The Commission for the Protection of Competition monitors the fulfillments of the commitments of the tour operators and the tourist agents under Regulation (EC) No. 1107/2006 in its capacity of a national body in charge of the implementation of this regulation.

In air transport, there are effective requirements regarding airport infrastructure and multiple requirements for accessibility for people with disabilities are implemented at community and national level.

There are provisions for the implementation of Regulation (EO) N1371/2007of the European Union for rights and obligations of travelers.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

The Republic of Bulgaria ratified the UN CRPD on 26 January 2012 and there is an expert group elaborating a biannual action plan for its implementation, which may include measures of legislative changes; these will be connected to accessibility to some extent. The draft action plan has to be finished in 6 months period.

e. Services regulated for accessibility

The Ordinance on Administrative Servicing contains a requirement under which the administrations shall provide convenient and easy access for people with disabilities to the administrative servicing unit by adapting service premises and the access to them. For example, the desks for administrative servicing at the head office of the Maritime Shipping Administration Executive Agency and the territorial units in the cities of Varna, Rousse, Bourgas and Lom have been made wheelchair accessible. A portal for blind people has been created within the official website of the Transport Ministry.

The Transport Ministry, within its competences, has drafted a special programme, Generally Accessible Transport, on the provision of wheelchair accessible transport. The programme is implemented through the Road Administration Executive Agency and the Railway Administration Executive Agency, in coordination with the Finance Ministry, as its main goal is providing greater access for people with disabilities to transport services. With a view to achieving the above goal, the losses upon intra and intercity carriage are covered under the national budget while carriers are compensated for free of charge travel and reduced fares for certain groups of citizens, including people with disabilities, within the executive budget.

f. Goods regulated for accessibility

There is Consumer Protection Act which regulates the protection of consumers, the powers of State bodies and the activity of consumer associations in this area. The purpose of this Act is to ensure protection of the fundamental consumer rights. There is a Commission for Consumer Protection which organizes National campaigns for safety of the products.

According to Article 168 on Medicinal Products in the Human Medicine Act the packaging of a medicinal product shall consist of immediate and/or outer packaging and of a patient brochure. When a medicinal product is allowed for use, its name on the outer packaging, the pharmaceutical form and the content of the active substance per dosing unit shall also be printed in Braille.

g. Enforcement of accessibility legislation

In the Protection against discrimination Act there is stated that a refusal to provide goods or services, as well as the provision of goods and services of a lower quality or on less favourable terms on the grounds referred to in Article 4 (1) shall not be allowed.

The Commission for Protection against Discrimination shall:
- ascertain violations of this or other Acts regulating equal treatment, the perpetrator of the violation and the aggrieved person;
- decree prevention and termination of the violation and restoration of the original situation;
- impose the sanctions envisaged and implement administrative enforcement measures;
- issue mandatory directions for compliance with this or other Acts regulating equal treatment and etc.

There are fines in many legislative pieces as it is stated for example in the Integration of people with disabilities Act etc. In the Protection against discrimination act measures are administrative.

h. Non-compliance and litigation

There is an Ombudsman Act which regulates the legal status, organization and activities of the Ombudsman. The Ombudsman shall intervene by the means provided for in this Act, when citizens' rights and freedoms have been violated by actions or omissions of the State and municipal authorities and the administrations thereof, as well as by the persons commissioned to provide public services.

Complaints and alerts to the Ombudsman may be submitted by natural persons, irrespective of

their citizenship, gender, political affiliation, or religious beliefs. Complaints and alerts may be written or oral, and may be submitted in person, by post or by other conventional means of communication.

Cyprus

a. Accessibility legislation: its place in the legal and regulatory framework

The rights of persons with disabilities for access to goods and services are protected in Cyprus by the general law "The Persons with Disabilities Law 2000-2007". In particular, under Article 6 of this law, unequal treatment of a person - based on disability and being unjustified - for the provision of goods, facilities and services is considered to be discrimination.

Apart from the above general law, the right of persons with disabilities to accessibility is also protected in specific national laws:

- Public Buildings: Regulation 61.H of the Construction of houses and roads legislation (1999) whereby all new buildings should be accessible to persons with disabilities. Responsible for the control of good implementation are the local authorities, by whom no building permit is issued unless is the plan abides by the regulation.
- Telecomunications: 2004 Law for the Regulation of Electronic Communications and Postal Services.
- Health Services: 2001 – 2006 Law for the Use of Medicines.
- Sea Transport Services: 2004 Law for Merchant Shipping.
- Elevator requirements: 2002 Law for Basic Requirements for Specific Goods.
- Television and Radio Information: 1998-2011 Law for Radio and Television Stations.
- Employment to the Wider Public Sector: 2009 Law for the Recruitment of Persons with Disabilities in the Wider Public Sector; 1988 Law for the Recruitment of Blind Trained Telephone Operators in the Public Sector.
- Public Education: The Law for Education and Training of Children with Special Needs 113(I)/1999 is the legislative framework which regulates all matters regarding the education of children with special educational needs (SEN) attending public schools. Children with disabilities are entitled to "free appropriate public education" along with students who are not disabled; the state is responsible for making education as well as schools accessible to them. There is also a 2006 Law for the Conduct of University Induction Examinations and the provision of reasonable adjustments.
- Social Protection: Various Laws for the provision of financial assistance, allowances, pensions etc.
- Public Procurement: 2006 Law for Public Contracts for Goods and Services.

b. General law, technical regulations and standards

As explained in point a., the general law "The Persons with Disabilities Law 2000-2007" provides (article 6) for general accessibility requirements regarding equal treatment of persons with disabilities in the fields of provision of goods and services. In article 7 it also states the requirement for compliance with the technical requirements for public transport as defined in specific law and regulations; Furthermore, in article 8, the Law provides for accessibility requirements in the fields of telecommunications and information.

A new legislation concerning the EU directive for safety in use and accessibility of the buildings is under process to be adopted. A Guide of about 80 pages for the "Safety in use and Accessibility" of the built environment is about to be issued, including technical regulation and technical standards. A special Annex is included, concerning schools, banks, hotels and

touristic settlements, restaurants and cafeterias, beaches. There is an annex concerning pavements and walkways.

c. Role of national, European and international standards

All national regulations developed keep up with the European standards. All projects financed through the Structural Funds are monitored and approved by the Accessibility Bureau of the Ministry of Communications and Works, so as to comply with the latest European accessibility requirements and an Accessibility Certificate is issued.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

The ratification by the Republic of Cyprus of the UN Convention on the Rights of Persons with Disabilities has not yet led to any changes in accessibility legislation.

A new legislation concerning the protection of the parking places for Blue badge holders is under preparation. The legislation concerns all parking places both in public and private buildings and provides for a higher fine than the existing one.

In addition, the existing 1999 Regulation for Construction of houses and roads is under amendment process in order to be harmonised with the EU directive concerning the "safety in use and accessibility of buildings" which comprises very detailed accessibility requirements.

e. Services regulated for accessibility

- Public Health
- Public Education
- Employment
- Social Protection (financial assistance, pensions, allowances etc)
- Public buildings
- Public buses
- Airport services
- Sea transport services
- Hotels
- Telecommunications
- Television and Radio Information
- Public Procurement

f. Goods regulated for accessibility as part of a service

The Ministry of Education and Culture following the directive of the aforementioned legislation provides the following:

<u>Access to school buildings</u>

- Schools increase access for individual pupils by making 'reasonable adjustments'. For instance, lessons are held on the ground floor if one of the pupils uses a wheelchair and the school does not have a lift.
- Other changes to the physical environment that schools make to increase access include: lighting and paint schemes to help visually impaired children, lifts and

ramps to help physically impaired children, carpeting and acoustic tiling of classrooms to help hearing impaired pupils.

- The state provides transportation to all disabled children who do not attend neighbouring schools.
- In many cases the vehicles used for transportation have the relevant equipment to suit the child's needs.
- Assistants are also provided on school transport if needed.
- The Ministry of Education and Culture also provides schools with special equipment such as wheelchairs, walking aids etc. to be used by disabled children.

Access to the curriculum

1. The curriculum is made accessible with the use of assistive technology. Examples of technology that children with SEN use include: touch-screen computers, joysticks and trackerballs, easy-to-use keyboards, interactive whiteboards, text-to-speech software, Braille-translation software, software that connects words with pictures or symbols etc.
2. Information that is normally provided in writing (such as handouts, timetables and textbooks) is made more accessible by providing it in Braille, in large print, on audiotape, using a symbol system.
3. Lessons provide opportunities for all pupils to achieve and are responsive to pupil diversity.
4. Sign language interpreters are provided to deaf children who need it.
5. Teachers allow additional time to disabled pupils to finish an exam, or use equipment in practical work.
6. Teachers allow for the mental effort expended by some disabled pupils, for example using lip reading.
7. Home schooling by special educators or classroom teachers is also available if a child cannot go to school because of health problems.
8. School visits, are made accessible to all pupils irrespective of impairment.
9. Other adjustments that help children to have better access to the curriculum include: changes to teaching and learning arrangements, classroom organisation, timetabling and support from other pupils.

g. Goods regulated for accessibility

Buses, tactile pavement plaques, elevators, W.C. equipment, automatic doors, special ramps, parking areas, wheelchairs are regulated for accessibility.

h. Enforcement of accessibility legislation

The Technical Services of the Local Authorities are responsible for the control of good implementation of the Construction Regulations during application for construction licence procedure.
In the new regulation in process, of “safety in use and accessibility”, an accessibility statement in the form of detailed questionnaire concerning accessibility requirements would be necessary. This way the architects are informed and at the same time they are committed in applying accessibility in to their projects.

If there is a complaint about any misuse concerning accessibility, the local authority is responsible to restore it.

i. Non-compliance and litigation

Any citizen with disabilities can bring a case on non-compliance with accessibility provisions to court according to the general law "The Persons with Disabilities Law 2000-2007". Article 9 of the law provides that any person that without reasonable cause acts or fails to act in a manner which amounts to discrimination against a person with disabilities shall be guilty of an offence punishable with a fine up to €6.800 or with imprisonment not exceeding six months or with both sentences. In the case of a legal entity committing discrimination the fine can be up to €11.960.

Also, any persons with disabilities or an organisation representing persons with disabilities can bring a case of discrimination because of non compliance with accessibility provisions to the Office of the Ombudsman and Protection of Human Rights which can issue recommendations for corrective actions.

Czech Republic

a. Accessibility legislation: its place in the legal and regulatory framework

With the active cooperation of organisations of persons with disabilities, in the past fifteen years numerous laws have entered into force which have created a solid legislative framework to ensure accessibility and use not only for public buildings, but also transport infrastructure and vehicles intended for public transport.

In connection with the creation of a barrier-free environment, certain basic regulations are worth mentioning, in particular the Building Act[53] and its Implementing Decrees.

The Building Act features significant modifications compared to previous provisions; barrier-free solutions and usage of buildings are recognised to be in public interest. The Building and Construction Authority can, under the provisions of the Act, order the owner of the construction, building site or developed area to arrange for its barrier-free access and usage. In addition, only such products, materials and constructions may be used in the building which will enable the due usage of the building including its barrier-free usage if the building has been designed as such.

The Implementing Decree on Building Documentation [54] comprises conditions and requirements for clearly defined and controllable solutions of buildings in terms of barrier-free access and usage by persons with limited mobility and orientation, both in the text as well as drawings sections.

The Decree on General Land Use Requirements[55] determines conditions for designing public areas so as to allow their barrier-free usage.

The Decree on General Technical Requirements for Barrier-Free Usage of Constructions[56] specifies general technical requirements for buildings and their parts so as to ensure their usage by persons with mobility related, visual, hearing and mental disability, the elderly, pregnant women, and persons accompanying a child in a pram or a child under the age of three.

On 14 July 2004, the Czech Government adopted the Governmental Plan for Funding the National Development Programme Mobility for All[57]. This programme focuses on the elimination of barriers in transport and buildings intended for public usage implemented before the date of entry into force of the Building Act which imposed the duty of barrier-free access.

The programme aims to create continuous and coherent barrier-free access routes in cities and municipalities so as to improve the accessibility of transport and buildings for persons with disabilities. In the programme, an invitation to submit plans for barrier-free access routes is announced twice a year. The plans are discussed and assessed by the Steering Committee and Assessment Committee of the programme. In its meetings, the Steering Committee, consisting

[53] Act No. 183/2006 Coll., on Special Planning and Building Code, as amended.
[54] Decree No. 499/2006 Coll., on Building Documentation.
[55] Decree No.501/2006 Coll., on General Land Use Requirements.
[56] Decree No. 398/2009 Coll., on General Technical Requirements for Barrier-Free Usage of Constructions.
[57] Resolution of the Government of the Czech Republic of 14 July 2004 No. 706.

of representatives of each department, deals not only with the evaluation of plans but also with issues of the concept, promotion and funding of the whole programme.

For the section of the Ministry of Culture, an obligation results from the Resolution to provide funding of investment undertakings in 2009 - 2015 leading to the elimination of barriers in the buildings of cultural facilities, i.e. in the buildings of museums, art galleries, theatres, cinemas, etc. amounting to approximately CZK 10 million annually.

The promotion of accessibility of cultural services for persons with disabilities is regarded a priority even in the fundamental strategic document for libraries, the Library Development Concept 2004 – 2010. The measures are implemented both in form of the continuous funding of the Library and Printing Office for the Blind K. E. Macana, a contributory institution of the Ministry of Culture, and by announcing grant tenders.

The scope of activity of the Ministry of Regional Development includes the programme "Barrier-Free Municipalities" whose purpose is to provide state support to investment and non-investment plans concerning the elimination of barriers in the buildings of urban and municipal authorities and in the social care facilities incorporated in the all-embracing chains of barrier-free routes in municipalities and cities. The state support is a system of investment or non-investment subsidies covering up to 50 % of the actually incurred costs of the undertaking in the relevant year. The following activities are referred to in particular:

- elimination of barriers in entrances and exits of buildings,
- elimination of barriers inside buildings,
- barrier-free adjustments of sanitary and social facilities in public premises,
- acquisition and application of lifting and transport technologies and systems.

In conformity with the conditions leading to the elimination of barriers to accessibility for persons with disabilities, police stations and additional premises used by the Czech Police have been subjected to gradual adjustments as well. Older premises of the district departments of the Czech Police which have not been adjusted yet are equipped with button signalling for persons with limited mobility and orientation leading to the office of the supervisor or security guard.

While renovating premises such as the previously and newly established contact and coordination centres, barrier-free entrances are built and parking space provided. In the existing premises, entrance doors are being adjusted, additional entrance platforms installed where the construction allows, and entrances for persons with disabilities are signed accordingly.

Premises of service rooms must be adjusted for internal communication, including the appropriate equipment for contact with persons with disabilities. Moreover, the venues designed for imparting information to the public must be equipped, besides other things, with induction loop system and signed with the international symbol of hearing disability.

Within the administration of the Ministry of Industry and Trade, legislative regulations were issued in recent years to institutionalize testing of aids and devices, and certification of selected products for buildings and constructions.

Regarding transport structures, the principle of non-discrimination focuses mainly on accessibility of transport routes for passengers with limited mobility and orientation. Solutions of all constructions in terms of their barrier-free accessibility and usage are contained in Implementing Decrees to the Building Act[58]. Issues of the barrier-free usage have also been incorporated in technical standards: ČSN 73 6110 Design of Local Communications (2006), ČSN 73 6425 Bus, Trolleybus and Tram Stops, Part 1: Design of Stops (2007).

The Ministry of Transport has participated actively in the preparation of the European Parliament and of the Council Regulation on the Rights of Passengers in Bus and Coach Transport[59] which will come into force on 1 March 2013. This Regulation is, inter alia, targeted at persons with limited mobility in consequence of disability, and it was adopted with a view to enabling such persons to travel by bus and coach at a comparable level with other citizens.

In railroad transport, the accessibility for persons with disabilities is incorporated in all programmes. By construction, update or renovation, the railroad constructions are designed and realized so as to meet the requirements of barrier-free accessibility according to the Decree on General Technical Requirements for Barrier-Free Usage of Constructions[60].

The update and operation of nation-wide railways incorporated in the European rail system are subject to principles of the directly applicable EU regulation which is the Commission Decision on Technical Specifications for Interoperability Relating to Persons with Limited Mobility and Orientation in Trans-European Conventional and High-Speed Rail System[61].

Mobility issues as such, including recommendations how to solve issues of mass transport (low-floor means of transport, equipment of stops, or traffic islands, adjustment of pavements and other movable or immovable facilities of cities and municipalities to suit persons with disabilities) are the subject of "Mobility Issues in an Aging Population" published by the Centre for Traffic Research and designed for staff of state administration[62].

The right to equal treatment and the prohibition of discrimination are defined by the Anti-Discrimination Act[63]. Paragraph 3 of Article 2 understands direct discrimination as such action or inaction, where an individual is treated less favourably than another person is treated or would be treated in a comparable situation, on the basis of race, ethnic origin, nationality, gender, sexual orientation, age, disability, religion, belief or opinion. Moreover, paragraph 5 determines discrimination as the action of treating an individual less favourably on the basis of her or his alleged origin as set out in paragraph 3.

[58] Implementing Decree No. 398/2009 Coll., No. 499/2006 Coll., No. 501/2006 Coll., No. 503/2006 Coll. to Act No. 183/2006 Coll., on Special Planning and Building Code, as amended.

[59] Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the Rights of Passengers in Bus and Coach Transport and amending Regulation (EC) No 2006/2004.

[60] Decree No. 398/2009 Coll., on General Technical Requirements for Barrier-Free Usage of Constructions.

[61] Commission Decision 2008/164/EC of 21 December 2007 concerning Technical Specifications of Interoperability Relating to Persons with Reduced Mobility in Trans-European Conventional and High-Speed Rail System.

[62] Published by NOVPRESS, Brno, ISBN-978-80-87342-05-3.

[63] Act No. 198/2009 Coll., on Equal Treatment and on Legal Means of Protection against Discrimination and on Amendment to Some Acts, as amended.

Afterwards, paragraph 2 of Article 3 of the referred Act defines indirect discrimination on the basis of disability also as the refusal or omission to take appropriate measures to enable the person with disability to access a certain job, to carry out certain work tasks or functional or other procedures at work, to utilise vocational counselling, or to participate in other specialized learning, or to take advantage of services intended for the general public, unless such measure would impose a disproportionate burden.

While making a decision whether a particular measure does not impose a disproportionate burden, in particular the level of merit is taken into consideration which the implementation of the given measure will bring to persons with disabilities, the acceptability of the financial burden of the measures for individuals or legal entities who are in charge of such implementation, the availability of financial and other assistance to give effect to the measures, and the eligibility of alternative action to meet the needs of persons with disabilities. A measure is not considered to impose a disproportionate burden if an individual or a legal entity is obliged to give effect to such measure under special regulation.

b. General law, technical regulations and standards

Please see point a. above.

c. Role of national, European and international standards

Current Czech legislation in the field of the barrier-free use of building is entirely comparable with the standards in force in EU countries.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

An important step helping to improve accessibility was the approval of an amendment to the Act on Public Administration Information Systems taking into account the needs and requirements of persons with disabilities. This Act was implemented by a decree on the form of disclosure of information related to public administration by means of websites for people with disabilities, which defined accessibility rules in detail.

1 April 2011 was the effective date of the Government Regulation on the Determination of Minimum Values and Indicators for Quality and Safety Standards and on the Proving Method in Connection with the Provision of Public Services in Passenger Transport[64], which implements the Act on Public Services in Passenger Transport[65] and defines the share of vehicles in public transport which must allow the transport of persons with limited mobility and orientation. The purpose is to enhance access for persons with disabilities to public transport provided by the state, regions or municipalities.

The Department of Transport, in cooperation with the Road and Motorway Directorate of the Czech Republic provides barrier-free usage of motorway and speedways constructions in places accessible to pedestrians, which means in particular rest areas and the surroundings of emergency call boxes, as part of its competence of a Special Building and Construction

[64] Government Regulation No. 63/2011 Coll. on the Determination of Minimum Values and Indicators for Quality and Safety Standards and on the Proving Method in Connection with the Provision of Public Services in Passenger Transport.

[65] Act No. 194/2010 Coll., on Public Services in Passenger Transport and on Amendment to Some Acts, as amended.

Authority for the respective land communications. The review of norms, technical regulations and model sheets of land communications concerning the issues of barrier-free usage of land communications are prepared in cooperation with the appointed representatives of non-governmental organizations, in particular with the Czech National Disability Council.

Since 2009, the barrier-free usage of the premises of schools and school facilities has been regulated by a separate Decree of the Ministry of Regional Development on General Technical Requirements for Barrier-Free Usage of Constructions[66].

The scope of activity of the Health Department includes Decree on Requirements for Material and Technical Equipment of Health Care Facilities[67] which determines, in addition to the above conditions, that the basic operating areas of inpatient departments must be equipped so that they can be used by patients with limited mobility and orientation.

e. Services regulated for accessibility

Please see above.

f. Goods regulated for accessibility as part of a service

Please see above.

g. Goods regulated for accessibility

Please see above.

h. Enforcement of accessibility legislation

The administration examines accessibility requirements before granting permits or allowing marketing of products.

i. Non-compliance and litigation

Non-compliance of accessibility legislation could be brought to court or to other relevant bodies by individuals, NGO's, public authorities, state bodies etc.

[66] Decree No. 398/2009 Coll., on General Technical Requirements for Barrier-Free Usage of Constructions.
[67] Decree No. 221/2010 Coll., on Requirements for Material and Technical Equipment of Health Care Facilities.

Denmark

a. Accessibility legislation: its place in the legal and regulatory framework

In Denmark accessibility is covered by the legal and regulatory framework.

For instance, for electronic communication networks and services the designated Universal Service Provider must provide, in accordance with sections 6 – 8 of the Executive Order 701 of 26 June 2008 on Universal Service, a number of specified services for disabled end-users on further specified terms and conditions. These services include a text telephony service and a related 24-hour call center. The pricing of USO-products for disabled end-users is regulated. Provision of public pay telephones is regulated in section 6 of the Electronic Communications Networks and Services (ECNSA) and Executive Order 710 of 25 July 1996. There is a specific provision allowing the use of hearing-aids in the executive order.

For passenger ships, MSC/Circ.735 "Recommendation on the design and operation of passenger ships to respond to elderly and disabled persons' needs" is mandatory.

In Denmark, accessibility to buildings is regulated through building legislation (the Building Act and Danish Building Regulations), which covers new building, refurbishment and renovation of existing buildings. The Danish Building Regulations are regularly updated.

Stricter accessibility requirements in connection with conversions in existing buildings were introduced in 2008, making such buildings subject to the requirement of level-free access, etc. With effect from 2 February 2008, the 2008 Buildings Regulations introduced a host of new requirements for accessibility for persons with disabilities, and existing accessibility requirements were significantly tightened.

The Building Regulations list the following requirements:

- level-free access to all units on the entrance floor of a building
- level-free access to all units on the floors of a building, parking spaces for people with disabilities, accessible passage from the car park to the building
- disabled toilets (open to the public)
- lifts that can be operated by people in wheelchairs
- induction loop systems in rooms with common activities, mobile/wireless induction loops or other forms of installations (e.g. in conference rooms and at desks)
- establishment of wheelchair spaces at permanently mounted spaces
- available signs and information in buildings

Further, several projects have been started at the Danish Building Research Institute (SBi), generally to help determine the extent to which it can be ensured that already existing provisions on accessibility are observed, so that accessibility to buildings is enhanced and improved. Thus, the projects are to be part of an overall assessment of whether additional

tools for observing accessibility provisions can improve accessibility to buildings for persons with disabilities.

The Building Regulations requirements on accessibility also apply for publicly subsidised housing as regulated in the Danish Act on Social Housing, etc. The Act sets out special requirements for housing accessibility, and funding is annually earmarked for refurbishing existing housing with a general view to increasing housing accessibility in the sector. To this end, a project has been launched to map accessibility in the more than 550,000 homes in the social housing sector. The project is presented on the Internet portal, www.danmarkbolig.dk. In the portal, persons with disabilities can find information on the accessibility of individual homes, and thus obtain help to find the homes best suited to their disabilities.

The Act on Social Housing, etc. lays down specific provisions on layout and design of social housing for persons with disabilities.

For more information in English about accessibility and article 9 in a Danish context: http://www.sm.dk/Temaer/sociale-omraader/Handicap/Documents/Engelsk_FNs_rapport_22082011.doc.pdf

b. General law, technical regulations and standards

In relation to accessibility of electronic communication networks and services, the European Universal Service Directive 2002/22/EC as amended by Directive 2009/136/EC has been implemented in the Danish Act no. 169 of 3 March 2011 on Electronic Communications Networks and Services (ECNSA).

Se above regarding the Building Regulation.

c. Role of national, European and international standards

For ships IMO standards are used. If there are no IMO standards for a subject, the Danish government would propose development of an international standard.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

As mentioned in "State of play" the only change in legislation found to necessary before the ratification was an amendment to make sure that Denmark met the provisions of Article 29 of the Convention, which require state parties to guarantee persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others.

In 2010 the requirement of accessible signs and information was introduced in connection with the implementation of the UN Convention on the Rights of Persons with Disabilities. Further, the Danish Building Research Institute performs a range of communications tasks on the building legislation on behalf of the Danish Enterprise and Construction Authority. The

tasks include advisory services, knowledge dissemination and preparation of directions, instructions and checklists.

e. Services regulated for accessibility

Services regulated for accessibility include a text telephony service and a related 24-hour call center. There are provisions for public pay telephones, as well as for passenger transport in passenger ships.

For more information in English about accessibility and article 9 in a Danish context: http://www.sm.dk/Temaer/sociale-omraader/Handicap/Documents/Engelsk_FNs_rapport_22082011.doc.pdf

f. Goods regulated for accessibility as part of a service

The Universal Service Provider for electronic communication networks and services (point a.) provides hardware and software needed to use the text telephony service.
Passenger ships are regulated for accessibility.

For more information in English about accessibility and article 9 in a Danish context: http://www.sm.dk/Temaer/sociale-omraader/Handicap/Documents/Engelsk_FNs_rapport_22082011.doc.pdf

g. Goods regulated for accessibility

Provision of public pay telephones is regulated in section 6 of the ECNSA and Executive Order 710 of 25 July 1996. There is a specific provision allowing use of hearing-aids in the executive order.
Passenger ships are regulated for accessibility.

For more information in English about accessibility and article 9 in a Danish context: http://www.sm.dk/Temaer/sociale-omraader/Handicap/Documents/Engelsk_FNs_rapport_22082011.doc.pdf

h. Enforcement of accessibility legislation

The Danish Business Authority enforces compliance with legislation regarding electronic communication networks and services. Non-compliance may be fined.
Accessibility requirements are examined before granting permits; there may be fines if a service or product is found not complying with existing regulations.

i. Non-compliance and litigation

Non-compliance with accessibility legislation may be brought before the Danish Business Authority. Decisions made by the Danish Business Authority may be appealed to the Telecommunications Complaint Board.
Non-compliance will result in the permit to operate a passenger ship being withheld or withdrawn. Non-compliance may also result in the case be brought to court.

Estonia

Estonia has done the necessary preparations needed for ratification of the UNCRPD but ratification has not entered into force yet.. So far the rights of people with disabilities, accessibility included, have been regulated and ensured by several provisions of law and included in strategic development plans of Estonian ministries.

a. Accessibility legislation: its place in the legal and regulatory framework

Legislation for buildings in Estonia, e.g. Building Act (adopted in 2002, latest review in 2011), also covers accessibility: if required by the purpose, buildings' parts intended for public use have to be accessible to and usable by persons with reduced mobility and by visually impaired and hearing impaired persons.

The Ministry of Economic Affairs and Communications is also developing different guidelines in different areas (e.g. building environment guidelines, universal design).

Access of disabled persons to public buildings is regulated by Regulation No. 14 Requirements to Guarantee Mobility of Persons with Physical, Visual and Hearing Disabilities in Public Buildings issued by the Minister of Economic Affairs and Communications in 2002. Similar requirements of access to residential buildings are the objective of one of the measures stipulated in the Development Plan for Residential Issues in Estonia for 2007-2013. The Estonian Housing Economy Development Plan 2008-2013 (approved by the Government in 2008) stipulates several direct activities to improve accessibility under the strategic development trend of guaranteeing housing availability, e.g. supporting the adaptation of housing to special needs and preparation of guidelines with respect to technical solutions in order to guarantee persons with physical disabilities access to residential buildings.

There are no legislative amendments planned for adoption in near future in the built environment sector because adequate legislation has been developed and it has come into force.

Estonia also has a Public Transport Act (adopted on 2000, last redaction on 2011), according to which disabled children, people with profound disabilities aged 16 and over, and persons accompanying people with severe or profound visual disabilities or guide dogs accompanying such persons are allowed to travel by public transport free of charge. The Transport Development plan for 2006-2013 stipulates that access to transport services and infrastructure has to be guaranteed for people with reduced mobility. This is done by development and maintenance of infrastructure. A new transport development plan for the next period is being drafted.

Local governments are responsible for arranging of transportation for persons with disabilities according to the Social Welfare Act (adopted on 1995, latest review in 2011); this is done by offering social transport and the service of adapted taxis.. The new Traffic Act (enforced in 2011) enacts specific requirements for people with visual and mobility disability on moving on pavements, also some exclusive rights of disabled drivers with reduced mobility and the drivers who are servicing a person with reduced mobility or a blind person. The Traffic Act is elaborated on that topic by a regulation of the Minister of Social Affairs.

The Electronic Communications Act (adopted in 2004, latest review in 2011) takes into consideration also the interests of different social groups, including persons with special needs. The access of disabled persons to information technologies is also prescribed in the Information Society Development Plan 2006-2013. This focuses on how to exploit the opportunities created by ICT wisely and to use them to improve overall quality of life. The Plan stipulates that particular attention should be paid to the inclusion of social groups with special needs into society, supporting regional development and local initiatives. One of the groups given high priority is people with disabilities. The goals and principles that were set in the Estonian Broadband Strategy 2005-2007 are also considered in the Strategy of Information Society 2006-2013. One of them is to make all public sector websites accessible to people with special needs.

The Ministry of Social Affairs of Estonia has prepared a Development Plan for Children and Families for 2011-2020 in 2011. Many activities in it are directed to improving the quality of life of children with disabilities and their families, including accessibility of services etc. The goal is to make it possible for every member of society to live their lives to the full with the help of the opportunities offered by ICT, and participate actively in public life. People with disabilities are included also in National Health Plan 2009-2020 and the Development Plan for the Education System 2007-2013. Furthermore, the Government takes actions to attain equalization of opportunities for persons with disabilities.

Lack of accessibility can be seen as discrimination according to the Equal Treatment Act, if existing legislation is disregarded or not obeyed in the sphere of education or employment.

b. General law, technical regulations and standards

General accessibility requirements are provided by general law, most of them for physical accessibility by Regulation No. 14 Requirements to Guarantee Mobility of Persons with Physical, Visual and Hearing Disabilities in Public Buildings issued by the Minister of Economic Affairs and Communications on 2002. Technical regulations and standards can specify the requirements for special products.

c. Role of national, European and international standards

Estonia does not have general national accessibility standards in addition to the abovementioned legislation, these issues are rather dealt with in different development plans and plans of action, e.g. for transport sector, design, health, education etc. Different European standards and best practices have been used as models for developing these plans. Principles of universal design are also mainstreamed to promote accessibility to different services – employment, buildings, transportation, medical services, information and communication, education, leisure, culture etc.

EC Regulation No 181/2011 of the European Parliament and of the Council concerning the rights of passengers in bus and coach transport will come into force in Estonia on 1st of March 2013. Regulation No 1371/2007 of the European Parliament and of the Council on rail passengers' rights and obligations is implemented partially due to the need for large-scale and long-term investments.

UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities (adopted in 1993, approved by Estonian Government in 1995) are also obeyed as an

international document. This guide has established an important framework for the implementation of universal design principles in Estonian society. Some international standards may be adopted by some enterprises in their economy sector, not nationally.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Estonia has not completed the ratification process of the UN Convention on the Rights of Persons with Disabilities yet. During the preparation process for the ratification, that has been conducted in the last years, there has been no need for changes in accessibility legislation. Still, the UNCRPD is used as an instrument and basis for policy-making.

e. Services regulated for accessibility

Service providers have to follow legislation that is mentioned above.

Requirements on health protection (including requirements for spaces, indoor furniture, indoor climate, lighting, maintenance, territory, etc.) for the facilities where social welfare services are provided are imposed by the Minister of Social Affairs with several regulations.

Possibilities of vocational education for persons with disabilities are ensured by the Regulation No. 25 by the Minister of Education and Science since 2006: conditions and procedures of vocational education of persons with special needs.

Requirements for the environment of children with disabilities (public buildings, streets, vehicles) are also stipulated in the Child Protection Act. In other respects legislation is based on the principle of equal treatment and children with disabilities are not differentiated from children without disabilities.

Requirements for work, tools and workplace adjustments for employees with disabilities are imposed in the Occupational Health and Safety Act and also in the Labour Market Services and Benefits Act.

Public libraries are bound by the Public Libraries' Act to offer free home service for persons with limited mobility, if needed. Interpreter for deaf party of a proceeding are enabled according to the Code of Civil Procedure and Code of Criminal Procedure.

Requirements imposed on accommodation, children's and health institutions, etc. do not differentiate between persons with disabilities and persons without disabilities. Therefore there are neither special requirements nor legislation imposed on them in addition to the ones mentioned above. Generally, there are no different rules or regulations for public or private service providers.

f. Goods regulated for accessibility as part of a service

There is Regulation No. 14 Requirements to Guarantee Mobility of Persons with Physical, Visual and Hearing Disabilities in Public Buildings issued by the Minister of Economic Affairs and Communications in 2002. It regulates access of disabled persons to public buildings and has imposed some requirements for goods used by it, including ramps, stairs, handrails, signs, bathrooms, mailboxes, box-offices, ATMs, ticket machines, counters, doors,

gates, elevators, fixture, fitment, equipment, lighting, upholstery materials and colors, flooring, toilet-bowls, washbasins etc.

g. Goods regulated for accessibility

Please see answer f.

h. Enforcement of accessibility legislation

The enforcement of accessibility legislation has administrative nature and all the mentioned types of enforcement power fines, examining accessibility requirements before granting permits or allowing marketing of products can be applied, if necessary. Enforceability of accessibility legislation could be better in Estonia. A lot of relevant tasks are directed to local governments (e.g. construction supervision, social transportation etc.) and the capability of local governments to accomplish its duties varies in different regions. The compliance with accessibility legislation is monitored also by the Chancellor of Justice (Ombudsman) who can also pay inspection visits, if necessary.

i. Non-compliance and litigation

A case of non-compliance with accessibility legislation can be brought to court, to the Chancellor of Justice (Ombudsman) or to the Gender Equality and Equal Treatment Commissioner. The Gender Equality and Equal Treatment Commissioner is an independent and impartial expert who acts independently, monitors compliance with the requirements of the Gender Equality Act and Equal Treatment Act. The Commissioner provides opinions concerning possible cases of discrimination. The Commissioner can be called upon by natural persons, the Chancellor of Justice by a legal entity or a natural person. The Chancellor accepts applications that explain what sections of the legislation or situation are not in conformity with the Constitution and the law according to the opinion of the applicant. He also can perform inspection in public institutions. The Chancellor proposes to harmonise the situation with the Constitution and the law. If the position of the Chancellor is not met or if the institution does not respond to the inquiry, he may submit a report to the body that monitors the activity of the institution, or to the Government or the Parliament. The Chancellor of Justice has the right to conduct conciliation. His position is final and can not be challenged in court.

Finland

The Ministry for Foreign Affairs has, in May 2011, set up a working group to prepare the measures necessitated by the ratification of the Convention and its Optional Protocol in Finland. The work of the working group and other related work are still ongoing, and the points below have to be interpreted accordingly.

a. Accessibility legislation: its place in the legal and regulatory framework

In Finland, lack of accessibility is not specifically defined as discrimination. Discrimination on the grounds of disability and health, among other reasons, is, however, banned under the Non-Discrimination Act. Discrimination can be direct or indirect. In practice, lack of accessibility may become direct or indirect discrimination, but only in the following contexts:

1. conditions for access to self-employment or means of livelihood, and support for business activities;
2. recruitment conditions, employment and working conditions, personnel training and promotion;
3. access to training, including advanced training and retraining, and vocational guidance;
4. membership and involvement in an organisation of workers or employers or other organisations whose members carry out a particular profession, including the benefits provided by such organisations.

Moreover, the Non-Discrimination Act binds the employer to take any reasonable steps to help a person with disabilities to gain access to work or training, to cope at work and to advance in their career. In assessing what constitutes reasonable, particular attention must be devoted to the costs of the steps, the financial position of the person commissioning work or arranging training, and the possibility of support from public funds or elsewhere towards the costs involved.

The Ministry of Justice has formed a working group to revise Non-Discrimination Act during this governmental period (2011-2014).

Finland's Disability Policy Programme 2010-2015 calls for strong inputs in the accessibility of the Finnish society over the next few years. With this programme, the aim is to strengthen the social, cultural, ecological and economic sustainability of the society as well as its justice and fairness. The objective is to ensure the design, realisation and implementation of services, environments and products in such a way that all people can use them.

Some of the measures included in the programme require the removal of existing barriers, whereas others call for functioning solutions for the future. The former set of measures is represented by the measure obligating all sectors of administration to reconstruct inaccessible facilities by the year 2020. The latter measures include the development of the monitoring of an accessible communications policy as well as the further development of accessibility of the electronic services of public administration and accessibility of public transport. Examples of the latter kind of measures also include guidance for accessible planning, development of legislation concerning new buildings, harmonisation of the interpretation of the accessibility legislation, the work to develop new and innovative solutions as well as the development of accessibility in relation to work and learning environments, social and health services and sports and culture.

The objective is to ensure continuous accessible chains of action. This means, for example, that one has the possibility to move smoothly and seamlessly between home, workplace, school, places of service and leisure activities as well as their near environments. This means also that all these facilities, places and means of transport between them as well as information about them must be accessible. The prerequisite for a non-discriminatory social development is that the principles of design for all are realised in the various parts of the action chain under the responsibility of various sectors of administration. Awareness about accessibility and the strengthening of accessibility should be raised to a similar kind of mainstreaming development in society that we currently have in terms of environmental awareness.

Built environment

The Land Use and Building Act (132/1999) defines the objectives land use planning in Finland. The first objective is to promote a safe, healthy, pleasant, socially functional living and working environment which provides for the needs of various population groups, such as children, the elderly and the disabled. The Act states that a building must, in so far as its use requires, also be suitable for people whose capacity to move or function is limited. The Land Use and Building Decree (895/1999) provides further regulations to ensure accessibility in different types of buildings. These include administrative and service buildings as well as commercial and service premises in other buildings to which everyone must have access for reasons of equality, and residential buildings with their building sites. This Section also covers buildings with work space which, for purposes of equality, must be designed and built so that they provide persons with restricted ability with sufficient opportunity to work, taking into account the nature of the work.

The Finnish Building Code lays out technical regulations and guidelines which supplement the Land Use and Building Act. The Building Code applies to new constructions; renovation and refurbishment are mainly outside the scope of the Building Code. Particularly the following decrees set out the requirements for the accessibility of public and residential buildings; F1 Barrier-free building (2005), F2 Safety in use of buildings (2001), G1 Housing design (2005).
(http://www.ymparisto.fi/default.asp?contentid=68171&lan=en).

At present, lack of accessibility in the built environment is mainly dealt with as a technical issue.

There are various guidelines concerning physical accessibility of buildings, as well as guide books on how to interpret building standards. The following organisations have given voluntary recommendations on the accessibility of communications, which are based on international standards:

- Advisory Committee on Information Management in Public Administration (JUHTA, Ministry of the Interior)
- Finnish Information Society Development Centre (TIEKE)
- Finnish Federation of the Visually Impaired (FFVI)

Finnish Design for All Network promotes accessibility of built environments, accessibility of communication and services, as well as usability of products. The DfA web portal includes

information, studies, tools and links to various areas of the accessibility. http://dfasuomi.stakes.fi/EN/index.htm.

Transport

The Ministry of Transport and Communications is preparing a transport policy report which is to be submitted to Parliament in spring 2012. The section concerning public transport emphasises the importance of accessibility in accordance with the accessibility strategy published by the Ministry in 2003. In recent years, accessibility has been stressed mainly in the conditions for transport purchases (railways) and in different legislative undertakings.

Technical regulations on transport equipment are mainly derived from European Union legislation and the Finnish legislation has been harmonised to better coincide with the legislation in other EU countries. There are technical regulations concerning equipment both for road traffic (city buses, railways) and water-born traffic (larger vessels).

Also the general legislation concerning passenger traffic is based on the EU legislation which the new Finnish Act for Public Transport (869/2009) only complements. The new act includes not only the obligation to set regional targets for the standard of the services (including accessibility), but also the obligation for certain quality of services by bus-service operators (including the obligation to report on the accessibility of services).

In Finland, the EU legislation on passenger rights applies. Provisions on the rights of persons with disabilities and persons with reduced mobility are included in the European Parliament and Council Regulations No 1107/2006 on air traffic, No 1371/2007 on train traffic, No 1177/2010 on water-born traffic and No 181/2011 on bus traffic. These regulations grant persons with disabilities the access to the above mentioned services, as well as and the arrangement of necessary assistance. However, the set of rights covered by different types of transport varies.

The only legislation that is solely national is the legislation concerning taxi traffic. The aim of the legislation has traditionally been to secure a sufficient level of services suitable for persons with disabilities. There are several regulations promoting the mobility of persons with disabilities. These regulations concern the training and education of taxi drivers and entrepreneurs (disability knowledge and skills), the granting of taxi licenses (there must be enough vehicles suitable for persons with disabilities), vehicles (there are different quotas and definitions for accessible taxis and taxis for persons with disabilities) and price (special supplements for assistance).

Information society

The Communications Market Act includes regulations on the public service obligation for the provision of general telecommunication services and on a decree on the minimum requirements for public telecommunication services provided for persons with hearing, speech and vision disorders.

The Act on Television and Radio Operations was amended as of 1 July 2011 so that national commercial channels were obliged to subtitle even Finnish and Swedish programmes. The decree complementing the act defines the percentage values for the increased need for

subtitling in 2011–2016. According to the effective decree, the public service broadcasting company YLE must subtitle all its programmes by 2016 (excluding music, sports and children's programmes).

The Government is carrying out the Action Programme towards a barrier-free information society for 2011-2015. The primary target groups of the Action Programme include government actors, product developers, service providers, R&D centres and different kinds of organisations. In addition, the programme can be used as a guideline by any other information society actor. The programme represents a step forward in implementing a barrier-free information society, and it will play a major role in developing the Finnish information society and communications policy over the next years.

The Action Programme aims at coordinating the development of information society accessibility; increasing people's information society skills and capabilities; developing increasingly multi-channel services and technology-neutral communications; improving the usability of hardware, software and auxiliary devices; improving the accessibility and comprehensibility of online content; supporting research and development activities and improving the accessibility in public procurements. The measures and targets of the Action Programme are defined annually by a working group monitoring the implementation of the programme.

Assistive technology

Services for assistive technology are regulated by several different pieces of legislation. Municipalities bear the main responsibility for providing the services. The National Insurance Institute of Finland, insurance and employee insurance companies, employment administration and State Treasury pay for the assistive devices that they are responsible for.

Disabled students and other students in need of special support are entitled to receive – free of charge – special assistive devices and services which they need to allow them to take part in their classes. Such aids are for example computers, lifts or special desks. Severely disabled students at upper secondary school or in grades 7-10 of comprehensive school are entitled to the assistive devices required for their studies (such as computers and low vision aids), under condition that these are specified in a special vocational training plan approved in accordance with the individual rehabilitation plan the Social Insurance Institution of Finland (KELA) assumes has been drawn up.

b. General law, technical regulations and standards

See point a.

c. Role of national, European and international standards

See point a.

With regard to the design of lifts suitable for disabled users, the Building Code F1 'Barrier-free building' (2005) refers to the EU Directive on lifts (95/16/EC), the EU Directive on machinery (98/37/EC) and the Standard EN 81-70:2003.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

The Ministry for Foreign Affairs has, in May 2011, set up a working group to prepare the measures necessitated by the ratification of the Convention and its Optional Protocol in Finland. Its work is still ongoing.

e. Services regulated for accessibility

See point a.

f. Goods regulated for accessibility as part of a service

See point a.

g. Goods regulated for accessibility

See point a.

The City Council of Helsinki has decided that the municipal public transport system (buses, trams and metro as well as stops and stations) must be accessible for all people.

h. Enforcement of accessibility legislation

See point a.

Before granting a building permit, the local building control authority examines the compliance of the plans with the accessibility legislation. The building control authority may also require a more detailed separate report on accessibility as a precondition for the building permit.

i. Non-compliance and litigation

In Finland, complaints can be made by anyone to the Chancellor of Justice and to the Parliamentary Ombudsman. The Chancellor of Justice supervises the lawfulness of the actions of Government ministers and public officials. He also monitors the implementation of basic rights and liberties and human rights. The Parliamentary Ombudsman of Finland monitors public authorities and officials to ensure that they observe the law and fulfill their duties in the discharge of their functions.

For example, the Parliamentary Ombudsman decisions 657/4/03 and 619/4/03 concern access to the voting site. Even though the Ombudsman did not find any unlawfulness in these two cases, the two central election boards in question were reminded that persons with physical disabilities need to be ensured both voting secrecy and unimpeded access to the voting site. The legal basis was the Constitution of Finland (731/1999), Section 6: Everyone is equal before the law. No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, *disability* or other reason that concerns his or her person.) The decisions of the Chancellor of Justice and the Parliamentary Ombudsman are not subject to appeal.

France

I. **Contexte général de l'accessibilité:**

La loi n°2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées garantit l'accès aux droits fondamentaux de toute personne handicapée, et retient le principe d'une cité accessible à tous en 2015 dans la plus grande autonomie possible. La France s'est fixé un objectif ambitieux: rendre l'ensemble des aspects de la vie quotidienne totalement accessible à toutes les formes de handicap d'ici 2015.

La loi du 11 février 2005 instaure l'accessibilité du cadre bâti, des transports et des nouvelles technologiques. L'accessibilité, jusqu'alors physique, est renforcée par l'inclusion des nouvelles technologies. Si ces textes s'adressent prioritairement aux personnes handicapées, ils concernent en fait la société dans son entier.

A ce stade, la question de l'accessibilité suscite davantage de l'inquiétude que de la mobilisation de la part des propriétaires concernés. Le sentiment général des associations est également à l'inquiétude : elles craignent que l'éloignement des dates butoirs ne démobilise les propriétaires et que les tentatives de contourner les obligations légales se multiplient. Les difficultés rencontrées sont principalement au nombre de deux :

- l'accessibilité est largement ressentie par les propriétaires et exploitants comme une contrainte technique supplémentaire et un coût supplémentaire : la mise en œuvre de cette politique nécessite un effort important de pédagogie, de mobilisation et d'accompagnement ;

- la réglementation en matière d'accessibilité est désormais très complète mais elle est également très complexe : sa mise en œuvre suppose donc une attention particulière en matière de formation.

Les objectifs de la France pour atteindre cet objectif d'accessibilité en 2015 sont :

- de faire partager le sens et les objectifs de la politique de mise en accessibilité par toute la société ;
- d'améliorer la formation et développer les connaissances sur l'accessibilité et la conception universelle ;
- d'accompagner, y compris financièrement, les collectivités locales dans la mise en accessibilité de leur patrimoine ;
- d'améliorer l'accès aux biens et aux services, dans une logique d'accès aux droits.

Concrètement, dans le cadre de la 2ème Conférence nationale du handicap de juin 2011 le Gouvernement a retenu des mesures[68] volontaristes visant en particulier à :

- accompagner le déploiement de l'accessibilité aux lieux de travail, aux vecteurs numériques et aux nouvelles technologies, par le lancement d'un plan métiers du handicap orienté vers le développement des métiers de l'accessibilité et de la conception universelle ;

[68] L'ensemble des mesures est consultable à l'adresse : http://www.solidarite.gouv.fr/IMG/pdf/Dossier_de_presse_conference_handicap-2.pdf

- améliorer l'accès aux soins des personnes handicapées, tant sur l'accessibilité de l'offre que des lieux de soins ;
- permettre l'accès du plus grand nombre à la culture et aux loisirs ;
- sensibiliser l'ensemble de la société à la conception universelle.

II . Principaux domaines concernés :

1. Domaine des transports :

Dans le domaine des transports, la loi introduit le concept de la chaîne du déplacement, qui éclaire la notion d'accessibilité. Cette chaîne comprend le cadre bâti, la voirie, les espaces publics, les systèmes de transport et leur intermodalité. Pour atteindre ce résultat, elle prévoit l'élaboration de documents de planification et de programmation des mesures à prendre et des travaux à réaliser : les schémas directeurs d'accessibilité (SDA) pour les transports et les plans d'accessibilité de la voirie et des espaces publics (PAVE) pour la voirie et les espaces publics. Elle instaure la concertation comme principe de base dans tous les processus d'élaboration des documents de programmation et de planification spécifiques à l'accessibilité (PAVE[69] et SDA[70]) ou portant sur l'organisation globale des déplacements tels que les plans de déplacements urbains (PDU).

Concernant la politique d'accessibilité des services de transports, la loi impose :

- un objectif de résultat : la mise en accessibilité de tous les services de transports collectifs d'ici février 2015. Lorsqu'il s'avère techniquement impossible (ITA [71]) de mettre en accessibilité les réseaux existants, doivent être mis à disposition des personnes handicapées ou à mobilité réduite des « transports de substitution » adaptés à ces personnes.

- un objectif de moyens : la loi oblige les acteurs à améliorer l'accessibilité de l'infrastructure des services de transport et du matériel roulant dans certaines occasions :
  - les travaux réalisés sur les arrêts de bus ou sur les gares doivent intégrer les prescriptions techniques d'accessibilité ;
  - les matériels roulants achetés pour l'extension des réseaux ou le renouvellement des flottes doivent être accessibles ;
  - les rénovations à mi-vie du matériel ferroviaire doivent intégrer l'accessibilité aux personnes handicapées ou à mobilité réduite.

- une procédure de dépôt de plainte : la loi de 2005 et les décrets qui en découlent prévoient que chaque autorité organisatrice de transport (AOT) mette en place une procédure de « dépôt de plainte » concernant les obstacles à la libre circulation des personnes à mobilité réduite. Il

69 *PAVE : plans de mise en accessibilité de la voirie et des espaces publics*

70 *SDA : schémas directeurs d'accessibilité*

71 ITA : impossibilité technique avérée

ne s'agit pas d'une « plainte » au sens pénal du terme mais d'un signalement des obstacles rencontrés.

Enfin, l'octroi d'aides publiques favorisant le développement des systèmes de transport collectif est subordonné à la prise en compte de l'accessibilité.

Pour conforter la mobilisation dans le domaine du transport, l'État apporte l'appui de son réseau scientifique et technique en publiant des guides méthodologiques et des recueils de bonnes pratiques, en conduisant des programmes de recherche et d'innovation dans les transports terrestres (PREDIT) et en organisant des journées de formation et d'échanges.

Il s'est également doté d'instances spécifiques :

- **le comité interministériel du handicap** a été créé pour définir, coordonner et évaluer les politiques menées par l'État. Il réunit tous les ministres concernés par la politique du handicap ;
- **l'observatoire interministériel de l'accessibilité et de la conception universelle,** qui réunit les représentants de tous les acteurs de l'accessibilité; il a pour mission d'évaluer l'accessibilité du cadre de vie, d'identifier les obstacles à la mise en œuvre des prescriptions législatives, de repérer les difficultés rencontrées au quotidien par les personnes handicapées et à mobilité réduite et de constituer un centre de ressources capitalisant, valorisant et diffusant les bonnes pratiques en matière d'accessibilité et de confort d'usage pour tous.

En application de l'article L. 114-2-1 de l'action sociale et de la famille, l'État doit organiser tous les trois ans une conférence nationale du handicap. La seconde en date du 8 juin 2011 a été l'occasion de dresser le bilan d'application de la loi dans toutes ses dimensions, de mesurer le chemin parcouru depuis la première conférence nationale de 2008 et de mieux identifier les domaines dans lesquels les progrès doivent encore être confirmés.

Les premiers résultats des politiques volontaristes des autorités organisatrices et des opérateurs sont déjà visibles et de bonnes expériences existent dans les départements.

Plus spécifiquement, d'un point de vue sectoriel :

- Concernant le réseau autoroutier concédé : l'accessibilité des personnes handicapées est actuellement diversement prise en compte, en fonction des maîtres d'ouvrage. Néanmoins, la loi imposant une accessibilité de l'ensemble des services en 2015, les sociétés concessionnaires d'autoroutes ont mis en place des programmes afin que l'échéance soit respectée sur l'ensemble du réseau autoroutier. Concernant l'accès aux aires de services, le renouvellement massif des bâtiments accueillant du public prévue dans les années à venir facilitera l'intégration des prescriptions réglementaires.

2. **Domaine du bâti :**

Le décret n° 2006-555 du 17 mai 2006 relatif à l'accessibilité aux personnes handicapées des établissements recevant du public, des installations ouvertes au public et des bâtiments d'habitation, a été pris pour application de cette loi. Il introduit les exigences réglementaires concernant l'accessibilité des bâtiments d'habitation collectifs (BHC) neufs et existants, des

maisons individuelles (MI) neuves, ainsi que des établissements recevant du public et des installations ouvertes au public (ERP-IOP) neufs et existants. Il définit les performances à atteindre par un bâtiment pour être accessible, ainsi que les actions qui doivent pouvoir y être réalisées par un usager handicapé. Ces exigences sont traduites en seuils réglementaires dans des arrêtés d'application parus en 2006 et 2007.

Depuis l'entrée en vigueur de cette loi, tous les bâtiments d'habitation collectifs neufs présentent des caractéristiques permettant leur utilisation par une personne handicapée.

De plus, les prestations offertes par l'ensemble des établissements neufs recevant du public sont accessibles dès la construction. Des règles supplémentaires sont définies pour certains types d'établissements spécifiques recevant du public. En outre, les ERP existants sont soumis à une obligation de mise en accessibilité à l'horizon 2015.

L'ensemble de ces dossiers font l'objet d'une instruction dans une commission consultative départementale de sécurité et d'accessibilité, à laquelle participent des associations de personnes handicapées, des représentants d'exploitant d'ERP et des représentants des services de l'État. Cette commission a pour objectif de prendre en considération la spécificité du projet et les potentielles contraintes de mise en accessibilité notamment pour les ERP existants.

Lorsque le montant des travaux réalisés dépasse 80% de la valeur de celui-ci, l'obligation de mise en accessibilité porte sur l'ensemble des parties communes ainsi que sur les logements touchés par les travaux dans la limite des contraintes du cadre bâti existant. De ce fait, toute réhabilitation lourde, entraîne la création d'un nouveau bâtiment d'habitation accessible moyennant de potentielles dérogations instruites par la commission consultative départementale de sécurité et d'accessibilité sus-mentionnée.

En 2007, le Ministère de l'enseignement supérieur et de la recherche a fait réaliser un guide méthodologique destiné à toutes les universités, puis, en 2009, un cahier des charges-cadre afin que les 148 établissements d'enseignement supérieur concernés fassent réaliser leur diagnostic d'accessibilité.

Par ailleurs, les constructions neuves et les réhabilitations lourdes inscrites dans les contrats de projets Etats-Régions (CPER) 2007 - 2013 contribuent à la mise en accessibilité du parc immobilier universitaire.

Le réseau des œuvres universitaires et scolaires, engagé depuis 2008 dans la mise en accessibilité de l'intégralité de ces structures, a en outre crée des résidences dédiées aux handicaps lourds à Grenoble, Toulouse, Nancy, Versailles et Créteil.

Enfin, un plan de rénovation de l'immobilier universitaire, opération Campus, a été lancé en 2008. Celui-ci permettra aux 10 campus lauréats de se rendre conformes aux normes d'accessibilité.

Le ministère des sports et le pôle ressources sport et handicap accompagnent les collectivités territoriales et les maitres d'œuvre dans la prise en compte de l'accessibilité dans les **équipements sportifs**. Ce dernier développe à cet effet des guides pratiques en matière d'accessibilité.

Un guide relatif aux piscines est déjà téléchargeable sur le site du pôle. Un guide relatif aux gymnases sera publié très prochainement et d'autres guides sont en préparation : stades, bases nautiques. Ces guides présentent d'une part les obligations réglementaires, d'autre part des préconisations.

3. **Domaine de la culture :**

3.1 **Accès au domaine de la culture :**

L'action des autorités françaises s'est traduite par plusieurs types d'interventions :

- **la formation à l'accessibilité :**

A cette fin, le Ministère de la Culture et de la Communication a déterminé la liste des diplômes, titres et certifications concernés par l'obligation de formation à l'accessibilité du cadre bâti aux personnes handicapées. L'ensemble des écoles nationales supérieures d'architecture intègre désormais cette thématique.

Au delà des diplômes d'architecture, cette obligation a été étendue aux professionnels participant à l'aménagement du cadre bâti et notamment aux designers d'objet et aux créateurs industriels, aux designers d'espace ou encore de la communication (graphique, multimédia).

Par ailleurs, une formation continue des professionnels est indispensable afin d'avoir une meilleure compréhension des enjeux de l'accessibilité. Ainsi, a été mis en œuvre, depuis 2006, un accompagnement des professionnels de la culture qui repose sur un plan de formation à la mise en conformité du cadre bâti. L'intérêt de ces formations est double :

- former les professionnels du cadre bâti du ministère aux besoins des personnes handicapées et à la nouvelle réglementation,

- sensibiliser les associations représentatives des personnes handicapées à la problématique de préservation du patrimoine.

- **La mise à disposition de guides pratiques :**

Le Ministère de la Culture et de la Communication a entrepris la réalisation d'une série de guides pratiques de l'accessibilité. Trois ouvrages ont d'ores et déjà été publiés :
- un premier de portée générale (2007),
- un deuxième consacré au spectacle vivant (2009),
- un troisième dédié à l'accueil des personnes handicapées mentales dans les lieux de culture (2010).

Cette collection s'enrichira prochainement de guides portant notamment sur les expositions accessibles, les bibliothèques et handicap et le cinéma et l'audiovisuel et handicap.

- **L'accessibilité aux établissements culturels** :

Un objectif en cours de réalisation est de rendre les établissements culturels accessibles à tous et pour tous.

Ainsi, depuis la loi du 11 février 2005, le Ministère de la culture et de la communication agit pour que soient rendus accessibles les établissements nationaux d'enseignement supérieur

« culture », les établissements nationaux « patrimoines », les établissements nationaux de diffusion de la création artistique et les établissements territoriaux.

- **Une mobilisation accrue des établissements publics « culture » :**

La Réunion des établissements culturels pour l'accessibilité (RECA) regroupe une vingtaine d'établissements publics engagés dans la réalisation de mesures permettant d'améliorer l'accueil des personnes handicapées dans les établissements culturels.

- **L'accès à la création artistique :**

La constitution de réseaux pour l'accès à la création artistique est encouragée et soutenue. Le ministère de la culture et de la communication a inscrit la prise en compte de l'accessibilité au sein de la directive nationale d'orientation des directions régionales des affaires culturelles, qui déclinent en région le soutien aux associations œuvrant en faveur de l'accès aux pratiques artistiques des personnes handicapées.

Cette action s'est développée au plan national dans les secteurs du théâtre et de la musique notamment par le soutien aux associations œuvrant en faveur de l'accès aux pratiques artistiques des personnes handicapées : l'Association Musique et situations de handicap (MESH), le Centre de Ressource Théâtre et Handicap (CRTH), Accès Culture.

Enfin, en 2007, le prix « musées pour tous, musées pour chacun » a été créé afin de distinguer une réalisation d'excellence en matière d'accessibilité pour les visiteurs handicapés, quel que soit le type de handicap. Cette réalisation prend la forme d'aménagements durables, de documents d'aide à la visite ou encore d'actions de médiation permettant ou facilitant l'accessibilité. En 2010, le Ministre de la Culture et de la Communication a exprimé son souhait de voir ce prix étendu à l'ensemble du champ des institutions culturelles du ministère. Ainsi, a été mis en place le prix « patrimoines pour tous, patrimoines pour chacun » afin d'impliquer l'ensemble des établissements patrimoniaux (Archives, musées de France, monuments historiques, Villes et Pays d'Art et d'Histoire) dans la mise en place d'une accessibilité généralisée de référence en direction de toutes personnes en situation de handicap.

3.2 **Accès aux médias :**

Des solutions volontaires se sont développées sous l'impulsion du Gouvernement français et du Conseil supérieur de l'audiovisuel, en accord avec les professionnels du secteur.

En France, de nombreuses dispositions ont été introduites dans la réglementation audiovisuelle afin de rendre les programmes télévisés accessibles aux personnes souffrant d'un handicap.

S'agissant des personnes sourdes ou malentendantes, la loi n° 2005-102 du 11 février 2005 a posé le principe général d'adaptation de la totalité des programmes télévisés des principales chaînes, à l'exception des messages publicitaires et de quelques dérogations justifiées par les caractéristiques de certains programmes, dans un délai maximum de cinq ans suivant la publication de la loi.

Plus récemment, des dispositions relatives à l'adaptation des programmes télévisés aux personnes aveugles ou malvoyantes par le recours à la technique dite de l'audiodescription ont également été introduites par la loi n° 2009-258 du 5 mars 2009 relative à la communication

audiovisuelle et au nouveau service public de la télévision dans la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication.

L'article 7 de la directive du 10 mars 2010 encourage le développement de l'accessibilité des services de médias audiovisuels aux personnes souffrant de déficiences visuelles ou auditives. Le Conseil supérieur de l'audiovisuel a décidé, dans le cadre de sa délibération n° 2010-57 du 14 décembre 2010 relative à la protection du jeune public, à la déontologie et à l'accessibilité des programmes sur les services de médias audiovisuels à la demande, de recommander aux éditeurs et distributeurs de SMAD de rendre les programmes accessibles aux personnes sourdes, malentendantes, aveugles ou malvoyantes.

3.3 **Accès à la lecture :**

La loi du 1er aout 2006 relative aux droits d'auteur et droits voisins dans la société de l'information, loi dite DADVSI, a introduit dans le code de la propriété intellectuelle une nouvelle exception au droit de reproduction et de représentation des auteurs et des titulaires de droits voisins au bénéfice des personnes handicapées.
Cette exception permet, sans autorisation préalable, ni rémunération des ayants droit, la reproduction et la représentation d'œuvres protégées sur des supports adaptés aux personnes handicapées, effectuées à des fins non lucratives par des personnes morales et par des établissements ouverts au public. Cette disposition permet l'accès aux supports physiques comme numériques. Pour exemple, la Bibliothèque nationale de France a inauguré, fin mars 2010, une plate-forme sécurisée de dépôt et de transfert des fichiers numériques ayant servi à l'impression des œuvres (PLATON).

Enfin, Frédéric Mitterrand, Ministre de la Culture et de la Communication et Roselyne Bachelot, Ministre des Solidarités et de la Cohésion sociale, ont traité de l'accessibilité au cinéma et à l'audiovisuel pour les personnes en situation de handicap à l'occasion d'une séance de travail de la Commission Nationale Culture Handicap le 26 janvier 2012. A cette occasion, le Ministre de la Culture et de la Communication a annoncé aux associations représentant les personnes en situation de handicap plusieurs mesures dont notamment:

- la mise en place d'une aide incitative du CNC pour que le sous-titrage et l'audio-description des films s'imposent progressivement dès leur sortie en salle ;
- le lancement de deux missions : l'une sur les métiers de l'audiodescription, l'autre sur la coordination de l'information sur les oeuvres sous-titrées et audio-décrites;
- la mise en place d'un groupe de travail afin d'accompagner la petite et moyenne exploitation cinématographique dans la mise en accessibilité des cinémas;
- la rédaction en cours d'un nouvel ouvrage de la collection Culture et Handicap consacré précisément à l'accessibilité au cinéma**.**

III- **Mesures envisageables**

Six ans après le vote de la loi du 11 février 2005, et afin d'assurer le rendez-vous de 2015, la priorité de la France en matière d'accessibilité concerne les secteurs suivants :

- les lieux de travail des secteurs publics et privés accessibles aux travailleurs handicapés,

- les nouvelles technologies d'information, de communication et de consommation,

- la santé,

- la formation de l'ensemble des professionnels concernés par la thématique du handicap,

- la culture et les loisirs,

- les transports.

La mesure la plus importante consiste à faire de l'accessibilité un « mot d'ordre » ou un principe général de société de « l'accès à tout pour tous ». Ce principe s'applique à l'ensemble de la population d'une société. Cette accessibilité doit pouvoir s'appuyer sur 4 piliers indispensables qu'une politique publique doit prévoir :

- L'accessibilité pour tous sans exclusion. La loi prend en compte toutes les formes de handicap, et concerne les personnes handicapées et les personnes à mobilité réduite, y compris de manière temporaire.

- L'accessibilité de l'ensemble de la chaîne des déplacements. Pour la première fois, une loi considère de façon intégrée le cadre bâti, les espaces publics, la voirie, les systèmes de transport et leur inter-modalité. L'enjeu est bien d'éliminer tout obstacle dans le cheminement des personnes atteintes d'une quelconque déficience.

- Des changements progressifs jusqu'en 2015. La loi impose des résultats selon un calendrier précis de mise en œuvre et elle prévoit des sanctions.

- Une accessibilité concertée. La loi est le fruit de la concertation avec les associations représentant les personnes handicapées.

En effet, s'il est « aisé » de concevoir des infrastructures et bâtiments neufs en tenant compte des handicaps, reprendre des infrastructures existantes peut s'avérer économiquement rédhibitoire dans certains cas. Par exemple, sur autoroute, l'aménagement de certains refuges permettant l'accès aux postes d'appels d'urgence n'est matériellement pas possible ou nécessiterait des investissements colossaux. Ainsi des mesures devraient être prises pour pallier ce type de situation. Par ailleurs, la difficulté réside davantage dans les moyens qui peuvent être débloqués par les différents maîtres d'ouvrages afin de réaliser les travaux nécessaires. Cette question ne se pose pas sur le réseau autoroutier concédé, mais elle peut devenir cruciale pour d'autres maîtres d'ouvrages.

L'ensemble de ces acteurs doivent dépasser le seul critère de coût lié à la mise en accessibilité des biens et des services. Au-delà de cet aspect financier, c'est l'ensemble d'une société qui est rendue accessible non pas à une catégorie de population mais à l'ensemble de la population constituant cette société. C'est un investissement à long terme d'intérêt national, voire européen, qui doit permettre une société inclusive pour une population.
Dans le domaine des transports, il est important de favoriser la concertation avec les associations comme avec les professionnels, tout au long des projets et de choisir un mode d'organisation permettant d'intégrer au mieux les avis, contraintes et revendications de chacun et :

- communiquer vers les maîtres d'ouvrage en utilisant par exemple la presse professionnelle, en diffusant des guides et en valorisant les bonnes pratiques ;
- attirer leur attention sur le traitement des espaces de transition entre le bâti, la voirie et les transports et l'entretien et l'exploitation des aménagements ;
- promouvoir la formation des services techniques et des professionnels qui interviennent sur l'espace public et la formation en général;

- sensibiliser les citoyens dans le cadre de comités de quartiers, de démarches de plans de mobilité et par l'utilisation de cartes de Gulliver ;
- associer le plus possible les réseaux scientifiques et les constructeurs.

Plus spécifiquement, dans le domaine routier, un manque de normalisation a été constaté concernant les bandes de guidage pour les personnes aveugles ou mal-voyantes. Différents systèmes sont actuellement testés par plusieurs maîtres d'ouvrage, mais la diversité des systèmes ne facilite pas leur reconnaissance et usage par les personnes handicapées. Il serait donc utile que les expérimentations puissent rapidement converger pour permettre une harmonisation des pratiques.

Enfin, les pouvoirs publics doivent règlementer pour les constructions neuves. L'existant doit être amélioré en cas de modification dans des mesures raisonnables.

Dans le domaine du bâti, deux grands axes prioritaires pourraient être développés à l'avenir :

- La formation des professionnels aux notions d'accessibilité ;
- La prise en compte des besoins réels des usagers en favorisant la concertation dès l'amont des projets.

Les petites et moyennes entreprises doivent avoir une meilleure connaissance des besoins des personnes en situation de handicap et mieux inclure la notion de conception universelle dans les biens et services. Elles doivent travailler en concertation avec les associations de personnes handicapées et à mobilité réduite, comme c'est actuellement le cas dans plusieurs villes européennes.

Concernant les constructeurs ou opérateurs de transport, le développement de la formation aux métiers liés à l'accessibilité des personnes en situation de handicap doit se poursuivre par la mise en place de nouveaux cursus de formation par exemple, voire l'émergence de nouveaux métiers.

La mise en place de plans de communication est indispensable, d'une part pour mieux faire connaître les besoins des personnes handicapées et à mobilité réduite et d'autre part, faire évoluer les mentalités.

Pour le transport maritime, depuis l'entrée en vigueur de la règlementation française sur l'accessibilité, de nombreuses PME ont su se positionner sur des marchés en ce qui concerne:

- la décoration intérieure (contraste pour les malvoyants)
- l'éclairage
- les affichettes et panneaux en braille etc…

Les petites et moyennes entreprises, par leur réactivité et leur capacité d'innovation, doivent être le support d'une politique de mise en accessibilité dans le domaine du bâti.

Germany

Equal access to the physical environment, means of transport, services and facilities as well as to information and communication technologies are essential conditions enabling people with and without disabilities to live together in a self-determined way in all areas of life.
In its schemes on accessibility, Germany pursues a broad approach with particular emphasis on the creation of accessibility in all areas of life. The Federal Republic of Germany has a number of laws and regulations on accessibility to implement the constitutional dictate of Article 3, para. 3, sentence 2 of the Basic Law that "No person shall be disfavoured because of disability".

Under the provisions of the Act on Equal Opportunities for Persons with Disabilities (BGG) providing for the prohibition of discrimination against disabled persons by public authorities and the creation of accessibility as well as under the equal opportunities legislation of the federal states, the government and the states are obliged to ensure comprehensive accessibility.

The goal of the Equal Opportunities Act is: constructional and other facilities, means of transport, technical utensils, information processing systems, acoustic and visual sources of information and communication facilities as well as other designed areas of life are to be accessible to and useable by persons with disabilities without particular obstacles in the customary manner and as a matter of principle without the assistance of others. In the sense of "design-for-all", the special focus lies on the characteristic "usable …. as a matter of principle without the assistance of others". This particularly strengthens the self-determination and personal responsibility of persons with disabilities. The regulations for the creation of accessibility are the core element of the Federal Act on Equal Opportunities for Persons with Disabilities which acted as model for the equal opportunity legislation of the 16 federal states. Moreover, the requirements of this Act are also relevant for other areas, e.g. the provision of benefits and services in the field of rehabilitation. This applies, in particular, also to rehabilitation services provided by the social insurance funds. Ten years after their introduction, the effectiveness of the provisions and instruments of the Equal Opportunities Act shall be reviewed. An evaluation to this effect is scheduled for 2013. On the basis of this evaluation, a potential need for amendments will be decided on.

The creation of accessibility is a dynamic process which can only be gradually implemented, taking account of the principle of proportionality and the means that are available. The standards of accessibility to be called on are subject to constant change. Specifically for individual regulatory areas, they are established by recognised technical regulations (such as the DIN standards of the German Institute for Standardisation) and - on the basis of the Act on Equal Opportunities for Persons with Disabilities - also via programmes, plans and agreed goals. Because, due to the long lifespan of current infrastructure facilities and vehicles, any necessary adjustments can only be made step by step, constructional and other facilities, means of transport, information processing systems and communication facilities are being successfully designed such that they can be used by persons with disabilities without particular difficulty and as a matter of principle without the assistance of others.

The access to justice for people with disabilities is guaranteed by German law. Corresponding provisions are, for example, contained in the Courts Constitution Act (GVG) and the Code of Criminal Procedure (StPO). The German Sign Language has been recognised as a language in its own right. In all proceedings before German courts and in administrative procedures with federal authorities, persons with hearing and speech impairments have the right to choose to

communicate either through German Sign Language, sound-accompanying signs or through other technical communication aids. Any costs arising in this regard are to be borne by the authorities or courts.

Blind and visually disabled persons participating in administrative procedures have the right that documents enabling them to exercise their rights be made accessible to them. The form of such documents depends on the possibilities of perception of the persons involved. Documents can, for example, be made accessible by being read out, with the help of sound recording devices, in Braille or capital letters, electronic form or by other means. The persons concerned are not to be charged with additional costs associated with the provision of these documents. The same applies to court proceedings.

In the Coalition Agreement of the Federal Government for the 17th legislative period it was agreed to draw up a National Action Plan (NAP) to implement the UN Convention. It was adopted by the Federal Government on 15 June 2011. With the NAP, a long-term overall strategy was drawn up for the implementation of the Convention. It is a package of measures rather than a legislative package and, in particular, aimed at closing existing gaps between the legal situation and the practice. More than 200 plans, projects and activities show that inclusion is a process that includes all areas of life. An important measure, for example, is ensuring access to medical care. All persons with disabilities are to be provided with unlimited access to every kind of health care and health services. The NAP therefore includes the objective of making a sufficient number of medical practices accessible over the next ten years. Together with the federal states and the medical profession, the federal government is going to develop an overall concept to give incentives for the creation of barrier-free access to or barrier-free equipment of practices and hospitals. The federal government's action plan is supplemented by other action plans of the federal states, municipalities, rehabilitation providers, disability and social organisations as well as providers of services for persons with disabilities and private sector companies. Some of these plans have already been adopted.

Accessibility and taking account of the "design-for-all" have become increasingly important criteria for companies, also with a view to the demographic trend of an ageing society. Accessibility opens up new consumer groups and thus, in addition to enhancing the participation of disabled persons, also new market opportunities for companies. Public relations and the provision of information on the implementation of accessibility in different areas of life are of crucial importance. Market research is therefore a major precondition for the development and supply of barrier-free goods and services. In this context it is important to identify products and services of special interest and to promote market research in these areas in a targeted way. Such research must include persons with disabilities. Many products are developed on the basis of scientific innovation or as a result thereof. Therefore, the training of experts involved in product development should contain elements to raise awareness of the subjects "accessibility" and "design-for-all".

With regard to information and the stimulation of change in the public's mindset, a lot of importance has been attached to the dissemination of good examples. For the above mentioned reasons, small and medium-sized enterprises (SME) should participate in this process. Since 2009, the Federal Ministry of Economics and Technology has organised conferences, particularly with SMEs, to make companies aware of the "design-for-all". A lot of good examples could be identified and published as a result. In 2012, further conferences will be held on this topic. But goods and services for persons with disabilities are not only in high demand by companies but also by the public sector - e.g. in social assistance.

Retail quality labels could support this process. In Germany, the government-supported initiative „Economic Factor Age“ developed the “Generation-Friendly Shopping” quality mark in cooperation with the German Retail Federation (Deutscher Handelsverband) and other institutions and organisations. The quality mark is awarded to stores catering to the needs of persons with a handicap, for example by ensuring an optimal design of their store entrance and arrangement of goods and by labelling their products with clearly legible price tags. Suitable measures should be adopted to sensitize consumer counselling services for accessibility as an distinctive characteristic of products and services. The involvement of people with disabilities is crucial for the success and acceptance of these measures.

Greece

The Greek constitutional law (article 4) defines that all people are equal before the law and that all Greek women and men have equal rights and obligations. According to that article, the same principles apply also to disable people.

Facilitation and accessibility

The General Secretary of Public Administration and Electronic Government with its circular letters mention the necessity of serving people with disability in priority and urging all public sector services to ensure accessibility to disable people.

Circulars of the Ministry of Interior define that public sector services, institutions and local authorities' services should provide for the accessibility of the built environment to people with disabilities. The Law 2831/2000 contains special clauses for the buildings to be accessible by people with disabilities. These clauses are related to issues such as the accessibility to entry-exit points of buildings, to sidewalks, elevators, post mail boxes and etc.

The Ministry of Environment, Physical Planning and Public Works has organised a "Committee of Accessibility" which recommend to the Minister issues that have to do with the implementation of the Law 2831/2000. Among others, members of this Committee are people from the National Confederation of Disabled People (ESAMEA).

The Athens Urban Transport Organisation's (OASA- www.oasa.gr) provides information about the accessibility to and the use of all means of transport (bus, trolley, metro, tram, train). In addition, the related infrastructure such as airports, bus and railway stations are accessible to people with disabilities. Most of city's transportation means are equipped with ramps in order to facilitate the boarding of people with disabilities using a wheel-chair.

Although there is no specific legislation about the e-accessibility and the participation of disable people in electronic government society, institutions or disability organisations develop websites in order to cover the special needs of this category of people.

A network of sports facilities accessible for athletes with disabilities has been developed; a network of sidewalks refurbished with ramps and tactile guide and also an accessible beach in Athens are available to disabled people.

More steps should be taken as well in the direction of comprehensive and systematic promotion of accessibility across the full range of policies and to raise awareness in particular of the sensitive group of children.

All Greek authorities, ministries etc. promote the right of disable people to accessibility in all areas of their daily and professional life. Article 9 of the UNCRPD is a guideline and all efforts are made under its principles.

a. Accessibility legislation: its place in the legal and regulatory framework

Circulars of the Ministry of Interior define that public sector services, institutions and local authorities' services should be provided for the accessibility of the built environment to people with disabilities. The Law 2831/2000 contains special clauses for buildings to be

accessible by people with disabilities. These clauses are related to issues such as the accessibility to entry-exit points of buildings, to sidewalks, elevators, post mail boxes and etc.

The Ministry of Environment, Physical Planning and Public Works has organised a "Committee of Accessibility" which recommend to the Minister issues that have to do with the implementation of the Law 2831/2000.

b. General law, technical regulations and standards

The existing legislation covers the basic requirements for the development of goods, products and services accessible to disabled people. Then, circulars produced by the Ministries, formulate, where appropriate, special conditions that must be followed for the development and implementation of accessible goods / services. For example, Law 2831/2000 Article 28 refers to special arrangements to accommodate people with disabilities to buildings, new and existing, and in public spaces. The Ministry of Public Works with a series of circulars required public bodies to take appropriate measures to implement the law. These circulars define technical details.

c. Role of national, European and international standards

The Greek legislation on accessibility follows international standards and has been defined from regulations produced by international bodies, e.g. mainly E.U., U.N, CoE. Although current legislation covers this issue, it seems there is a need for updating it after the upcoming ratification of the U.N. Convention on rights for people with disabilities.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Signing the U.N. Convention has not yet led to any changes regarding accessibility legislation, but it is expected that the ratification will affect current legislation, although it already covers all main topics that should be included in legislation regarding accessibility.

e. Services regulated for accessibility

The law 2831/2000 Article 28 provides special arrangements to accommodate people with disabilities.
More specifically, paragraph 1 defines that areas of new buildings should ensure both horizontal and vertical access by people with disabilities. These buildings are the buildings used by the public: public Services, public entities, private legal entities of the public sector, civil society organizations, local authorities first and second tier or uses, rollup public, education, health and social care, offices and trade as well as in parking lots of these buildings.

f. Goods regulated for accessibility

The Athens Urban Transport Organisation's (OASA-www.oasa.gr) provides information about the accessibility to and the use of all means of transport (bus, trolley, metro, tram, train). In addition, the related infrastructure such as airports, bus and railway stations are accessible to disabled people. Most of the city's means of transport are equipped with ramps in order to facilitate the boarding of people with disabilities using wheel-chairs. Besides means of transport, all goods and services either produced for or provided to the public should be

harmonised with internal legislation and E.U. directives and regulations, e.g. telephones, ATM's, doors, elevators, tables etc.

g. Enforcement of accessibility legislation

For particular buildings, the responsible departments for the implementation of accessibility in public spaces are the units of Accessibility and the Technical Services of the Municipalities. Other bodies responsible for implementation of accessibility in public buildings are the units of accessibility of the ministries, public entities, regions and local authorities, first and second degree. Monitoring of the implementation of accessibility works carried out by the Inspector General of Public Administration, who in that jurisdiction, directs and coordinates all the control mechanisms of the state to determine the motivation and compliance of public bodies and municipalities in implementing the projects accessibility. In particular, the control and policing of points of accessibility of public spaces and parking spaces shall be the responsibility of the concerned municipal police.

h. Non-compliance and litigation

Complaints may be submitted with a signed claim to the Ombudsman. A claim could be brought either by any directly concerned natural or legal person or association of persons. After the investigation, the Ombudsman, if required by the nature of the case may draw the conclusion which informs the relevant minister and the competent services, and mediates in any suitable way to solve the problem.

At the same time, any person can go to court, asking either the compliance of public or private entities with existing legislation on accessibility or to claim compensation for any damage.

Hungary

a. Accessibility legislation: its place in the legal and regulatory framework

The Hungarian law on the rights and equal opportunities of persons with disabilities (ACT XXVI of 1998 7/A. §) recognised the equal right to accessible public services. To implement this law the accessibility of public services is obligatory. The legislation defines accessibility in a complex way, so not just the accessibility of buildings is obligatory but the accessibility of information and services are also obligatory. This obligation refers to governmental, self-governmental and private public service providers; the earliest connecting deadline was 31. December 2008, and the latest was 31. December 2013.

The law declares in a separate paragraph, that people with disabilities must be provided with equal chances to access information of general interest, furthermore to information that refers to the rights of people with disabilities and (refers to) the services provided for them.

Paragraph 27 shows the human right viewpoint of the law, and declares: "Any person that has been treated unfairly on the grounds of his/her disability, he/she shall be entitled to all the rights that are to be enforced when personal rights are violated". This refers to all the rights named/declared under the law, so if there is a lack of accessibility, - after the deadline expires - the defaulter can be sued.

b. General law, technical regulations and standards

The Hungarian law on the rights and equal opportunities of persons with disabilities (ACT XXVI of 1998) recognises the right of accessible services and the requirements of suppliers. The law on Hungarian Sign Language and the use of Hungarian Sign Language (ACT CXXV of 2009) recognises the ICT accessibility of deaf people. The Hungarian law about the construction and protection of the built environment (ACT LXXVIII of 1997) and its implementation regulation, the governmental regulation about the national settlement planning and building requirements (253/1997.) contain the technical specifications of the physical accessibility.

We try to build the most modern requirements in the tendering packages during the implemented accessibility projects financed by EU and national resources. (About this we inform more in the answer belongs to the point c).

c. Role of national, European and international standards

In 2007, the legal predecessor of the Ministry of National Resources has put forward a Manual aiming to realize equal accessibility, which was updated in 2009 based on the new building acts. This expert document on architecture contains a broader system of requirements than the effective legislative provisions in the field of realizing accessibility, such as the W3C recommendation on web accessibility or other ICT standards where no relevant legal regulation has been formulated yet. The application of the Manual in cases of development projects financed by the European Union is obligatory.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Hungary ratified the UN Convention on the Rights of Persons with Disabilities and the related Optional Protocol in 2007. The main impact of the ratification is the declaration of the law on Hungarian Sign Language and the use of Hungarian Sign Language (ACT CXXV of 2009). This law recognises −inter alia− the communication rights of deaf and deaf-blind people and their rights to free sign language interpreting service, and learning through Sign Language, and TV programmes have to be subtitled, and during formal –judicial, police, etc. –processes obligatory to use Sign Language interpreter.

This Convention inspired the modification of the governmental regulation about the national settlement planning and building requirements (253/1997.) in 2009, which enlarge the technical and architectural specifications in connection with the physical accessibility.

We will take into consideration the principles of the Convention when reviewing the Hungarian law on the rights and equal opportunities of persons with disabilities (ACT XXVI of 1998). On the basis of the professional trends, national and international experiences we will update the legislation about the accessibility.

e. Services regulated for accessibility

The accessibility obligation of the ACT XXVI of 1998 refers to the further public services:

- all public power activity- including all kinds of authority, governmental, administrational and judicial activity- furthermore the activity of the parliament, organisations subordinate to the parliament, the Constitutional Court, parliamentary commissioners, the prosecution, home defence and security organisations practicing their competence.
- public media, education, public education and collection, culture, science, social, child welfare, child protection, health, sport, youth, and employment services, cares and activities provided by institutions run by the state.
- all activities of local and minority governments practicing their competence- including especially the authority and other administrational activities- and according to the 2nd point services, cares and activities provided by local and minority governments, NGOs and parochial institutions, and institutions financed by them.
- service activity provided in all kinds of customer services, furthermore
- service activity based on all kinds of authority permit or authority obligation, that serves the public care of a settlement or a part of a settlement, is not restricted and cannot be restricted.

f. Goods regulated for accessibility as part of a service

There is no legislation in force in connection with the accessibility of the goods.

g. Goods regulated for accessibility

There is no accessibility legislation for manufactured goods in Hungary at the moment.

h. Enforcement of accessibility legislation

In accordance with the legal regulations in force, compliance with accessibility provisions during the construction of a new building or the reconstruction of an already existing one is

verified by the building authorities in each case in advance. In principle, granting a building permit must be denied in all cases where fulfilling the requirements is not guaranteed. In practice however, it poses a serious problem that the experts of the building authority are not well-informed enough about accessibility requirements and numerous mistakes derive from inefficient construction.

The effective provisions do not impose classic sanctions on accessibility legislation. Non-compliant providers will first and foremost have to face the previously mentioned possibility of litigation. Moreover, the Equal Treatment Authority may investigate whether maintainers have fulfilled legal obligations in a given case. In cases of a violation, the Authority may impose a fine.

In our plans, reviewing the legal framework to provide accessibility will also extend to the legal consequences of non-compliance.

i. Non-compliance and litigation

The Hungarian law on the rights and equal opportunities of persons with disabilities (ACT XXVI of 1998 27. paragraph) declared "Any person has been treated unfairly on the grounds of his/her disability, he/she shall be entitled to all the rights that are to be enforced when personal rights are violated". This means in practice, that the defaulter can be sued because of violation of individual rights.

Furthermore, in the case of breaking the law considering the accessibility legislation, plaintiffs can turn to the Commissioner of Fundamental Rights (ombudsman) and to the Equal Treatment Authority.

According to the Hungarian law on the rights and equal opportunities of persons with disabilities (ACT XXVI of 1998 25. paragraph (7)) "The National Council on Disability Affairs and the national organisations for advocating the rights of persons with disabilities may initiate court proceedings against anybody violating the rights of persons with disabilities as encoded in legislation in order to enforce such rights, even if it is not possible to establish the identity of the particular disabled person who has experienced the insult."

Ireland

a. Accessibility legislation: its place in the legal and regulatory framework

Equality (anti-discrimination) legislation, the Equal Status Acts 2000 to 2008, provides that anyone selling goods, providing services, selling or letting accommodation, educational institutions and clubs must do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, where without these it would be impossible or unduly difficult to access goods, services, accommodation etc. This is subject to nominal cost.

The Disability Act 2005 obliges public bodies to make their buildings, services communications, and information as well as heritage sites accessible for people with disabilities and is supported by statutory codes of practice and also practical guidelines. It also establishes requirements for a complaints process with appeals to the national Ombudsman. Programmes of works have been undertaken and committed in sectoral plans (disability action plans produced by key Government Departments under the Disability Act).

Part M of the Building Regulations also covers accessibility and applies to new buildings (other than private houses) which have to have mandatory Disability Access Certificates; and over time to public areas of public sector buildings.

b. General law, technical regulations and standards

Legislation provides specific requirements for the public sector as stated above and provides for the Disability Access Certificate for all sectors. It is also a subject of regulations, i.e. in the case of new buildings, Part M of the Building Regulations sets out general requirements, and the accompanying Technical Guidance Document lists specifications for particular aspects of a building (e.g. doorway and corridor widths) that would satisfy the accessibility specifications.

c. Role of national, European and international standards

2011 Irish legislation on the legal requirement for Energy Suppliers in relation to Universal Design is set out in Section 3 (3) of The European Communities (Internal Market in Electricity and Gas) (Consumer Protection) Regulations of 2011 (S.I. No. 463 of 2011). This section states that suppliers must apply the principles of Universal Design to:

- all products and services offered or provided to final customers, and
- communications with final customers.

In early 2012 the National Standards Authority of Ireland (NSAI) produced the first global guidance standard for Energy suppliers in Ireland. This was specifically based on the universal design of how the energy suppliers (electricity and gas) communicate to their customers – verbal, written and electronic based communication. The National Disability Authority's Centre for Excellence in Universal Design and the office of the Commission for Energy Regulation in Ireland co-chaired the production of this guidance standard with all the key stakeholders from energy suppliers in Ireland and diverse user group representations from age, size ability and disability.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Since signing the Convention, updating and strengthening of Building regulations, and introduction of mandatory Disability Access Certificates for new buildings have occurred as part of the National Disability Strategy, the key vehicle for advancing policies in relation to people with disabilities.

e. Services regulated for accessibility

Equality legislation covers both public and private sectors. The Equal Status Acts 2000 to 2008 apply to people who:

- Buy and sell a wide variety of goods,
- Use or provide a wide range of services,
- Obtain or dispose of accommodation,
- Attend at, or are in charge of, educational establishments,
- There are separate provisions on discriminatory clubs.

Disability legislation is specific to the public sector only. The Disability Act 2005 regulates for access to public buildings and heritage sites and access to services and information provided by public bodies.

Regulations for the building sector, Part M of the Building Regulations, apply to both public and private sectors.

f. Goods regulated for accessibility as part of a service

Equality legislation states "goods and services" without specifying the nature of those goods and services. Disability legislation provides for accessibility to be taken into account in public procurement of goods and services, again without specifying the nature of goods involved.

g. Goods regulated for accessibility

The Public Transport Regulation Act 2009 specifically requires that improved access to transport systems and in particular to public transport services by people with disabilities be achieved.

In 2010 the Irish government introduced S.I. No. 248/2010,the Taxi Regulation Act 2003 (Wheelchair Accessible Hackneys and Wheelchair Accessible Taxis - Vehicle Standards) Regulations 2010. This regulation covers:

- applications for the grant of a wheelchair accessible hackney or a wheelchair accessible taxi licence;
- applications for the renewal of a licence ; and
- renewal of a wheelchair accessible hackney or a wheelchair accessible taxi licence.

The Merchant Shipping Act 2010 covers passenger vessels to ensure that they are accessible to people with disabilities. This is based on the EU Regulation 1177/2010 on the rights of passengers travelling by Sea and Inland Waterways.

The Irish statutory Centre for Excellence in Universal Design is working with the National Standards Authority in relation to universal design standards for services. Work to date has included recent adoption of a SWIFT standard for improved energy services to customers, including those with disabilities. The national regulatory body for the energy sector is working to achieve compliance.

h. Enforcement of accessibility legislation

For accessibility of goods and services generally (equality legislation), the Equality Authority provides advice and information and can guide complainants, the Equality Tribunal adjudicates on complaints, and can make an award of monetary compensation to the complainant, to be paid by the offending organisation.

Disability legislation governing access to public services, premises and information provides that individuals can appeal to a statutory Inquiry Officer, or ultimately to the Ombudsman, who can recommend that appropriate action be taken by the public body.

With regard to accessibility of new buildings, an award of a Disability Access Certificate is required before the building can be occupied. This is the role of Local Authorities.

i. Non-compliance and litigation

Individuals can bring a complaint to the Equality Tribunal (for complaints regarding general accessibility of goods/services) and the remedy is usually damages awarded to the complainant. Awards may be appealed to the Courts. The Equality Authority can join the complainant in taking the case.

Individuals can bring a complaint, under the Disability Act, on accessibility of public services to the head of the Public Body who must then appoint a statutory Inquiry Officer to investigate the complaint and advise on remedial steps to be taken. Should the complainant be dissatisfied with the outcome of this process they have the right to refer it to the Ombudsman.

Italy

a. Accessibility legislation: its place in the legal and regulatory framework

General provisions on accessibility of infrastructures (built environment) are included in the law n. 104/1992 (Statutory law to promote the assistance, the social integration and rights of persons with disabilities), which provides for all designs of public buildings and private buildings open to the public to comply with the legislation regarding the removal of architectural barriers. Authorizations to build depend on the same legislation.

The Consolidated Building Act (*Testo Unico Edilizia*, approved by *Decreto del Presidente della Repubblica* n. 380/2001 and related provisions (e.g. law n. 13/1989) provides for the removal of architectural barriers in private and public buildings and relevant sanctions.

Detailed technical regulations on accessibility of public buildings and private buildings open to the public are included in Presidential Decree n. 503 of 24 July1996.

Law n. 4/2004[72] provides for specific measures aimed at enhancing access to ICT tools and devices for persons with disabilities. The Law states that measures to favour ICT accessibility belong to the measures to implement equality principles enshrined in the Constitutional Law (art. 3). Therefore it regards the granting of equality conditions.

Law n. 104/1992 establishes that municipalities should identify suitable ways to provide individual transport for persons with disabilities who are not able to use public transport, by drawing up mobility plans foreseeing alternative services.

Law n. 37/1974 provides for guide dogs to be allowed free of charge on public transport. Recent public means of transport such as train buses and coaches are equipped with special facilities for passengers with disabilities and with reduced mobility. All European directives and regulations concerning accessibility of public transport have been implemented, in particular Regulation (EC) n. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air which is expected to pave the way for similar regulations in the field of bus and maritime transport.

It should be noted also that Decree of the Ministry of Cultural Heritage and Activities of 28 March 2008 adopted the Guidelines for the elimination of architectural barriers in places of cultural interest.

In the Italian law accessibility is designed primarily to overcome architectural barriers as well as all physical obstacles that are a source of discomfort for the mobility of everyone and especially for those who have a reduced or impaired mobility, permanently or temporarily; limiting or preventing anyone from convenient and safe use of parts, equipment or components or represented by the lack of measures and indicators that allow the orientation and recognition of places and sources of danger to anyone and in particular for the blind, partially-sighted and deaf.

[72] For the English version see the following link: http://www.pubbliaccesso.it/normative/law_20040109_n4.htm

The concept of architectural barrier is, therefore, very extensive and articulated and includes elements of different nature, which may cause perceptual or physical limitations, such as particular conformations of the objects and places that may be a source of disorientation, fatigue, discomfort or distress. Architectural barriers are therefore not only narrow steps or passages, but also slippery, uneven or bumpy paths and roads, stairs without handrails, steep ramps, lobbies without seating systems or protection from the weather, the lack of guidance or indications that helps identify any source of danger, and so on. Physical barriers are an obstacle to "anyone", not only for particular categories of persons with disability, but for all potential users.

Specific initiatives are adopted by the regions on the base of their responsibility (since 2001) for local governance of social policies.

b. General law, technical regulations and standards

See item a.

Regarding L. 4/2004 and ICT accessibility the Law is accompanied by an implementation regulation and technical rules contained in secondary norms (Regulation DPR 75/2005 for English version see http://www.pubbliaccesso.it/normative/implementation_regulations.htm and Ministerial Decree 8 July 2005 http://www.pubbliaccesso.it/normative/DM080705-en.htm) which set technical requisites and guidelines. So, on the one hand, the Law provides for principles, and guidelines regarding training, responsibilities of e.g. public managers regarding ICT procurement etc.; on the other hand, implementation regulation gives operative indications concerning the assessment of accessibility etc.

c. Role of national, European and international standards

See item a.

Regarding L. 4/2004 and ICT accessibility, international guidelines such as WCAG (Web Content Accessibility Guidelines released by W3C) are taken into account as point of reference. Under this aspect it is worth mentioning that in consideration of the release of the WCAG 2.0, the technical requisites (Annex A of DM 5 July 2004) are undergoing a revision (already notified to European Commission according to EC Directive 98/34).

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Italy is in the first phase, checking the effectiveness of national legislation in relation to the principles of the UNCRPD. The national Law n. 18/2009 provides the establishment of a National Observatory in order to monitor the condition of people with disabilities. The National Observatory, which met for its official session on December 16th, 2010, to monitor the condition of people with disabilities will also assure the implementation of the activities provided by the Article 33.2 of the UN Convention. On July 2011 six working groups, of which one has to examine issues related to accessibility, were formed within the Observatory, in order to deal with all major areas of reference set by the UN Convention.

e. Services regulated for accessibility

Transport, education, tourism, cultural activities, electoral services.

Regarding ICT accessibility Law 4/2004 mainly targets public administrations websites and public procurement of ICT devices. (The compliance to accessibility provisions is also stated in the Digital Administration Code legislative Decree 2005/82 as modified by legislative Decree 235/2010 as compulsory obligation for public administration websites).

As for Digital tools used in Education (Digital content for education and learning) specific provisions are contained in the Ministerial decree 30 April 2008 – only in Italian http://www.pubbliaccesso.it/normative/DM300408.htm)

f. Goods regulated for accessibility as part of a service

Article. 7 of Law no. 104/1992 provides that the National Health Service is obliged to ensure assistance and the supply of any equipment, tool, prostheses and technical aids necessary for the treatment of impairments, in order to make sure that poor persons with disabilities have the opportunity to benefit from equipment and help to promote personal mobility. In this area, reference can be made to Ministerial Decree 27 August 1999, n. 332, dealing with types and modes of prostheses and services free of charge, by the NHS. For the other types of equipment, tool, prostheses and technical aids not specifically listed under that provision, is possible to obtain a tax advantage.

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g. Goods regulated for accessibility

People with disabilities can obtain a special license to drive a vehicle adapted to their specific needs, after authorization by a Local Medical Committee (ASL), responsible for ensuring the driving capacity (Article 116, c. 5, *Codice della Strada*). Moreover, Article 27 of Law no. 104/1992 introduces a 20% subsidy on costs to modify the driving systems, and several forms of tax benefits are listed for the purchase of a vehicle for people with disabilities or their families (reduced VAT, income tax deduction, exemption from payment of road fees and exemption from property transfers). In addition regions introduced contributions for purchasing vehicles for people with disabilities.

At the national level, regarding the possibility for people with disabilities to benefit from aids, equipment, technology for mobility, Decree of the President of the Republic n. 917 of December 22, 1986 (*Approvazione del T.U. sulle imposte dei redditi*) provides the possibility to deduct 19% of the costs incurred for the purchase of necessary means for personal mobility, and ICT and technical means designed to promote personal autonomy and the possibility of real integration of disabled people. E.g.: wheelchairs, artificial limbs, guide dogs for blind people, vehicles adapted to the needs of people with disabilities. Furthermore, a special VAT (4% instead of 20%) is reserved for orthopedic appliances or special vehicles with engines or other mechanism of propulsion, stair lifts, prostheses and aids related to permanent functional impairment (Law n. 263 of May 29, 1989). Law n. 30 of 28 February 1997 establishes a special VAT for purchasing technical and ICT aids designed to promote the autonomy of people with disabilities.

h. Enforcement of accessibility legislation

Law no. 104 of February 5, 1992, states that any project to be implemented in public or private buildings (when open to public) are subject to control by the municipality which has to verify their compliance to local regulations.

Regarding ICT accessibility, art. 9 of DPR 75/2005 (implementation regulation of L. 4/2004) states that each administration has to appoint a person responsible for ICT accessibility and it foresees a monitoring activity by a public body (former CNIPA, now DigitPA). Disciplinary sanctions can be applied to public managers who do not respect the requirements of the law.

More recently (December 2009), in order to have a more effective compliance to the law leveraging on users involvement in a full Web 2.0 way, the "Observatory for the Accessibility of Public Administration Websites" has been launched. Through the portal www.accessibile.gov.it , any citizen can complain regarding lack of accessibility (or usability) of public websites, but he/she can also give evidence to good practices. Through the website is also possible to monitor how the reports are handled until the cases are solved. Moreover, www.accessibile.gov.it has become a tool to spread the culture of web accessibility by giving space to news, examples, guidelines and good practices.

i. Non-compliance and litigation

In order to ensure equality and non discrimination of people with disabilities in every field of social life, including accessibility, Italy adopted Law no. 67, March 1, 2006 (*Measures for the judicial protection of persons with disabilities who are victims of discrimination)*. In defining the concept of anti-discrimination, Article 2 refers to the principle of equal treatment from which it follows that there can be no discrimination against persons with disabilities.

As for the procedural aspects of the protection, article 3 refers to article 44 of Legislative Decree no, 286, July 25, 1998 (*Consolidated text of provisions governing immigration and the status of the foreigner).* According to art. 44, when dealing with any form of discrimination from a single person or a public administration, anyone can file a case in civil courts to obtain the adoption of any necessary measure to remove the effects of that discrimination.

Non-execution of judge's orders can imply imprisonment until three years. The procedure ends with the executive order to terminate any behavior, conduct or act of discrimination, and to undertake any necessary measure to remove the effects of discrimination.

The intervention of the court is therefore not limited to modifying what had already happened, but also aimed to prevent discrimination in the future, thanks to positive actions for substantial equality of all people with disabilities.

Associations entitled to protect the rights of persons with disabilities (art. 4), identified by the Decree of the President of the Council of Ministers 21 June 2007, n. 181 (*Associations and entities qualified to act for judicial protection of persons with disabilities, victims of discrimination)* can also act on behalf of the disabled person after delegation of the party concerned, under form of public act or private writing (Art. 4, paragraph 1). In case of collective discrimination, associations and organizations are empowered to act without delegation (Art. 4, paragraph 3).

Latvia

a. Accessibility legislation: its place in the legal and regulatory framework

At the national level any discrimination is prohibited by the Constitution. However non-discrimination principles on the grounds of disability have been incorporated into different national laws, for example regarding access to education, consumer rights, health sector, social security, employment, etc.. Thus the responsibility regarding accessibility falls into scope of respective branch ministries.

Policy planning documents relevant for the topic, approved in 2011:
Action Plan for Implementing the Basic Principles on Policy for Elimination of Disability and its Consequences 2005-2015", adopted in 2006. The plan includes measures to foster equal rights of persons with disabilities in different spheres of life.
On 25 May 2011, the Cabinet of Ministers approved "***The Electronic Government Development Plan for 2011–2013***"[73] has been prepared in 2011 (order No.218) covering measures to: reduce the administrative burden and increase efficiency of the organizational process in the public administration; develop electronic services tailored to the needs of population and enterprises; develop state information systems and the ICT infrastructure, fostering internet access; facilitate public involvement in the policy-making process. It is developed for further implementation of Information Society Development Guidelines and continuity of e-Government Development Programme 2005-2009 and developed with regard to the objectives set in the Malmö Declaration and European eGovernment Action Plan 2011-2015.
The plan comprises 192 measures and its aim is to provide available public services to citizens in a convenient and simple way, through electronic data exchange between public administration and local government entities, while increasing government efficiency and reducing its costs. It is planned to create and develop more than 220 e-services within the framework of the Plan, including for citizens with disabilities. Implementation of the Plan is proceeding according to the time schedule approved in the Plan. In 2011 20 e-services have been developed, in 2012 there are planned to develop more than 150 e-services.

In line with National development documents setting the objectives to facilitate the e-skills to benefit from the digital society on 18th May 2011, the Cabinet of Ministers approved the "Electronic Skills Development Plan for 2011-2013" (order No.207)[74] taking into account the objectives set in the "Digital Agenda for Europe" as well as related national policy documents. The Plan is a short-term policy planning document and its aim is to promote the development of an information society allowing the population of Latvia to learn general e-skills commensurate with their education and professional activity levels during the period from year 2011 to 2013. The plan sets the objectives to raise the awareness and motivation of the necessity of e-skills as one of the eight key competences which are fundamental for individuals in a knowledge-based society.
The main target groups of the Plan are government employees, the unemployed and job seekers, retirees, long- term social care institution residents, disabled persons, prisoners according to Digital Agenda for Europe *Action 066: Implement by 2011 long-term e-skills and digital literacy policies and promote relevant incentives for SMEs and disadvantaged groups*.

[73] http://polsis.mk.gov.lv/view.do?id=3718

[74] http://polsis.mk.gov.lv/view.do?id=3662

Measures for facilitating e-skills of other target groups are foreseen in other national development planning documents.
The Plan's implementation has started. One of the tasks in the Plan is to hold the annual European E-skills Week with the aim to promote e-skills and ICT profession by involving and informing all groups of population, including entrepreneurs.

b. General law, technical regulations and standards

Built environment

The accessibility of the built environment in construction policy is regulated by the Construction law, which defines „accessibility of the environment" and also determines that a structure shall be designed and constructed so as to ensure the accessibility of the environment.

Currently there are two regulations of the Cabinet of Ministers in force- Regulation No 567 „Regulation on Latvian Building code LBN 208-08 „Public buildings and structures"" and Regulation No409 „Regulation on Latvian Building code LBN 211-98 „Multi-storey Multi-apartment Residential Buildings"" that include requirements of ensuring physical accessibility for persons with disabilities. In Regulation No567 the chapter "A*ccessibility in public buildings for people with disabilities"* provides ensuring requirements of physical accessibility in public buildings. In Regulation No409 the chapter "*Requirements of comfort for disabled persons"* provides requirements of physical accessibility in residential buildings, if there are anticipated apartments for families having disabled people with movement impairments.

Transport

Public transport

Currently an intensive work is underway to incorporate the main requirements for passenger rights into national law in accordance with the European Parliament and Council Regulation of 16 February 2011 (EU) No 181/2011 on bus passengers' rights and amending Regulation (EC) No 2006/2004, including, inter alia, provisions for disabled persons and persons with reduced mobility.

Procedures for the provision and use of public transportation services are determined in the Regulations "The order of provision and utilization of public transport services" which determine that all information in a bus about bus stop place shall be accessible in visual form and carried in audio form. Categories of passengers who have the right to pay lower fees for public transportation services provided along basic routes in a network of routes, as the procedure of paying lower fees and the amount by which the said fees are to be lowered are determined in the Regulation "Categories of passengers who have the right to pay lower fees for public transportation services provided along basic routes in a network of routes".

Environmental requirements established in the assignment of the planning architecture and referred to the Cabinet Regulations „General Building Regulations" are taken into consideration when designing and building the state roads network.

The national standard LVS 448:2008 "Railway applications. Passenger platforms for 1520 mm railway lines" lay down general requirements, which is harmonised with the EC decision 2008/164/EC of21 December 2007, concerning the technical specification of interoperability relating to "persons with reduced mobility" in the trans-European conventional and high-speed rail system. Standard requirements provide the upgrade of platforms height from 200 mm to 550 mm height from the rail surface.

Air transport

In the field of aviation Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air including European Civil Aviation Conference (ECAC) Doc 30 is applicable to the Republic of Latvia. Latvian Civil Aviation Agency exercises the supervising of application.

Sea transport

The Directive 2003/24, which amends Directive 98/18/EC on safety rules and standards for passenger ships engaged on domestic voyages, has been implemented by the Regulations of the Cabinet of Ministers No145 "Regulations Regarding the Safety of Ro-Ro Passenger Ships and High-Speed Passenger Craft" adopted on 14 February 2006. The Directive includes specific requirements for persons with reduced mobility, in particular access to the ship, signs, messages relay systems, alarms and additional requirements, designed to ensure mobility on board ships. The issue of accessibility to new ships for international services Latvia as member state of the International Maritime Organisation should follow to the Recommendation on the Design and Operation of Passenger Ships to Respond to Elderly and Disabled Persons' Needs regulated by the International Maritime Organisation.

In Latvia the European Parliament and Council Regulation (EU) No 1177/2010 on the rights of passengers travelling by sea and inland waterway was adopted on November 24, 2010, (will be applied from 18/12/2012) therefore amending Regulation (EC) No 2006/2004.

In the issue of accessibility to new ships for international services Latvia as member state of the International Maritime Organisation should follow to the Recommendation on the Design and Operation of Passenger Ships to Respond to Elderly and Disabled Persons' Needs regulated by the International Maritime Organisation.

ICTs and communications

In the field of information and communication technologies, Universal service directive 2002/22/EC and its amendment 2009/136/EC is transposed in the Electronic communications law and Electronic mass media law, ensuring the principle of equivalence of choice and access, access to European single emergency number 112, must carry obligations**.**

The Postal Law stipulates that secograms (postal items, which contains notifications or printed papers prepared in a special manner, using the writing system for the blind – Braille, as well as other information carriers addressed to the blind) are exempted from payment for postal services.

Regulations of the Cabinet of Ministers, No.171 "Procedures by which Institutions Place Information on the Internet" (adopted 6 March 2007) prescribes the procedures, by which institutions shall place information on the Internet in order to ensure availability thereof. In addition, in websites of institutions must be a section "easy to read", hence covering more citizen groups that are able to comprehend the information. In the regulations there defined a range of technical requirements for websites, that gives the possibility to perceive the information in several ways (in written form, as well as in the form of pictures and sound). And websites shall provide for a possibility to select the font size[75].

The Electronic Documents Law foresees that state and local authorities are obliged to accept electronically signed documents from individuals and legal entities, therefore, for many

[75] http://www.likumi.lv/doc.php?id=154198

services persons can apply by sending a digitally signed request to the official e-mail of the competent authority. Many of them a person can also receive electronically.

In order to reduce the administrative burden on enterprises and citizens and ensure good governance principles in accordance with the State Administration Structure Law and the Administrative Procedure Law, the Ministry of Environmental Protection and Regional Development examining drafts of regulatory acts and policy planning documents developed by other ministries and giving official opinions afterwards, urges institutions to include principles of electronically available services both applying and receiving, also including advantages (faster or cheaper receive for the electronic channel) etc, and to reduce the administrative burden on businesses and citizens. In 2011, there are given 146 official opinions on legislation and policy planning documents developed by other ministries.

The Ministry of Environmental Protection and Regional Development developing its own legislation, takes into consideration mentioned principles and includes them into the policy and regulatory acts.

To provide the observation of principles stated by State Administration Structure Law, the regulations of the Cabinet of Ministers, No.357 „Procedures by which institutions cooperating provide information electronically, as well as provide and certify the trueness of such information" (approved on 13th April, 2010) prescribes procedures, basic principles and available methods for cooperation between institutions electronically providing the information at their disposal and confirmation of such information.

The regulations of the Cabinet of Ministers Nr.792 (adopted on 11th October, 2011) "Regulations on action program" Infrastructure and Services" appendix 3.2.2.2 activity "Development of Public Internet Access Points"" provides for development of new public Internet access points or significant improvement of existing public Internet access points in local governments, in order to increase possibilities for Internet access to widest range of society groups, promoting access to electronic and other services, and information provided by public administration and commercial companies. The available total funding for the activity is 3 million LVL. Implementation of the activity ensures the Ministry of Environmental Protection and Regional Development as the responsible authority and the State Regional Development Agency as a cooperation authority.

Within the framework of the activity it is planned to create around 547 new or improve existing public internet access points – in each city (except Riga), municipality or municipality's territorial unit (town, rural territory) not more than one public Internet access points.

Mentioned regulations on the implementation of 3.2.2.2 activity has set a criterion for provision of horizontal priority "Equal Opportunities" - a project being appraised on this criterion, the project will receive extra points if it foresees specific actions to ensure equal opportunities, including providing services to persons with functional disabilities.

c. Role of national, European and international standards

When developing national standards international and best practices are being used to develop national standards. European Standards foreseen in EU Regulation are being incorporated and adopted as national standards.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Currently the future strategic document "Basic Principles of Implementation of the Convention on the Rights of Persons with Disabilities for 2013-2019" is being elaborated in close cooperation with line ministries and DPO's, it is foreseen that this document will also include certain proposals for measures and amendments to the legal acts to promote accessibility.

e. Services regulated for accessibility

See above.
Additional amendments to the legal acts regarding access to goods and services are under debate currently.

f. Goods regulated for accessibility as part of a service

See above.

g. Goods regulated for accessibility

See above.

h. Enforcement of accessibility legislation

Supervision (control) exists regarding construction process.

i. Non-compliance and litigation

In case of discrimination or non-compliance individual person or an NGO can file a case in court.

Lithuania

a. Accessibility legislation: its place in the legal and regulatory framework

The Law on Equal Opportunities (Official Gazette, 2008, No. 76-2998) prohibits all types of direct and indirect discrimination on grounds of age, sexual orientation, disability**,** race, ethnicity, religion or beliefs at work, educational institutions and in the sphere of services and goods.

According to Article 8 of this act, following the principle of equal opportunities, sellers or manufacturers of goods and providers of services must, irrespective of consumers' gender, race, nationality, language, origin, social status, faith, beliefs, views, age, sexual orientation, disability, ethnicity or religion:

i. create equal conditions for all consumers to obtain the same products, goods and services including provision with housing and applying equal terms and guarantees for the same products, goods and services of the same value;
ii. while providing information on or while advertising products, goods or services to consumers, ensure that such information does not convey humiliation or scorn or restriction of rights or giving privileges on the grounds of gender, race, nationality, language, origin, social status, faith, beliefs, views, age, sexual orientation, disability, ethnicity or religion and that such information does not form a public attitude that an individual has an advantage or disadvantage due to the aforementioned grounds.

Provisions of the Law of Social Integration of the Disabled require those with duties under the Law to make adjustments to special needs of disabled in the fields of: provision of information, health care, accessibility, education, transport, etc.

The Law also provides that the Ministry of Environment is responsible for the preparation of construction technical regulations for the adaptation of environment to the needs of the disabled and for supervising the implementation of such regulations.

In the 11 Article of The Law of Social Integration of the Disabled for provision of accessibility are responsible:

- For adaptation of facilities for disabled persons' special needs are responsible local authorities;
- For territorial planning and design of buildings and public works buildings, housing and the environment, public transport facilities for passenger service, and their infrastructure, information environmental adaptation are responsible local authorities, owners and users of the objects.

Article 34 of the Republic of Lithuania Law on Education establishes that access to education shall be ensured for persons with special needs by adapting the school environment and by providing special pedagogical, psychological and special assistance.

The Law On Fundamentals of Protection of the Rights of the Child (Official Gazette, 1996, no. 33-807) provides that public buildings, streets and transportation means, which are to be used by a disabled child, shall be adapted to the special needs of a disabled child. The Law also provides that adapted accommodations shall be installed within institutions intended for these children. State and municipal executive institutions shall ensure according to their

competence and potential that requirements indicated in parts one and two of this article, would be implemented.

The Law on Construction stipulates that during the design, construction, reconstruction or major renovation of buildings (except blocks of flats under renovation) and engineering constructions, it is necessary to adapt them to the special needs of disabled according to the Law of Social Integration of the Disabled.

The responsibilities to provide reasonable accommodation for disabled persons are embedded in The Law on Equal Opportunities. In The Law on Equal Opportunities there is embedded that employers „shall take appropriate measures to enable a person with disabilities to have access to employment, to work, to seek career or to undergo training, including reasonable accommodation, if those measures shall not cause disproportionate burden to employer". This provision regulates only employer's duty, but not in the area such as social protection, education, provision of goods and services.

In Lithuania there is a Programme for the Adaptation of Housing of the Disabled (hereinafter referred to as the Programme) which also contributes to improvement of accessibility for the disabled. The purpose of the Programme is to seek independence and social integration of the disabled, meeting their special needs and adapting housing and its environment to their special needs. The Programme is targeted at disabled with physical impairment and having difficulty moving around the house who need an adaptation of housing.

Article 14 of The Law on Education of Republic of Lithuania establishes that access to education shall be ensured for persons with special needs by providing special pedagogical, psychological and special assistance.

b. General law, technical regulations and standards

Information regarding accessibility in Lithuanian legislation is provided in point a.

Adaptation of constructions and territories to disabled people's needs in Lithuania is enshrined in construction technical regulations (CTR): Orders of the Minister of Environment on Construction Technical Regulations:

CTR 2.03.01:2001-Constructions and Territories. Requirements for needs of the Disabled;
CTR 2.02.02:2004-The Buildings of Public Service;
CTR 2. 02-01-2004-Residential Buildings;
CTR 2.02.09:2005-Deatched Residential Buildings;
CTR 2.06.02:2001-Bridges and Tunnels. General Requirements;
CTR 2.06.01:1999-Transport Systems of Cities, Towns and Villages;
CTR 1.05.06:2010-Designing of the Structure;
CTR 1.07.01:2010-Documents authorising construction works
CTR 1.07.01:2010-Completion of Construction

In Lithuania the Information Society Development Committee under the Ministry of Transport and Communications prepared Methodological Recommendations for the development and testing of web sites adapted to the needs of disabled people. According to the aforementioned Recommendations, state and municipal authorities are obliged to adapt web sites for disabled. The Information Society Development Committee once a year performs an analysis to ascertain whether the web pages are adapted for the disabled.

c. Role of national, European and international standards

Lithuania does not develop purely national accessibility standards. All European Standards and several international ones in the area of accessibility are adopted as national standards.

Accessibility for disabled and persons with reduced mobility to transport services are regulated by European Union regulations which are binding in Lithuania:

- Regulation of the European Parliament and of the Council concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004;
- Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations;
- Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air;
- Regulation of the European Parliament and of the Council on the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Measures to improve access to the environment for people with disabilities are included in the National Programme for Social Integration of the Disabled 2003-2012 and its implementation measures. New National Programme for Social Integration of the Disabled 2013-2019 are being prepared now. Measures for improving accessibility are going to be included in it. In 2011 workshops on universal design were organized in Lithuania for architects, designers and other specialists. The material for workshops was prepared according to international documents (including the UNCRPD).

e. Services regulated for accessibility

See point a.

In Lithuania lawyers, notaries and bailiffs must ensure that disabled persons have access to their services. The bailiff's office should be established on the first floor of the building. If there is a lift for disabled, the office can be on other floors of the building. Anyway, access to services provided by lawyers, notaries and bailiffs has to be ensured. The Lithuanian Chamber of Bailiffs and the Ministry of Justice are responsible for controlling that offices meet all requirements regarding accessibility for disabled people.

f. Goods regulated for accessibility as part of a service

According to Lithuanian national law, when implementing equal treatment, a seller or producer of goods or a service (commercial or public) provider, without regard to gender, race, nationality, language, origin, social status, belief, convictions or views, age, sexual orientation, disability, ethnic origin or religion, must:

1. provide consumers with equal access to the same products, goods and services, including housing, as well as apply equal conditions of payment and guarantees for the same products, goods and services or for products, goods and services of equal value;

2. when providing consumers with information about products, goods and services or advertising them, ensure that such information does not convey humiliation, contempt or restriction of rights or extension of privileges on the grounds of gender, race, nationality, language, origin, social status, belief, convictions or views, age, sexual orientation, disability, ethnic origin or religion and that it does not form public opinion that these qualities make a person superior or inferior to another.

g. Enforcement of accessibility legislation

A person who considers himself wronged by failure to apply equal treatment shall have the right to appeal to the Equal Opportunities Ombudsman. An appeal to the Equal Opportunities Ombudsman shall not preclude the possibility of defending rights in court. Associations or other legal persons which have, in accordance with the legal act regulating their activities, the defence and representation in court of persons discriminated against on a particular ground as one of their activities may, on behalf of the person discriminated against, represent him in judicial or administrative procedures in the manner prescribed by laws. In the course of the investigation or upon completion of the investigation, the Equal Opportunities Ombudsperson may take a decision:

1. to refer the investigation material to a pre-trial investigation institution or the prosecutor if features of a criminal act have been established;
2. to address an appropriate person or institution with a recommendation to discontinue the actions violating equal rights and to amend or repeal a legal act related thereto;
3. to hear cases of administrative offences and impose administrative sanctions;
4. to dismiss the complaint if the violations indicated in it have not been corroborated;
5. to terminate the investigation if the complainant withdraws his complaint or when there is a lack of objective evidence about the committed violation or when the complainant and offender conciliate or when acts that violate equal rights cease to be performed or when a legal act that violates equal rights is amended or repealed;
6. to admonish for committing a violation;
7. to suspend the investigation if the person, whose complaint or actions, in reference to which a complaint has been made, are under investigation, is ill or away;
8. temporarily, until taking the final decision, to ban an advertisement if there is sufficient evidence that the displayed or intended to be displayed advertisement can be recognised as inciting ethnic, racial, religious hatred or hatred on the basis of sex, sexual orientation, disability, beliefs or age and would do serious harm to the public interests, would humiliate human honour and dignity and would pose threat to the principles of public morals;
9. to impose an obligation on operators of advertising activity to terminate an unauthorised advertisement and to establish the terms and conditions for the discharge of this obligation.

In Lithuania, the Department for the Affairs of Disabled at the Ministry of Social Security and Labour (hereinafter – Department) inspects buildings' compliance with design solutions, which should fulfil the requirements to meet the needs of disabled. In the case of renovated (modernized) buildings, the Department for the Affairs of Disabled doesn't inspect buildings' compliance with design solutions. According to the CTR (Construction Technical Regulation) "Completion of Construction" in the Commission for completion of constructions should be involved representative or authorised person of the Department, who inspects that constructions would be adapted to the needs of disabled. If there are violations of the CTR,

the responsible body shall be punished according to the Republic of Lithuania Code of Administrative Violations. Sanctions are applied by The State Territorial Planning and Construction Inspectorate under the Ministry of Environment or the Court.

The following institutions control that the requirements set in legislation are properly implemented: municipalities and the State Territorial Planning and Construction Inspectorate under the Ministry of Environment according to their competence.

h. Non-compliance and litigation

Victims of discrimination have the right to appeal to the Equal Opportunities Ombudsman or defend their rights in court. Associations or other legal persons which can, in accordance with the legal act regulating their activities, defend and represent in court persons discriminated against on a particular ground, may, do so in judicial or administrative procedures in the manner prescribed by laws.

The Equal Opportunities Ombudsman does not have litigation powers and cannot represent victims of discrimination in court.

A person who has suffered discrimination has the right to claim compensation for economic and non-economic damages from the persons guilty thereof in the manner prescribed by laws.

Luxembourg

a. Accessibility legislation: its place in the legal and regulatory framework

There is an accessibility act dated March 2001 (*Loi du 29 mars 2001 portant sur l'accessibilité des lieux ouverts au public*) which regulates the accessibility of the built environment. The regulations, that are specified in a grand-ducal regulation dated November 2001 (*Règlement grand-ducal modifié du 23 novembre 2001 portant exécution des articles 1 et 2 de la loi du 29 mars 2001 portant sur l'accessibilité des lieux ouverts au public*), only apply to public or publicly funded buildings and facilities which have been newly built or substantially renovated.

Furthermore, there is the 2008 (22 July 2008) act regarding the accessibility of public spaces to persons with disabilities who are accompanied by an assistance dog (22 July 2008) and the 2008 Grand-Ducal regulation (19 December 2008) regarding the limitations to the access of persons with disabilities accompanied by assistance dogs to those places.

Lack of accessibility has been considered discrimination since the 2006 act on equal treatment (*Loi du 28 novembre 2006 sur l'égalité de traitement*) but only in regard to workplace discrimination. Since the ratification of the Convention by the Grand-Duchy of Luxemburg (*Loi du 28 juillet 2011*) steps have been undertaken to incorporate the concept of reasonable accomodation, as well as the denial of reasonable accomodation as a form of discrimination, into relevant legal documents.

b. General law, technical regulations and standards

Cf. point c.

Furthermore a series of accessibility measures aim to guarantee that persons with disabilities enjoy equal opportunities and the full participation in all aspects of life. These various measures are the following:

- National accessibility concept and the label "Accessibility Plus"
- The Standards Guide (Guide des norms) which is a reference document on accessible construction and which gives clear explanations of the legal provisions
- The label "EureWelcome" resulting from an interregional collaboration supported by INTERREG
- ECA – European concept for Accessibility
- ECA for Administrations

The question of accessibility is a constant concern in Luxembourg.

c. Role of national, European and international standards

In the Grand-Duchy, the legislator develops its own national standards (cf. accessibility act and regulation). In the context of accessibility there is also compilation of non-mandatory norms (cf. "Guide des normes"). Those norms and directives coexist with the legal standards and they go more into details than the legal standards.

If there is more precise information needed on a special subject where there are no clear legal provisions, the authorities tend to turn to the relevant DIN rules of the "Deutsches Institut für

Normung e.V.". This is often the case regarding the installation of special lifts, tactile materials for the floor or road traffic signal systems for blind persons.

These are the relevant DIN rules:

- DIN EN 81-70:2003 + A1:2004: Safety rules for the construction and installations of lifts - Particular applications for passenger and goods passengers lifts - Part 70: Accessibility to lifts for persons including persons with disability;
- DIN 32984: 2011-10: Tactile materials for the floor at public places
- DIN 32981: 2002-11: Additional equipment for road traffic signal systems to ensure that they can also be used by blind persons

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

During the first trimester 2012 the Luxemburg Government has accepted and presented a new national 5-year action Plan for the implementation of the UN-CRPD. This action plan announces some major changes in accessibility legislation during the next 5 years. These changes will mainly broaden the scope of the 2001 accessibility act.

e. Services regulated for accessibility

As indicated in point a., presently, the regulations only apply to public or publicly funded buildings and facilities which have been newly built or substantially renovated. The exhaustive enumeration of those services can be found in art.1 and 2 of the following grand-ducal regulation: "Règlement grand-ducal modifié du 23 novembre 2001 portant exécution des articles 1 et 2 de la loi du 29 mars 2001 portant sur l'accessibilité des lieux ouverts au public".

f. Goods regulated for accessibility as part of a service

Some of the legal and regulatory provisions relate to the accessibility of goods, as e.g. those about the parking lots, the toilets, bathtubs, kitchen worktops or the telephone booths. (cf. *Règlement grand-ducal modifié du 23 novembre 2001 portant exécution des articles 1 et 2 de la loi du 29 mars 2001 portant sur l'accessibilité des lieux ouverts au public)*

g. Goods regulated for accessibility

The accessibility of doors, elevators, stairs and other central elements of a building is regulated in the 2011 accessibility act and its corresponding regulation ("règlement"). As for goods like busses or trains, the government makes sure of their accessibility by integrating accessibility criteria in their public calls for tender.

h. Enforcement of accessibility legislation

Currently, the enforcement is of administrative nature. There is one administration department « *service national de la sécurité dans la fonction publique* » that is responsible for examining compliance with the provisions of the 2001 accessibility act. As the provisions of that particular act apply to public or publicly funded buildings and facilities, a permit to build an edifice or to exploit a service in such a building is only granted if the conditions set out in the accessibility act are fulfilled.

i. Non-compliance and litigation

In Luxembourg, in case of a persisting disagreement with the administration, you may bring the matter before the Mediator (Ombudsman). As the 2001 Accessibility Act applies to public or publicly funded buildings and facilities, one can of course call upon the ombudsman if one feels victim of a case of noncompliance with the relevant act.

At the present day, the bill provides no consequences, no penalty and no fines, for non-compliance with accessibility legislation. But that is most likely going to change in the near future. As a matter of fact, the accessibility legislation and the accessibility standards are going to be revised and that will probably be one of the modifications.

Malta

a. Accessibility legislation: its place in the legal and regulatory framework

Articles 12 and 13 of the Equal Opportunities (Persons with Disability) Act (Cap. 413) provide for rules on access of disabled people on an equal basis with others with regards to access to premises and the provision of goods, services and facilities.

The Act also allows for the test of reasonableness which takes into consideration the nature and cost of the required accommodation, the financial resources of the person or organisation required to carry out the accommodation, and the availability of public funds to cover the expenses (Article 20).

b. General law, technical regulations and standards

Rule on Access for all are provided for by the Equal Opportunities (Persons with Disability) Act, (Cap. 413), while in relation to physical accessibility to buildings this is monitored through the 'Access for All Guidelines' referred to in point e.

c. Role of national, European and international standards

The 'Access for All Design Guidelines' which deal with accessibility to buildings were developed locally with reference to accessibility standards used in other countries.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Bill no. 85 of 2011 "Various Laws (Disability Matters) (Amendment) Act, 2011", which is currently being debated in the Maltese Parliament, is aimed at bringing Maltese legislation in line with UNCRPD, thus paving the way to Malta's ratification thereof. The Bill includes amendments to the Equal Opportunities (Persons with Disability) Act (Cap. 413) and it will further strengthen existing legislation, by including 'and use' in the provision of goods, services and facilities (Article 15 of the Equal Opportunities (Persons with Disability) Act (Cap. 413).

e. Services regulated for accessibility

As mentioned above, Articles 12 and 13 of the Equal Opportunities (Persons with Disability) Act (Cap. 413) refer to physical accessibility of buildings as well as access to the provision of goods, facilities, and services.

Indeed, Article 12 refers to access to premises it shall be unlawful for any person to discriminate against another person on the grounds of the disability of such other person or a disability of any of his family members by refusing amongst other to allow access to, or the use of any premises, or of any facilities within such premises

On the other hand, Article 13 refers to the provision of goods and services to qualified persons with disablity and stipulates the following:

(1) Save as provided for in sub-article (3), no qualified person with a disability shall, on the grounds of disability, be excluded from participation in or be denied the benefits

of the programmes or activities of any person or body in relation to the goods, facilities or services to which this article applies or be discriminated against by any person or body providing such goods, facilities or services which the qualified person seeks to obtain or use.

(2) This article applies to the provision (whether on payment or not) of goods, facilities and services to the public or any article of the public and includes in particular, but without prejudice to the generality of the foregoing -
    (a) access to and use of any place which members of the public or a section of the public are permitted to enter;
    (b) the provision of property rights and of housing;
    (c) accommodation in a hotel, boarding house or similar establishment;
    (d) facilities by way of banking, insurance or for grants, loans, credit or finance;
    (e) participation in occupational and other pension schemes;
    (f) facilities for education;
    (g) facilities for entertainment, sports or recreation;
    (h) facilities for transport or travel by land, sea or air;
    (i) the services of any profession or trade, or of any local or other public authority;
    (j) membership of associations, clubs or other organisations;
    (k) enjoyment of civic rights and performance of civic duties; and
    (l) such ther facilities and services as the Minister may prescribe by regulations made under this Act.

(3) The provisions of sub-articles (1) and (2) of this article shall not apply where compliance with such provisions in relation to a qualified person with a disability would be impracticable or unsafe and could not be made practicable and safe by reasonable modification to rules, policies or practices, or the removal of architectural, communication or transport barriers or the provision of auxiliary aids or services.

(Please see also point d. regarding the addition of 'use' in Article 13 through the Disability Matters Amendment Bill.)

f. Goods regulated for accessibility as part of a service

Kindly refer to point e.

g. Goods regulated for accessibility

In general, manufactured goods are not regulated for accessibility in Malta.

In terms of access to buildings, the 'Access for All Design Guidelines' produced by the National Commission Persons with Disabilities covers accessibility of buildings, including all areas and facilities within, as well as outside areas.

These Guidelines are constantly updated and a third edition will become operational as of 1 June 2012. The overriding objective remains that of providing a comprehensive guide to the achievement of a physical environment that is inclusive, accessible and adheres to the principles of universal design. In brief, the main aim is towards the achievement of an environment that does not inherently feature obstacles and barriers to anyone, irrespective of ability, age or physical condition. It is acknowledged that no set of guidelines can hope to take

account of all imaginable possibilities encountered in the physical environment; cognisant of the fact that essentially all buildings and physical environments are unique. In this context, these guidelines aspire to provide general guidance to the minimum standards of most of the elements and structures likely to form part of the physical environment and that would allow a disabled person to independently enter and make use of the facility. In essence, they provide a framework to direct creative efforts in providing an accessible environment in new and existing buildings.

h. Enforcement of accessibility legislation

In relation to accessibility of buildings to be used by the public (including places of work), the National Commission Persons with Disability assesses development applications submitted to the Malta Environment and Planning Authority in order to assess their conformity with the Access for All Design Guidelines. If the application is not compliant with such Guidelines, the National Commission Persons with Disability can object to the granting of building permit and inform the Malta Environment and Planning Authority accordingly.

Also, as previously mentioned, Articles 12 and 13 of the Equal Opportunities (Persons withDisability) Act (Cap. 413) provide for access to premises and also the provision of goods and services to qualified persons with a disability. In this regard, by virtue of Articles 32 and 33 of the Act, the National Commission Persons with Disability may initiate investigations or deal with complaints on the breach of the provisions of the Equal Opportunities (Persons with Disability) Act (Cap. 413). Procedure for the Investigation of Complaints Regulations (LN 13/01 and LN3/02) lays down the procedure to be adopted by the National Commission for Persons with Disability in investigating complaints including the possibility to formally request remedial action. This happens when the Commission concludeds that an unlawful act constitutes a breach of any provision of the Act; in the event of non complaince there is the possibility of appealing to the Civil Courts to order the necessary remedial action to be undertaken immediately.

i. Non-compliance and litigation

As stated in the previous reply, Articles 32, 33 and 34 of the Equal Opportunities (Persons with Disability) Act (Cap. 413) stipulates the rules for the dealing with complaints, investigations and enforcement of the provisions of the Act

Articles 33 and 34 of the Act and Procedure for the Investigation of Complaints Regulations (LN 13/01 and LN3/02) provide for the situations when the National Commission for Persons with Disability may refer an alleged discrimination to the Civil Courts. Such referral by the Commission does not prevent any person having a legal interest in the matter to, either personally or through his/her legal representative, bring a civil action related to an alleged unlawful act of discrimination and make a request for compensation of damages thereto.

Moreover, the proposed Disability Matters Amendments Bill, which is currently in Parliament, proposes to also allow disability NGOs the power to seek remedial action.

The Netherlands

a. Accessibility legislation: its place in the legal and regulatory framework

In the Netherlands there is legislation which deals with accessibility in various domains, such as:

The Act on equal treatment on the ground of disability or chronic disease (Wgbh/cz). This Act combats discrimination of persons with a disability in the fields of education, labour, housing and public transport. The three domains first mentioned are in force. The last domain will be in force after technical regulations will be published in 2012. An important element in this Act is the duty to provide for reasonable accommodation, when needed and appropriate. The lack of doing so is considered to be forbidden discrimination.

The Act on social support (Wmo). This Act compels local authorities to promote participation of all citizens including persons with disabilities. Where (physical or social) inaccessibility occurs, the authorities have to provide compensation. Domains include housing, mobility, leisure.

The 2003 Building Code (Bouwbesluit) regulates usability (including accessibility) of new or renewed public buildings. The regulations cover functional requirements depending on the use of the building or parts of it.

Several Acts regulate the public transport system. Regulations for accessibility are part of these general acts. Due to lifetime cycle of buildings, buses, trains, trams, metro and ferries a stepwise approach to full accessibility is chosen.

The Act on sheltered Workplaces (WSW) guarantees and effectuates the right to employment for those who are only capable to work in an adapted environment. The WSW aims to protect and to stimulate the capacity to work under regular conditions. The local authorities are concerned that as much indicated inhabitants as possible find jobs under adapted conditions. Besides several reintegration measures might be used.

A regulation based on the Media act (Mediawet) rules that since 2011 95 % of the Dutch-language programmes of the national public broadcasting service are subtitled for persons with hearing impairments; programmes of commercial broadcasters should be subtitled for 50 % of the Dutch–language programmes. Most of the programmes in other languages are subtitled for the general public. Apart from this, the Netherlands government considers the accessibility of the media for persons with visual impairments of utmost importance. So far the choice has been not to regulate this via the Media act. The government has chosen to approach the national public as well as commercial broadcasters to underline the importance of sufficient accessibility for persons with visual impairments and also requested them to provide information about what measurements already have been or will be taken to reach this goal. The results so far are very positive.

Several regulations support the participation of pupils with a disability in education. Such regulations include the earlier mentioned building code, the provision of (technical) aids and a special budget for indicated pupils with a disability who attend regular education at the level of primary, secondary and vocational education. Institutions for higher education have a legal duty to provide for education for all students with disabilities, who meet the admission

demands for all. The earlier mentioned Wgbh/cz obliges them to provide for reasonable accommodation, when needed and appropriate.

Besides legislation, there are also several guidelines, handbooks and action plans with respect to accessibility. In the list below, some of them are mentioned:

Buildings

- Guidelines for layout and design of governmental buildings - In general buildings in use by the government will be accessible according to the standards of the International Accessibility Symbol.
- The hallmark living (Keurmerk Wonen) gives guidelines of the layout of neighbourhoods (including accessibility like lowered kerbstones).
- The Handbook on accessibility gives instructions to designers on size and measurements for accessible buildings and public space outdoor (publ. by Misset in cooperation with user organizations)
- Guidelines on the construction and design of specific buildings like schools, catering industry, shops. These guidelines give examples to implement the Building code mentioned above.

Public Transport

- Voertuigenreglement (as an implementation of directive 2001/85/EC) regulates accessibility of buses.
- Several Handbooks governing voluntary adjustments in or on bus stops, taxis, walking routes and train-transport (the latter still in progress).
- A Memorandum gives standards and guidelines for railway stations. It also contains standards on accessibility.
- Implementation schedule on accessibility: schedule in which the accessibility of railway stations and trains will be improved. For instance, the minister of Transport will send an Action Plan to Parliament in spring 2012 concerning the full accessibility of trains by 2030.

Access to the internet

- Guidelines on accessible internet sites including accessibility. The Ministry of the Interior and Kingdom Affairs integrated accessibility into basic guidelines used for public websites (www.webrichtlijnen.overheid.nl) The Web Guidelines are based on the principle of 'universal design'. A website that complies with the Web Guidelines is accessible to all users (search engines, browsers, mobile phones) and people with disabilities. Moreover, implementation of web guidelines when building a new website does not cost more than building them from the same site without web guidelines. For government websites the web guidelines are already mandated since September 2006. For provinces, water boards and municipalities the web guidelines are mandatory since 2010.

b. General law, technical regulations and standards

Accessibility requirements are not provided in general law. See point a.

c. Role of national, European and international standards

The Dutch Normalisation Institute develops standards in the field of accessibility. Special attention is paid to implementing the ISO/CEN-Guide on design for all.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Until now legislation and regulations have not been changed as a consequence of implementing the UN CRPD. Accessibility is a factor that has been given attention in several domains. For instance, the code on equal treatment in public transport on the basis of disability or chronic disease was already in progress, independently of article 9 of the UN-convention.

e. Services regulated for accessibility

See point a. In addition, some initiatives of close cooperation between government and civil society can be mentioned.

On December 3, 2009, the then Minister of Health, opened the information point "AllesToegankelijk.nl" (All Accessible). In “all accessible” both entrepreneurs and organizations of people with disabilities, government and research institutes work together to improve the accessibility of goods and services for people with disabilities. “All Accessible” is an important part in spreading knowledge and increasing awareness and support towards an accessible Netherlands.

“All Accessible” provides information and is also a platform that connects supply and demand accessible to everyone who want to know more about accessibility and focuses specifically on entrepreneurs.

f. Goods regulated for accessibility as part of a service

This is not applicable in the Netherlands.

g. Goods regulated for accessibility

See point a.

h. Enforcement of accessibility legislation, non-compliance and litigation

In the Netherlands, cases concerning the non-compliance of accessibility legislation can be brought to court as well as to a quasi-judicial body, i.e. the Dutch Equal Treatment Commission. This Commission is an independent organisation that was established in 1994 to promote and monitor compliance with equal treatment legislation. The Commission also gives advice and information about the standards that apply. When the Commission (CGB) receives a request for an opinion about alleged differentiation, it investigates whether the equal treatment law has been violated.

Everyone in the Netherlands can ask the Commission for an opinion or advice about a specific situation concerning unequal treatment. Petitioning the Commission is free of charge and legal representation is not required. The Commission does not have to wait for petitions to be

filed; it is also entitled to investigate on its own initiative in specific areas where systematic or persistent patterns of discrimination are suspected. Unlike court verdicts the opinions of the Commission are not legally binding. In practice the opinions have a great moral significance and are followed up in most cases.

One can also bring a case to court for unequal treatment as a consequence of lack of accessibility, for instance when there is no reasonable accommodation provided to make the service/good accessible. Depending on the specific circumstances of the individual case, various remedies are available, e.g. damages, enforcing accessibility etc.

Poland

a. Accessibility legislation: its place in the legal and regulatory framework

On 1 August 1997 the Sejm of the Republic of Poland adopted a Resolution – Charter of Rights of Persons with Disabilities, whereby it reiterates the rights conferred by the Constitution of the Republic of Poland, Convention on the Rights of the Child and the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities. This document defines the rights of persons with disabilities to live a life that is independent, self-reliant, active and free from any aspects of discrimination. It provides a list of ten rights[76] pointing at the crucial areas where vigorous action needs to be taken by the Government and local authorities to carry into effect the rights of persons with disabilities. In particular it calls for action to ensure access to goods and services allowing full participation in public life, school education, work conditions accommodated as necessary, life in environment free of functional barriers including access to public offices, polling stations, public utilities, use of means of transport at ease, access to information and communication.

Accessibility requirements are considered mainly as technical issues. The general accessibility requirements are set up in various legal acts and the special, more detailed accessibility requirements of technical nature are defined in legal regulations.

Legal obligations and rules on accessibility for persons with disabilities concern mainly the built environment and various services.

The definition of reasonable accommodation regarding employment has been included in the Act on Vocational and Social Rehabilitation and Employment of Persons with Disabilities and lack of such reasonable accommodation is considered as violation of the rule of equal treatment in employment - in the light of antidiscrimination provisions of the Act – Labour Code.

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[76] The list, included into the **Resolution – Charter of Rights of Persons with Disabilities,** mentions disabled persons` right to:

1. access to goods and services which enable them to fully participate in the social life
2. access to medical treatment and care, early diagnosis, medical rehabilitation and education
3. access to comprehensive rehabilitation aiming at social adaptation
4. education in integrated systems or in special schools or to education on an individual basis, if necessary
5. psychical and pedagogical assistance and other kind of specialized assistance enabling personal development
6. work on the open labour market or in an adjusted environment when such a requirement results from their disability
7. social security - taking into account the necessity of bearing higher costs related to disability and taking these costs into account in the tax system
8. life in functional barrier-free environment, including:
   - access to public buildings
   - use of public transport
   - access to information
   - possibility of interpersonal communication
9. a self-governing representation and to consult draft legislation concerning people with disabilities
10. full participation in public, social, cultural, artistic and sports life as well as in recreation and tourism appropriately to individual needs and interest.

In 2011, provisions concerning needs of persons with disabilities, particularly persons with reduced mobility, were included in special regulations: on the technical conditions to be met by buildings and facilities of the underground (issued according to the Act – Law on Construction) and by trams and trolleybuses and their necessary equipment (issued according to the Act – Transportation Law). The Act on Public Collective Transport, which came into force on 1 March 2011, determines the rules of organization and operation of regular passenger carriage in public road, railway, other rail vehicle (for example tram), rope, cable and field, sea and inland waterway transport, carried out on Polish territory and in border areas. It obliges to take into account the needs of persons with disabilities and persons with reduced mobility as concerns defining requirements for means of transport and organization of transport services. The Act provides that transport plans should be prepared by the Minister of Infrastructure and self-government bodies on any level, taking into account inter alia the need for sustainable development of public transport, in particular the needs of disabled persons and persons with reduced mobility, in the field of transport services.

b. General law, technical regulations and standards

Provisions obligating to ensure access for persons with disabilities to various buildings or services are included in general law, i.e. in the legal acts, and the special accessibility requirements are defined in legal regulations, implementing these acts. For example:

- The Act on Spatial Planning and Management and the Act - Law on Construction introduced the obligation to consider the needs of persons with disabilities when planning and building any new buildings and other constructions of public use and multi-family dwelling-houses and also when modernizing or remodelling existing ones. Technical standards that buildings and related installations should fulfil are set out in the regulation implementing the Act – Law on Construction in force since 1995. The special technical and construction provisions concerning public roads, road engineering facilities, railway structures and railway crossings with public roads, which ensure that they are accessible for persons with disabilities, are included in other various regulations implementing the Act - Law on Construction.
- There are also other special technical provisions defining accessibility requirements included in regulations implementing various acts, such as the Regulation on the technical conditions to be met by the hotel facilities and other facilities in which hotel services are provided, implementing the Act on Tourism Services.
- Special requirements concerning school buses are defined in the Regulation of Minister of Infrastructure on the technical conditions for vehicles and the scope of their necessary equipment, issued by virtue of the Act – Road Traffic Law.
- Provisions concerning needs of persons with disabilities were included in the Regulation of the Ministry of Infrastructure on technical conditions to be met by trams and trolleybuses and their necessary equipment (issued according to the Act – Transportation Law).

c. Role of national, European and international standards

The accessibility legislation in Poland mainly makes use of international or European standards. For example:

- Poland applies provisions of the Regulations No. 107 of the United Nations Economic Commission for Europe (UN/ECE) on uniform provisions concerning the approval of

vehicles category M2 and M3 with respect to their general construction. Appendix 8 of the Regulations sets out requirements for technical equipment facilitating access for passengers with reduced mobility which are harmonized in this respect with the applicable requirements of the EU Directive 2001/85/EC. These requirements should be applied by the 42 countries that are parties to the Agreement, done at Geneva on 20 March 1958.

- Websites (particularly of public administration bodies) should meet the requirements of e-accessibility defined by W3C Consortium in guidelines WCAG 1.0 and WCAG 2.0.

For information on Polish standards see point g. below.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

The awareness on accessibility has been raised thanks to dissemination of information concerning not only provisions of the UN Convention on the Rights of Persons with Disabilities but also other EU documents as well as the Recommendation Rec(2006)5 of the Committee of Ministers of the Council of Europe to member states on the "Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015". This might probably contribute to:

- better implementation of the provisions concerning needs of persons with disabilities and persons with reduced mobility, included in EU regulations and national special regulations adopted in accordance with the EU legislation regarding rights of passengers (in 2011 the technical conditions to be met by buildings and facilities of underground and by trams and trolley buses and their necessary equipment were defined in two regulations of the Minister of Infrastructure);
- improvement of access for persons with disabilities to enjoyment of the right to vote (the new Act-Election Code entered into force on 1 August 2011; the Act provides, inter alia, for: ensuring the accessibility of information concerning election and the accessibility of polling stations for people with reduced mobility, the possibility for a voter with a severe or moderate degree of disability to vote by post or to delegate somebody to vote on his/her behalf, possibility to vote using overlays to vote cards prepared in Braille).

e. Services regulated for accessibility

The Act on Spatial Planning and Management and the Act - Law on Construction introduced the obligation to consider the needs of persons with disabilities in new construction projects, but also when modernizing existing buildings as well as multi-family dwelling housing. Technical standards that buildings and related installations (including parking lots) should fulfil are set out in the regulation implementing the Act – Law on Construction in force since 1995. These standards are to be applied when planning, building or remodelling.

The services in the following areas are regulated by additional legal provisions ensuring accessibility for persons with disabilities:

- public transport (the Act – Transportation Law, according to which carriers are obliged to ensure proper conditions of safety and hygiene as well as comfort and due

services for users, and should undertake actions facilitating the use of means of transport by travellers, particularly by persons with reduced mobility and disabled persons;, the Act on Public Collective Transport, which obliges to take into account the needs of persons with disabilities and persons with reduced mobility as concerns defining requirements for means of transport and organization of transport services; the Act – Air Law, which - in Annex No 2 to the Act - set up the system of fines for breach of provisions of the Regulation (EC) No 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air; this system of fines came in force on 18 September 2011),

- telecommunication (the Act - Telecommunication Law provides that telecom operators are obliged to ensure disabled persons access to services of general access, also by providing the necessary facilities particularly for blind and dim-sighted persons, persons using hearing aids, deaf or dumb persons and wheelchair users. Special requirements in this field are included in the regulation implementing provisions of the Act),
- post (the Act – Postal Law introduces an obligation for operators providing general access postal services to undertake adaptations enabling persons with disabilities' access to services),
- audio-visual media (since 1 July 2011 the amended Act on Radio and Television Broadcasting obliges television broadcasters to ensure the availability of programs for persons with visual or hearing impairments by introducing appropriate facilities such as audio description, subtitling for the deaf and sign language translations; at least 10% of the quarterly time of broadcasting, with the exception of advertising and telesales, should have such facilities),
- health (the Regulation of the Minister of Health of 2 February 2011 on requirements to be met with regard to technical and sanitary facilities and equipment of health care institutions, issued according to the Act of 15 April 2011 on Medical Activity),
- education (the Act on System of Education provides that the system ensures any citizen the right to education and sets up various obligations for public authorities to enable people's enjoyment of this right; for example it sets up an obligation for local self-government to provide students with disabilities, in the age 5-21, free transportation and care during transport to the nearest school),
- higher education (The Act – Higher Education Law stipulates that among main tasks of university or other school is creating conditions for people with disabilities to participate fully in the process of education and research; terms and procedure of recruitment for entrance exams should take into account the specific needs of candidates who are disabled, and the statute of study have to specify how to adapt the organization and proper implementation of the educational process to the specific needs of students who are disabled, including adapting the conditions of study to the type of disability. Moreover, the Act provides (in art. 164.3) that didactic classes for students may also be conducted with the use of methods and techniques of distance education. This creates possibilities particularly for persons with reduced mobility to use e-learning courses. There is a special scholarship for disabled students, in the amount depending on student’s degree of disability, available irrespective to social scholarship),
- hotel industry (the Regulation on the hotel facilities and other facilities in which hotel services are provided, issued according to the Act on Tourism Services),
- information provided by entities implementing public tasks (the Act on Informatization of Activities of Entities Performing Public Tasks - by the virtue of the amendment of the Act, which came into force in June 2010, the definition of minimal

requirements for ICT systems, on which Council of Ministers is authorized to issue regulations, was completed bearing in mind the need to ensure access to information resources for persons with disabilities; the Act on Access to Public Information),
- sports facilities (there is an obligation, introduced by the Act - Law on Construction, to take into account the needs of persons with disabilities when planning and building any new sports buildings and facilities, in a way similar to other constructions of public use, and also when modernising or remodelling existing ones),
- contacts between persons with disabilities and public administration organs or services (the Act of 18 August 2011 on sign language and other means of communication).

A number of universities establish their standards for actions enabling persons with various kinds of disabilities to study. Some activities in this area are financially supported by the State Fund for Rehabilitation of Persons with Disabilities (PFRON).

f. Goods regulated for accessibility as part of a service

Ensuring accessibility of services is a matter of general law (i.e. of the legal acts). And the special accessibility requirements are defined in legal regulations, implementing these acts, that have more technical nature, or often in the Polish standards.

The Act on System of Education provides that the system ensures any citizen the right to education and sets up various obligations for public authorities to enable people enjoyment of this right. There are available manuals and auxiliary books for blind students (in Braille) and for partially-sighted students (in enlarged print), as well as manuals for special education of students with mental retardation and deaf students.

g. Goods regulated for accessibility

There are, *inter alia*, special accessibility legal provisions concerning:

- construction of school busses (defined in the Regulation of Minister of Infrastructure on the technical conditions for vehicles and the scope of their necessary equipment, issued by virtue of the Act – Road Traffic Law),
- technical conditions to be met by trams and trolleybuses and their necessary equipment, taking into account needs of persons with disabilities (included in the Regulation of the Ministry of Infrastructure issued according to the Act – Transportation Law).

Goods are manufactured in Poland in accordance with the Polish standards issued by the Polish Normalization Committee. There are for example several Polish standards defining requirements for technical aids for persons with disabilities manufactured as medical devices in accordance with the provisions of Directive 93/42/EEC.

The classification of technical aids that are used by persons with disabilities, based on their basic function, has been introduced by the Polish Standard PN-EN ISO 9999:2007. The classification covers the following eleven classes: aids for individual therapy; aids for exercising; orthotics and prostheses; aids for personal care and protection; personal mobility aids; household aids; equipment and adaptation of home and other premises; aids enabling communication and information; aids to use the products and goods; aids and equipment to improve the environment, tools and machines; aids for recreation.

Polish standards associated with the accessibility of transport regards to "Technical aids for the blind and visually impaired. Sound signaling on pedestrian crossings with traffic lights. PN-Z-80100:2004 "and "Accessibility of objects and facilities for persons with disabilities. Signs of public information PZ-Z-80101:2007".

h. Enforcement of accessibility legislation

Enforcement of accessibility requirements is done mainly in the field of construction and technical equipment and has administrative nature.

Construction supervision, i.e. control and monitoring system of construction processes, is exercised by the General Inspector of Construction Supervision (on the central level) and bodies of architectural and construction supervision (on voivodship and powiat levels) as well as of specialized construction supervision which control *inter alia* compliance of architectural and construction solutions with relevant legal provisions, standards and principles of technical knowledge.

The Act - Law on Construction provides that buildings must be designed and constructed in the manner specified in the regulations, providing, among others, conditions necessary for persons with disabilities, in particular wheelchair users, to use buildings and other constructions of public use and multi-family dwelling-houses. As concerns such buildings, derogations from the technical and construction provisions may not result in reducing the accessibility for persons with disabilities.

A construction project must be approved by the competent authority. The project should include information concerning accessibility for persons with disabilities. Any deviation from the approved construction project, related to ensuring the conditions necessary for use of the building by persons with disabilities, constitute a significant deviation from the project and as such require a decision on changing the building permit.

It is necessary to notify the relevant construction supervision body of completion of the construction which requires a building permit. The construction supervision inspectorate can then carry out the mandatory inspection of construction. The check includes, among other things, verifying compliance with the architecture and construction project in providing the conditions necessary for use of the building by persons with disabilities, as concerns public use buildings and multi-family dwelling housing. If irregularities are found, apart from the refusal of the decision to permit the use of an object, it shall impose a fine provided for in the Act - Law on Construction.

The General Inspector of Construction Supervision and voivodship inspectors of construction supervision are relevant authorities for construction products. A construction product may be placed on the market if it is suitable for use in the performance of works, to the extent corresponding to its functional characteristics and intended purpose and enables meeting basic requirements by the construction object. Who is marketing a construction product not suitable for use in the performance of works, is subjected to a fine.

Technical devices (for example lifts and lifting platforms for persons with disabilities), defined in the Act on technical inspection, are subjected to technical inspection during their designing, manufacturing (including manufacturing materials and components), installation,

repairing and modernizing, marketing and operating. The factory manufacturing technical devices should have the appropriate permission issued by the competent technical inspection authority.

Who allows to operate technical devices without obtaining the decision of the competent body of technical inspection unit on the release of device for use or marketing, or against the decision to suspend operation of a technical device or withdraw from the market, is subjected to a fine (according to the Code of Procedure in Cases of Misconduct) or penalty of restriction of liberty.

The Office of Electronic Communication has introduced the Senior Certificate and Certificate "Without Barriers" for telecommunication companies who offer special services for the elderly and persons with disabilities.

i. Non-compliance and litigation

A case on non-compliance of accessibility legislation, considered as violation of the rule of non-discrimination and equal treatment, may be brought, by the individual person or by an NGO, to court or to the Ombudsman, officially called the Human Rights Defender.

The Human Rights Defender, who safeguards human rights and freedoms specified in the Constitution and other legislative acts, as well as safeguards implementation of the rule of equal treatment, investigates whether there has been an infringement on the legal regulations or rules of social coexistence and justice as a result of action or neglect by the bodies, organizations or institutions obliged to comply with and implement such freedoms and rights. After investigation of a case, the Human Rights Defender may, among others:

- address the motion to the body, organization or institution, if he considers its action as an infringement of the human and civil freedoms and rights,
- request to start civil legal proceedings or take part in such ongoing proceedings with the rights of a public prosecutor.

Community organizations, including non-governmental organizations representing the interests of persons with disabilities, are granted with special procedural rights in the Polish law:

- According to the Code of Civil Procedure, in cases regarding the protection of consumers, the community organizations whose statutory objectives include the protection of equal status and the principle of non-discrimination may, upon the consent of the citizens, institute actions on behalf of the citizens, and may, upon the consent of the claimant, join the proceedings at any stage thereof. Such organisations, even if they do not participate in proceedings, may present to the court an opinion which is essential to the case in the form of a resolution passed by their duly authorised bodies.
- According to the Administrative Procedure Code, in a case concerning an individual person, a community organization shall have the right to file a demand to initiate proceedings and to be admitted to participate in proceedings if the statutory objectives of that organization justify it and it is in the social interest. A state administration agency, acknowledging the demand of the community organization as well-founded, shall decide on initiating the proceedings ex officio, or on admitting the organization

to participate in the proceedings. Denial to initiate proceedings or to admit the community organization to participation in the proceedings may be subjected to complaint. The community organization shall participate in proceedings enjoying all the rights of the party to the proceedings.

Furthermore, a state administration agency, initiating the proceedings in a case concerning an individual person, shall notify a community organization of the proceedings if it decides that the organization can be interested in these proceedings on account of its statutory objectives and if it is in the social interest. A community organization even if it does not participate in the proceedings may, with the approval of a state administration agency, submit its opinion in the case, expressed in the resolution or in the declaration of its statutory body, to that agency.

Any person against whom the principle of equal treatment has been infringed is entitled to compensation. In matters of breach of the principle of equal treatment provisions of the Act - Civil Code apply.

Portugal

a. Accessibility legislation: its place in the legal and regulatory framework

Portugal has an anti-discrimination law, Law No. 46/2006 of 28th August, which legislates on matters relating to discrimination in general, and also with discrimination in the areas of accessibility.
However, in technical terms, the issues of accessibility are legislated by Decree-Law No. 163/2006 of 8th August.

b. General law, technical regulations and standards

See point g.

c. Role of national, European and international standards

The Portuguese legislation in the field of accessibility has national concepts, but also complies with European standards. It should be noted in the introduction of the European Card in Portuguese legislation, the European Directive on buses, measures the European Concept of Accessibility of the European Commission, Air Transport - new rights for people with reduced mobility.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

The ratification of UN Convention on the Rights of Persons with Disabilities is after the entry into force of legislation that regulates accessibility. Thus, it is the intention of Portugal to make changes to Decree-Law No. 163/2006 of 8th August

e. Services regulated for accessibility

By 2006, the existing legislation in Portugal on accessibility was applicable only to government services. With the entry into force of Law No. 46/2006 of 28th August and Decree-Law No. 163/2006 of 8th August, the government departments and private entities have become the subject of regulation.

f. Goods regulated for accessibility as part of a service

The Decree-Law No. 163/2008 of 8th August contains a set of technical standards to improve accessibility for people with reduced mobility, in particular, on public roads, buildings and establishments in general, and also buildings, establishments and facilities for specific use and, finally, accessible routes.

g. Goods regulated for accessibility

The legislation in force in Portugal on accessibility laws in general and abstract. However, the transport, telecommunications and other services conform to technical standards applicable to each sector.

h. Enforcement of accessibility legislation

Complaints relating to discrimination in the area of accessibility, and taking into account the Law No 46/2006 of 28th August and Decree-Law No. 163/2006 of 8th August, can be treated in an administrative form, which is the submission of a complaint, the process of opening a misdemeanour procedure and, if confirmed, imposing a fine. They can also be treated with legal recourse to the courts.

i. Non-compliance and litigation

Individual citizens, non-governmental organizations of disabled persons or other entities can file complaints for violation of legislation on accessibility, which can be from the civil courts in general or even with the Ombudsman.

Romania

a. Accessibility legislation: its place in the legal and regulatory framework

The Law no. 448/2006 Regarding the Protection and Promotion of the Rights of Disabled Persons, with further completions and modifications, (http://www.anph.ro/eng/news.php?ida=5) has a chapter (chapter IV) dedicated to accessibility: that foresees in view of ensuring the access of disabled persons to the physical, informational and communicational environment.

b. General law, technical regulations and standards

- The Norm 051/2001 for the adaptation of the civil buildings and the urban space to the needs of persons with disabilities was approved by the Order no 649/2001 of Minister of Public Work, Transport and Home. In the present the Norm is the subject of modifications, the deadline for the new Norm is the end of 2012.
- The Norm sets the minimum quality conditions required by the users (persons with disabilities) from the civil buildings, buildings for public utility and the afferent urban space, in accordance with Law 10/1995 (the Law of quality in constructions).
- The Guide regarding the designing the web pages for the authorities and institutions of central and local public administration. The Guide is addressed to public administrations using ICT.
- http://www.mcsi.ro/Minister/Domenii-de-activitate-ale-MCSI/Tehnologia-Informatiei/Ghiduri-IT-%281%29/Realizarea-paginilor-web-pentru-autoritatile-si-in

c. Changes in legislation/regulation linked to the implementation of the UN CRPD

Romania will harmonize the national legislation with the UN Convention on the Rights of Persons with Disabilities by the end of 2012.

d. Services regulated for accessibility

Physical environment:

- The public utility buildings, the ways of access, the dwelling buildings constructed using public funds, the common transportation means and their stations, the cabs, the railway transport wagons for the travellers and the platforms of the main stations, the parking spaces, the public streets and roads, the public telephones, the informational and communicational environment shall be adapted according to the legal provisions in the field, so as to allow the free access of disabled persons.
- The buildings in the patrimony and the historical buildings shall be adapted, observing the architectonic characteristics, according to the specific legal provisions.
- The authorities provided by law shall issue the building permit for the public utility buildings subject to the observance of the legal provisions in this field, so as to allow the free access of disabled persons.

Transport:

- In order to facilitate the free access of disabled persons to transport and travel, the local public administration authorities shall take measures for:
    i. the adaptation of all the common transportation means in circulation;

ii. the adaptation of all the stations of common transportation means according to the legal provisions, including the marking by tactile pavement of the access spaces to the entry door in the means of transport;
iii. the mounting of the bill boards corresponding to the needs of the persons with a visual and hearing handicap in public transportation means;
iv. the printing in capital letters and contrasting colours of the routes and numbers of the transportation means.

- All the taxi operators shall ensure at least a car adapted to the transport of the disabled persons using the wheel chair.
- The refusal of taxi drivers to ensure the transport of the disabled person and walking device shall be deemed as discrimination.
- adapting the pedestrian crossings on the public roads and streets according to the legal provisions, including the marking by tactile pavement;
- the installation of visual and sound signalling systems at the intense traffic crossroads.
- guide dogs accompanying persons with a severe disability shall have a free and free of charge access to all the public places and in the means of transport.
- The railway infrastructure administrators and the railway transport operators shall:
  i. adapt at least one wagon and the main train stations in order to allow the access of the disabled persons using the wheel chair;
  ii. mark by a contrasting tactile pavement the ways to the embarking platforms, counters or other utilities.
- In the parking spaces next to public utility buildings and in the organized ones, at least 4% of the total number of parking lots shall be adapted, reserved and signalled by an international sign, but not less than two lots, for the free of charge parking of the means of transport for disabled persons.
- The disabled persons or the legal representatives thereof, upon request, may benefit from a card-permit for free parking lots. The vehicle transporting a disabled person owning a card-permit shall benefit from free of charge parking.
- In the parking spaces of the public field and as close to the domicile as possible, their administrator shall distribute free of charge parking lots to the disabled persons who requested and need such parking.

<u>Communications and informational environment:</u>

- Publication houses shall make available the electronic matrixes used for printing magazines and books to the authorized legal persons requesting them to transform them in a format accessible to the persons with sight or reading deficiencies, according to the copyright and related rights, as subsequently amended and supplemented.
- Public libraries shall establish sections with books in formats accessible to the persons with sight or reading deficiencies.
- Telecom operators shall:
  i. adapt at least one booth to a public telephone battery according to the legal provisions in force;
  ii. provide information on the cost of services in forms accessible to disabled persons.
- Banking services operators shall make available to disabled persons at their request, account statements and other information in accessible formats.
- The employees of the operators of banking and mail services shall assist in the filling in of forms, at the request of disabled persons
- The owners of hotels spaces shall:
  i. adapt at least one room for the housing of the disabled person using the wheel chair;

ii. mark by tactile pavement or carpets the entry, the reception desk and own the tactile map of the building;
iii. mount elevators with tactile signs.

- The local and central authorities and institutions shall ensure, for the direct relations with the persons with a hearing or deafblind handicap, authorized interpreters of the mimic and gesture language or of the specific language of the deafblind person.
- The public local and central authorities and the private law or public local and central institutions shall provide information and documentation services accessible to disabled persons.
- The public relation services shall display and dispose of information accessible to the persons with a visual, hearing and mental handicap
- The public authorities shall take measures for:
  i. - making accessible their own web pages, in view of improving the accessing of electronic documents by the persons with a sight and mental handicap;
  ii. - the use of pictograms in all the public services;
  iii. - the adaptation of telex and telefax telephones for the persons with a hearing handicap.

In the purchase of equipment and software, the public institutions shall take into account the observance of the accessibility criterion.

e. Goods regulated for accessibility

The public authorities shall take measures for:

- making accessible their own web pages, in view of improving the accessing of electronic documents by the persons with a sight and mental handicap;
- the use of pictograms in all the public services;
- the adaptation of telex and telefax telephones for the persons with a hearing handicap.

In the purchase of equipment and software, the public institutions shall take into account the observance of the accessibility criterion.

Telecom operators shall:

- adapt at least one booth to a public telephone battery according to the legal provisions in force

The railway infrastructure administrators and the railway transport operators shall:

- adapt at least one wagon and the main train stations in order to allow the access of the disabled persons using the wheel chair

Visual and sound signalling systems at the intense traffic crossroads.

All the taxi operators shall ensure at least a car adapted to the transport of the disabled persons using the wheel chair.

The local public administration authorities shall take measures for:

- the adaptation of all the common transportation means (buses, trams) in circulation.

f. Enforcement of accessibility legislation

The Law no. 448/2006 Regarding the Protection and Promotion of the Rights of Disabled Persons, with further completions and modifications is mentioning in Chapter IX / Legal Responsibility the facts which are deemed as minor offences and sanctioned by fines: http://www.anph.ro/eng/news.php?ida=5 (e.g. the parking of other means of transport on the parking lots adapted, reserved and signalled through an international sign for disabled persons; the issuance of disability degree certificates breaching the criteria, etc).

The Social Inspection, a governmental structure, is responsible with the control of the implementation of accessibility.

g. Non-compliance and litigation

A person can bring a case on non-compliance of accessibility legislation to court. The claim can be brought by an individual, or an NGO. The court can decide to give a sanction by fine and by binding to make the service accessible.

Slovakia

a. Accessibility legislation: its place in the legal and regulatory framework

Railway transport

The issue of access for persons with disabilities to railway transport services is governed by regulation (EC) no. 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (hereinafter referred to as the "Regulation"). The regulation lays down the obligation for railway undertakings or the infrastructure manager to provide disabled persons and persons with reduced mobility the right to carriage on a non-discriminatory basis. Disabled persons and persons with reduced mobility are entitled to information on the accessibility of rail services and on the conditions of access to carriages and on facilities in trains. It also establishes the obligation for railway undertakings and infrastructure managers in accordance with the technical specifications for interoperability (TSI) to ensure the accessibility of stations, platforms and other facilities for disabled persons and persons with reduced mobility. The TSI PRM also applies fully in the purchase of new and the upgrading of existing rolling stock. They establish the obligation to ensure accessibility of vehicles for people with reduced mobility and disabled persons. Station managers are obliged to provide assistance to persons with reduced mobility and disabled persons for the purpose of boarding/alighting from a service for which they have purchased a transport ticket. In the case of the complete or partial loss of or damage to mobile equipment or other special equipment used by disabled persons or persons with reduced mobility, no limit on compensation is applied from the side of the railway undertaking.

Road transport

On 10 November 2011 there entered into force technical regulation "TP 10/2011 – Design of barrier-elimination measures for persons with reduced mobility and orientation on roads", which is the methodology for creating barrier-free measures, lays down requirements for the design of barrier-elimination measures for persons with reduced mobility and orientation on roads and provides specimen graphic prints of barrier-elimination measures for persons with reduced mobility and orientation, with a description and reasoning for the use of specific solutions. Severely disabled persons are entitled to exemption from paying for motorway toll stickers. Under § 6(6)(ch) of Act no. 135/1961 Coll. on roads, as amended, no payment is made in the case of motor vehicles and vehicle combinations for which a financial contribution is provided to persons with severe disability for increased costs associated with the operation of a passenger motor vehicle under § 8 of Act no. 447/2008 Coll. on financial contributions for compensation of severe disability and amending certain laws.

Electronic communications and postal services

Government Resolution no. 360 of 13.5.2009 approved the National Policy for Electronic Communications for 2009 to 2013, which sets out the strategy for the development of electronic communications networks and services in the Slovak Republic, in particular in the field of the harmonisation of the regulatory framework, the development of competition, use of the frequency spectrum, privacy and security, crisis management and critical infrastructure, international cooperation and development of innovative services. In accordance with the National Policy for Electronic Communications for 2009 – 2013 and with the Strategy for the Transition from Analogue to Digital Terrestrial TV and Radio Broadcasting in Slovakia, 2011 saw the digitalisation of terrestrial television. Digital technology provides possibilities on the basis of which even persons with severe disabilities benefit from television in such a degree

that was not achievable with analogue solutions. Digital television broadcasting allows such services as closed captioning and narration, and allows greater functionality in the form of advanced electronic programme guides.

In the framework of the transition to digital broadcasting in accordance with § 67 (4) of the Digital Broadcasting Act, from 15.3.2011 to 31.8.2011 the MTCRD SR provided a one-time non-repayable grant to purchase equipment for receiving digital television, regardless of reception platform, in Slovakia. Grant applications could be submitted by severely disabled persons who are beneficiaries of payment in material distress, or persons assessed jointly with beneficiaries.

The standing of disabled persons is covered by Act no. 351/2011 Coll. on electronic communications, which entered into effect on 1.11.2011. The act, in the field of regulating consumer relations in electronic communications in certain cases, specifically emphasises the standing of disabled customers. This concerns in particular the extension of obligations on undertakings providing electronic communications to provide information for disabled persons on services intended for them, the obligation to take measures to ensure equal access to services for end users with disabilities. There is also the possibility here for the SR Telecommunications Regulatory Authority to impose an obligation to provide free information on cost control for an electronic communications service provided to a disabled customer. In the case of universal service, the SR Telecommunications Regulatory Authority may impose the obligation to lease or sell, if a disabled user so requests, a specially equipped telecommunications terminal appropriate to his disability for the price of a standard telecommunications terminal, or to ensure barrier-free access to selected public payphones.

On the basis of an intergovernmental agreement, the Universal Postal Convention (SR Ministry of Foreign Affairs Notice no. 50/2010 Coll. on the acceptance of Acts of the Universal Postal Union), the Slovak Postal Service (Slovenská pošta, a. s. hereinafter referred to as "Slovak Post"), provides a domestic and international Postal Service for visually impaired users for free posting of items identified as a "blind literature" weighing up to 7000 g. The content of these items may be documents prepared for the blind (Braille script) or pressed relief Latin (Klein script), blocks with Braille labels, audio recordings on electromagnetic and optical media, special papers for the blind, but only if they are posted by an institution for the blind, or if they are addressed to such an institution.

Construction and housing policy

The main policies, principles and requirements ensuring a barrier-free environment and accessibility of buildings in the Slovak Republic are incorporated into the following generally binding legal regulations:

- Act no. 50/1976 Coll. on zoning and the building code (the Building Act) as amended;
- Decree no. 532/2002 Coll. laying down details on general technical requirements for construction and general technical requirements for buildings used by persons with reduced mobility and orientation (which replaced the previous Decree no. 192/1994 Coll.).

Education

Accessibility in education pursuant to Article 9 of the Convention on the Rights of Persons with Disabilities (hereinafter referred to as the "Convention") is codified in Act no. 365/2004 Coll. on equal treatment in certain areas and protection against discrimination, amending certain other laws (the Antidiscrimination Act) as amended at all levels of education. Its principle is reflected in generally binding legal regulations of the education sector, governing

the admission of pupils to schools and their education. The basic right to accessibility of education for pupils with disabilities in schools providing pre-primary, primary and secondary levels of education is laid down in the provisions of § 6 (3) and § 9 (4) of Act no. 596/2003 Coll. on central government in education and school authorities and on the amendment of certain acts, as amended. The provisions of § 144(2) and (3) of Act no. 245/2008 Coll. on education (the Schools Act) and on the amendment of certain acts as amended guarantee their right to specific forms and methods in education corresponding to their needs and the right to use special textbooks and special didactic and compensatory aids, sign language, Braille and alternative ways of communicating. Further particulars regarding the admission of pupils with disabilities to schools, their graduation and the organisational arrangements of their education, besides the above-mentioned Act no. 245/2008 Coll. on education (the Schools Act) and on the amendment of certain acts as amended, are governed also in particular by its following implementing regulations: SR Ministry of Education Decree no. 320/2008 Coll. on primary schools as amended by Decree no. 224/2011 Coll., SR Ministry of Education Decree no. 282/2009 Coll. on secondary schools as amended by Decree no. 268/2011 Coll., SR Ministry of Education Decree no. 318/2008 Coll. on the completion of study at secondary schools as amended by SR Ministry of Education, Science, Research and Sport Decree no. 209/2011 Coll.

Culture

An important step in creating stable elements in the care of culture for people with disabilities and of the accessibility of cultural services is SR Act of Parliament no. 434 of 26 October 2010 on the granting of subsidies by the Ministry of Culture of the Slovak Republic (hereinafter the "Ministry of Culture"). The act provides for the purpose, scope, method and conditions for granting subsidies by the Ministry of Culture. In § 2 – Purpose of granting subsidies – as follows: paragraph (1). The Ministry may in the respective budgetary year provide subsidy from the state budget for these purposes: in point f) – cultural activities of disabled or otherwise disadvantaged groups. Promotion of the availability of cultural services is often dependent on the creation of financial mechanisms and limits in this field.

b. General law, technical regulations and standards

Railway transport

In the code of carriage of a passenger rail carrier there is codified its obligation in connection with the infrastructure manager to provide free assistance upon boarding/alighting from a train if the passenger gives prior notification of their intended destination.

Road transport

On 10 November 2011 there entered into effect the technical regulation "TP 10/2011 – Design of barrier-elimination measures for persons with reduced mobility and orientation on roads"

Water transport

The issue of non-discrimination and the exercise of rights of persons with disabilities and persons with reduced mobility in water transport is governed by Regulation (EU) No 1177/2010 of the European Parliament and of the Council.

Construction and housing policy

The main policies, principles and requirements ensuring a barrier-free environment and accessibility of buildings in the Slovak Republic are incorporated into the following generally binding legal regulations:
– Act no. 50/1976 Coll. on zoning and the building code (the Building Act) as amended;
Decree no. 532/2002 Coll. laying down details on general technical requirements for construction and general technical requirements for buildings used by persons with reduced mobility and orientation (which replaced the previous Decree no. 192/1994 Coll.).

The provisions of the Building Act relating to basic requirements for constructions are taken from Council Directive 89/106/EEC (from Annex 1). The act mandated also general technical requirements for buildings used by persons with reduced mobility and orientation, which are detailed in Decree no. 532/2002 Coll.. Zoning documentation, architectural designs and construction projects must meet the conditions specified by this Decree, whereby the attributes of barrier-free access in the most basic features will be achieved; typological principles for making environments and buildings accessible are set out in a manner compatible with standards of other European countries.
General technical requirements for buildings used by persons with reduced mobility and orientation apply, irrespective of the building owner, to

- apartment buildings and other buildings for housing,
- an apartment, if it is to be used by a person with reduced mobility and orientation (a special-purpose apartment),
- a house, if it is to be used by a person with reduced mobility and orientation (a special-purpose house),
- a non-residential building in the part intended for use by the public,
- a building in which there is envisaged the employment of persons with reduced mobility and orientation (building with a sheltered workplace),
- an engineering construction in a part intended for use by the public.

c. Role of national, European and international standards

Water transport
The issue of non-discrimination and the exercise of rights of disabled persons and persons with reduced mobility in water transport is governed by international European standards.

Electronic communications and postal services:
The MTCRD SR in connection with the rights of disabled people was actively involved in the commenting process, voting and translation of European standards adopted in the system of Slovak Technical Standards, listed in the attached Table 1.

Construction and housing policy
The provisions of the Building Act relating to basic requirements for constructions are taken from Council Directive 89/106/EEC (from Annex 1). The act mandated also general technical requirements for buildings used by persons with reduced mobility and orientation, which are detailed in Decree no. 532/2002 Coll.. Zoning documentation, architectural designs and construction projects must meet the conditions specified by this Decree, whereby the attributes of barrier-free access in the most basic features will be achieved; typological principles for making environments and buildings accessible are set out in a manner compatible with standards of other European countries.

Education

Accessibility in education is codified in national legislation in accordance with European standards.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Electronic communications and postal services

In accordance with the Convention on the Rights of Persons with Disabilities, Slovak Post is making barrier-free entrances for persons with reduced mobility and orientation in newly-opened post offices in accordance with the SR Ministry of Environment Decree no. 532/2002 Coll. laying down details on general technical requirements for construction and general technical requirements for buildings used by persons with reduced mobility and orientation (§ 57). Slovak Post at its leased and own premises in which barrier-free entrances have not been constructed is gradually making them and will continue to do so in the framework of the planned reconstruction and modernisation of post offices. Slovak Post also provides persons with disabilities, by agreement, all financial services and pension payments by means of a postman.

e. Services regulated for accessibility

Railway transport

The Regulation and Rail Transport Act provide for the provision of access to railway transport services for disabled persons and persons with reduced mobility on a non-discriminatory basis.

Air transport

The issue of non-discrimination and the application of rights of persons with disabilities and persons with reduced mobility in air transport was addressed by Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006, which creates rules for the protection and provision of assistance services for persons with disabilities and persons with reduced mobility in air transport, with the aim of protecting them against discrimination and of ensuring that they are provided assistance services.

Construction and housing policy

General technical requirements for buildings used by persons with reduced mobility and orientation apply, irrespective of the building owner, to:

- apartment buildings and other buildings for housing,
- an apartment, if it is to be used by a person with reduced mobility and orientation (a special-purpose apartment),
- a house, if it is to be used by a person with reduced mobility and orientation (a special-purpose house),
- a non-residential building in the part intended for use by the public,
- a building in which there is envisaged the employment of persons with reduced mobility and orientation (building with a sheltered workplace),
- an engineering construction in a part intended for use by the public.

Social affairs

The commitments made by signingthe Convention are reflected in Act no. 447/2008 Coll. on financial contributions to compensate for severe disability and on the amendment of certain acts, in particular through the provision of a financial contribution for personal assistance, where personal assistance ensures also help by means of interpreting in sign language,

articulation and tactile interpreting, as well as by means of a financial contribution for transport, a financial contribution for the acquisition of aids, a financial contribution for purchasing a passenger motor vehicle, a financial contribution to offset increased expenses associated with the operation of a passenger motor vehicle, a financial contribution for purchasing lifting equipment, a financial contribution for modification of an apartment, a financial contribution for modification of a house, a financial contribution for modification of a garage. In accordance with the Social Services Act (§ 9 of Act no. 448/2008 Coll.) providers of social services, both public and non-public (private) are required to meet general technical requirements for construction and general technical requirements for buildings used by persons with reduced mobility and orientation under a special regulation (the Building Act and implementing decree). Compliance with the barrier-free accessibility in the provision of social services is one of the criteria for evaluating the quality of a social service provided. In the interest of ensuring accessibility for persons with disabilities to various services in the framework of social services an interpreting service is provided (in sign language, articulation and tactile interpreting), escort and reading services (§§ 43 and 44 of the Social Services Act) to these people by professional social services staff.
http://www.employment.gov.sk/legislativa.html (Social Services Act)

Healthcare

The availability of health care in relation to severely disabled persons in Slovakia is not regulated, but is based comprehensively on an anti-discrimination approach. With regard to the needs of severely disabled persons, the obligation for compliance of the material and technical equipment of healthcare facilities pursuant to barrier-free access and movement within these facilities is established by Edict of the Ministry of Health of the Slovak Republic no. 09812/2008-OL on minimum requirements for staffing and material-technical equipment of individual types of healthcare facilities as amended, laid down under § 8(2) of Act no. 578/2004 Coll. on healthcare providers, health care workers, professional organisations in health care and amending certain laws as amended. The edict is published in the Journal of the SR Ministry of Health part 32-51, of 28 October 2008, Volume 56, link: *http://www.health.gov.sk/?vestniky-mz-sr*. This legislative material obliges healthcare facilities to provide barrier-free access and to enable patients with reduced mobility and orientation to move via horizontal communications, ramps or elevators. At individual departments there must be at least one shower cabinet accessible for persons with reduced mobility and also for a wheelchair with an immobile patient. Toilets for patients must have a door that can be opened outwards and at least one toilet cubicle must be accessible for patients with reduced mobility and orientation. The basic material equipment and instrumentation of a department must include at least one bed for persons with reduced mobility, including an antidecubitus bed. Through the law on the scope and conditions of payment for medicinal products, medical aids and dietary foods on the basis of public health insurance the Ministry of Health of the Slovak Republic sets out the scope and terms of payment for medicinal products, medical aids and dietary foods on the basis of public health insurance. In relation to people with disabilities, this consists primarily in maintaining the greatest affordability through regulation of the amount of supplementary payments, by setting prescription, indicative and quantitative restrictions that reflect the special needs of these patients.

Education

A support service for enabling or improving the accessibility of education for pupils with disabilities is the legislatively established position of teaching assistant at a nursery school,

primary school and secondary school, including special schools. During higher education students with disabilities have the possibility to use the assistance of a coordinator for education of students with disabilities.

f. Goods regulated for accessibility as part of a service

Railway transport
The Regulation and Rail Transport Act provide for the provision of access to railway transport services for disabled persons and persons with reduced mobility on a non-discriminatory basis.

Education
Textbooks and textbook transcripts in formats suitable for pupils with visual impairments (textbooks in Braille, electronic textbooks).

g. Enforcement of accessibility legislation

As regards the issue of enforceability of rights in the field of access for persons with disabilities, anyone has the right to seek court protection of their rights, if they feel that their rights have been infringed through non-compliance with the principle of equal treatment on the grounds of their disability. They may also demand that the party who failed to comply with the principle of equal treatment refrain from such conduct, and, if possible, rectify the unlawful state or provide adequate redress. If adequate redress were not to be satisfactory, the aggrieved party may claim non-pecuniary damages in cash (§ 9 of Act no. 365/2004 Coll. the Antidiscrimination Act), as well as damage compensation.

Everyone has the right to protection of their rights also out of court, for example through mediation, by lodging complaints with public authorities, or by means of the Office of the Ombudsman.

Authorities are also involved in the enforceability of law in the field of access to products, facilities, services or an environment with regard to persons with disabilities. The competent authorities may impose fines for failure to comply with obligations imposed in relevant legislation, carry out compliance checks, and may refuse to issue or may revoke a licence.

For example, under § 43 of Act no. 514/2009 Coll. on rail transport as amended, the competent authority may impose on a rail undertaking a fine in the case that it fails to comply with the rights of passengers under a special regulation (Regulation of the European Parliament and Council. 137/2007 on the rights and obligations of rail passengers), or if it does not create conditions to improve passenger comfort and ease of movement and travel of select groups of passengers, passengers with child pushchairs and transport of guide dogs, for example through the fact that it does not provide guidance and information essential for passengers on rail vehicles for their safe carriage according to the carriage contract, including passengers with impaired hearing or sight.

In the field of construction, it is worth mentioning that the Building Act sets out basic general technical requirements for buildings used by persons with reduced mobility. The intention pursued is not simply the constitutionality of legislation, but also the possibility of better control and enforceability of law from the side of building authorities, since pursuant to § 43e of the Building Act “general technical requirements for construction, including general

technical requirements for buildings used by persons with reduced mobility and orientation specify requirements for the zoning-technical solution of a construction, the building-technical and purpose solution of buildings, under which legal persons, individuals, central and local governments are obliged to proceed in siting, designing, permitting, implementing, approving, using and removing buildings".

Implementing legislation, Decree no. 532/2002 Coll. lays down details on general technical requirements for construction and on general technical requirements for buildings used by persons with reduced mobility and orientation.

Railway transport
Supervision over the application of Regulation (EC) No 1371/2007 of the European Parliament and of the Council on rail passengers' rights and obligations is carried out by the Railway Regulatory Authority. If the case of a violation of the carriage code, the person affected has the right to turn with their complaint directly to the carrier, or to the Slovak Trade Inspectorate.

Water transport
As a result of Regulation (EU) No 1177/2010 of the European Parliament and of the Council, Act no. 338/2000 Coll. on inland waterway vessels is to be amended.

Education
The task of supervision over compliance with accessibility in education is performed by the State Schools Inspectorate.

Culture
The Ministry of Culture promotes the availability of library, museum and gallery services for persons with disabilities by means of implementing measures deriving from the government strategy papers: Strategy for Development of Slovak Libraries for 2008 – 2013 – measure no. 3.7: support for the availability of libraries for disadvantaged groups, including persons with disabilities (the document was approved in SR Government Resolution no. 943 of 7 November 2007), as well as by means of the Strategy for Development of Museums and Galleries to 2011 (the document was approved in SR Government Resolution no. 1078 of 20 December 2006). In objectives 4.1 and 4.5 there are detailed the measures supporting equal opportunities for disadvantaged groups including people with disabilities.

h. Non-compliance and litigation

Judicial system
"A person who has knowledge that accessibility legislation is being violated has the right to file a complaint to state authorities performing supervision and monitoring and to seek redress – this may concern, for example, barrier-free access issues, availability of websites for the visually impaired, etc. If the rights of a person are directly violated, that person is entitled to file at the competent court litigation to protect their rights, most usually a claim for protection against discrimination under the Anti-Discrimination Act.

There applies the general rule that anyone can claim their rights at court, if they are or have been subject to infringement of their rights, legally protected interests or freedoms through a failure to comply with the principle of equal treatment. In court proceedings a person may

require an offender to refrain from such conduct, if possible to rectify the unlawful state or provide adequate redress.

If through a violation of accessibility regulations, constituting a breach of the principle of equal treatment, there could be infringed the rights, legally protected interests and freedoms of a large or uncertain number of persons, or if through such a violation a public interest could otherwise be seriously endangered, the right to claim protection of the right at court pertains also to a legal entity established by law or whose aim or subject of activity is protection against discrimination. A legal person may seek in particular a decision that the principle of equal treatment has been infringed, and that the party who failed to comply with the principle of equal treatment refrain from such conduct and, if possible, rectify the unlawful state.

Protection of rights in connection with legislation and its potential conflict with international treaties by which the Slovak Republic is bound may be appealed by a person, for example through a complaint to the Ombudsman, who is entitled to submit to the Constitutional Court of the Slovak Republic a petition for commencing proceedings on the accordance of legislation if a generally binding legal regulation contravenes a fundamental right or freedom awarded to a natural person or legal person.".

Education

Any failure to comply with a right to accessibility in education of persons with disabilities is dealt with by an organisation at a higher management level, including the Ministry of Education, Science, Research and Sport of the Slovak Republic, the State Schools Inspectorate, the courts.

Culture

The Ministry of Culture is committed to protecting human dignity, fundamental rights and freedoms, to prohibiting the incitement of hatred and to preventing the spread of specific types of programmes by means of legislative measures. For the field of electronic media and video-on-demand, the protection of human dignity, fundamental rights and freedoms, the prohibition of incitement of hatred and prevention of the spread of specific types of programmes are permanently ensured by the provisions of § 19 of Act no. 308/2000 Coll. on broadcasting and retransmission and on the amendment of Act no. 195/2000 Coll. on telecommunications, as amended (hereinafter referred to as the "Broadcasting Act"). Under § 19(1) of the Broadcasting Act a video-on-demand service, a programme service and components thereof may not:

b) through the manner of their production and content infringe the human dignity and fundamental rights and freedoms of others,
c) promote violence and overtly or covertly incite hatred, denigrate or defame on the basis of gender, race, colour, language, faith and religion, political or other opinion, national or social origin, nationality or ethnic group,
d) promote war or describe cruel or otherwise in human conduct in a manner that inappropriately trivialises them, excuses them or approves of them,
e) depict without justification scenes of real violence, where there is unduly emphasised the actual course of dying or where there are depicted persons exposed to physical or mental suffering that is considered to be an infringement of human dignity; this applies even if the persons concerned have consented to such depiction.

The Council for Broadcasting and Retransmission (hereinafter referred to as the "Council") as the supervisory authority may impose on a broadcaster or a video-on-demand service provider

for a breach of obligations laid down in § 19 of the Broadcasting Act an obligation to broadcast a notice of the violation of the act, or to suspend provision of the programme, for at most 30 days. For a breach of such obligation the Council may concurrently impose on a broadcaster of a television programme service a fine from €3319 to €165 969, a broadcaster of a radio programme service a fine from €497 to €49 790, an Internet broadcaster a fine from €500 to €60 000 and a video-on-demand service provider a fine from €500 to €40 000. If a broadcaster, despite the imposition of repeated penalties, deliberately and seriously violates obligations laid down in § 19(1)(b) or (c) of the Broadcasting Act, the Council can revoke its licence.

Slovenia

a. Accessibility legislation: its place in the legal and regulatory framework

Slovenia has undertaken to respect prohibition of discrimination in relation to disability in all areas of human life, including accessibility. The basic rights for equalising opportunities arise from the Constitution of the Republic of Slovenia, in which Article 14 is worded as follows: "…everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status, disability or any other personal circumstance". The constitution explicitly emphasises the right to equality of persons with disabilities before the law and that nobody shall be discriminated against due to disability (Sendi and others, 2008 [77]).

The umbrella act regulating the area of protection of persons with disabilities is the 2010 Equalisation of Opportunities for Persons with Disabilities Act (ZIMI)[78]. The first chapter of the Act – elimination of discrimination against persons with disabilities – covers the area of access of buildings and facilities in public use, public transport, residence and goods / services provided by public. For this area, the strategic document "Action Programme for Persons with Disabilities 2017−2013)" [79] and the document "National guidelines to improve built environment, information and communications accessibility for people with disabilities"[80] are crucial.

On 7 December 2005 the Government adopted national Guidelines to improve accessibility for persons with disabilities to physical environment and information and communication, which are a comprehensive set of measures to be implemented by 2025. The objectives laid down in the National guidelines are based on a number of acts adopted by the Republic of Slovenia (such as in the area of environmental planning, building construction, accessibility to apartments, working environment and equipment, air and road transport, electronic communications, etc.). Access to services of public and private sectors and to the physical environment is considered to be the right of persons with disabilities and of all other functionally impaired persons. By this project the state aims at establishing accessible environment for living and work of all people and at providing all groups of people with equal opportunities both in the areas of education, culture and recreation and in the area of decision-making.

The technical aspect of managing the built environment, space and communications is regulated with the following: the Spatial Management Act[81], the Construction Act (ZGO-1)[82],

[77] R. Sendi, B. Černič Mali, B. K. Kebler, B. Tominc, S. Mijukič, B. Kobal, S. Smolej and M. Nagode, (2008). *Ukrepi za uresničevanje pravic invalidov do dostopa brez ovir, končno poročilo* (Measures for the implementation of the rights of persons with disabilities for obstacle-free access, final report). Ljubljana: Urban planning institute of the Republic of Slovenia.

[78] Official Gazette of the Republic of Slovenia, No. 94/2010

[79] Available at: http://www.mddsz.gov.si/fileadmin/mddsz.gov.si/pageuploads/dokumenti__pdf/api_07_13.pdf (10 December 2010).

[80] Official Gazette of the Republic of Slovenia, No. 113/2005

[81] Official Gazette of the Republic of Slovenia, No. 110/2002 (8/2003 corr.), amendments: Official Gazette of the Republic of Slovenia, No. 58/2003-ZZK-1 (Land Register Act) , 33/2007-ZPNaèrt (Spatial Planning Act) 108/2009-ZGO-1C (Act amending the Construction Act), 79/2010 Odl.US (Ruling of the Constitutional Court): U-I-85/09-8, 80/2010-ZUPUDPP (Spatial Planning of Arrangements of National Significance Act).

[82] Official Gazette of the Republic of Slovenia, No. 110/2002, amendments: Official Gazette of the Republic of Slovenia, No. 97/2003 Odl.US (Ruling of the Constitutional Court): U-I-152/00-23, 41/2004-ZVO-1

the Rules on the requirements for free access to, entry to and use of public buildings and facilities and multi-apartment buildings[83], and the SIST ISO/TR 9527 National standard – building construction: needs of persons with disabilities and other functionally impaired persons in buildings[84] and the Use of Slovenian Sign Language Act [85].

Accessibility is also one of the objectives of the housing policy, based on the implementation of the National Housing Programme[86].

b. General law, technical regulations and standards

The majority of provisions on accessibility are determined in the sectoral legislative provisions, while more detailed technical requirements are given in regulations or standards.

Example:
The Construction Act regulates the conditions for construction of all kinds of works, sets out the essential requirements and the fulfilment thereof regarding the characteristics of works, prescribes the method and conditions for pursuit of the activities (Article 1 of ZGO-1), while the Rules on railway stations and stops facilities[87] specify the equipment of railway stations and stops that enables passengers and other persons equal, independent and safe access to trains and movement at train stations.

c. Role of national, European and international standards

The Slovenian legislation is developed on the grounds of European recommendations and directives, and UN recommendations and documents from the area of human rights and provision of equal opportunities to persons with disabilities for inclusion in society and for overcoming obstacles.

Example:
With the Construction Act, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market has been transposed into Slovenian law (Official Gazette of the Republic of Slovenia, No. 376 of 27 December 2006, p. 36); also, the Directive of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications has been transposed (Official Gazette of the Republic of Slovenia, No. 255 of 30 September 2005, p.22) (Article 2 of the Construction Act).

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

(Environment Protection Act), 45/2004, 47/2004, 62/2004 Odl.US (Ruling of the Constitutional Court): U-I-1/03-15, 102/2004-official consolidated text (14/2005 corr.), 92/2005-ZJC-B (Act Amending Public Roads Act), 93/2005-ZVMS (Veterinary Compliance Criteria Act), 111/2005 Odl.US (Ruling of the Constitutional Court): U-I-150-04-19, 120/2006 Odl.US (Ruling of the Constitutional Court): U-I-286/04-46, 126/2007, 57/2009 Skl.US (Constitutional Court Order): U-I-165/09-8, 108/2009, 61/2010-ZRud-1 (Mining Act), (62/2010 corr.).

[83] Official Gazette of the Republic of Slovenia, No. 97/2003, amendments: Official Gazette of the Republic of Slovenia, No. 77/2009 Odl.US (Ruling of the Constitutional Court): U-I-138/08-9.

[84] Official Gazette of the Republic of Slovenia, No. 92/1999, amendments: Official Gazette of the Republic of Slovenia, No. 97/2003

[85] Official Gazette of the Republic of Slovenia, No. 96/2002.

[86] Official Gazette of the Republic of Slovenia, No. 43/2000.

[87] Official Gazette of the Republic of Slovenia, No. 53/2002, amendments: 61/2007-ZVZelP (Railway Traffic Safety Act), 72/2009.

Ratification of the UN Convention on the Rights of Persons with Disabilities initiated the preparation and adoption of the Equalisation of Opportunities for Persons with Disabilities Act, the Electronic Communications Act[88] and amendments to the Vocational Rehabilitation and Employment of Disabled Persons Act[89].

e. Services regulated for accessibility

Unhindered movement of functionally impaired persons is guaranteed by Article 17 of the Construction Act (ZGO-1). The Act determines that all works in public use that are newly constructed, and works in public use that are reconstructed, must ensure that functionally impaired persons are able to access, enter and use the works without physical obstructions or communicational barriers.

The second paragraph of Article 17 lays down that every newly constructed or reconstructed works in public use, whose construction is carried out pursuant to the provisions of this Act and that does not have all its premises on the ground floor must be equipped with at least one lift or other appropriate device for such purposes.

With regard to the reconstruction of works in public use that are protected in accordance with regulations on cultural heritage, the essential requirements attained for the works may differ from those prescribed, but only under the condition that the deviation is not such that because of it there would be a threat to the safety of the works, to the lives and health of people, to traffic, to neighbouring works or to the environment (Article 17(3) of ZGO-1).

With regard to apartment buildings with more than ten apartments constructed pursuant to the provisions of this act, the requirement for ensuring unhindered access, entry and use must be fulfilled by at least one-tenth of all the apartments, and all joint premises intended for such apartments (Article 17(4) of ZGO-1).

Access, entry and use without physical obstructions or communicational barriers shall be ensured through project design and construction (Article 17(5) of ZGO-1).

In Article 2, the ZGO-1 defines that works in public use are works whose use is intended for all under the same conditions; such works are divided in terms of manner of use into public areas and non-residential buildings intended for public use. A public area is an area whose use is intended for all under the same conditions. A non-residential building intended for public use is a building whose use is intended for all under the same conditions. Public infrastructure works are civil engineering works that form a network serving a specific type of public utility of national or local importance or forms a network of general benefit to the public.

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[88] Official Gazette of the Republic of Slovenia, Nos. 43/2004, 86/2004-ZVOP-1 (Personal Data Protection Act), 129/2006, 13/2007-official consolidated text, 102/2007-ZDRad (Digital Broadcasting Act), 110/2009, 33/2011.

[89] Vocational Rehabilitation and Employment of Disabled Persons Act (ZZRZI), Official Gazette of the Republic of Slovenia, Nos. 63/2004, 72/2005, 100/2005-official consolidated text, 114/2006, 16/2007-official consolidated text, 14/2009 Odl.US (Ruling of the Constitutional Court) : U-I-36/06-18, 84/2011 Odl.US (Ruling of the Constitutional Court): U-I-245/10-13, U-I-181/10-6, Up-1002/10-7, 87/2011.

The Use of Slovenian Sign Language Act, adopted in 2002, grants deaf persons the right to use Slovenian sign language, to be informed in techniques adjusted to their needs and lays down the scope and method of exercising the right to a sign language interpreter.

f. Goods regulated for accessibility as part of a service

The legislation referred to in point a. determines: accessibility of services provided in works in public use (in point e. in more detail); accessibility of public transport; public use of the Slovenian sign language (interpretation), and the right to assistive devices.

g. Goods regulated for accessibility

Based on legislation and public tenders, goods from the areas stated in point f. are adapted to and accessible to persons with disabilities, for example: books, medicinal products, public toilets, automated teller machines, phone booths, buses, vessels, aeroplanes, public transport ticket machines (in Ljubljana), and lifts.

h. Enforcement of accessibility legislation

The legislation contains penal provisions for non-implementing legal provisions and their violations; the transgressions are adjudicated by inspection services.

Example of penal provision:
Article 164 of the Construction Act determines that a fine of EUR 1,500 to EUR 30,000 shall be imposed upon a legal person if it "…fails to ensure that functionally impaired persons are able to access, enter and use a facility in public use of which it is the investor without physical obstructions or communicational barriers."

In article 96, the ZGO-1 lays down that in the procedure of issuing a permit for use, the relevant administrative body shall deny the issue of the permit if it establishes, inter alia, that the construction is non-compliant and the changes that arose during construction caused change in the location's conditions or other conditions and elements determined by the building permit that could affect health conditions, the environment, the safety of the works or a change in the prescribed essential requirements, provision of unhindered access and movement of functionally impaired persons.

i. Non-compliance and litigation

The right to judicial protection is declared in Article 23 of the Constitution, under which "Everyone has the right to have any decision regarding his rights, duties and any charges brought against him made without undue delay by an independent, impartial court constituted by law." (Kresal Šoltes, 2007[90]).

[90] K. Kresal Šoltes (2007): *Uveljavljanje in varstvo pravic* (Enforcement and protection of rights) in Barbara Kresal et al. (editor): *Vodnik po pravicah invalidov v slovenski zakonodaji*, (Guide to the rights of persons with disabilities in Slovenian law pp. 139-148. Ljubljana: Institute for Labour Law at the Faculty of Law, University of Ljubljana.

Anyone who believes that his right(s) were violated by an act or action of a state authority, local self-government body or bearer of public authorities, can turn to the Ombudsman, her four deputies or professional associates.
The Ombudsman can:

- warn the authority that has violated the right(s) to rectify the violation or the irregularity committed or even propose that it compensate for the damage caused;
- submit proposals for amendments to laws and other regulations to the Government or the Parliament;
- propose to all authorities that fall within her competence that they improve their operation and relations with clients;
- give her opinion on any case involving the violation of rights and freedoms. It does not matter what kind of proceeding is involved, or what phase the proceeding is at before the authority concerned.

The Ombudsman has no statutory powers in relation to the private sector and cannot intervene in cases in which rights are violated by, for example, a private company. In such cases, she can put pressure on state authorities, local self-government bodies and bearers of public authorities responsible for supervising the work of a private undertaking (Ombudsman's website[91]).

The Advocate of the Principle of Equality prevents and eliminates discrimination in Slovenia. He examines petitions or complaints concerning alleged cases of discrimination. He issues legally non-binding opinions on whether a person has been discriminated against in a certain situation (subject to unequal treatment because of personal circumstances). At the same time, he recommends to the offender ways to eliminate the violation, its causes and consequences. Through such non-formal intervention, the Advocate tries to eliminate the violation and provides help to improve future practice. When an issue cannot be resolved in this way, the Advocate may ask inspection authorities to prosecute for minor offences. A proceeding before the Advocate is cost-free and confidential. The Advocate also provides assistance to persons who were discriminated against during legal and other proceedings, i.e. by giving advice on legal remedies and how to use them before other state authorities. Anyone has the right to ask the Advocate for advice on whether their actions could result in discrimination, on how to act in order to avoid discrimination or how to more effectively respect the right to equal treatment. In addition, the Advocate provides general information on discrimination issues and the situation in this area in Slovenia (website of the Office for Equal Opportunities[92]).

[91] Available at: http://www.varuh-rs.si/ (9 February 2012).
[92] Available at: http://www.uem.gov.si/ (9 February 2012).

Spain

a. Accessibility legislation: its place in the legal and regulatory framework

The idea of integral accessibility that is promoted under the Law of Equal Opportunities, Non-Discrimination and Universal Accessibility of People with Disabilities (hereinafter referred to as LIONDAU; Ley de Igualdad de Oportunidades, No Discriminación y Accesibilidad Universal de las Personas con Discapacidad), means that the built environment has to be considered as a chain in which all links must be accessible, so that the accomplishment of the activities of a person with disability are not interrupted or impeded because one of the links in the chain, an environment or a space, is not accessible and does not let them advance along their journey by themselves.

The First National Plan of Accessibility contains the commitment of Governments in relation to the promotion of accessibility, which will be developed in successive three-year periods until 2012.

The Spanish Disability Strategy 2012-2020, approved in November 2011, is inspired by principles of Law 26/2011, 1 August, for the normative adaptation to the Convention on the Rights of Persons with Disabilities and Law 51/2003, 2 December, of equal opportunities, non discrimination and universal accessibility of people with disability (LIONDAU) that defines the concept of Universal Accessibility. One of the main objectives of this Strategy is Accessibility understood as the right of persons with disabilities to access the physical environment, transport, information technology and communications systems, and other facilities and services with the same conditions than the rest of the population. The first strategic measure on accessibility is to support the "European Accessibility Act" mentioned in the EU Disability Strategy 2010-2020.

In the Spanish legislative system, Autonomous Communities (Regional Governments) have the competencies for the development of laws to be applied within their territory. In particular, every Autonomous Community has its own accessibility legislation, which includes technical guidelines for its implementation.

Furthermore, in order to harmonize and to establish a general framework to be considered by all the regional authorities, the national government has issued the Law 51/2003 of equal opportunities, non discrimination and universal accessibility for people with disabilities.

In this Law 51/2003, lack of accessibility is seen as indirect discrimination. The technical issues related with its implementation are specified in several royal decrees and orders.

- Royal Decree 1417/2006, of 1 December, that establishes the Arbitral System for resolving complaints on equal opportunities, non discrimination and accessibility on the basis of disability.
- Royal Decree 366/2007 of 16 March, which sets forth the conditions of accessibility and non-discrimination of people with disabilities in their relations with the General State Administration.
- Royal Decree 505/2007 of 20 April, which sets forth the basic conditions of accessibility and non-discrimination of people with disabilities for accessing and using public spaces and buildings.
- Royal Decree 1494/2007, of 12 November, by which the Regulations on basic conditions for access for persons with disabilities to technologies, products and services related to the information society and social communication media are passed.

- Royal Decree 1544/2007, of 23 November, by which the basic conditions of accessibility and non-discrimination for access to and the use of means of transportation by people with disabilities are regulated.
- Royal Decree 173/2010, of 19 February, amending the Technical Building Code, approved by Royal Decree 314/2006 of March 17, in terms of accessibility and non discrimination of persons with disabilities.
- Royal Decree 422/2011, of 25 March, by which the Regulation on basic conditions for participation of persons with disabilities in political life and electoral processes are regulated.

All these regulations are available in both Spanish and English at http://sid.usal.es/spanishlawsondisability

Work is currently underway on the two Royal Decrees that are missing in order to complete the development of the LIONDAU, in accordance with what is foreseen in the aforementioned Law:

- Basic conditions of accessibility and non-discrimination for access to and the use of goods and services at the public's disposal.
- Training curriculum on universal access and the training of professionals.

b. General law, technical regulations and standards

In those areas where accessibility is regulated by a law as a general framework, its technical requirements are specified by different pieces of law within the Spanish legal system: Royal Decrees and Orders. Examples of these are listed under point g.

Besides, some technical standards are recognised as mandatory by law. An example of this is the UNE EN 81-70-2004 on accessibility to lifts for persons including persons with disability, which is included in the Spanish Technical Building Code, the normative framework that establishes the safety and habitability requirements of buildings set out in the Building Act.

c. Role of national, European and international standards

European standards are adopted and translated in Spain by AENOR, the Spanish Association for Standardization and Certification. AENOR also elaborates its own standards applicable only in Spain.

Some references (www.aenor.es):

- UNE 41510:2001 Accesibilidad en el urbanismo.
- UNE 41522:2001 Accesibilidad en la edificación. Accesos a los edificios.
- UNE 41520:2002 Accesibilidad en la edificación. Espacios de comunicación horizontal.
- UNE 41523:2001 Accesibilidad en la edificación. Espacios higiénico-sanitarios.
- UNE 41524:2010 Accesibilidad en la edificación. Reglas generales de diseño de los espacios y elementos que forman el edificio. Relación, dotación y uso.
- UNE 41500:2001 IN Accesibilidad en la edificación y el urbanismo. Criterios generales de diseño.
- UNE 200007:2007 IN Accesibilidad en las interfaces de las instalaciones eléctricas de baja tensión.
- UNE 153030:2008 IN Accesibilidad en televisión digital.
- UNE 139801:2003 Aplicaciones informáticas para personas con discapacidad. Requisitos de accesibilidad al ordenador. Hardware.

- UNE 139803:2004 Aplicaciones informáticas para personas con discapacidad. Requisitos de accesibilidad para contenidos en la Web.
- UNE-EN 81-70:2004 Reglas de seguridad para la construcción e instalación de ascensores. Aplicaciones particulares para los ascensores de pasajeros y de pasajeros y cargas. Parte 70: Accesibilidad a los ascensores de personas, incluyendo personas con discapacidad.
- UNE-EN 81-70:2004/A1:2005 Reglas de seguridad para la construcción e instalación de ascensores. Aplicaciones particulares para los ascensores de pasajeros y de pasajeros y cargas. Parte 70: Accesibilidad a los ascensores de personas, incluyendo personas con discapacidad.
- UNE-CEN/TS 81-82:2008 EX Reglas de seguridad para la construcción e instalación de ascensores. Ascensores existentes. Parte 82: Mejora de la accesibilidad a los ascensores de personas, incluyendo personas con discapacidad.
- UNE 139802:2009 Requisitos de accesibilidad del software
- UNE 170002:2009 Requisitos de accesibilidad para la rotulación.
- UNE 170002:2009 ERRATUM: 2009. Requisitos de accesibilidad para la rotulación.
- UNE 41501:2002 Símbolo de accesibilidad para la movilidad. Reglas y grados de uso.
- UNE-ISO/IEC 24751-1:2012 Tecnologías de la información. Adaptabilidad y accesibilidad individualizadas en aprendizaje electrónico, en educación y formación. Parte 1: Marco y modelo de referencia.
- UNE-ISO/IEC 24751-2:2012 Tecnologías de la Información. Adaptabilidad y accesibilidad individualizadas en aprendizaje electrónico, en educación y formación. Parte 2: Necesidades y preferencias para la prestación digital del "acceso para todos".
- UNE-ISO/IEC 24751-3:2012 Tecnologías de la Información. Adaptabilidad y accesibilidad individualizadas en aprendizaje electrónico, en educación y formación. Parte 3: Descripción de recurso digital "acceso para todos".

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Spain has signed and ratified the UN Convention on the Rights of Persons with Disabilities. Taking this into consideration, relevant legislation has been revised and, when necessary, modified in order to comply with the Convention. All modifications came into force by adoption of the Law 26/2011 on the normative adaptation to the International Convention on the Rights of Persons with Disabilities, dated 1 August 2011 (Available at: http://www.boe.es/boe/dias/2011/08/02/pdfs/BOE-A-2011-13241.pdf)

In Spain everything regarding accessibility for people with disabilities concerning guides, orientations, etc. that have been drawn up in this field, have used the obligations set forth in Art. 9 of the UN Convention as a reference.

e. Services regulated for accessibility

The scope of the Law 51/2003 of equal opportunities, non discrimination and universal accessibility for people with disabilities, modified by the mentioned Law 26/2011, applies to the following services:

- Telecommunications and information society
- Urban built environment, infrastructures and buildings
- Transports
- Goods and services available to the public
- Communication with the public administration
- Access to justice
- Cultural heritage, in accordance with heritage legislation.

f. Goods regulated for accessibility as part of a service

Accessibility to goods used in the provision of services is considered under the scope of the Law 51/2003, as above listed. Details about its technical implementation are still under study.

g. Goods regulated for accessibility

- Technologies, services and products related with the information society and social communication means. Regulated by Royal Decree 1494/2007 (http://www.boe.es/aeboe/consultas/bases_datos/doc.php?id=BOE-A-2007-19968)
- Means of transport, including buses, stations, etc. Regulated by Royal Decree 1544/2007 (http://www.boe.es/aeboe/consultas/bases_datos/doc.php?id=BOE-A-2007-20785)
- Most of construction products, such as doors, etc., are regulated in the relevant accessibility legislation of the Autonomous Communities. Furthermore, provisions for accessibility in goods related with urban built environment, such as street furniture, as stated in Law 51/2003, are regulated by the Royal Decree 505/2007 (http://www.boe.es/aeboe/consultas/bases_datos/doc.php?id=BOE-A-2007-9607)

h. Enforcement of accessibility legislation

The Law 51/2003 includes provisions in this regard under Chapter III "Promotion and defence". In particular, the law provides for two mechanisms of enforcement:

1. A system for infractions and sanctions for equal opportunities, non-discrimination and universal accessibility of persons with disabilities, passed to keep watch over the degree of fulfilment and efficiency of what has been set forth in both the LIONDAU and in the development of these regulations. Eleventh final provision, specified by Law 49/2007.

2. An arbitrating system. Article 17 of Law 51/2003, specified by Royal Decree 1417/2006.

Besides, accessibility legislation issued by the Autonomous Communities has its own system for infractions and sanctions. Apart from this, within the procedures for public works contracts (build environment and building), administrations has to examine accessibility requirements before granting permits.

i. Non-compliance and litigation

Any individual, NGO or state body can bring a claim to court. Besides to the arbitrating system above mentioned, claims can be brought to the Permanent Specialised Office (Oficina Permanente Especializada), a body of the National Disability Council, under the scope of the Spanish Ministry of Health, Social Services and Equality.

Sweden

a. Accessibility legislation: its place in the legal and regulatory framework

In Sweden lack of accessibility is seen as discrimination in the area of employment and of higher education.

The Swedish Discrimination Act prohibits discrimination in cases where the employer, by taking reasonable support and adaptation measures, can see to it that an employee, a job applicant or a trainee with a disability is put in a comparable situation to people without such a disability.

The Discrimination Act also prohibits discrimination in cases where an education provider, by taking reasonable measures regarding the accessibility and usability of the premises, can see to it that a person with a disability who is applying or has been accepted for education under the Higher Education Act (1992:1434) or for education that can lead to a qualification under the Act concerning authority to award certain qualifications (1993:792), is put in a comparable situation to people without such a disability.

A new Planning and Building Act entered into force in Sweden on 2 May 2011. The Act replaces regulation from 1987 and 1994 and includes significant improvements. For increased accessibility an assessment of the accessibility and usability of a building for people with impaired mobility or orientation is to be made at the planning permission stage. This will ensure that accessibility is provided for correctly from the very start.

The National Board of Housing, Building and planning is responsible for the general supervision of the planning and building administration within the country. The National Board issues for example regulations and general recommendations on the removal of easily eliminated obstacles.

b. General law, technical regulations and standards

Accessibility requirements are provided both in general law and in technical regulations or standards. Se under e. about the Planning and building Act (PBL) which includes accessibility and usability for persons with impaired movement or orientation as one of several technical requirements for construction works.

The work on standardisation is a basic precondition in the accessibility work in Sweden for example in the work on e-inclusion. Handisam has produced a proposed action plan for e-inclusion that highlights initiative areas within various policy areas, with the aim of contributing towards everyone being able to share in the information society and for this to be as easy as possible. Proposals for a future structure for following up e-accessibility have been prepared in an investigation.

Within the accessibility work, according to the Government, the State should set a good example in order to effectively achieve results. Authorities under the Government should therefore formulate and conduct their activities bearing in mind the goals of the disability policy. The Ordinance on the government authorities' responsibility for the implementation of the disability policies provides support for this work. According to the Ordinance (2001:526), government authorities must, by conducting inventories and drawing up action plans, work to

make their premises, their operations and information more accessible to persons with disabilities. The Ordinance has been important for the accessibility work, although other measures have also been of importance, such as regulations regarding easily eliminated obstacles.

The Act on Housing Adaptation Grants instructs the municipalities to provide grants for adaptation in order to increase the accessibility to and usability of existing housing for persons with disabilities or elderly people. Sweden's Government allocates approximately SEK 40 million annually in grants for the conversion of public meeting areas and non-governmental cultural premises. Around half of the total of 100 projects in 2009 used the funds they had been granted to make the premises accessible and usable for persons with disabilities.

Stringent demands are stipulated as regards the form and function of public information symbols, in order for them to make life easier for citizens. The Swedish Institute of Assistive Technology has developed graphic symbols in a national standard in order to increase the use of non-verbal information presentation in buildings and other public locations, particular consideration has been given to persons with various disabilities. This relates particularly to disabilities that affect vision, cognitive capacity or movement. They should be seen as part of the work of making society accessible for many more people. The symbols that are included in the new Swedish standard conform to the requirements for form and function that exist for the standardisation of public information symbols. All have been tested for comprehension in accordance with an international ISO standard for test methods (ISO 9186-1).

c. Role of national, European and international standards

The Swedish National Guidelines for Public Sector Websites give public sector organisations practical advice and examples on how to procure, create and evaluate websites and eServices in order to improve accessibility, usability, search ability and comply with the international standards and EU i2010 goals. The guidelines have had a huge impact on the accessibility and usability of public websites and eServices in Sweden.

EU law places demands on transporters and station managers regarding rights for persons with disabilities or reduced mobility; the Regulation on rail passengers' rights and obligations and the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air. These legal instruments establish that persons with disabilities and persons with reduced mobility are entitled to travel with the relevant form of transport and to receive assistance in conjunction with their journey.

For shipping, the Swedish Maritime Administration has issued national regulations and general advice about the adaptation of passenger vessels with regard to persons with disabilities. There is also EU legislation that regulates technical requirements for vehicles within the various transport types, which is intended for example to ensure that they are accessible to persons with disabilities.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

In recent years, the government has intensified the work in the fields of an accessible civil service, easily eliminated obstacles in the built environment and accessible public transport.

The Swedish government is investigating the possibility to include discrimination on grounds of inaccessibility on other areas than working life and higher education.

e. Services regulated for accessibility

The Swedish Planning and Building Act (PBL) includes accessibility and usability for persons with impaired movement or orientation as one of several technical requirements for construction works. The requirements apply to buildings, plots, public locations and areas with facilities other than buildings. Swedish building regulations also contain detailed requirements regarding accessibility in housing. In all new and converted accommodation, for example, there must be accessible wet rooms. All new buildings must, for example, have accessible entrances, and newly built accommodation must have a turning area for indoor wheelchairs. The building regulations also require lifts in new and converted housing buildings of more than three floors, and for storage areas, mailboxes, laundry rooms, waste areas, refuse disposal and other accom-modation supplements to be accessible and usable. The requirement for lifts also exists for buildings that contain working premises to which the general public have access, as well as public premises.

A new Planning and Building Act entered into force on 2 May 2011. An assessment of the accessibility and usability of a building for people with impaired mobility or orientation is to be made at the planning permission stage. This will ensure that accessibility is provided for correctly from the very start. The municipalities are responsible for the requirements in the Planning and Building Act being satisfied on a local level. In order to drive through developments locally and regionally, the Government has supported municipalities in the creation of indicators and systems for open comparisons of accessibility and accessibility work for persons with disabilities.

More and more municipalities are already working voluntarily to observe accessibility issues in the production of detailed plans, in-depth overview plans and regular overview plans. The Swedish National Board of Housing, Building and Planning has been working since 2006 on guidance for municipalities regarding overview planning, for example via a series of publications that include accessibility. The National Board is responsible for the general supervision of the planning and building administration within the country. The National Board issues for example regulations and general recommendations on the removal of easily eliminated obstacles.

The Government and Parliament have decided on specific transport policy goals and funds for achieving an accessible and usable transport system. Among the 13 prioritised areas, the accessibility goal has been specified as follows: The transport system must be designed so that it can be used by persons with disabilities.

The Disability and Public Transportation Act (1979:558) contains provisions to the effect that the body that supervises public transport and the body that plans and exercises such transport must ensure that the services and the means of transport that are used are accessible to persons with disabilities as far as possible.

The Special Transport Services Act (SFS 1997:736) regulates an obligation for each municipality to arrange passenger transport for individuals who, due to a disability that is not only temporary, have significant difficulties in moving about themselves or in travelling by public transport.

Local and regional public transport is the responsibility of the country's municipalities, that are performing comprehensive work to adapt public transport to the needs of persons with disabilities. Public transport vehicles are accessible to an increasingly great extent: two-thirds of the buses operating local services are low-floor vehicles, and more than half of the buses have automatic stop announcements.

The State is speeding up the work in the municipalities by providing state grants for vehicles, terminals, stops, training, information and payment systems, pedestrian and cycle paths, wheelchair lifts, lifts, co-ordination measures, etc. As a rule, the State pays half the costs for each measure.

Over the past 10 years, government authorities have conducted a range of projects aimed at promoting the issue of making public transport accessible, as well as to integrate the work of the State, municipalities and the private sector. This relates to both physical measures in the infrastructure and vehicles, as well as 'softer' initiatives such as training personnel in how to treat persons with disabilities in an appropriate manner. These projects have been conducted in collaboration with the disabled people's movement.

There have also been major improvements aimed at increasing accessibility in the road transport system. More than half of all bus-stops in the national road network have been converted to make it possible for more and more persons with disabilities to travel by bus.

Identification of obstacles in the physical environment, both indoors and outdoors, and in both private and public properties, is performed by the municipalities. Various tools for analysing accessibility at an overall level are being developed in municipalities and regions.

A concrete example of measures that have been implemented are the regulations regarding public procurement. The Public Procurement Act stipulates that the technical specifications in tender documentation should, where possible, be determined with regard to the criteria in respect of accessibility for persons with disabilities or be formulated with a view to the needs of all users. The specifications should ensure that the properties of materials, goods and services are suitable for the area of application, both in the works contract and the service and supply contract.

The National Board of Health and Welfare has investigated whether persons with disabilities can apply for care and support on the same terms as the rest of the population. This has taken place by means of charting accessibility to Sweden's social welfare offices and healthcare centers. In this context, accessibility also refers to how accessible the environment is, as well as how usable services and products are for persons with disabilities. The conclusions of the charting process are that accessibility is high for persons with mobility disabilities, which indicates that the national regulations and the targeted information efforts in recent years have been effective. In the majority of healthcare centers and social welfare offices, however, there are major deficiencies as regards accessibility for persons with other types of disability, in particular impaired vision, impaired hearing and cognitive disabilities. This means that the Government needs to become clearer in its communication of what accessibility is.

The Government has implemented measures to drive through developments in order to break the cycle of isolation entailed by the inability to use IT. In addition to increased access to

broadband and new technical solutions, the Government has invested in increased usability and accessibility of established and new services for persons with disabilities.

For example, the Swedish Post and Telecom Agency (PTS) is developing electronic services for persons with disabilities in conjunction with affected players. PTS has conducted trials with 'streaming' talking books and talking newspapers on mobile phones. In a report that was submitted to the Government in autumn 2009, the Swedish Agency for Disability Policy Coordination, Handisam, submitted a proposed action plan for e-Inclusion, in the report "Rätt från början" ["Right from the beginning"]. Several measures from the action plan have already been implemented within various policy areas.

The Electronic Communications Act (2003:389) aims at ensuring that private individuals, legal entities and public authorities shall have access to secure and efficient electronic communications. Universal services shall always be available for everybody on equivalent terms throughout Sweden at affordable prices.

If it is necessary for the universal services to be available at affordable prices, the party that is considered appropriate for this may be ordered to, at an affordable price, provide access for people with disability to services according to the same extent and on equivalent terms as for other end-users and satisfy the needs of people with disability for such special services.

Access to universal services shall be safeguarded through procurement by the State if this is called for especially having regard to the costs for the provision of the service or the network.

The Discrimination Act (2008:567) also grants that a job applicant or a trainee with a disability is put in a comparable situation to people without such a disability. The provision is applicable in cases concerning the digital work environment.

f. Goods regulated for accessibility as part of a service

The Swedish National Guidelines for Public Sector Websites takes an integrated approach to usability, accessibility and standardization. The Guidelines support the procurement, development, and maintenance of a website or eService by a public administration so that it offers equal opportunity usage for all citizens. The guidelines contain criteria which cover the entire lifecycle of a website or eService. The guidelines are intended for several target groups and give recommendations concerning strategic planning as well as design, development and administration. As follows from the principle of mainstreaming accessibility, the Guidelines present web accessibility as an integral part of the overall development process.

g. Enforcement of accessibility legislation

The Planning and Building Act specifies sanctions for transgressions of the requirements for construction works, including accessibility in new and altered buildings, as a fixed sum and/or prohibition on the use of the building or a part thereof, until the faults have been rectified.

In the event of transgressions, the municipal building committee decides whether the consequences are to be financial fines and/or demands to rectify the deficient accessibility solutions. Financial fines are not earmarked for accessibility-improving measures.

h. Non-compliance and litigation

The Equality Ombudsman supervises compliance with the law and is entitled to bring a case in the courts on behalf of an individual who considers himself or herself to have been discriminated against. Certain non-profit organisations are also entitled to take legal action. The Equality Ombudsman must also work to ensure that discrimination that is linked to disability does not occur in any area of social life, and work to achieve equal rights and opportunities regardless of disability. The Ombudsman must, through advice and in other ways, contribute to the person who has been subjected to discrimination being able to utilise his or her rights. Furthermore, the authority is tasked for example with providing information and training, suggesting constitutional amendments to counteract discrimination, as well as implementing other suitable measures.

United Kingdom

a. Accessibility legislation: its place in the legal and regulatory framework

Accessibility legislation is in force in the UK, with this issue generally being treated as an aspect of discrimination law. In England, Scotland and Wales, section 20 of the Equality Act 2010 builds on all previous discrimination legislation. It formally recognises the rights of disabled people to access everyday services, whether they are paid for or not. It consolidates and expands the previous duty on public authorities to think about the implications of their programmes and policies from the perspective of race, gender and disability. It imposes a duty to make reasonable adjustments for disabled people in specified circumstances. A tribunal or court can determine that non-compliance with this duty is unlawful discrimination.

The duty to make reasonable adjustments applies in the following areas:

- Services and public functions (Part 3 and Schedule 2)
- Premises (Part 4 and Schedule 4)
- Work (Part 5 and Schedule 8)
- Education (Part 6 and Schedule 13)
- Associations (Part 7 and Schedule 21)
- Each of the Parts mentioned above (Schedule 21)

The duty comprises three requirements:

1) changing the way things are done, such as changing a rule or policy;
2) making changes to a physical feature, such as providing a ramp to allow wheelchair users access to a building; and
3) providing auxiliary aids and services, such as providing special computer software or providing a different service.

In each case, the duty applies where a disabled person is put at a substantial disadvantage in comparison with a person who is not disabled. The duty holder then has to take reasonable steps to avoid the disadvantage.

Information on the Equality Act 2010 Act can be found at: at
http://www.legislation.gov.uk/ukpga/2010/15/contents/enacted

The Disability Discrimination Act 1995 provides similar protection in Northern Ireland.

The UK has guidelines and voluntary standards covering a wide range of areas, e.g. the "Lifetime Homes" standard which defines standards and guidelines to ensure homes are accessible to everyone. All social housing will be built to these standards from 2011, with the aim that all housing will be by 2013[93]. Building Regulations in England and Wales impose certain accessibility requirements on domestic and non-domestic buildings.[94]

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[93] Information on the Lifetime Homes standard can be found at:
http://www.communities.gov.uk/publications/housing/lifetimehomesneighbourhoods

[94] Information can be found in Approved Document M at :
http://www.planningportal.gov.uk/england/professionals/en/4000000000988.html
Information on the Public Service Accessibility Regulations 2000 for public transports can be found at http://www.dft.gov.uk/topics/access/buses-and-coaches/legislation/ and at http://www.dft.gov.uk/topics/access/rail/rail-vehicles/

UK airports like others in the EU, must comply with EU Regulation 1107/2006, which require that they provide services to ensure that disabled passengers can move through the airport, board, disembark and transit between flights.

The Communications Act 2003 sets minimum targets for subtitling, signing and audio description on television channels. The Code of Television Access Services produced by the UK communications regulator Ofcom gives guidance on these targets and how access to television services can be improved for people with hearing or visual impairments[95].

Regulations similarly exist covering Scotland and Northern Ireland.

The "Five Principles for Improving Provision of Information for Disabled People" sets out guidelines on how disabled people's access to information on public services can be improved[96].

b. General law, technical regulations and standards

As above, all service providers are required to comply with the provisions of the Equality Act 2010 or the Disability Discrimination Act 1995 in Northern Ireland. There are, however, some areas such as transport and buildings where there are also specific technical regulations and standards in place. Meeting a specific technical regulation may not be sufficient to meet the wider provisions of the Equality Act 2010 and the Equality Act 2010 does not set specific technical regulations or standards.

c. Role of national, European and international standards

European accessibility standards have been developed and are used in the context of the following EU mandates:

- Mandate 283 - Mandate to the European Standards Bodies for a guidance document in the field of safety and usability of products by people with special needs (e.g. elderly and disabled).
- Mandate 273 - Mandate to the European Standards Bodies for standardization in the field of information and communications technologies (ICT) for disabled and elderly people.
- Mandate 292 - Mandate to the European Standards Bodies for a guidance document in the field of safety of consumers and children - Product information.
- Mandate 293 - Mandate to the European Standards Bodies for a guidance document in the field of safety of consumers and children - Child safety.
- M/376: Standardization Mandate to CEN, CENELEC and ETSI in support of European Accessibility Requirements for Public Procurement of Products and Services in the ICT Domain (PDF) (7 December 2005)
- M/420: Standardization Mandate to CEN, CENELEC and ETSI in support of European Accessibility Requirements for Public Procurement in the Built Environment (PDF) (21 December 2007).

BSI (the national standards body) refers to the following legislation when developing British Standards:

- Equality Act 2010
- UN Convention on the Human Rights of Disabled People
- EU Employment Equality Directive.

There are also the following relevant EU resolutions:

[95] http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/ctas.pdf
[96] Information on the five principles can be found at: http://odi.dwp.gov.uk/common/publications-index.php

- EU Policy (1) CoE Resolution ResAp (2001)1 “on the introduction of the principles of universal design into the curricula of all occupations working on the built environment” (“Tomar Resolution”) “Universal design” ResAP(2007)3 “Achieving full participation through Universal Design”
- Recommendation Rec(2006)5 of the Committee of Ministers to member states on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015 EU Disability Action Plan (DAP) 2008-2009

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

The reasonable adjustments duty in the Equality Act 2010, and previously for England, Scotland and Wales the Disability Discrimination Act 1995, are in accordance with the provisions of Article 9 of the UN Convention on the Rights of Persons with Disabilities. The Equality Act 2010 continues to build on the good work already achieved – one example of a significant change to the reasonable adjustment duty is a single threshold for the ‘trigger point’ of when a disabled person is put at a ‘substantial disadvantage’.

e. Services regulated for accessibility

In the UK, all service providers in both the public and private sectors are under a duty to make reasonable adjustments in certain circumstances where a disabled person is put at a ‘substantial disadvantage compared to non-disabled people’. Reasonable steps must be taken to avoid the disadvantage or to adopt a reasonable alternative method of providing the service.

The duty for service providers is anticipatory. This means that a service provider cannot wait until a disabled person wants to use its services but must think in advance (and on an ongoing basis) about what disabled people with a range of impairments might reasonably need. This is because the relationship between, for example, a shop and its customers is transitory and, whilst a service provider can reasonably be expected to anticipate such things as ramps for mobility-impaired customers, it would not be expected to provide personalised adjustments in the same way as is expected of employers.

However, section 20 of the Act recognises the need to strike a balance between the rights of disabled people and the interests of service providers. Thus, the reasonable adjustment duty only requires service providers to make adjustments that are reasonable in all the circumstances, depending on a number of factors including the size and nature of the organisation, the financial resources available to it and the nature of the services provided.

Section 20 of the Act specifically provides that the duty to make reasonable adjustments does not require a service provider to take a step that would fundamentally alter the nature of the service they provide.

f. Goods regulated for accessibility as part of a service

The duty to make reasonable adjustments applies to the provision of both goods and services under Part 3 of the Equality Act 2010. To the extent that the provision of a service includes access to goods, that is covered by the duty.

g. Goods regulated for accessibility

In general, manufactured goods are not regulated for accessibility in the UK. However, the requirement for services to be accessible means that that goods used in providing a service must be accessible or the service provider must provide an alternative way of accessing their service. For example, a bank would need to ensure that its ATMs are accessible or provide ATM services in a reasonable alternative manner; a bath manufacturing company is not required to manufacture accessible baths but must ensure that their sales processes are accessible.

Public Transport Accessibility is covered by a number of regulations:

- The Public Service Accessibility Regulations 2000 and its amendments require improved accessibility of buses and coaches. All single-decker buses, double-decker buses, and coaches on scheduled services must comply by 2016, 2017 and 2020 respectively - http://www.dft.gov.uk/topics/access/buses-and-coaches/legislation/
- Since December 1998, all new and refurbished rail vehicles have had to meet Rail Vehicle Accessibility Regulations - All rail vehicles, both heavy and light rail, must be accessible by no later than 1 January 2020 - http://www.dft.gov.uk/topics/access/rail/rail-vehicles/
- UK airports like others in the EU, must comply with EU Regulation 1107/2006, which require that they provide services to ensure that disabled passengers can move through the airport, board, disembark and transit between flights - http://europa.eu/legislation_summaries/transport/mobility_and_passenger_rights/l24132_en.htm The Civil Aviation Authority promotes and enforces compliance of air regulations within the UK.
- Part M (Access to and use of buildings) of the Building Regulations 2010 sets out minimum requirements to ensure that a broad range of people are able to access and use facilities within buildings. http://www.planningportal.gov.uk/buildingregulations/approveddocuments/partm/
- The Communications Act 2003 sets minimum targets for subtitling, signing and audio description on television channels. The Code of Television Access Services produced by the UK communications regulator Ofcom gives guidance on these targets and how access to television services can be improved for people with hearing or visual impairments. http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/ctas.pdf
- The BSI (British Standards Institution) Group is the UK's National Standards Body. It works with manufacturing and service industries, businesses, the UK and other national governments and consumers to facilitate the production of British, European and international standards including those relating to disability accessibility.
- BSI also runs a consumer network including a representative who focuses on ‘Design for All’. There is a Disabled Experts’ Reference Group (DERG), who provides advice and input to standards in development. http://www.bsigroup.com/en/Standards-and-Publications/How-to-get-involved/Disabled-Experts-Reference-Group/
- ISO Guide 71 (also known as CEN/CENELEC Guide 6) provides Guidelines for standards developers to address the needs of older persons and persons with disabilities. http://www.iso.org/iso/catalogue_detail?csnumber=33987
- The BS 8878 Web Accessibility Code of Practice published in November 2010 presents a fully up-to-date, detailed guide for businesses and organizations to make their web products more accessible to disabled and older users - http://shop.bsigroup.com/en/ProductDetail/?pid=000000000030180388BS 8878 Web accessibility. Code of Practice.

h. Enforcement of accessibility legislation, non-compliance and litigation

The Equality Act 2010 provides for enforcement where an individual disabled person considers that they have been discriminated against because of a failure to comply with the duty to make reasonable adjustments. Depending on the circumstances, the individual may bring a claim before a tribunal or court. Remedies can include damages, declarations, quashing orders, mandatory orders and injunctions. This means that the tribunal or court can

require that certain adjustments are made in order to make the service or goods accessible to the claimant.

In addition, the Equality and Human Rights Commission, an independent statutory body with a remit including the elimination of discrimination and the reduction of inequality, has enforcement powers in this regard under the Equality Act.

Accessibility legislation in the UK is enforced by the application of case law, brought by individuals or bodies on behalf of individuals when they believe there rights have been infringed or a law broken in regards to them accessing a product or service.

European Union

The European Commission is committed to removing the economic and social barriers that prevent people with disabilities from enjoying their rights and full and complete participation in all areas of life.

Equality of opportunity for people with disabilities is at the centre of the multiannual European Disability Strategy 2010-2020 which was adopted on 15 November 2010[97], and its predecessor the EU Disability Action Plan 2003-2010[98].

The overarching goal of the EU Strategy is the continuous and sustainable improvement in the situation of persons with disabilities in economic, social and participatory terms.

The European Disability Strategy 2010-2020[99] provides the key elements of accessibility policies in the EU. It defines 'accessibility' as meaning that people with disabilities have access, on an equal basis with others, to the physical environment, transportation, information and communications including technologies and systems (ICT), and other facilities and services in line with Art. 9 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD), to which the EU is a party.

Accessibility concept

Accessibility is considered as a wide concept that includes the prevention and elimination of obstacles that pose problems for persons with disabilities in using products, services and infrastructures. General accessibility measures address in a anticipatory manner the most common problems that persons with disability face. Accessibility and Reasonable accommodation are two related concepts that have to be understood within the "social model of disability". They are both contributing to solutions to ensure equal access for person with disabilities when interacting with goods and services and performing a task.

Accessibility targets the general group of person with disabilities addressing their most common needs and needs to be complemented by measures of reasonable accommodation, namely appropriate measures to be taken, where needed in a particular case, to enable a person with a disability to have access to a product or a service that target a particular individual with a disability.

Achieving accessibility requires acting on the design and functioning of the product, service or infrastructure itself to be "more usable" by persons with disabilities in general while taking into account the diversity of requirements coming from various impairments. Accessibility is thus mostly preventive and proactive while reasonable accommodation is often reactive.

The implementation of accessibility is often supported by general guidelines or standards that describe how products or services should be built.

EU policy background

In the EU, persons with disabilities and older persons constitute a substantial and strongly growing part of the population that can benefit from accessibility measures. Older persons often have chronic illnesses that have associated impairments. Furthermore, even with good

[97] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0636:EN:NOT

[98] http://ec.europa.eu/social/main.jsp?catId=430&langId=en.

[99] COM (2010) 636

health, mobility and dexterity are reduced and the functional performance of the senses diminishes. This leads to activity limitations. Over 32 % of those between 55 and 65 years of age report a disability. That figure increases to over 40 %, 60 % and 70 % for each additional ten years.

While the ageing of the population can raise the visibility of the market potential of products with good accessibility features in the most commercial areas, particularly health care, there are other areas where the economic potential is often overlooked by industry. Industry's response is limited and disabled persons do not benefit from the opportunities created by the single market as much as other citizens do. But also the myriad of national, regional and local accessibility rules and regulations does not make things easier for industry. These can *de facto* act as obstacles to the free movement of goods, persons and services in the EU and to potential economies of scale.

Addressing accessibility at EU level

At EU level, accessibility has been addressed mainly in three thematic policy areas: ICT, transport and built environment. It has been a core element of the EU policy since the nineties. Accessibility was already addressed in the European Disability Action plan 2003 -2010.

At EU level there are various legislative acts that contain certain accessibility provisions regulating some goods and services. The detailed list of EU legal acts addressing accessibility is contained in the Declaration of Competences annexed to the Council Decision on the conclusion by the EU of the UN Convention on the Rights of Persons with Disabilities (UNCRPD)[100]. In general, accessibility is not the main purpose of these legal instruments, but one of the many issues addressed:

- There are some legal instruments that contain general accessibility provisions like the Structural Funds Regulation[101] or the Public Procurement Directives[102]. Some legal instruments, like the Copyright Directive, are of enabling nature and permit the Member States to develop exceptions in national legislation that aim to improve accessibility for persons with disabilities but do not impose obligations[103].
- There are some acts that require specific products to be accessible. This is the case of lifts[104] and vehicles with more than eight seats[105] or even for some specific groups of persons with disabilities, like the Braille requirement for packaging of medicines[106].
- There are some sector regulations that have some general provisions for persons with disabilities addressing accessibility to some extent or indirectly, like the eCommunication package in the area of Information and Communication Technologies[107] and the various Regulations on the rights of persons with reduced mobility[108] in the area of transport.

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100 See Annex II in the document available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:023:0035:0061:EN:PDF

101 Regulation (EC) No 1083/2006 and COM(2011) 615 final

102 Directives 2004/17/EC and 2004/17/EC.

103 Directive 2001/29/EC.

104 Directive 95/16/EC.

105 Directive 2001/85/EC

106 Directive 2004/27/EC

107 http://ec.europa.eu/information_society/policy/ecomm/eu-rules/index_en.htm

108 http://europa.eu/legislation_summaries/transport/mobility_and_passenger_rights/l24132_en.htm

With regard to ICT, in addition to the eCommunication package, the EU has invested significantly in RTD work. There are a number of Directives that address disability issues and that provide for possibility to address accessibility matters either in the terminals, the networks, the services including broadcasting services.

Furthermore, the eAccessibility policy has focused on the web and the promotion of Design for All. Accessibility to ICT is also dealt with in the Digital Agenda[109].

In the transport sector significant attention at EU level has been given to provide assistance to passengers with reduced mobility, while less work has been done on the accessibility side (accessibility of vehicles and transport infrastructures such as stations, bus stops). However in the rail area specific accessibility legislation is developed to address the accessibility of rail vehicles and stations that are part of the Trans-European network. The recent White Paper on transport refers to accessibility of the transport infrastructures beyond the service provision to persons with reduced mobility.

In the area of the built environment, some RTD projects and studies have been undertaken and accessibility has emerged in the policy discussions in the context of the lead market initiative for sustainable construction. Information on accessibility is gathered as part of social sustainability that includes some regulatory and standardisation aspects. EU transnational projects on accessibility address for example the training of professionals in accessible design, the development of tools for carrying out a detailed accessibility audit of buildings or accessibility in tourism infrastructures and services.

EU standardisation on accessibility

Since a number of years the Commission has been investing in the development of common voluntary standards on accessibility in specific areas. Currently, European standardisation organisations are working on preparing standards under three mandates given by the European Commission.

The first two Mandates address accessibility in the sense of point 2 (a) of article 9 of the Convention:

- Mandate 376 focuses on accessibility standards for ICT goods and services, and the standards are intended to be used in public procurement proceedings.
- Mandate 420 aims at developing accessibility standards for the built environment also intended to be used in public procurement.

. The third Mandate addresses accessibility in the sense of article 4 (f) of the Convention:

- Mandate 473 aims at including accessibility following "Design for all" (or Universal Design) in relevant mainstream standards and to develop process standards for manufactures and services providers on how to include accessibility in their product development cycle and service provision.

Horizontal instruments fostering accessibility

Public procurement

The current Public Procurement Directive allows for the integration of social considerations and specifically states the use of "Design for All" and accessibility requirements whenever

[109] COM(2010) 245

possible in the technical specifications in the contract documentation for public bids. [110] The Commission has issued a legislative proposal in 2011 making accessibility compulsory in public procurement in the EU.

Structural Funds
The General Regulation [111] on the European Regional development Fund, the European Social Fund and the Cohesion Fund, one of the largest financial instruments of the EU, places emphasis on addressing the issue of accessibility in its Article 16: "*The Member States and the Commission shall take appropriate steps to prevent any discrimination on the basis of gender, race or ethnic origin, religion or belief, disability, age or sexual orientation during the various stages of implementing the Funds and, in particular, access to them. Accessibility for disabled persons shall be one of the criteria to be observed in defining operations co-financed by the Funds and to be taken into account during the various stages of implementation"*.
The Commission has made a toolkit for using EU Structural and Cohesion funds and Ensuring accessibility and non-discrimination of people with disabilities. It includes examples of the prevention of discrimination on the basis of disabilities and accessibility for disabled persons as a horizontal principle, and also refers to a number of specific areas for potential action, including in the fields of transport, ICT and access to finance.

Research
Research activities in the area of accessibility to the built environment, transport and ICT have been in place since the early 90s. Only in the area of eAccessibility (addressing both accessibility to mainstream products and services and assistive solutions) there has been a budget of over 200 Million Euros and with over 200 projects. The current 7th Frame work programme addresses the area of eAccessibility. . The budget for the 7th Frame work programme and for deployment activities under the Competitive and innovation Programme are over 100 Million Euros.

Antidiscrimination Legislation
The European Directive establishing a general framework for equal treatment in employment and occupation contains an article on the obligation of employers to provide reasonable accommodation for disabled persons.[112] No reference is made in this context to accessibility.

However the 2008 Commission proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of inter alia disability, states that in order to guarantee the compliance with the principle of equal treatment in relation to person with disabilities, the measures necessary to enable persons with disabilities to have effective non-discriminatory access (meaning accessibility) among other to goods and services which area available to the public shall be provided by anticipation including through appropriate modifications or adjustments. However such measures should not impose a disproportionate burden, nor require a fundamental alteration or require the provision of alternatives thereto.[113]

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4 Directive 2004/18/EC of 31 March 2004 of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

111 Article 16 of 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, OJ L 210, 31.7.2006, p.25

112 Article 5 of Directive 2000/78

113 Art 4 COM (2008) 426

Notwithstanding this previous obligation, reasonable accommodation shall be provided unless it would impose a disproportionate burden.

On going EU developments on accessibility

In the European Disability Strategy 2010-2020, the Commission has proposed to use legislative and other instruments, such as standardisation, to foster accessibility to complement on going activities. The Commission is preparing the development by the end of 2012 of a 'European Accessibility Act', *which could include the development of specific standards for particular sectors to substantially improve the proper functioning of the internal market for accessible goods and services*.

To that end the European Commission has issued a contract for a study on the potential socio-economic impacts of possible new legal measures by the EU to improve accessibility of goods and services for people with disabilities. This study will serve as a basis for *exploring the merits of adopting EU regulatory measures to substantially improve the proper functioning of the internal market for accessible products and services, including measures to step up the* use of public procurement.

The Commission work programme for 2012 describes this initiative as Proposal for a Directive to improve the market of goods and services that are accessible for persons with disabilities and elderly persons, based on a "design for all" approach. This business friendly initiative will include binding measures to promote procurement and harmonisation of accessibility standards.

The objective of this initiative is the improvement of the functioning of the Internal Market in relation to accessible goods and services in creating economies of scale and remedying market failures improving the effectiveness of accessibility legislation to create an EU level playing field.

It is expected that this will stimulate innovation in the accessibility field through the development and use of European standards, increasing also the incentives in the markets by increasing public procurement of accessible goods and services;

Improving the availability in the market of accessible goods and services as well as increased competition among industry on accessibility will improve the inclusion and participation of persons with disabilities in the European society and economy.

ANNEX 1: STATE OF PLAY

Dates of signatures and ratification					
Country	**Signature**		**Ratification*/Formal confirmation**		**Reporting**
	UN Convention	**Optional Protocol**	**UN Convention**	**Optional Protocol**	**1st Report submitted to UN**
AT	30 March 2007	30 March 2007	25 September 2008	25 September 2008	October 2010
BE	30 March 2007	30 March 2007	2 July 2009	2 July 2009	**July 2011**
BG	27 September 2007	18 December 2008	**26 January 2012**		
CY	30 March 2007	30 March 2007	**27 June 2011**	**27 June 2011**	
CZ	30 March 2007	30 March 2007	28 September 2009		**October 2011**
DE	30 March 2007	30 March 2007	24 February 2009	24 February 2009	**September 2011**
DK	30 March 2007		23 July 2009		**August 2011**
EE	25 September 2007		**14 April 2012****		
EL	30 March 2007	27 September 2010	**11 April 2012****		
ES	30 March 2007	30 March 2007	3 December 2007	3 December 2007	May 2010
FI	30 March 2007	30 March 2007			
FR	30 March 2007	23 September 2008	18 February 2010	18 February 2010	
HU	30 March 2007	30 March 2007	20 July 2007	20 July 2007	October 2010
IE	30 March 2007				
IT	30 March 2007	30 March 2007	3 March 2009	3 March 2009	
LT	30 March 2007	30 March 2007	18 August 2010	18 August 2010	
LU	30 March 2007	30 March 2007	**26 September 2011**	**26 September 2011**	
LV	18 July 2008	22 January 2010	1 March 2010	31 August 2010	
MT	30 March 2007	30 March 2007			
NL	30 March 2007				
PL	30 March 2007				
PT	30 March 2007	30 March 2007	23 September 2009	23 September 2009	
RO	26 September 2007	25 September 2008	**31 January 2011**		
SE	30 March 2007	30 March 2007	15 December 2008	15 December 2008	**February 2011**
SI	30 March 2007	30 March 2007	24 April 2008	24 April 2008	
SK	26 September 2007	26 September 2007	26 May 2010	26 May 2010	
UK	30 March 2007	26 February 2009	8 June 2009	7 August 2009	**November 2011**
EU	30 March 2007		23 December 2010		

§ Dates in **bold** show developments under 2011 and 2012

* Ratification means the deposit of the instrument of ratification with the Secretary-General of the United Nations

** The Internal procedure achieved, but the instruments of ratification not yet deposited with the Secretariat General of the UN.

ANNEX 2: RESPONSIBLE AUTHORITIES AND CONTACT PERSONS

This annex contains an overview of responsible authorities, focal points, coordination mechanisms and contact points. The data were provided by the Member States in reply to the following questions:

* Who is responsible for the implementation (putting into practice) of the UN Convention, *i.e.* the focal point foreseen in article 33(1) of the Convention?

* Have you established a coordination mechanism foreseen in article 33(1) of the Convention?

Austria

Focal Point at federal level: Federal Ministry of Labour, Social Affairs and Consumer Protection (mail to: behindertenrechtskonvention@bmask.gv.at)

Coordination mechanism: Federal Ministry of Labour, Social Affairs and Consumer Protection (Website: www.bmask.gv.at)

Independent mechanism: Independent Committee on monitoring the implementation of the CRPD in Austria (Chair: Marianne Schulze)

Office of the Austrian CRPD Monitoring Committee
c/o Federal Ministry of Labour, Social Affairs and Consumer Protection
A-1010 Vienna, Stubenring 1
Fax: +43 1 718 94 70 2706
e-Mail: buero@monitoringausschuss.at
Website: www.monitoringausschuss.at

Contact:

Max Rubisch
Federal Ministry of Labour, Social Affairs and Consumer Protection (CRPD Focal Point)
A-1010 Vienna, Stubenring 1
E-Mail: max.rubisch@bmask.gv.at, Tel. +43-1-711 00-6262

Andreas Reinalter
Federal Ministry of Labour, Social Affairs and Consumer Protection (CRPD Focal Point)
A-1010 Vienna, Stubenring 1
E-Mail: andreas.reinalter@bmask.gv.at, Tel. +43-1-711 00-2255

Belgium

Focal Points:

- Federal level : Federal Public Service Sociale Security – DG Strategy & Research
- Flanders: Gelijke Kansen in Vlaanderen (Equal Opportunities in Flanders)
- Walloon region: Agence Wallonne pour l'Intégration des Personnes handicapées (Agency for Integration of Persons with Disabilities)

- Brussels-Capital region: Cel Gelijke Kansen en Diversiteit (Equal Opportunities and Diversity Body)
- Commission of the French speaking Community COCOF : Service Personne Handicapée Autonomie Recherchée (PHARE)
- Joint Community Commission COCOM : Administration COCOM
- French-Speaking community : WBI Service multilatéral mondial (WBI Multilateral World Service)
- German-speaking community: Dienststelle für Personen mit Behinderung (Office for People with Disabilities)

Coordination mechanism: Federal Public Service Sociale Security – DG Strategy & Research

Independent mechanisms: Centre for Equal Opportunities and Opposition to Racism

Contacts:

- Federal level + interfederal coordination mechanism: Greet van Gool - Federal Public Service Social Security, DG Strategy, International Affairs & Research – Mail: greet.vangool@minsoc.fed.be; CoordinationmechanismUNCRPD@minsoc.fed.be
- Flanders : Marian Vandenbossche – Gelijke Kansen in Vlaanderen– Mail: marian.vandenbossche@dar.vlaanderen.be
- Walloon Region: Jean-Marc HURDEBISE – AWIPH - Agence wallonne pour l'intégration des Personnes handicapées - Mail : jm.hurdebise@awiph.be
- Brussels Capital Region : Melissa De Schuiteneer - Cel Gelijke Kansen en Diversiteit - Mail: mdeschuiteneer@mbhg.irisnet.be
- Commission of the French speaking Community COCOF : DEBACKER Philippe – Service PHARE –Mail : pdebacker@cocof.irisnet.be
- Joint Community Commission COCOM - Edith Poot - Administration COCOM – Mail: epoot@ggc.irisnet.be
- French-Speaking community : FAURE Marien – WBI Service multilatéral mondial – Mail : m.faure@wbi.be
- German-speaking community: Joel Arens - DPB - Dienststelle für Personen mit Behinderung – Mail : joel.arens@dpb.be
- Independant mechanism: Centre for Equal Opportunities and Opposition to Racism – Mail: epost@cntr.be

Bulgaria

Focal Point: Integration of People with Disabilities Department at Ministry of Labour and Social Policy

Coordination mechanism: None established

Independent mechanism: None established

Contact:
Joanna Germanova
Ministry of Labour and Social Policy
Directorate "Policy for people with disabilities, equal right and social benefits"

2 Triaditza street, 1051 Sofia, Bulgaria
Email: jpetrova@mlsp.government.bg, Tel.: + 359 2 8119 658

Nadezhda Harizanova
Integration of People with Disabilities' Department
Directorate "Policy for people with disabilities, equal right and social benefits"
Ministry of Labour and Social Policy
2 Triaditza street, 1051 Sofia, Bulgaria
Email: nharizanova@mlsp.government.bg, Tel.: + 359 2 8119 656

Ministry of Labour and Social Policy
National Council for Integration of People with Disabilities.
Council of Ministers, regional governors, regional government in cooperation with civil society.

Ministry of Youth, Education and Science, Ministry of Health, Ministry of Regional Development and Republic Works, Ministry of Justice, Ministry of Culture, Ministry of transport, ICT, Ministry of economy, energetic and tourism, State Agency for Child Protection, Agency for People with Disabilities, Social Assistance Agency, National Statistical Institute and regional government.

Cyprus

Focal Point: Department for Social Inclusion of Persons with Disabilities at Ministry of Labour and Social Insurance

Coordination mechanism: The Pancyprian Council for the Persons with Disabilities.

Independent mechanism: Ombudsman and Commissioner for the Protection of Human Rights.

Contact:
Christina Flourentzou-Kakouri
Department for Social Inclusion of Persons with Disabilities
1430 Nicosía, Cyprus
Tel: 00357 22 815120, Fax: 00357 22 482737
e-mail: cflourentzou@dsid.mlsi.gov.cy

Czech Republic

Focal Point: Ministry of Labour and Social Affairs

Coordinating mechanism: Ministry of Labour and Social Affairs
Ministry of Foreign Affairs
Government Board for People with Disabilities
Czech National Disability Council

Independent mechanism: none established

Contact:
Stefan Culik
Ministry of Labour and Social Affairs
Na Poricnim pravu 1
128 01 Prague 2
Czech Republic
Tel: +42 22192 2693
E-mail: Stefan.Culik@mpsv.cz

Denmark

Focal Point: The Ministry of Social Affairs and Integration

Coordination: The Inter-ministerial Committee of Civil Servants on Disability Matters

Independent mechanism: The Danish Institute for Human Rights

Contact:
Anne Bækgaard (aba@sm.dk) or Thomas Falslund Johansen (tfj@sm.dk)
Ministry of Social Affairs and Integration
Holmens Kanal 22, DK-1060 København K
+45 33 92 93 00

The Danish Disability Council
Civil society: involvement through representative organizations ("Danske Handicaporganisationer"/Danish Council of Organisations of Disabled People,
Each sector Ministry is responsible of implementing necessary changes etc. in their area (the principle of sector responsibility)

Estonia

Focal Point: Ministry of Social Affairs.

Coordination mechanism: Ministry of Social Affairs (network of all the ministries yet to be formed)

Independent mechanism: none established, to be formed by the Estonian Chamber of Disabled People

Contact:
Aile Rahel Ausna
Social Welfare Department, Ministry of Social Affairs, Gonsiori 29, 15027 Tallinn, Estonia.
E-mail: rahel.ausna@sm.ee; Tel: +372 626 9228

Ministry of Foreign Affairs
Ministries (Ministry of Education and Research, Ministry of Justice, Ministry of Culture, Ministry of Internal Affairs, Ministry of Economic Affairs and Communications, Ministry of Finance) and non-governmental organizations (Estonian Chamber of Disabled People,

Estonian Union of People with Visual Impairment, Estonian Association of Hard Hearing, Estonian Union of Persons with Mobility Impairment, Association of Estonian Cities, Association of Municipalities of Estonia
Estonian National Council of People with Disabilities

Finland

Focal Point: none established

Coordination mechanism: none established

Independent mechanism: none established

Contact:
Satu Sistonen, Legal Officer (until May 2012)
Ministry of Foreign Affairs
Unit for human right courts and conventions
Email: satu.sistonen@formin.fi

Eveliina Pöyhönen
Ministerial Adviser
Social Inclusion Team
Department for Promotion of Welfare and Health
Ministry of Social Affairs and Health
P.O. Box 33, FI-00023 Government, Finland
Email: eveliina.poyhonen@stm.fi
Tel. +358 9 160 74133, +358 50 570 2186

France

Focal point: All administrations, services and bureaus working on the implementation of disability policy (not formally appointed yet as focal points)

Coordination mechanism: Interministerial committee of disability, chaired by the Prime Minister

Independent mechanism: Not appointed yet (see Chapter 2)

Contact:
Pascal FROUDIERE
European and International Affairs Unit
DIRECTORATE GENERAL FOR SOCIAL COHESION
Ministry for Solidarity and Social Cohesion
Phone : +33 (0)1 40 56 80 14
E-Mail : pascal.froudiere@social.gouv.fr

Germany

Focal Point: Federal Ministry of Labour and Social Affairs

Coordination Mechanism: Federal Government Commissioner for Matters relating to Persons with Disabilities

Monitoring Mechanism: German Institute for Human Rights
CRPD National Monitoring Mechanism
Zimmerstrasse 26/27, 10969 Berlin, Germany
Tel.: 0049-30-259359-450
E-Mail: monitoring-stelle@institut-fuer-menschenrechte.de
Fax: 0049-30-259359-459
www.institut-fuer-menschenrechte.de/en/monitoring-mechanism.html

Contact:
André Necke
Desk officer, Federal Ministry of Labour and Social Affairs,
email: andre.necke@bmas.bund.de
Tel. +49-30-527-1780

Barbara Braun
Desk officer, Federal Ministry of Labour and Social Affairs,
email: barbara.braun@bmas.bund.de
Tel. +49-30-527-2433

Greece

Focal point: None established

Coordination mechanism: none established

Independent mechanism: none established

Contact:
1. Stelakatos Michael,
Ministère des Affaires Etrangeres
Zalokosta 3, Athènes
e-mail: m.stelak@mfa.gr
Tel. : +30 210 368 33 19

2**.** Nikolsky Dimitrios
Ministry of Health and Social Solidairty
Aristotelous 17, Athens
e-mail: d.nikolsky@yyka.gov.gr
Tel: +30 210 5227700

Hungary

Focal Point: Ministry of National Resources

Coordination mechanism: not established

Independent mechanism: National Council on Disability Issues

Contact:
Mr Roland KISGYŐRI
Deputy Head of Department
Email: roland.kisgyori@nefmi.gov.hu
Ministry of National Resources

Ireland

Focal Point: will be confirmed following ratification

Coordination mechanism: will be confirmed following ratification

Independent mechanism: will be confirmed following ratification

Contact:
Richard Godfrey
Disability Policy Division
Department of Justice and Equality
Email: rcgodfrey@justice.ie
Tel: +353 1 4790212

Italy

Focal Point: Ministry of Labour and Social Policies - Directorate general for inclusion and social policies,

Coordination mechanism: Ministry of Labour and Social Policies- Directorate general for inclusion and social policies

Independent mechanism: National Observatory for monitoring the condition of people with disabilities (Law 18/2009)

Contact:
Alfredo Ferrante, aferrante@lavoro.gov.it, disabili@lavoro.gov.it
Head of Unit for persons with disabilities
Directorate general for inclusion and social policies
Ministry of Labour and Social Policies
Via Fornovo, 8
00192 Roma - IT
Tel +39 06.4683.4659-4457

Latvia

Focal Point: The Ministry of Welfare

Coordination mechanism: The National Council of Disability Affairs (NCDA)
Independent mechanism: The Ombudsman office (also the NCDA and working groups)

Contact:
Liene Kaulina-Bandere, Tel:+37167021608, Liene.Bandere@lm.gov.lv
Elina Celmina, Tel: +371 67021612, Elina.Celmina@lm.gov.lv

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Latvia

fax +371 67021607

Lithuania

Focal Point: Ministry of Social Security and Labour

Sub-Focal points: The Ministry of Education and Science, the Ministry of Transport and Communications, the Ministry of Health, the Ministry of Environment, the Ministry of Economics, the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of the Interior, the Ministry of Culture, the Department of Physical Education and Sports under the Government of the Republic of Lithuania, the Department of Statistics, Information Society Development Committee under the Ministry of Transport and Communications.

Coordinating mechanism: Ministry of Social Security and Labour

Independent mechanism: The Council for the Affairs of Disabled at the Ministry of Social Security and Labour and the Office of Equal Opportunities Ombudsperson.

Contact:
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Head of Equal Opportunities Division,
Tel: +370 5 266 42 61,

Rūta Jakubauskienė, ruta.jakubauskiene@socmin.lt
Chief Specialist of Equal Opportunities Division
Tel: +370 5 266 42 74

Luxembourg

Focal point: Ministry of Family Affairs and Integration

Coordination mechanism: Ministry of Family Affairs and Integration

Independent mechanism:

Task of promoting and monitoring: Consultative Commission of Human Rights (of the Grand Duchy of Luxembourg) jointly with the Centre for Equal Treatment
Task of protecting: National Ombudsman

Contact:
Pierre Biver
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Ministry of Family Affairs & Integration
12-14 avenue Emile Reuter
L-2919 Luxembourg
pierre.biver@fm.etat.lu

Malta

Focal Point: Ministry for Justice, Dialogue and the Family

Coordination mechanism: Ministry for Justice, Dialogue and the Family

Independent mechanism: National Commission Persons with Disability (KNPD)

Contact:
For implementation: Anne-Marie Callus, Kummissjoni Nazzjonali Persuni b'Diżabilità, Bugeia Institute, Braille Street, St Venera

The National Commission Persons with Disability (KNPD) established by the Equal Opportunities (Persons with Disability) Act (includes representatives of the main Government Ministries and also the voluntary sector working in the field).

The Netherlands

Focal Point: The Ministry of Health, Welfare and Sport (VWS)

Coordination mechanism: Proposed network of representatives from all layers of government.

Independent mechanism: National Human Rights Institute

Contact:
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PO Box 20350
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E: nicolette.damen@minvws.nl

Léon Poffé
Ministry of Health, Welfare and Sport

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NL 2500 EJ The Hague
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Poland

Focal Point: Ministry of Labour and Social Policy

Coordination mechanism: none established

Independent mechanism: none established

Contact:
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Ministry of Labour and Social Policy,
Department of Economic Analyses and Forecasts,
Nowogrodzka 1/3/5, 00-513 Warsaw, Poland
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Małgorzata Kiełducka, malgorzata.kielducka@mpips.gov.pl
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Nowogrodzka 1/3/5, 00-513 Warsaw, Poland
Tel: +48 22 529 06 12, fax. +48 22 529 06 02

Portugal

Focal point: to be designated

Coordination mechanism: National Institute for the Rehabilitation (waiting for Governmental designation)

Independent mechanism: to be designated

Contact:
José Madeira Serôdio (PhD)
National Institute for the Rehabilitation
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1069-178 Lisbon
Portugal
Tel: 00351 21 792 95 00
Fax: 00351 21 792 95 95
E-mail: José.M.Serodio@inr.mtss.pt

Romania

Focal Point: Ministry of Labor, Family and Social Protection / General Directorate for the Protection of Persons with Handicap

Coordination mechanism: Ministry of Labor, Family and Social Protection / General Directorate for the Protection of Persons with Handicap

Independent mechanism: none established

Contact:
Gabriela Dobre
General Directorate for the Protection of Persons with Handicap
Ministry of Labor, Family and Social Protection
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Tel: +4 021 212 54 38
Fax: +4 021 212 54 43
gabriela.dobre@anph.ro

Slovak Republic

Focal Point: none established

Coordination mechanism: none established

Independent mechanism: none established

With regard to the fact that the SR Government through a vote of no confidence by the legislative body has lost the mandate to carry out its function, the contact point together with the coordination mechanism in the framework of central government will be established only after the early parliamentary elections in June 2012.

Contact: (will be confirmed after the establishment of coordination mechanism)
Ministry of Labour, Social Affairs and Family of the Slovak Republic
Spitalska 4-6
816 43 Bratislava
Slovakia
Tel.: +421 2 2046 1055
Fax.: +421 2 2046 1075
dana.podobna@employment.gov.sk

Slovenia

Focal Point: Ministry of Labour, Family and Social Affairs, Directorate for persons with disability

Coordination mechanism: None established

Independent mechanisms: Government Council for Persons with Disabilities;

National Council of Disabled People's Organisation of Slovenia (NSIOS)

Contact:
Cveto Uršič,
Ministry of Labour and Social Affairs, general director, Directorate for disabled
Kotnikova 28, 1000 Ljubljana, SLOVENIA, tel: + 386 1 369 75 38, fax: +386 1 369 75 64
cveto.ursic@gov.si

Governmental Council for Persons with Disabilities
Relevant ministries
Slovenian National Council of disabled people's organizations

Spain

Focal Point : Ministry of Foreign Affairs and Cooperation as well as the Ministry of Health, Social Services and Equality[114], through Directorate-General for Disability Support Policies, which is responsible for the coordination of both.

Coordination: National Disability Council (General State Administration, Associations of common public interest, experts advisors).

Independent Mechanism: CERMI (Spanish Committee of Representatives of Persons with Disabilities) created by the National Disability Council

Contact:
Ignacio Tremiño
dgdiscapacidad@msssi.es
General Director of Disability Support Policies. Ministry of Health, Social Policy and Equality
Paseo de la Castellana 67-6ª planta
tel: + 34 918226502/03

Eva Mendoza
eva.mendoza@maec.es
Humans Rights Office - Ministry of Foreign Affairs and Cooperation (MAEC)

Sweden

Focal Point: Ministry of Health and Social Affairs

Coordinating mechanisms: Social Services Division of the Ministry of Health and Social Affairs; Swedish Agency for Disability Policy Coordination

Independent mechanism: none established

[114] The recent ministerial reorganization undertaken by the Spanish government, under which social policies, and therefore the UNCRPD, have been assigned to the new Ministry of Health, Social Services and Equality.

Contact:
Malin Ekman Aldén, malin.ekman-alden@social.ministry.se
Ministry of Health and Social Affairs Social Services Division
Tel: +46 8 405 11 15

UK

Focal Point: Office for Disability Issues (ODI)

Coordinating mechanism: Office for Disability Issues (ODI)

Independent mechanisms: UK's four equality and human rights Commissions i.e. the Equality and Human Rights Commission (EHRC), the Scottish Human Rights Commission (SHRC), the Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI)

Contact:
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London SW1H 9NA
Tel: +44 20 7449 5072,
Fax: +44 20 7449 5087

Department for Work and Pensions; Office for Disability Issues

European Union

Focal point: European Commission

Coordination mechanism: none established

Independent mechanism: none established

Contact:
Johan ten Geuzendam,
Head of Unit,
D3 Rights of Persons with Disabilities
European Commission
DG Justice
Rue Luxembourg 46 - 1049 Brussels

ANNEX 3: WEBSITES

Belgium
Federal Ministry of Social Security: www.socialsecurity.fgov.be/
Flemish administration for 'Equal Opportunities in Flanders' : www.gelijkekansen.be
Walloon Agency for Integration of Persons with Disabilities : www.awiph.be/
Brussels Joint Community Commission : www.bico.irisnet.be
Office of the German-speaking Community for Persons with Disabilities: www.dpb.be

Cyprus
Ministry of Labour and Social Insurance: www.mlsi.gov.cy
Department for Social Inclusion of Persons with Disabilities: www.mlsi.gov.cy/dsid

Czech Republic
Ministry of Labour and Social Affairs: www.mpsv.cz
Czech National Disability Council: www.nrzp.cz

Denmark
Ministry of Social Affairs and Integration: www.ism.dk

Estonia
Ministry of Social Affairs: www.sm.ee
The Estonian Chamber of Disabled People www.epikoda.ee

Finland
Electronic Treaty Data Base www.finlex.fi
Ministry of Foreign Affairs formin.finland.fi

France
Ministry for Solidarity and Social Cohesion: http://www.solidarite.gouv.fr/

Germany
Federal Ministry of Labour and Social Affairs:
www.bmas.de
Portal for persons with disabilities, their family, administrations and enterprises
www.einfach-teilhaben.de
Federal Commissioner:
www.behindertenbeauftragter.de
Monitoring Mechanism:
www.institut-fuer-menschenrechte.de/en/monitoring-mechanism.html

Greece
Ministry of Health and Social Security: www.mohaw.gr,
National Confederation of People with Disabilities: www.esaea.gr

Hungary
http://www.szmm.gov.hu

Ireland

http://www.justice.ie/en/JELR/Pages/Disability%20Policy

Italy
Ministry for Social Solidarity
www.solidarietasociale.gov.it

Latvia
Ministry of Welfare
www.lm.gov.lv

Lithuania
Ministry of Social Security and Labour and Department of Disabled People
http://www.ndt.lt/id-teises_aktai.html; http://www.socmin.lt/

Luxembourg
Ministry of Family Affairs and Integration
http://www.mfi.public.lu/

Malta
National Commission Persons with Disability (NCPD) website http://www.knpd.org.

The Netherlands
www.rijksoverheid.nl/onderwerpen/gehandicapten/gelijke-behandeling (Dutch)
www.rijksoverheid.nl

Poland
Ministry of Labour and Social Policy websites: www.mpips.gov.pl,
http://www.niepelnosprawni.gov.pl/dokumenty-organizacji-narodow-zj/konwencja-o-prawach/

Portugal
The Ministry of Solidarity and Social Security
The National Institute for Rehabilitation, I.P. www.inr.pt

Romania
National Authority for Persons with Handicap: www.anph.ro

Slovakia
Ministry of Labour, Social Affairs and Family of the Slovak Republic
www.employment.gov.sk

Slovenia
http://www.mddsz.gov.si/en/legislation/
http://www.mddsz.gov.si/en/publications/

Spain
Ministry of Health, Social Services and Equality: www.msssi.es
Ministry of Foreign Affairs and Cooperation: www.maec.es
Comité Español de Representantes de Personas con discapacidad (CERMI): www.cermi.es

Sweden
Government's home page: www.sweden.gov.se
Contains an Easy Read version of the Convention, Braille and sign language.

UK
www.officefordisability.gov.uk
Contains English language Easy Read version of the Convention.

European Union
Until April: http://ec.europa.eu/social/main.jsp?catId=429&langId=en
After May 2011 http://ec.europa.eu/justice/policies/intro/policies_intro_en.htm

Other relevant websites
http://www.un.org/disabilities/
www.easpd.eu
www.handicap.dk
www.nrozp.sk
www.cnditalia.it
www.superando.it
www.edf-feph.org/
www.epr.eu
www.enil.eu
www.coface-eu.org
http://www.un-convention.info/index.html
Independent (part funded by the UK Government) UK website dedicated to promoting disabled persons human rights.

ANNEX 4: NORWAY'S CONTRIBUTION TO THE 5TH HIGH LEVEL GROUP REPORT ON THE IMPLEMENTATION OF THE UNCRPD

Ratification of CRPD.

Norway signed the CRPD on 30. March 2007, the day of opening for signature. Norwegian legislation complies with the Convention, with the exception that a new act on legal capacity and guardianship has not yet been implemented. The new act was necessary to bring our legislation i compliance with article 12 of the CRPD. A new administration has to be set up to administer a more professionalized system of supportive guardians. Since legal capacity and guardianship concerns a civil right, the Government deems that the new legislation has to be implemented before ratification. The Government aims at ratifying the CRPD and will submit a proposition to the Parliament in the near future.

National implementation and monitoring

Each government ministry is responsible for disability matters within its field of competence. Norwegian policy has for many years had the same goals as the CRPD. The Ministry of Children, Equality and Social Inclusion coordinates the government's disability policy and functions as focal point for CRPD matters. That ministry chairs the government's committee of state secretaries on disability matters. 11 ministries are represented.
The Equality and Anti-discrimination Ombud is responsible for promoting, protecting and monitoring the important Anti-discrimination and Accessibility Act. The Ombud has these functions also as concerns CEDAW and CERD. In addition the Ombud has a special responsibility for monitoring living conditions for persons with disabilities.

There are a number of mechanisms for participation of persons with disabilities and their representative organizations in disability issues.

On national level:

- Regular meetings on political level between the Government and representatives of the organizations of persons with disabilities several times a year.
- Additional Meetings on political and administrative level between individual ministries and umbrella organizations or individual organizations from time to time and on specific issues.
- The National Disability Council is a forum for consultation between the government, disability organizations and experts on disability issues.

On County Council and Municipal level:

- Each County Council and Municipal Council is obliged by law the have an advisory Council on Disability matters to ensure participation of persons with disability on important matters, including accessibility, discrimination and services. In addition to representatives of persons with disabilities representative of the County or Municipal Council often take part in these advisory councils.

Norwegian disability organizations receive an annual government subsidy of more than NOK 100 million.

Formal decisions on the implementation on article 33 of CRPD will be taken in connection with its ratification.

Collecting statistics and /or developing indicators.

Statistic Norway (SSB) has the overall responsibility for meeting the need for statistics on Norwegian society and is also responsible for coordinating all official statistics in Norway. There is no established official definition on disability to be used in preparation of all statistics. Thus disability is defined according to the purpose of the statistics. Eurostat has developed a questionnaire, (European Disability and Social Integration Module) which partly has been integrated in the living condition survey on health.(Health Interview Survey)
However, SSB prepare several statistics which include markers on disability, some of them may also be disaggregated on gender and age. Some examples: The Labour Force Survey, the Population and Housing Census, and Living Conditions Survey on Health in Norway. Norway also conducts the EU-Silc, which might be disaggregated on disability.

Accessibility in national law.

In Norway accessibility legislation is found both in legislation concerning technical issues and as part of antidiscrimination legislation. Necessary links are made between the two when covering the same aspects of accessibility.

Accessibility requirements were first introduced in the building legislation in 1976. The requirements have been strengthened and expanded by later revisions. The latest revision was (made) in 2010 when universal design replaced accessibility as the defined objective in the building legislation, widening the scope of requirements and the required quality of accessibility to buildings and constructions.

Universal design is also required in legislation concerning city planning/outdoor environments, transport and public procurement. An Anti-Discrimination and Accessibility Act has been effective in Norway since 2009. It protects people with disabilities from discrimination and requires that public and private undertakings that offer goods or services to the general public are obliged to ensure the universal design of the undertaking's normal function provided this does not entail an undue burden for the undertaking. This covers the physical environment as well as the undertakings ICT services.
Requirements for further accessibility to services and goods and strengthened requirements for ICT services are under preparation for inclusion in the Anti-Discrimination and Accessibility Act.

Norway signed the UN convention on the Rights of Persons with Disabilities in 2003. The convention has been carefully examined to decide if more accessibility legislation should be introduced to comply with the convention. This has verified that the existing and pending Norwegian plans, policies and legislation in the field of accessibility are in line with the convention.

The premises of all public and private services directed towards the public in new buildings must be universally designed according to the building legislation. There are no exceptions to this requirement. In addition sectorial legislation has specific and more extensive requirements concerning universal design and accessibility, i.e. schools and universities, selected public offices and transport.

The Anti-Discrimination and Accessibility Act requires universal design of the undertaking's normal function provided this does not entail an undue burden for the undertaking. This requirement is also effective for services located in existing/old buildings, and covers all services directed towards the public.

The Public Procurement Act requires that all services and products purchased by providers of public services should be evaluated in accordance with universal design. There are no exceptions to this requirement except products and services where universal design is not relevant. All providers of services directed towards the public must comply with the Anti-Discrimination and Accessibility Act which requires that the physical means used in providing the service, including ICT, should be universally designed.

Concrete regulations concerning products are effective for some products, mainly those used in environments which should be accessible to the public. Examples of this are busses, ships and other means of transport affected by EU-regulations. In addition construction products such as elevators, electric switches, water-taps etc should be universally designed according to building regulations. A number of other products are covered by national standards and comparable guidelines. The scope of these standards is wide, covering ICT, out-door areas, infrastructure and more.

To support the implementation of national laws on universal design and accessibility and stimulate the work towards a universally designed society the Norwegian Government has launched action plans. The plan in operation is "Norway universally designed by 2025 The Norwegian government's action plan for universal design and increased accessibility 2009-2013.

Products for private use (with the exception of technical aids), are as a rule not covered by accessibility regulations. A national project conducted by the Norwegian Design Council is in operation to increase the use of universal design when designing products for the private sphere. Typical products dealt with in this project are toothbrushes, cutlery and kitchen equipment, packaging, internet design, cars etc.

Since it has been decided to use universal design when implementing accessibility in Norway, a number of new national standards have been developed. In addition existing standard have been reviewed and revised to cover the level of accessibility required by universal design. New standards has been developed amongst others for buildings, out-door areas, ICT and transport. A standard for goods and services is pending. International standards are used or included in national standards when relevant.

The various laws requiring universal design differs slightly when it comes to enforcement, but in general the enforcement is done administratively. A breach of the law can, if not corrected, result in fines or injunction to correct situation. If a case is not resolved the parties it may be brought to court.

The Anti-Discrimination and Accessibility Act is enforced by The Equality and Anti-Discrimination Ombud. Anyone affected can bring a claim to the Ombud.

The law enforcement role of the Ombud includes making statements in connection with complaints regarding violations of laws and regulations that are within the working scope of

the Ombud. The Equality and Anti-Discrimination Tribunal will try appeals based on the Ombuds statements. Parties may take the case to court if the Tribunal's conclusion is not accepted.

The Norwegian policies on universal design and accessibility take into account views expressed by NGOs and other parties. Representatives from interest organizations for people with disabilities participate in all relevant committees and panels.

Links: Norway universally designed by 2025 The Norwegian government's action plan for universal design and increased accessibility 2009-2013.

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Email: Postmottak@bld.dep.no
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Coordination mechanism: Ministry of Children, Equality and Social Inclusion

Independent mechanism: Equality and anti-discrimination ombud.
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RICHTLINIE 2000/78/EG DES RATES

vom 27. November 2000

zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf

DER RAT DER EUROPÄISCHEN UNION —

gestützt auf den Vertrag zur Gründung der Europäischen Gemeinschaft, insbesondere auf Artikel 13,

auf Vorschlag der Kommission ([1]),

nach Stellungnahme des Europäischen Parlaments ([2]),

nach Stellungnahme des Wirtschafts- und Sozialausschusses ([3]),

nach Stellungnahme des Ausschusses der Regionen ([4]),

in Erwägung nachstehender Gründe:

(1) Nach Artikel 6 Absatz 2 des Vertrags über die Europäische Union beruht die Europäische Union auf den Grundsätzen der Freiheit, der Demokratie, der Achtung der Menschenrechte und Grundfreiheiten sowie der Rechtsstaatlichkeit; diese Grundsätze sind allen Mitgliedstaaten gemeinsam. Die Union achtet die Grundrechte, wie sie in der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten gewährleistet sind und wie sie sich aus den gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten als allgemeine Grundsätze des Gemeinschaftsrechts ergeben.

(2) Der Grundsatz der Gleichbehandlung von Männern und Frauen wurde in zahlreichen Rechtsakten der Gemeinschaft fest verankert, insbesondere in der Richtlinie 76/207/EWG des Rates vom 9. Februar 1976 zur Verwirklichung des Grundsatzes der Gleichbehandlung von Männern und Frauen hinsichtlich des Zugangs zur Beschäftigung, zur Berufsbildung und zum beruflichen Aufstieg sowie in Bezug auf die Arbeitsbedingungen ([5]).

(3) Bei der Anwendung des Grundsatzes der Gleichbehandlung ist die Gemeinschaft gemäß Artikel 3 Absatz 2 des EG-Vertrags bemüht, Ungleichheiten zu beseitigen und die Gleichstellung von Männern und Frauen zu fördern, zumal Frauen häufig Opfer mehrfacher Diskriminierung sind.

(4) Die Gleichheit aller Menschen vor dem Gesetz und der Schutz vor Diskriminierung ist ein allgemeines Menschenrecht; dieses Recht wurde in der Allgemeinen Erklärung der Menschenrechte, im VN-Übereinkommen zur Beseitigung aller Formen der Diskriminierung von Frauen, im Internationalen Pakt der VN über bürgerliche und politische Rechte, im Internationalen Pakt der VN über wirtschaftliche, soziale und kulturelle Rechte sowie in der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten anerkannt, die von allen Mitgliedstaaten unterzeichnet wurden. Das Übereinkommen 111 der Internationalen Arbeitsorganisation untersagt Diskriminierungen in Beschäftigung und Beruf.

(5) Es ist wichtig, dass diese Grundrechte und Grundfreiheiten geachtet werden. Diese Richtlinie berührt nicht die Vereinigungsfreiheit, was das Recht jeder Person umfasst, zum Schutze ihrer Interessen Gewerkschaften zu gründen und Gewerkschaften beizutreten.

(6) In der Gemeinschaftscharta der sozialen Grundrechte der Arbeitnehmer wird anerkannt, wie wichtig die Bekämpfung jeder Art von Diskriminierung und geeignete Maßnahmen zur sozialen und wirtschaftlichen Eingliederung älterer Menschen und von Menschen mit Behinderung sind.

(7) Der EG-Vertrag nennt als eines der Ziele der Gemeinschaft die Förderung der Koordinierung der Beschäftigungspolitiken der Mitgliedstaaten. Zu diesem Zweck wurde in den EG-Vertrag ein neues Beschäftigungskapitel eingefügt, das die Grundlage bildet für die Entwicklung einer koordinierten Beschäftigungsstrategie und für die Förderung der Qualifizierung, Ausbildung und Anpassungsfähigkeit der Arbeitnehmer.

(8) In den vom Europäischen Rat auf seiner Tagung am 10. und 11. Dezember 1999 in Helsinki vereinbarten beschäftigungspolitischen Leitlinien für 2000 wird die Notwendigkeit unterstrichen, einen Arbeitsmarkt zu schaffen, der die soziale Eingliederung fördert, indem ein ganzes Bündel aufeinander abgestimmter Maßnahmen getroffen wird, die darauf abstellen, die Diskriminierung von benachteiligten Gruppen, wie den Menschen mit Behinderung, zu bekämpfen. Ferner wird betont, dass der Unterstützung älterer Arbeitnehmer mit dem Ziel der Erhöhung ihres Anteils an der Erwerbsbevölkerung besondere Aufmerksamkeit gebührt.

(9) Beschäftigung und Beruf sind Bereiche, die für die Gewährleistung gleicher Chancen für alle und für eine volle Teilhabe der Bürger am wirtschaftlichen, kulturellen und sozialen Leben sowie für die individuelle Entfaltung von entscheidender Bedeutung sind.

(10) Der Rat hat am 29. Juni 2000 die Richtlinie 2000/43/EG ([6]) zur Anwendung des Gleichbehandlungsgrundsatzes ohne Unterschied der Rasse oder der ethnischen Herkunft angenommen, die bereits einen Schutz vor solchen Diskriminierungen in Beschäftigung und Beruf gewährleistet.

(11) Diskriminierungen wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung können die Verwirklichung der im EG-Vertrag festgelegten Ziele unterminieren, insbesondere die Erreichung eines hohen Beschäftigungsniveaus

([1]) ABl. C 177 E vom 27.6.2000, S. 42.
([2]) Stellungnahme vom 12. Oktober 2000 (noch nicht im Amtsblatt veröffentlicht).
([3]) ABl. C 204 vom 18.7.2000, S. 82.
([4]) ABl. C 226 vom 8.8.2000, S. 1.
([5]) ABl. L 39 vom 14.2.1976, S. 40.
([6]) ABl. L 180 vom 19.7.2000, S. 22.

und eines hohen Maßes an sozialem Schutz, die Hebung des Lebensstandards und der Lebensqualität, den wirtschaftlichen und sozialen Zusammenhalt, die Solidarität sowie die Freizügigkeit.

(12) Daher sollte jede unmittelbare oder mittelbare Diskriminierung wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung in den von der Richtlinie abgedeckten Bereichen gemeinschaftsweit untersagt werden. Dieses Diskriminierungsverbot sollte auch für Staatsangehörige dritter Länder gelten, betrifft jedoch nicht die Ungleichbehandlungen aus Gründen der Staatsangehörigkeit und lässt die Vorschriften über die Einreise und den Aufenthalt von Staatsangehörigen dritter Länder und ihren Zugang zu Beschäftigung und Beruf unberührt.

(13) Diese Richtlinie findet weder Anwendung auf die Sozialversicherungs- und Sozialschutzsysteme, deren Leistungen nicht einem Arbeitsentgelt in dem Sinne gleichgestellt werden, der diesem Begriff für die Anwendung des Artikels 141 des EG-Vertrags gegeben wurde, noch auf Vergütungen jeder Art seitens des Staates, die den Zugang zu einer Beschäftigung oder die Aufrechterhaltung eines Beschäftigungsverhältnisses zum Ziel haben.

(14) Diese Richtlinie berührt nicht die einzelstaatlichen Bestimmungen über die Festsetzung der Altersgrenzen für den Eintritt in den Ruhestand.

(15) Die Beurteilung von Tatbeständen, die auf eine unmittelbare oder mittelbare Diskriminierung schließen lassen, obliegt den einzelstaatlichen gerichtlichen Instanzen oder anderen zuständigen Stellen nach den einzelstaatlichen Rechtsvorschriften oder Gepflogenheiten; in diesen einzelstaatlichen Vorschriften kann insbesondere vorgesehen sein, dass mittelbare Diskriminierung mit allen Mitteln, einschließlich statistischer Beweise, festzustellen ist.

(16) Maßnahmen, die darauf abstellen, den Bedürfnissen von Menschen mit Behinderung am Arbeitsplatz Rechnung zu tragen, spielen eine wichtige Rolle bei der Bekämpfung von Diskriminierungen wegen einer Behinderung.

(17) Mit dieser Richtlinie wird unbeschadet der Verpflichtung, für Menschen mit Behinderung angemessene Vorkehrungen zu treffen, nicht die Einstellung, der berufliche Aufstieg, die Weiterbeschäftigung oder die Teilnahme an Aus- und Weiterbildungsmaßnahmen einer Person vorgeschrieben, wenn diese Person für die Erfüllung der wesentlichen Funktionen des Arbeitsplatzes oder zur Absolvierung einer bestimmten Ausbildung nicht kompetent, fähig oder verfügbar ist.

(18) Insbesondere darf mit dieser Richtlinie den Streitkräften sowie der Polizei, den Haftanstalten oder den Notfalldiensten unter Berücksichtigung des rechtmäßigen Ziels, die Einsatzbereitschaft dieser Dienste zu wahren, nicht zur Auflage gemacht werden, Personen einzustellen oder weiter zu beschäftigen, die nicht den jeweiligen Anforderungen entsprechen, um sämtliche Aufgaben zu erfüllen, die ihnen übertragen werden können.

(19) Ferner können die Mitgliedstaaten zur Sicherung der Schlagkraft ihrer Streitkräfte sich dafür entscheiden, dass die eine Behinderung und das Alter betreffenden Bestimmungen dieser Richtlinie auf alle Streitkräfte oder einen Teil ihrer Streitkräfte keine Anwendung finden. Die Mitgliedstaaten, die eine derartige Entscheidung treffen, müssen den Anwendungsbereich dieser Ausnahmeregelung festlegen.

(20) Es sollten geeignete Maßnahmen vorgesehen werden, d. h. wirksame und praktikable Maßnahmen, um den Arbeitsplatz der Behinderung entsprechend einzurichten, z. B. durch eine entsprechende Gestaltung der Räumlichkeiten oder eine Anpassung des Arbeitsgeräts, des Arbeitsrhythmus, der Aufgabenverteilung oder des Angebots an Ausbildungs- und Einarbeitungsmaßnahmen.

(21) Bei der Prüfung der Frage, ob diese Maßnahmen zu übermäßigen Belastungen führen, sollten insbesondere der mit ihnen verbundene finanzielle und sonstige Aufwand sowie die Größe, die finanziellen Ressourcen und der Gesamtumsatz der Organisation oder des Unternehmens und die Verfügbarkeit von öffentlichen Mitteln oder anderen Unterstützungsmöglichkeiten berücksichtigt werden.

(22) Diese Richtlinie lässt die einzelstaatlichen Rechtsvorschriften über den Familienstand und davon abhängige Leistungen unberührt.

(23) Unter sehr begrenzten Bedingungen kann eine unterschiedliche Behandlung gerechtfertigt sein, wenn ein Merkmal, das mit der Religion oder Weltanschauung, einer Behinderung, dem Alter oder der sexuellen Ausrichtung zusammenhängt, eine wesentliche und entscheidende berufliche Anforderung darstellt, sofern es sich um einen rechtmäßigen Zweck und eine angemessene Anforderung handelt. Diese Bedingungen sollten in die Informationen aufgenommen werden, die die Mitgliedstaaten der Kommission übermitteln.

(24) Die Europäische Union hat in ihrer der Schlussakte zum Vertrag von Amsterdam beigefügten Erklärung Nr. 11 zum Status der Kirchen und weltanschaulichen Gemeinschaften ausdrücklich anerkannt, dass sie den Status, den Kirchen und religiöse Vereinigungen oder Gemeinschaften in den Mitgliedstaaten nach deren Rechtsvorschriften genießen, achtet und ihn nicht beeinträchtigt und dass dies in gleicher Weise für den Status von weltanschaulichen Gemeinschaften gilt. Die Mitgliedstaaten können in dieser Hinsicht spezifische Bestimmungen über die wesentlichen, rechtmäßigen und gerechtfertigten beruflichen Anforderungen beibehalten oder vorsehen, die Voraussetzung für die Ausübung einer diesbezüglichen beruflichen Tätigkeit sein können.

(25) Das Verbot der Diskriminierung wegen des Alters stellt ein wesentliches Element zur Erreichung der Ziele der beschäftigungspolitischen Leitlinien und zur Förderung der Vielfalt im Bereich der Beschäftigung dar. Ungleichbehandlungen wegen des Alters können unter bestimmten Umständen jedoch gerechtfertigt sein und erfordern daher besondere Bestimmungen, die je nach der Situation der Mitgliedstaaten unterschiedlich sein können. Es ist daher unbedingt zu unterscheiden zwischen einer Ungleichbehandlung, die insbesondere durch rechtmäßige Ziele im Bereich der Beschäftigungspolitik, des Arbeitsmarktes und der beruflichen Bildung gerechtfertigt ist, und einer Diskriminierung, die zu verbieten ist.

(26) Das Diskriminierungsverbot sollte nicht der Beibehaltung oder dem Erlass von Maßnahmen entgegenstehen, mit denen bezweckt wird, Benachteiligungen von Personen mit einer bestimmten Religion oder Weltanschauung, einer bestimmten Behinderung, einem bestimmten Alter oder einer bestimmten sexuellen Ausrichtung zu verhindern oder auszugleichen, und diese Maßnahmen können die Einrichtung und Beibehaltung von Organisationen von Personen mit einer bestimmten Religion oder Weltanschauung, einer bestimmten Behinderung, einem bestimmten Alter oder einer bestimmten sexuellen Ausrichtung zulassen, wenn deren Zweck hauptsächlich darin besteht, die besonderen Bedürfnisse dieser Personen zu fördern.

(27) Der Rat hat in seiner Empfehlung 86/379/EWG vom 24. Juli 1986 [1] zur Beschäftigung von Behinderten in der Gemeinschaft einen Orientierungsrahmen festgelegt, der Beispiele für positive Aktionen für die Beschäftigung und Berufsbildung von Menschen mit Behinderung anführt; in seiner Entschließung vom 17. Juni 1999 betreffend gleiche Beschäftigungschancen für behinderte Menschen [2] hat er bekräftigt, dass es wichtig ist, insbesondere der Einstellung, der Aufrechterhaltung des Beschäftigungsverhältnisses sowie der beruflichen Bildung und dem lebensbegleitenden Lernen von Menschen mit Behinderung besondere Aufmerksamkeit zu widmen.

(28) In dieser Richtlinie werden Mindestanforderungen festgelegt; es steht den Mitgliedstaaten somit frei, günstigere Vorschriften einzuführen oder beizubehalten. Die Umsetzung dieser Richtlinie darf nicht eine Absenkung des in den Mitgliedstaaten bereits bestehenden Schutzniveaus rechtfertigen.

(29) Opfer von Diskriminierungen wegen der Religion oder Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung sollten über einen angemessenen Rechtsschutz verfügen. Um einen effektiveren Schutz zu gewährleisten, sollte auch die Möglichkeit bestehen, dass sich Verbände oder andere juristische Personen unbeschadet der nationalen Verfahrensordnung bezüglich der Vertretung und Verteidigung vor Gericht bei einem entsprechenden Beschluss der Mitgliedstaaten im Namen eines Opfers oder zu seiner Unterstützung an einem Verfahren beteiligen.

(30) Die effektive Anwendung des Gleichheitsgrundsatzes erfordert einen angemessenen Schutz vor Viktimisierung.

(31) Eine Änderung der Regeln für die Beweislast ist geboten, wenn ein glaubhafter Anschein einer Diskriminierung besteht. Zur wirksamen Anwendung des Gleichbehandlungsgrundsatzes ist eine Verlagerung der Beweislast auf die beklagte Partei erforderlich, wenn eine solche Diskriminierung nachgewiesen ist. Allerdings obliegt es dem Beklagten nicht, nachzuweisen, dass der Kläger einer bestimmten Religion angehört, eine bestimmte Weltanschauung hat, eine bestimmte Behinderung aufweist, ein bestimmtes Alter oder eine bestimmte sexuelle Ausrichtung hat.

(32) Die Mitgliedstaaten können davon absehen, die Regeln für die Beweislastverteilung auf Verfahren anzuwenden, in denen die Ermittlung des Sachverhalts dem Gericht oder der zuständigen Stelle obliegt. Dies betrifft Verfahren, in denen die klagende Partei den Beweis des Sachverhalts, dessen Ermittlung dem Gericht oder der zuständigen Stelle obliegt, nicht anzutreten braucht.

(33) Die Mitgliedstaaten sollten den Dialog zwischen den Sozialpartnern und im Rahmen der einzelstaatlichen Gepflogenheiten mit Nichtregierungsorganisationen mit dem Ziel fördern, gegen die verschiedenen Formen von Diskriminierung am Arbeitsplatz anzugehen und diese zu bekämpfen.

(34) In Anbetracht der Notwendigkeit, den Frieden und die Aussöhnung zwischen den wichtigsten Gemeinschaften in Nordirland zu fördern, sollten in diese Richtlinie besondere Bestimmungen aufgenommen werden.

(35) Die Mitgliedstaaten sollten wirksame, verhältnismäßige und abschreckende Sanktionen für den Fall vorsehen, dass gegen die aus dieser Richtlinie erwachsenden Verpflichtungen verstoßen wird.

(36) Die Mitgliedstaaten können den Sozialpartnern auf deren gemeinsamen Antrag die Durchführung der Bestimmungen dieser Richtlinie übertragen, die in den Anwendungsbereich von Tarifverträgen fallen, sofern sie alle erforderlichen Maßnahmen treffen, um jederzeit gewährleisten zu können, dass die durch diese Richtlinie vorgeschriebenen Ergebnisse erzielt werden.

(37) Im Einklang mit dem Subsidiaritätsprinzip nach Artikel 5 des EG-Vertrags kann das Ziel dieser Richtlinie, nämlich die Schaffung gleicher Ausgangsbedingungen in der Gemeinschaft bezüglich der Gleichbehandlung in Beschäftigung und Beruf, auf der Ebene der Mitgliedstaaten nicht ausreichend erreicht werden und kann daher wegen des Umfangs und der Wirkung der Maßnahme besser auf Gemeinschaftsebene verwirklicht werden. Im Einklang mit dem Verhältnismäßigkeitsprinzip nach jenem Artikel geht diese Richtlinie nicht über das für die Erreichung dieses Ziels erforderliche Maß hinaus —

HAT FOLGENDE RICHTLINIE ERLASSEN:

KAPITEL I

ALLGEMEINE BESTIMMUNGEN

Artikel 1

Zweck

Zweck dieser Richtlinie ist die Schaffung eines allgemeinen Rahmens zur Bekämpfung der Diskriminierung wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung in Beschäftigung und Beruf im Hinblick auf die Verwirklichung des Grundsatzes der Gleichbehandlung in den Mitgliedstaaten.

Artikel 2

Der Begriff „Diskriminierung"

(1) Im Sinne dieser Richtlinie bedeutet „Gleichbehandlungsgrundsatz", dass es keine unmittelbare oder mittelbare Diskriminierung wegen eines der in Artikel 1 genannten Gründe geben darf.

(2) Im Sinne des Absatzes 1

a) liegt eine unmittelbare Diskriminierung vor, wenn eine Person wegen eines der in Artikel 1 genannten Gründe in einer vergleichbaren Situation eine weniger günstige Behandlung erfährt, als eine andere Person erfährt, erfahren hat oder erfahren würde;

b) liegt eine mittelbare Diskriminierung vor, wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren Personen mit einer bestimmten Religion oder Weltanschauung, einer bestimmten Behinderung, eines bestimmten Alters oder mit einer bestimmten sexuellen Ausrichtung gegenüber anderen Personen in besonderer Weise benachteiligen können, es sei denn:

   i) diese Vorschriften, Kriterien oder Verfahren sind durch ein rechtmäßiges Ziel sachlich gerechtfertigt, und die Mittel sind zur Erreichung dieses Ziels angemessen und erforderlich, oder

[1] ABl. L 225 vom 12.8.1986, S. 43.
[2] ABl. C 186 vom 2.7.1999, S. 3.

ii) der Arbeitgeber oder jede Person oder Organisation, auf die diese Richtlinie Anwendung findet, ist im Falle von Personen mit einer bestimmten Behinderung aufgrund des einzelstaatlichen Rechts verpflichtet, geeignete Maßnahmen entsprechend den in Artikel 5 enthaltenen Grundsätzen vorzusehen, um die sich durch diese Vorschrift, dieses Kriterium oder dieses Verfahren ergebenden Nachteile zu beseitigen.

(3) Unerwünschte Verhaltensweisen, die mit einem der Gründe nach Artikel 1 in Zusammenhang stehen und bezwekken oder bewirken, dass die Würde der betreffenden Person verletzt und ein von Einschüchterungen, Anfeindungen, Erniedrigungen, Entwürdigungen oder Beleidigungen gekennzeichnetes Umfeld geschaffen wird, sind Belästigungen, die als Diskriminierung im Sinne von Absatz 1 gelten. In diesem Zusammenhang können die Mitgliedstaaten den Begriff „Belästigung" im Einklang mit den einzelstaatlichen Rechtsvorschriften und Gepflogenheiten definieren.

(4) Die Anweisung zur Diskriminierung einer Person wegen eines der Gründe nach Artikel 1 gilt als Diskriminierung im Sinne des Absatzes 1.

(5) Diese Richtlinie berührt nicht die im einzelstaatlichen Recht vorgesehenen Maßnahmen, die in einer demokratischen Gesellschaft für die Gewährleistung der öffentlichen Sicherheit, die Verteidigung der Ordnung und die Verhütung von Straftaten, zum Schutz der Gesundheit und zum Schutz der Rechte und Freiheiten anderer notwendig sind.

Artikel 3

Geltungsbereich

(1) Im Rahmen der auf die Gemeinschaft übertragenen Zuständigkeiten gilt diese Richtlinie für alle Personen in öffentlichen und privaten Bereichen, einschließlich öffentlicher Stellen, in Bezug auf

a) die Bedingungen — einschließlich Auswahlkriterien und Einstellungsbedingungen — für den Zugang zu unselbständiger und selbständiger Erwerbstätigkeit, unabhängig von Tätigkeitsfeld und beruflicher Position, einschließlich des beruflichen Aufstiegs;

b) den Zugang zu allen Formen und allen Ebenen der Berufsberatung, der Berufsausbildung, der beruflichen Weiterbildung und der Umschulung, einschließlich der praktischen Berufserfahrung;

c) die Beschäftigungs- und Arbeitsbedingungen, einschließlich der Entlassungsbedingungen und des Arbeitsentgelts;

d) die Mitgliedschaft und Mitwirkung in einer Arbeitnehmer- oder Arbeitgeberorganisation oder einer Organisation, deren Mitglieder einer bestimmten Berufsgruppe angehören, einschließlich der Inanspruchnahme der Leistungen solcher Organisationen.

(2) Diese Richtlinie betrifft nicht unterschiedliche Behandlungen aus Gründen der Staatsangehörigkeit und berührt nicht die Vorschriften und Bedingungen für die Einreise von Staatsangehörigen dritter Länder oder staatenlosen Personen in das Hoheitsgebiet der Mitgliedstaaten oder deren Aufenthalt in diesem Hoheitsgebiet sowie eine Behandlung, die sich aus der Rechtsstellung von Staatsangehörigen dritter Länder oder staatenlosen Personen ergibt.

(3) Diese Richtlinie gilt nicht für Leistungen jeder Art seitens der staatlichen Systeme oder der damit gleichgestellten Systeme einschließlich der staatlichen Systeme der sozialen Sicherheit oder des sozialen Schutzes.

(4) Die Mitgliedstaaten können vorsehen, dass diese Richtlinie hinsichtlich von Diskriminierungen wegen einer Behinderung und des Alters nicht für die Streitkräfte gilt.

Artikel 4

Berufliche Anforderungen

(1) Ungeachtet des Artikels 2 Absätze 1 und 2 können die Mitgliedstaaten vorsehen, dass eine Ungleichbehandlung wegen eines Merkmals, das im Zusammenhang mit einem der in Artikel 1 genannten Diskriminierungsgründe steht, keine Diskriminierung darstellt, wenn das betreffende Merkmal aufgrund der Art einer bestimmten beruflichen Tätigkeit oder der Bedingungen ihrer Ausübung eine wesentliche und entscheidende berufliche Anforderung darstellt, sofern es sich um einen rechtmäßigen Zweck und eine angemessene Anforderung handelt.

(2) Die Mitgliedstaaten können in Bezug auf berufliche Tätigkeiten innerhalb von Kirchen und anderen öffentlichen oder privaten Organisationen, deren Ethos auf religiösen Grundsätzen oder Weltanschauungen beruht, Bestimmungen in ihren zum Zeitpunkt der Annahme dieser Richtlinie geltenden Rechtsvorschriften beibehalten oder in künftigen Rechtsvorschriften Bestimmungen vorsehen, die zum Zeitpunkt der Annahme dieser Richtlinie bestehende einzelstaatliche Gepflogenheiten widerspiegeln und wonach eine Ungleichbehandlung wegen der Religion oder Weltanschauung einer Person keine Diskriminierung darstellt, wenn die Religion oder die Weltanschauung dieser Person nach der Art dieser Tätigkeiten oder der Umstände ihrer Ausübung eine wesentliche, rechtmäßige und gerechtfertigte berufliche Anforderung angesichts des Ethos der Organisation darstellt. Eine solche Ungleichbehandlung muss die verfassungsrechtlichen Bestimmungen und Grundsätze der Mitgliedstaaten sowie die allgemeinen Grundsätze des Gemeinschaftsrechts beachten und rechtfertigt keine Diskriminierung aus einem anderen Grund.

Sofern die Bestimmungen dieser Richtlinie im übrigen eingehalten werden, können die Kirchen und anderen öffentlichen oder privaten Organisationen, deren Ethos auf religiösen Grundsätzen oder Weltanschauungen beruht, im Einklang mit den einzelstaatlichen verfassungsrechtlichen Bestimmungen und Rechtsvorschriften von den für sie arbeitenden Personen verlangen, dass sie sich loyal und aufrichtig im Sinne des Ethos der Organisation verhalten.

Artikel 5

Angemessene Vorkehrungen für Menschen mit Behinderung

Um die Anwendung des Gleichbehandlungsgrundsatzes auf Menschen mit Behinderung zu gewährleisten, sind angemessene Vorkehrungen zu treffen. Das bedeutet, dass der Arbeitgeber die geeigneten und im konkreten Fall erforderlichen Maßnahmen ergreift, um den Menschen mit Behinderung den Zugang zur Beschäftigung, die Ausübung eines Berufes, den beruflichen Aufstieg und die Teilnahme an Aus- und Weiterbildungsmaßnahmen zu ermöglichen, es sei denn, diese Maßnahmen würden den Arbeitgeber unverhältnismäßig belasten. Diese Belastung ist nicht unverhältnismäßig, wenn sie durch geltende Maßnahmen im Rahmen der Behindertenpolitik des Mitgliedstaates ausreichend kompensiert wird.

Artikel 6

Gerechtfertigte Ungleichbehandlung wegen des Alters

(1) Ungeachtet des Artikels 2 Absatz 2 können die Mitgliedstaaten vorsehen, dass Ungleichbehandlungen wegen des Alters keine Diskriminierung darstellen, sofern sie objektiv und ange-

messen sind und im Rahmen des nationalen Rechts durch ein legitimes Ziel, worunter insbesondere rechtmäßige Ziele aus den Bereichen Beschäftigungspolitik, Arbeitsmarkt und berufliche Bildung zu verstehen sind, gerechtfertigt sind und die Mittel zur Erreichung dieses Ziels angemessen und erforderlich sind.

Derartige Ungleichbehandlungen können insbesondere Folgendes einschließen:

a) die Festlegung besonderer Bedingungen für den Zugang zur Beschäftigung und zur beruflichen Bildung sowie besonderer Beschäftigungs- und Arbeitsbedingungen, einschließlich der Bedingungen für Entlassung und Entlohnung, um die berufliche Eingliederung von Jugendlichen, älteren Arbeitnehmern und Personen mit Fürsorgepflichten zu fördern oder ihren Schutz sicherzustellen;

b) die Festlegung von Mindestanforderungen an das Alter, die Berufserfahrung oder das Dienstalter für den Zugang zur Beschäftigung oder für bestimmte mit der Beschäftigung verbundene Vorteile;

c) die Festsetzung eines Höchstalters für die Einstellung aufgrund der spezifischen Ausbildungsanforderungen eines bestimmten Arbeitsplatzes oder aufgrund der Notwendigkeit einer angemessenen Beschäftigungszeit vor dem Eintritt in den Ruhestand.

(2) Ungeachtet des Artikels 2 Absatz 2 können die Mitgliedstaaten vorsehen, dass bei den betrieblichen Systemen der sozialen Sicherheit die Festsetzung von Altersgrenzen als Voraussetzung für die Mitgliedschaft oder den Bezug von Altersrente oder von Leistungen bei Invalidität einschließlich der Festsetzung unterschiedlicher Altersgrenzen im Rahmen dieser Systeme für bestimmte Beschäftigte oder Gruppen bzw. Kategorien von Beschäftigten und die Verwendung im Rahmen dieser Systeme von Alterskriterien für versicherungsmathematische Berechnungen keine Diskriminierung wegen des Alters darstellt, solange dies nicht zu Diskriminierungen wegen des Geschlechts führt.

Artikel 7

Positive und spezifische Maßnahmen

(1) Der Gleichbehandlungsgrundsatz hindert die Mitgliedstaaten nicht daran, zur Gewährleistung der völligen Gleichstellung im Berufsleben spezifische Maßnahmen beizubehalten oder einzuführen, mit denen Benachteiligungen wegen eines in Artikel 1 genannten Diskriminierungsgrunds verhindert oder ausgeglichen werden.

(2) Im Falle von Menschen mit Behinderung steht der Gleichbehandlungsgrundsatz weder dem Recht der Mitgliedstaaten entgegen, Bestimmungen zum Schutz der Gesundheit und der Sicherheit am Arbeitsplatz beizubehalten oder zu erlassen, noch steht er Maßnahmen entgegen, mit denen Bestimmungen oder Vorkehrungen eingeführt oder beibehalten werden sollen, die einer Eingliederung von Menschen mit Behinderung in die Arbeitswelt dienen oder diese Eingliederung fördern.

Artikel 8

Mindestanforderungen

(1) Die Mitgliedstaaten können Vorschriften einführen oder beibehalten, die im Hinblick auf die Wahrung des Gleichbehandlungsgrundsatzes günstiger als die in dieser Richtlinie vorgesehenen Vorschriften sind.

(2) Die Umsetzung dieser Richtlinie darf keinesfalls als Rechtfertigung für eine Absenkung des von den Mitgliedstaaten bereits garantierten allgemeinen Schutzniveaus in Bezug auf Diskriminierungen in den von der Richtlinie abgedeckten Bereichen benutzt werden.

KAPITEL II

RECHTSBEHELFE UND RECHTSDURCHSETZUNG

Artikel 9

Rechtsschutz

(1) Die Mitgliedstaaten stellen sicher, dass alle Personen, die sich durch die Nichtanwendung des Gleichbehandlungsgrundsatzes in ihren Rechten für verletzt halten, ihre Ansprüche aus dieser Richtlinie auf dem Gerichts- und/oder Verwaltungsweg sowie, wenn die Mitgliedstaaten es für angezeigt halten, in Schlichtungsverfahren geltend machen können, selbst wenn das Verhältnis, während dessen die Diskriminierung vorgekommen sein soll, bereits beendet ist.

(2) Die Mitgliedstaaten stellen sicher, dass Verbände, Organisationen oder andere juristische Personen, die gemäß den in ihrem einzelstaatlichen Recht festgelegten Kriterien ein rechtmäßiges Interesse daran haben, für die Einhaltung der Bestimmungen dieser Richtlinie zu sorgen, sich entweder im Namen der beschwerten Person oder zu deren Unterstützung und mit deren Einwilligung an den in dieser Richtlinie zur Durchsetzung der Ansprüche vorgesehenen Gerichts- und/oder Verwaltungsverfahren beteiligen können.

(3) Die Absätze 1 und 2 lassen einzelstaatliche Regelungen über Fristen für die Rechtsverfolgung betreffend den Gleichbehandlungsgrundsatz unberührt.

Artikel 10

Beweislast

(1) Die Mitgliedstaaten ergreifen im Einklang mit ihrem nationalen Gerichtswesen die erforderlichen Maßnahmen, um zu gewährleisten, dass immer dann, wenn Personen, die sich durch die Nichtanwendung des Gleichbehandlungsgrundsatzes für verletzt halten und bei einem Gericht oder einer anderen zuständigen Stelle Tatsachen glaubhaft machen, die das Vorliegen einer unmittelbaren oder mittelbaren Diskriminierung vermuten lassen, es dem Beklagten obliegt zu beweisen, dass keine Verletzung des Gleichbehandlungsgrundsatzes vorgelegen hat.

(2) Absatz 1 lässt das Recht der Mitgliedstaaten, eine für den Kläger günstigere Beweislastregelung vorzusehen, unberührt.

(3) Absatz 1 gilt nicht für Strafverfahren.

(4) Die Absätze 1, 2 und 3 gelten auch für Verfahren gemäß Artikel 9 Absatz 2.

(5) Die Mitgliedstaaten können davon absehen, Absatz 1 auf Verfahren anzuwenden, in denen die Ermittlung des Sachverhalts dem Gericht oder der zuständigen Stelle obliegt.

Artikel 11

Viktimisierung

Die Mitgliedstaaten treffen im Rahmen ihrer nationalen Rechtsordnung die erforderlichen Maßnahmen, um die Arbeitnehmer vor Entlassung oder anderen Benachteiligungen durch den Arbeitgeber zu schützen, die als Reaktion auf eine Beschwerde innerhalb des betreffenden Unternehmens oder auf die Einleitung eines Verfahrens zur Durchsetzung des Gleichbehandlungsgrundsatzes erfolgen.

Artikel 12

Unterrichtung

Die Mitgliedstaaten tragen dafür Sorge, dass die gemäß dieser Richtlinie getroffenen Maßnahmen sowie die bereits geltenden einschlägigen Vorschriften allen Betroffenen in geeigneter Form, zum Beispiel am Arbeitsplatz, in ihrem Hoheitsgebiet bekannt gemacht werden.

Artikel 13

Sozialer Dialog

(1) Die Mitgliedstaaten treffen im Einklang mit den einzelstaatlichen Gepflogenheiten und Verfahren geeignete Maßnahmen zur Förderung des sozialen Dialogs zwischen Arbeitgebern und Arbeitnehmern mit dem Ziel, die Verwirklichung des Gleichbehandlungsgrundsatzes durch Überwachung der betrieblichen Praxis, durch Tarifverträge, Verhaltenskodizes, Forschungsarbeiten oder durch einen Austausch von Erfahrungen und bewährten Verfahren, voranzubringen.

(2) Soweit vereinbar mit den einzelstaatlichen Gepflogenheiten und Verfahren, fordern die Mitgliedstaaten Arbeitgeber und Arbeitnehmer ohne Eingriff in deren Autonomie auf, auf geeigneter Ebene Antidiskriminierungsvereinbarungen zu schließen, die die in Artikel 3 genannten Bereiche betreffen, soweit diese in den Verantwortungsbereich der Tarifparteien fallen. Die Vereinbarungen müssen den in dieser Richtlinie sowie den in den einschlägigen nationalen Durchführungsbestimmungen festgelegten Mindestanforderungen entsprechen.

Artikel 14

Dialog mit Nichtregierungsorganisationen

Die Mitgliedstaaten fördern den Dialog mit den jeweiligen Nichtregierungsorganisationen, die gemäß den einzelstaatlichen Rechtsvorschriften und Gepflogenheiten ein rechtmäßiges Interesse daran haben, sich an der Bekämpfung von Diskriminierung wegen eines der in Artikel 1 genannten Gründe zu beteiligen, um die Einhaltung des Grundsatzes der Gleichbehandlung zu fördern.

KAPITEL III

BESONDERE BESTIMMUNGEN

Artikel 15

Nordirland

(1) Angesichts des Problems, dass eine der wichtigsten Religionsgemeinschaften Nordirlands im dortigen Polizeidienst unterrepräsentiert ist, gilt die unterschiedliche Behandlung bei der Einstellung der Bediensteten dieses Dienstes — auch von Hilfspersonal — nicht als Diskriminierung, sofern diese unterschiedliche Behandlung gemäß den einzelstaatlichen Rechtsvorschriften ausdrücklich gestattet ist.

(2) Um eine Ausgewogenheit der Beschäftigungsmöglichkeiten für Lehrkräfte in Nordirland zu gewährleisten und zugleich einen Beitrag zur Überwindung der historischen Gegensätze zwischen den wichtigsten Religionsgemeinschaften Nordirlands zu leisten, finden die Bestimmungen dieser Richtlinie über Religion oder Weltanschauung keine Anwendung auf die Einstellung von Lehrkräften in Schulen Nordirlands, sofern dies gemäß den einzelstaatlichen Rechtsvorschriften ausdrücklich gestattet ist.

KAPITEL IV

SCHLUSSBESTIMMUNGEN

Artikel 16

Einhaltung

Die Mitgliedstaaten treffen die erforderlichen Maßnahmen, um sicherzustellen, dass

a) die Rechts- und Verwaltungsvorschriften, die dem Gleichbehandlungsgrundsatz zuwiderlaufen, aufgehoben werden;

b) die mit dem Gleichbehandlungsgrundsatz nicht zu vereinbarenden Bestimmungen in Arbeits- und Tarifverträgen, Betriebsordnungen und Statuten der freien Berufe und der Arbeitgeber- und Arbeitnehmerorganisationen für nichtig erklärt werden oder erklärt werden können oder geändert werden.

Artikel 17

Sanktionen

Die Mitgliedstaaten legen die Sanktionen fest, die bei einem Verstoß gegen die einzelstaatlichen Vorschriften zur Anwendung dieser Richtlinie zu verhängen sind, und treffen alle erforderlichen Maßnahmen, um deren Durchführung zu gewährleisten. Die Sanktionen, die auch Schadenersatzleistungen an die Opfer umfassen können, müssen wirksam, verhältnismäßig und abschreckend sein. Die Mitgliedstaaten teilen diese Bestimmungen der Kommission spätestens am 2. Dezember 2003 mit und melden alle sie betreffenden späteren Änderungen unverzüglich.

Artikel 18

Umsetzung der Richtlinie

Die Mitgliedstaaten erlassen die erforderlichen Rechts- und Verwaltungsvorschriften, um dieser Richtlinie spätestens zum 2. Dezember 2003 nachzukommen, oder können den Sozialpartnern auf deren gemeinsamen Antrag die Durchführung der Bestimmungen dieser Richtlinie übertragen, die in den Anwendungsbereich von Tarifverträgen fallen. In diesem Fall gewährleisten die Mitgliedstaaten, dass die Sozialpartner spätestens zum 2. Dezember 2003 im Weg einer Vereinbarung die erforderlichen Maßnahmen getroffen haben; dabei haben die Mitgliedstaaten alle erforderlichen Maßnahmen zu treffen, um jederzeit gewährleisten zu können, dass die durch diese Richtlinie vorgeschriebenen Ergebnisse erzielt werden. Sie setzen die Kommission unverzüglich davon in Kenntnis.

Um besonderen Bedingungen Rechnung zu tragen, können die Mitgliedstaaten erforderlichenfalls eine Zusatzfrist von drei Jahren ab dem 2. Dezember 2003, d. h. insgesamt sechs Jahre, in Anspruch nehmen, um die Bestimmungen dieser Richtlinie über die Diskriminierung wegen des Alters und einer Behinderung umzusetzen. In diesem Fall setzen sie die Kommission unverzüglich davon in Kenntnis. Ein Mitgliedstaat, der die Inanspruchnahme dieser Zusatzfrist beschließt, erstattet der Kommission jährlich Bericht über die von ihm ergriffenen Maßnahmen zur Bekämpfung der Diskriminierung wegen des Alters und einer Behinderung und über die Fortschritte, die bei der Umsetzung der Richtlinie erzielt werden konnten. Die Kommission erstattet dem Rat jährlich Bericht.

Wenn die Mitgliedstaaten derartige Vorschriften erlassen, nehmen sie in den Vorschriften selbst oder durch einen Hinweis bei der amtlichen Veröffentlichung auf diese Richtlinie Bezug. Die Mitgliedstaaten regeln die Einzelheiten der Bezugnahme.

Artikel 19

Bericht

(1) Bis zum 2. Dezember 2005 und in der Folge alle fünf Jahre übermitteln die Mitgliedstaaten der Kommission sämtliche Informationen, die diese für die Erstellung eines dem Europäischen Parlament und dem Rat vorzulegenden Berichts über die Anwendung dieser Richtlinie benötigt.

(2) Die Kommission berücksichtigt in ihrem Bericht in angemessener Weise die Standpunkte der Sozialpartner und der einschlägigen Nichtregierungsorganisationen. Im Einklang mit dem Grundsatz der systematischen Berücksichtigung geschlechterspezifischer Fragen wird ferner in dem Bericht die Auswirkung der Maßnahmen auf Frauen und Männer bewertet. Unter Berücksichtigung der übermittelten Informationen enthält der Bericht erforderlichenfalls auch Vorschläge für eine Änderung und Aktualisierung dieser Richtlinie.

Artikel 20

Inkrafttreten

Diese Richtlinie tritt am Tag ihrer Veröffentlichung im *Amtsblatt der Europäischen Gemeinschaften* in Kraft.

Artikel 21

Adressaten

Diese Richtlinie ist an die Mitgliedstaaten gerichtet.

Geschehen zu Brüssel am 27. November 2000.

Im Namen des Rates

Der Präsident

É. GUIGOU

URTEIL DES GERICHTSHOFS (Zweite Kammer)

6. Dezember 2012(*)

„Gleichbehandlung in Beschäftigung und Beruf – Richtlinie 2000/78/EG – Verbot jeder Diskriminierung wegen des Alters und einer Behinderung – Entlassungsabfindung – Sozialplan, der die Minderung des Abfindungsbetrags für behinderte Arbeitnehmer bei Entlassung vorsieht"

In der Rechtssache C-152/11

betreffend ein Vorabentscheidungsersuchen nach Art. 267 AEUV, eingereicht vom Arbeitsgericht München (Deutschland) mit Entscheidung vom 17. Februar 2011, beim Gerichtshof eingegangen am 28. März 2011, in dem Verfahren

Johann Odar

gegen

Baxter Deutschland GmbH

erlässt

DER GERICHTSHOF (Zweite Kammer)

unter Mitwirkung des Richters A. Rosas in Wahrnehmung der Aufgaben der Präsidentin der Zweiten Kammer sowie der Richter U. Lõhmus, A. Ó Caoimh, A. Arabadjiev (Berichterstatter) und C. G. Fernlund,

Generalanwältin: E. Sharpston,

Kanzler: K. Malacek, Verwaltungsrat,

aufgrund des schriftlichen Verfahrens und auf die mündliche Verhandlung vom 18. April 2012,

unter Berücksichtigung der Erklärungen

– von Herrn Odar, vertreten durch die Rechtsanwälte S. Saller und B. Renkl,

– der Baxter Deutschland GmbH, vertreten durch Rechtsanwältin C. Grundmann,

– der deutschen Regierung, vertreten durch T. Henze, J. Möller und N. Graf Vitzthum als Bevollmächtigte,

– der Europäischen Kommission, vertreten durch J. Enegren und V. Kreuschitz als Bevollmächtigte,

nach Anhörung der Schlussanträge der Generalanwältin in der Sitzung vom 12. Juli 2012

folgendes

Urteil

1 Das Vorabentscheidungsersuchen betrifft die Auslegung von Art. 2 und Art. 6 Abs. 1 Unterabs. 2 Buchst. a der Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf (ABl. L 303, S. 16).

2 Dieses Ersuchen ergeht im Rahmen eines Rechtsstreits zwischen Herrn Odar und seinem früheren Arbeitgeber, der Baxter Deutschland GmbH (im Folgenden: Baxter), über den Betrag der Entlassungsabfindung, die er aufgrund des zwischen diesem Unternehmen und dessen Betriebsrat geschlossenen Vorsorglichen Sozialplans erhalten hat.

Rechtlicher Rahmen

Unionsrecht

3 In den Erwägungsgründen 8, 11, 12 und 15 der Richtlinie 2000/78 heißt es:

„(8) In den vom Europäischen Rat auf seiner Tagung am 10. und 11. Dezember 1999 in Helsinki vereinbarten beschäftigungspolitischen Leitlinien für 2000 wird die Notwendigkeit unterstrichen, einen Arbeitsmarkt zu schaffen, der die soziale Eingliederung fördert, indem ein ganzes Bündel aufeinander abgestimmter Maßnahmen getroffen wird, die darauf abstellen, die Diskriminierung von benachteiligten Gruppen, wie den Menschen mit Behinderung, zu bekämpfen. Ferner wird betont, dass der Unterstützung älterer Arbeitnehmer mit dem Ziel der Erhöhung ihres Anteils an der Erwerbsbevölkerung besondere Aufmerksamkeit gebührt.

…

(11) Diskriminierungen wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung können die Verwirklichung der im EG-Vertrag festgelegten Ziele unterminieren, insbesondere die Erreichung eines hohen Beschäftigungsniveaus und eines hohen Maßes an sozialem Schutz, die Hebung des Lebensstandards und der Lebensqualität, den wirtschaftlichen und sozialen Zusammenhalt, die Solidarität sowie die Freizügigkeit.

(12) Daher sollte jede unmittelbare oder mittelbare Diskriminierung wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung in den von der Richtlinie abgedeckten Bereichen gemeinschaftsweit untersagt werden. …

…

(15) Die Beurteilung von Tatbeständen, die auf eine unmittelbare oder mittelbare Diskriminierung schließen lassen, obliegt den einzelstaatlichen gerichtlichen Instanzen oder anderen zuständigen Stellen nach den einzelstaatlichen Rechtsvorschriften oder Gepflogenheiten; in diesen einzelstaatlichen Vorschriften kann insbesondere vorgesehen sein, dass mittelbare Diskriminierung mit allen Mitteln, einschließlich statistischer Beweise, festzustellen ist."

4 Gemäß Art. 1 der Richtlinie ist ihr „Zweck … die Schaffung eines allgemeinen Rahmens zur Bekämpfung der Diskriminierung wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung in Beschäftigung und Beruf im Hinblick auf die Verwirklichung des Grundsatzes der Gleichbehandlung in den Mitgliedstaaten".

5 Die Abs. 1 und 2 von Art. 2 („Der Begriff ‚Diskriminierung'") der Richtlinie sehen vor:

„(1) Im Sinne dieser Richtlinie bedeutet ‚Gleichbehandlungsgrundsatz', dass es keine unmittelbare oder mittelbare Diskriminierung wegen eines der in Artikel 1 genannten Gründe geben darf.

(2) Im Sinne des Absatzes 1

a) liegt eine unmittelbare Diskriminierung vor, wenn eine Person wegen eines der in Artikel 1 genannten Gründe in einer vergleichbaren Situation eine weniger günstige Behandlung erfährt, als eine andere Person erfährt, erfahren hat oder erfahren würde;

b) liegt eine mittelbare Diskriminierung vor, wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren Personen mit einer bestimmten Religion oder Weltanschauung, einer bestimmten Behinderung, eines bestimmten Alters oder mit einer bestimmten sexuellen Ausrichtung gegenüber anderen Personen in besonderer Weise benachteiligen können, es sei denn:

i) diese Vorschriften, Kriterien oder Verfahren sind durch ein rechtmäßiges Ziel sachlich gerechtfertigt, und die Mittel sind zur Erreichung dieses Ziels angemessen und erforderlich, oder

ii) der Arbeitgeber oder jede Person oder Organisation, auf die diese Richtlinie Anwendung findet, ist im Falle von Personen mit einer bestimmten Behinderung aufgrund des einzelstaatlichen Rechts verpflichtet, geeignete Maßnahmen entsprechend den in Artikel 5 enthaltenen Grundsätzen vorzusehen, um die sich durch diese Vorschrift, dieses Kriterium oder dieses Verfahren ergebenden Nachteile zu beseitigen."

6 Art. 3 („Geltungsbereich") der Richtlinie 2000/78 bestimmt in Abs. 1:

„Im Rahmen der auf die Gemeinschaft übertragenen Zuständigkeiten gilt diese Richtlinie für alle Personen in öffentlichen und privaten Bereichen, einschließlich öffentlicher Stellen, in Bezug auf

…

c) die Beschäftigungs- und Arbeitsbedingungen, einschließlich der Entlassungsbedingungen und des Arbeitsentgelts;

…"

7 Art. 6 („Gerechtfertigte Ungleichbehandlung wegen des Alters") der Richtlinie sieht in Abs. 1 vor:

„Ungeachtet des Artikels 2 Absatz 2 können die Mitgliedstaaten vorsehen, dass Ungleichbehandlungen wegen des Alters keine Diskriminierung darstellen, sofern sie objektiv und angemessen sind und im Rahmen des nationalen Rechts durch ein legitimes Ziel, worunter insbesondere rechtmäßige Ziele aus den Bereichen Beschäftigungspolitik, Arbeitsmarkt und berufliche Bildung zu verstehen sind, gerechtfertigt sind und die Mittel zur Erreichung dieses Ziels angemessen und erforderlich sind.

Derartige Ungleichbehandlungen können insbesondere Folgendes einschließen:

a) die Festlegung besonderer Bedingungen für den Zugang zur Beschäftigung und zur beruflichen Bildung sowie besonderer Beschäftigungs- und Arbeitsbedingungen, einschließlich der Bedingungen für Entlassung und Entlohnung, um die berufliche Eingliederung von Jugendlichen, älteren Arbeitnehmern und Personen mit Fürsorgepflichten zu fördern oder ihren Schutz sicherzustellen;

…"

8 Art. 16 der Richtlinie bestimmt:

„Die Mitgliedstaaten treffen die erforderlichen Maßnahmen, um sicherzustellen, dass

a) die Rechts- und Verwaltungsvorschriften, die dem Gleichbehandlungsgrundsatz zuwiderlaufen, aufgehoben werden;

b) die mit dem Gleichbehandlungsgrundsatz nicht zu vereinbarenden Bestimmungen in Arbeits- und Tarifverträgen … für nichtig erklärt werden oder erklärt werden können oder geändert werden."

Deutsches Recht

Deutsche Rechtsvorschriften

9 Die Richtlinie 2000/78 wurde durch das Allgemeine Gleichbehandlungsgesetz vom 14. August 2006 (BGBl I S. 1897, im Folgenden: AGG) in die deutsche Rechtsordnung umgesetzt. § 1 („Ziel des Gesetzes") AGG sieht vor:

„Ziel des Gesetzes ist, Benachteiligungen aus Gründen der Rasse oder wegen der ethnischen Herkunft, des Geschlechts, der Religion oder Weltanschauung, einer Behinderung, des Alters oder der sexuellen Identität zu verhindern oder zu beseitigen."

10 § 10 („Zulässige unterschiedliche Behandlung wegen des Alters") AGG bestimmt:

„Ungeachtet des § 8 ist eine unterschiedliche Behandlung wegen des Alters auch zulässig, wenn sie objektiv und angemessen und durch ein legitimes Ziel gerechtfertigt ist. Die Mittel zur Erreichung dieses Ziels müssen angemessen und erforderlich sein. Derartige unterschiedliche Behandlungen können insbesondere Folgendes einschließen:

…

6. Differenzierungen von Leistungen in Sozialplänen im Sinne des Betriebsverfassungsgesetzes, wenn die Parteien eine nach Alter oder Betriebszugehörigkeit gestaffelte Abfindungsregelung geschaffen haben, in der die wesentlich vom Alter abhängenden Chancen auf dem Arbeitsmarkt durch eine verhältnismäßig starke Betonung des Lebensalters erkennbar berücksichtigt worden sind, oder Beschäftigte von den Leistungen des Sozialplans ausgeschlossen haben, die wirtschaftlich abgesichert sind, weil sie, gegebenenfalls nach Bezug von Arbeitslosengeld, rentenberechtigt sind."

11 Die §§ 111 bis 113 des Betriebsverfassungsgesetzes in der Fassung vom 25. September 2001 (BGBl. I S. 2518) schreiben Maßnahmen vor, die zur Milderung der für Arbeitnehmer aus der Umstrukturierung eines Unternehmens entstehenden Nachteile zu ergreifen sind. Arbeitgeber und Betriebsräte sind verpflichtet, zu diesem Zweck Sozialpläne abzuschließen.

12 § 112 („Interessenausgleich über die Betriebsänderung, Sozialplan") des Betriebsverfassungsgesetzes sieht in Abs. 1 vor:

„Kommt zwischen Unternehmer und Betriebsrat ein Interessenausgleich über die geplante Betriebsänderung zustande, so ist dieser schriftlich niederzulegen und vom Unternehmer und Betriebsrat zu unterschreiben. Das Gleiche gilt für eine Einigung über den Ausgleich oder die Milderung der wirtschaftlichen Nachteile, die den Arbeitnehmern infolge der geplanten Betriebsänderung entstehen (Sozialplan). Der Sozialplan hat die Wirkung einer Betriebsvereinbarung. …"

13 Gemäß § 127 des Dritten Buches des Sozialgesetzbuchs erfolgt die Zahlung von Regelarbeitslosengeld für eine begrenzte Dauer, die vom Alter des Arbeitnehmers und der Länge des Zeitraums abhängt, in dem Beiträge geleistet wurden. Ein Arbeitnehmer hat vor Vollendung des 50. Lebensjahrs Anspruch auf Arbeitslosengeld in Höhe von 12 Monatsgehältern, nach Vollendung des 50. Lebensjahrs in Höhe von 15 Monatsgehältern, nach Vollendung des 55. Lebensjahrs in Höhe von 18 Monatsgehältern und mit Vollendung des 58. Lebensjahrs in Höhe von 24 Monatsgehältern.

Vorsorglicher Sozialplan und Ergänzender Sozialplan

14 Baxter schloss mit dem Gesamtbetriebsrat am 30. April 2004 einen Vorsorglichen Sozialplan. In § 6 Abs. 1 Punkte 1.1 bis 1.5 dieses Plans heißt es:

„1. Abfindungen bei Beendigung des Arbeitsverhältnisses (außer ‚Frühverrentung')

1.1 Mitarbeitern, denen trotz aller Bemühungen kein zumutbarer Arbeitsplatz bei Baxter in Deutschland angeboten werden kann, bei denen auch eine vorzeitige Beendigung des Arbeitsverhältnisses nach § 5 nicht in Frage kommt und die das Unternehmen verlassen (durch betriebsbedingte Kündigung oder einvernehmliche Beendigung), erhalten eine zu versteuernde Bruttoabfindung in Euro nach folgender Formel:

Abfindung = Altersfaktor x Betriebszugehörigkeit x Bruttomonatsentgelt [im Folgenden: Standardformel]

1.2 Altersfaktorentabelle

Lebens-alter	Alters-faktor	Lebens-alter	Alters-faktor	Lebens-alter	Alters-faktor	Lebens-alter	Alters-faktor	Lebens-alter	Alters-faktor
18	0,35	28	0,60	38	1,05	48	1,30	58	1,70
19	0,35	29	0,60	39	1,05	49	1,35	59	1,50
20	0,35	30	0,70	40	1,10	50	1,40	60	1,30
21	0,35	31	0,70	41	1,10	51	1,45	61	1,10
22	0,40	32	0,80	42	1,15	52	1,50	62	0,90
23	0,40	33	0,80	43	1,15	53	1,55	63	0,60
24	0,40	34	0,90	44	1,20	54	1,60	64	0,30
25	0,40	35	0,90	45	1,20	55	1,65		
26	0,50	36	1,00	46	1,25	56	1,70		
27	0,50	37	1,00	47	1,25	57	1,70		

…

1.5 Bei Mitarbeitern, die älter als 54 Jahre sind und betriebsbedingt gekündigt werden oder einvernehmlich das Arbeitsverhältnis beenden, wird die gemäß § 6 Abs. 1 Punkt 1.1 errechnete Abfindung folgender Berechnung gegenübergestellt:

Monate bis zum frühestmöglichen Renteneintritt x 0,85 x Bruttomonatsentgelt [im Folgenden: Sonderformel]

Sollte die [Standardformel-Abfindung] größer sein als die [Sonderformel-Abfindung], so kommt die geringere Summe zur Auszahlung. Diese geringere Summe darf jedoch die Hälfte der [Standardformel-Abfindung] nicht unterschreiten.

Ist das Ergebnis [der Sonderformel] gleich null, kommt die Hälfte der [Standardformel-Abfindung] zur Auszahlung."

15 Am 13. März 2008 schloss Baxter mit dem Gesamtbetriebsrat einen Ergänzenden Sozialplan. In § 7 dieses Plans, der die Abfindungen betrifft, heißt es:

„Mitarbeiter, die in den Geltungsbereich dieses Sozialplans fallen und deren Arbeitsverhältnis wegen der Betriebsänderung endet, erhalten die folgenden Leistungen:

7.1 Abfindung. Die Mitarbeiter erhalten die einmalige Abfindung, die sich aus § 6 [Abs.] 1 des Vorsorglichen Sozialplans ergibt.

7.2 Klarstellung. Zu § 6 [Punkt] 1.5 des Vorsorglichen Sozialplans einigen sich die Parteien auf folgende Klarstellung: Unter ‚frühestmöglichem Renteneintritt' wird verstanden der Zeitpunkt, zu dem der Mitarbeiter erstmals eine der gesetzlichen Altersrenten, auch eine solche mit Abschlägen wegen vorzeitiger Inanspruchnahme, in Anspruch nehmen kann.

…"

Ausgangsverfahren und Vorlagefragen

16 Der Kläger des Ausgangsverfahrens, Herr Odar, ist österreichischer Staatsangehöriger und 1950 geboren. Er ist verheiratet, hat zwei unterhaltsberechtigte Kinder und ist als Schwerbehinderter anerkannt; der Grad seiner Behinderung beträgt 50 %. Herr Odar war seit dem 17. April 1979 bei Baxter bzw. deren Rechtsvorgängerinnen beschäftigt, zuletzt als Marketing-Manager.

17 Baxter kündigte das Arbeitsverhältnis von Herrn Odar mit Schreiben vom 25. April 2008 und bot ihm die Fortführung des Arbeitsverhältnisses am Standort München-Unterschleißheim (Deutschland) an. Herr Odar nahm dieses Angebot an und beschloss dann, seinerseits zum 31. Dezember 2009 zu kündigen, nachdem die Parteien vereinbart hatten, dass diese Kündigung seinen Abfindungsanspruch nicht schmälern werde.

18 Wie sich aus der Vorlageentscheidung ergibt, hat Herr Odar gegenüber der Deutschen Rentenversicherung mit Vollendung des 65. Lebensjahrs, d. h. ab dem 1. August 2015, Anspruch auf eine Regelaltersrente und mit Vollendung des 60. Lebensjahrs, d. h. ab dem 1. August 2010, Anspruch auf eine Altersrente für Schwerbehinderte.

19 Baxter zahlte Herrn Odar aufgrund des Vorsorglichen Sozialplans eine Bruttoabfindung in Höhe von 308 253,31 Euro. Nach der Standardformel hätte die ihm zu zahlende Abfindung 616 506,63 Euro brutto betragen. Ausgehend von einem frühestmöglichen Renteneintritt nach der Sonderformel, d. h. zum 1. August 2010, errechnete Baxter eine Abfindung in Höhe von 197 199,09 Euro brutto. Sie zahlte ihm daher den garantierten Mindestbetrag, der der Hälfte von 616 506,63 Euro entspricht.

20 Mit Schreiben vom 30. Juni 2010 erhob Herr Odar beim Arbeitsgericht München Klage. Er beantragte, Baxter zur Zahlung einer weiteren Bruttoabfindung in Höhe von 271 988,22 Euro zu verurteilen. Dieser Betrag entspricht der Differenz zwischen der ihm tatsächlich gezahlten Abfindung und dem Betrag, den er erhalten hätte, wenn er bei gleicher Dauer der Betriebszugehörigkeit zum Zeitpunkt der Beendigung seines Arbeitsverhältnisses 54 Jahre alt gewesen wäre. Herr Odar ist der Ansicht, dass er durch die Berechnung der im Vorsorglichen Sozialplan vorgesehenen Abfindung wegen seines Alters und seiner Behinderung benachteiligt werde.

21 Das vorlegende Gericht fragt sich, ob § 10 Satz 3 Nr. 6 AGG und die Regelung des § 6 Abs. 1 Punkt 1.5 des Vorsorglichen Sozialplans mit der Richtlinie 2000/78 vereinbar sind. Es führt aus, wenn die erste dieser beiden nationalen Bestimmungen nicht im Einklang mit dem Unionsrecht stehe und daher keine Anwendung finde, sei der von Herrn Odar bei ihm erhobenen Klage stattzugeben. Die Regelung der zweiten Bestimmung könne nämlich nicht auf eine mit dieser Richtlinie unvereinbare Vorschrift gestützt werden.

22 Unter diesen Umständen hat das Arbeitsgericht München beschlossen, das Verfahren auszusetzen und dem Gerichtshof folgende Fragen zur Vorabentscheidung vorzulegen:

1. Verstößt eine innerstaatliche Regelung, die vorsieht, dass eine unterschiedliche Behandlung wegen des Alters zulässig sein kann, wenn die Betriebsparteien im Rahmen eines betrieblichen Systems der sozialen Sicherheit Beschäftigte von den Leistungen des Sozialplans ausgeschlossen haben, die wirtschaftlich abgesichert sind, weil sie, gegebenenfalls nach Bezug von Arbeitslosengeld, rentenberechtigt sind, gegen das Verbot der Altersdiskriminierung gemäß Art. 1 und Art. 16 der Richtlinie 2000/78, oder ist eine solche Ungleichbehandlung gemäß Art. 6 Abs. 1 Unterabs. 2 Buchst. a der Richtlinie gerechtfertigt?

2. Verstößt eine innerstaatliche Regelung, die vorsieht, dass eine unterschiedliche Behandlung wegen des Alters zulässig sein kann, wenn die Betriebsparteien im Rahmen eines betrieblichen Systems der sozialen Sicherheit Beschäftigte von den Leistungen des Sozialplans ausgeschlossen haben, die wirtschaftlich abgesichert sind, weil sie, gegebenenfalls nach Bezug von Arbeitslosengeld, rentenberechtigt sind, gegen das Verbot der Diskriminierung wegen einer Behinderung gemäß Art. 1 und Art. 16 der Richtlinie 2000/78?

3. Verstößt eine Regelung eines betrieblichen Systems der sozialen Sicherheit, die vorsieht, dass bei Mitarbeitern, die älter als 54 Jahre sind und betriebsbedingt gekündigt werden, eine alternative Berechnung der Abfindung auf Grundlage des frühestens möglichen Rentenbeginns vorgenommen wird und im Vergleich zur regulären Berechnungsmethode, welche insbesondere an die Dauer der Betriebszugehörigkeit anknüpft, der geringere Abfindungsbetrag, jedoch mindestens die Hälfte der regulären Abfindungssumme, zu zahlen ist, gegen das Verbot der Altersdiskriminierung gemäß Art. 1 und Art. 16 der Richtlinie 2000/78, oder ist eine solche Ungleichbehandlung gemäß Art. 6 Abs. 1 Unterabs. 2 Buchst. a der Richtlinie gerechtfertigt?

4. Verstößt eine Regelung eines betrieblichen Systems der sozialen Sicherheit, die vorsieht, dass bei Mitarbeitern, die älter als 54 Jahre sind und betriebsbedingt gekündigt werden, eine alternative Berechnung der Abfindung auf Grundlage des frühestens möglichen Rentenbeginns vorgenommen wird und im Vergleich zur regulären Berechnungsmethode, welche insbesondere an die Dauer der Betriebszugehörigkeit anknüpft, der geringere Abfindungsbetrag, jedoch mindestens die Hälfte der regulären Abfindungssumme, zu zahlen ist und bei der alternativen Berechnungsmethode auf eine Altersrente wegen einer Behinderung abgestellt wird, gegen das Verbot der Diskriminierung wegen einer Behinderung gemäß Art. 1 und Art. 16 der Richtlinie 2000/78?

Zu den Vorlagefragen

Zu den ersten beiden Fragen

23 Mit seinen ersten beiden Fragen, die zusammen zu prüfen sind, möchte das vorlegende Gericht wissen, ob Art. 2 Abs. 2 und Art. 6 Abs. 1 der Richtlinie 2000/78 dahin auszulegen sind, dass sie einer innerstaatlichen Regelung entgegenstehen, die vorsieht, dass eine unterschiedliche Behandlung wegen des Alters zulässig sein kann, wenn die Betriebsparteien im Rahmen eines betrieblichen Systems der sozialen Sicherheit Beschäftigte von den Leistungen des Sozialplans ausgeschlossen haben, die wirtschaftlich abgesichert sind, weil sie, gegebenenfalls nach Bezug von Arbeitslosengeld, rentenberechtigt sind.

24 In diesem Zusammenhang ist sogleich auf die ständige Rechtsprechung des Gerichtshofs hinzuweisen, nach der eine Vermutung für die Entscheidungserheblichkeit der Vorlagefragen des nationalen Gerichts spricht, die es zur Auslegung des Unionsrechts in dem rechtlichen und tatsächlichen Rahmen stellt, den es in eigener Verantwortung festgelegt und dessen Richtigkeit der Gerichtshof nicht zu prüfen hat. Der Gerichtshof darf die Entscheidung über ein Ersuchen eines nationalen Gerichts nur dann verweigern, wenn die erbetene Auslegung des Unionsrechts offensichtlich in keinem Zusammenhang mit der Realität oder dem

Gegenstand des Ausgangsrechtsstreits steht, wenn das Problem hypothetischer Natur ist oder wenn der Gerichtshof nicht über die tatsächlichen und rechtlichen Angaben verfügt, die für eine zweckdienliche Beantwortung der ihm vorgelegten Fragen erforderlich sind (vgl. u. a. Urteile vom 22. Juni 2010, Melki und Abdeli, C-188/10 und C-189/10, Slg. 2010, I-5667, Randnr. 27, vom 29. März 2012, SAG ELV Slovensko u. a., C-599/10, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 15, sowie vom 12. Juli 2012, VALE Építési, C-378/10, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 18).

25 Genau dies ist hier der Fall.

26 Die ersten beiden Fragen beruhen nämlich auf der Prämisse von § 10 Satz 3 Nr. 6 AGG, dass die Betriebsparteien Beschäftigte von den Leistungen des Sozialplans ausschließen, die wirtschaftlich abgesichert sind, weil sie, gegebenenfalls nach Bezug von Arbeitslosengeld, rentenberechtigt sind.

27 In der Vorlageentscheidung deutet jedoch nichts darauf hin, dass das Ausgangsverfahren einen solchen Fall betrifft. Das vorlegende Gericht hat vielmehr ausgeführt, dass Arbeitnehmer, die kurz vor dem Renteneintritt stünden, nach dem Vorsorglichen Sozialplan, im Unterschied zu der in der AGG-Bestimmung vorgesehenen Möglichkeit, nicht von der Entlassungsabfindung ausgeschlossen werden könnten und der Anspruch des Arbeitnehmers auf Arbeitslosengeld auch nicht berücksichtigt werde. Wie aus den Akten hervorgeht, hat Herr Odar eine Entlassungsabfindung erhalten, die jedoch gemäß § 6 Abs. 1 Punkt 1.5 des Vorsorglichen Sozialplans in Verbindung mit § 7 Punkt 7.2 des Ergänzenden Sozialplans gemindert wurde, was er mit seiner Klage beim genannten Gericht angreift.

28 Die Frage der Vereinbarkeit von § 10 Satz 3 Nr. 6 AGG mit der Richtlinie 2000/78 hat daher im Hinblick auf den Gegenstand des Ausgangsverfahrens offensichtlich abstrakten und rein hypothetischen Charakter.

29 Deshalb sind die erste und die zweite vom vorlegenden Gericht gestellte Frage nicht zu beantworten.

Zur dritten Frage

30 Mit seiner dritten Frage möchte das vorlegende Gericht wissen, ob Art. 2 Abs. 2 und Art. 6 Abs. 1 der Richtlinie 2000/78 dahin auszulegen sind, dass sie einer Regelung eines betrieblichen Systems der sozialen Sicherheit entgegenstehen, die vorsieht, dass bei Mitarbeitern, die älter als 54 Jahre sind und denen betriebsbedingt gekündigt wird, die ihnen zustehende Abfindung auf der Grundlage des frühestmöglichen Rentenbeginns berechnet wird und diesen Arbeitnehmern im Vergleich zur Standardberechnungsmethode, nach der sich die Abfindung insbesondere nach der Dauer der Betriebszugehörigkeit richtet, eine geringere als die sich nach der Standardmethode ergebende Abfindungssumme, mindestens jedoch die Hälfte dieser Summe, zu zahlen ist.

31 Was zunächst die Frage betrifft, ob die im Ausgangsverfahren in Rede stehende innerstaatliche Regelung in den Geltungsbereich der Richtlinie 2000/78 fällt, ist darauf hinzuweisen, dass diese Richtlinie, wie sich sowohl aus ihrem Titel und ihren Erwägungsgründen als auch aus ihrem Inhalt und ihrer Zielsetzung ergibt, einen allgemeinen Rahmen schaffen soll, der gewährleistet, dass jede Person „in Beschäftigung und Beruf" gleichbehandelt wird, indem ihr ein wirksamer Schutz vor Diskriminierungen aus einem der in Art. 1 der Richtlinie genannten Gründe – darunter auch das Alter – geboten wird.

32 Im Einzelnen ergibt sich aus Art. 3 Abs. 1 Buchst. c der Richtlinie 2000/78, dass diese im Rahmen der auf die Europäische Union übertragenen Zuständigkeiten „für alle Personen in öffentlichen und privaten Bereichen, einschließlich öffentlicher Stellen", u. a. in Bezug auf „die Beschäftigungs- und Arbeitsbedingungen, einschließlich der Entlassungsbedingungen und des Arbeitsentgelts" gilt.

33 § 6 Abs. 1 Punkt 1.5 des Vorsorglichen Sozialplans sieht für Arbeitnehmer, die älter als 54 Jahre sind, eine Minderung des Abfindungsbetrags bei Entlassung vor und betrifft somit die

Entlassungsbedingungen dieser Arbeitnehmer im Sinne von Art. 3 Abs. 1 Buchst. c der Richtlinie 2000/78. Eine solche innerstaatliche Bestimmung fällt daher in den Geltungsbereich dieser Richtlinie.

34 Wie sich aus der ständigen Rechtsprechung des Gerichtshofs ergibt, müssen die Sozialpartner, wenn sie Maßnahmen treffen, die in den Geltungsbereich der das Verbot der Diskriminierung wegen des Alters für Beschäftigung und Beruf konkretisierenden Richtlinie 2000/78 fallen, unter Beachtung dieser Richtlinie vorgehen (Urteile vom 13. September 2011, Prigge u. a., C-447/09, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 48, sowie vom 7. Juni 2012, Tyrolean Airways Tiroler Luftfahrt, C-132/11, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 22).

35 Zur Frage, ob die im Ausgangsverfahren in Rede stehende Regelung eine Ungleichbehandlung wegen des Alters im Sinne von Art. 2 Abs. 1 der Richtlinie 2000/78 enthält, ist festzustellen, dass § 6 Abs. 1 Punkt 1.5 des Vorsorglichen Sozialplans für Arbeitnehmer, die älter als 54 Jahre sind und denen betriebsbedingt gekündigt wird oder die das Arbeitsverhältnis einvernehmlich beenden, zur Folge hat, dass die Standardformel-Abfindung der Sonderformel-Abfindung gegenübergestellt wird. Dem betroffenen Arbeitnehmer wird der geringere Betrag gewährt; er hat jedoch die Garantie, einen der Hälfte der Standardformel-Abfindung entsprechenden Betrag zu erhalten.

36 Nach diesen Bestimmungen wurde Herrn Odar ein Betrag von 308 357,10 Euro gezahlt, der der Hälfte der Standardformel-Abfindung entspricht. Wenn Herr Odar bei seiner Entlassung 54 Jahre alt gewesen wäre, hätte er, unter sonst gleichen Umständen, Anspruch auf eine Abfindung in Höhe von 580 357,10 Euro gehabt. Dass er älter als 54 Jahre war, hat daher zur Anwendung der Vergleichsmethode und zur Zahlung eines geringeren als des Betrags geführt, auf den er Anspruch gehabt hätte, wenn er dieses Alter noch nicht überschritten gehabt hätte. Die im Vorsorglichen Sozialplan vorgesehene Berechnungsmethode bei betriebsbedingter Kündigung stellt somit eine unmittelbar auf dem Alter beruhende Ungleichbehandlung dar.

37 Es ist zu prüfen, ob diese Ungleichbehandlung gemäß Art. 6 Abs. 1 Unterabs. 1 der Richtlinie 2000/78 gerechtfertigt werden kann. Nach dieser Bestimmung stellt nämlich eine Ungleichbehandlung wegen des Alters keine Diskriminierung dar, sofern sie objektiv und angemessen ist und im Rahmen des nationalen Rechts durch ein legitimes Ziel, worunter insbesondere rechtmäßige Ziele aus den Bereichen Beschäftigungspolitik, Arbeitsmarkt und berufliche Bildung zu verstehen sind, gerechtfertigt ist und die Mittel zur Erreichung dieses Ziels angemessen und erforderlich sind.

38 Zum Ziel der im Ausgangsverfahren in Rede stehenden nationalen Maßnahmen führt das vorlegende Gericht aus, dass der Wortlaut des § 6 Abs. 1 Punkt 1.5 des Vorsorglichen Sozialplans keinen Hinweis auf die verfolgten Ziele enthalte. Aus den dem Gerichtshof vorgelegten Akten geht jedoch hervor, dass diese mit dem Ziel der Regelung des § 10 Satz 3 Nr. 6 AGG übereinstimmen. Wie das vorlegende Gericht ausführt, müssen die von den Sozialpartnern im Rahmen des Sozialplans gewählten Modalitäten geeignet sein, das in dieser Bestimmung des AGG genannte Ziel tatsächlich zu fördern, und dürfen die Interessen der benachteiligten Altersgruppen nicht unverhältnismäßig beeinträchtigen.

39 Gemäß § 112 des Betriebsverfassungsgesetzes in der Fassung vom 25. September 2001 sei es Sinn und Zweck eines Sozialplans, die Folgen struktureller Veränderungen im betreffenden Unternehmen auszugleichen oder zu verringern. In ihren schriftlichen Erklärungen hat die deutsche Regierung hierzu ausgeführt, dass Abfindungen aufgrund eines Vorsorglichen Sozialplans nicht spezifisch darauf gerichtet seien, die Wiedereingliederung in das Erwerbsleben zu erleichtern.

40 Eine Differenzierung nach dem Alter bei Abfindungen aufgrund eines Vorsorglichen Sozialplans verfolge ein Ziel, das auf der Feststellung beruhe, dass, weil es um in der Zukunft liegende wirtschaftliche Nachteile gehe, bestimmte Arbeitnehmer, bei denen solche sich aus dem Verlust ihres Arbeitsplatzes ergebenden Nachteile nicht oder weniger als bei anderen einträten, generell von diesen Ansprüchen ausgeschlossen werden könnten.

41 Die deutsche Regierung betont in diesem Zusammenhang, ein Sozialplan müsse die Verteilung begrenzter Mittel so vorsehen, dass er seine „Überbrückungsfunktion" in Bezug auf alle Arbeitnehmer und nicht nur die älteren erfülle. Ein solcher Plan dürfe grundsätzlich nicht dazu führen, den Fortbestand des Unternehmens oder die verbleibenden Arbeitsplätze zu gefährden. § 10 Satz 3 Nr. 6 AGG erlaube es auch, die Möglichkeiten eines Missbrauchs zu begrenzen, der darin bestünde, dass ein Arbeitnehmer eine Abfindung bezöge, die dazu bestimmt sei, ihn bei seiner Suche nach einer neuen Beschäftigung zu unterstützen, obwohl er in den Ruhestand trete.

42 Die innerstaatliche Bestimmung bezwecke daher die Gewährung eines Ausgleichs für die Zukunft, den Schutz der jüngeren Arbeitnehmer sowie die Unterstützung bei ihrer beruflichen Wiedereingliederung und trage zugleich der Notwendigkeit einer gerechten Verteilung der begrenzten finanziellen Mittel eines Sozialplans Rechnung.

43 Solche Ziele können, als Ausnahme vom Grundsatz des Verbots der Diskriminierung wegen des Alters, u. a. Ungleichbehandlungen in Zusammenhang mit der „Festlegung besonderer Beschäftigungs- und Arbeitsbedingungen, einschließlich der Bedingungen für Entlassung und Entlohnung, um die berufliche Eingliederung von Jugendlichen [und] älteren Arbeitnehmern … zu fördern oder ihren Schutz sicherzustellen", im Sinne von Art. 6 Abs. 1 Unterabs. 2 der Richtlinie 2000/78 rechtfertigen.

44 Darüber hinaus ist das Ziel, zu vermeiden, dass eine Entlassungsabfindung Personen zugutekommt, die keine neue Stelle suchen, sondern ein Ersatzeinkommen in Form einer Altersrente beziehen wollen, als legitim anzusehen (vgl. in diesem Sinne Urteil vom 12. Oktober 2010, Ingeniørforeningen i Danmark, C-499/08, Slg. 2010, I-9343, Randnr. 44).

45 Unter diesen Umständen ist anzuerkennen, dass Ziele wie die mit § 6 Abs. 1 Punkt 1.5 des Vorsorglichen Sozialplans verfolgten grundsätzlich eine Ungleichbehandlung wegen des Alters, wie in Art. 6 Abs. 1 Unterabs. 1 der Richtlinie 2000/78 vorgesehen, als „objektiv und angemessen" „im Rahmen des nationalen Rechts" rechtfertigen können.

46 Ferner muss geprüft werden, ob die zur Erreichung dieser Ziele eingesetzten Mittel angemessen und erforderlich sind und ob sie nicht über das zur Erreichung des verfolgten Ziels Erforderliche hinausgehen.

47 In diesem Zusammenhang ist darauf hinzuweisen, dass die Mitgliedstaaten und gegebenenfalls die Sozialpartner auf nationaler Ebene über einen weiten Ermessensspielraum nicht nur bei der Entscheidung über die Verfolgung eines bestimmten sozial- und beschäftigungspolitischen Ziels, sondern auch bei der Festlegung der für seine Erreichung geeigneten Maßnahmen verfügen (vgl. in diesem Sinne Urteil vom 5. Juli 2012, Hörnfeldt, C-141/11, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 32).

48 Zur Angemessenheit der in Rede stehenden Bestimmungen des Vorsorglichen Sozialplans und des Ergänzenden Sozialplans ist festzustellen, dass die Minderung des Abfindungsbetrags bei Entlassung, den Arbeitnehmer erhalten, die zum Zeitpunkt ihrer Entlassung wirtschaftlich abgesichert sind, im Hinblick auf das Ziel solcher Sozialpläne, aufgrund ihrer begrenzten finanziellen Mittel Arbeitnehmer, für die sich der Übergang in eine neue Beschäftigung als schwierig erweist, stärker zu schützen, nicht unangemessen erscheint.

49 Somit erscheint eine Bestimmung wie § 6 Abs. 1 Punkt 1.5 des Vorsorglichen Sozialplans nicht offensichtlich unangemessen, um das legitime Ziel einer Beschäftigungspolitik wie der vom deutschen Gesetzgeber verfolgten zu erreichen.

50 Zur Erforderlichkeit dieser Bestimmungen ist zwar festzustellen, dass gemäß § 7 Punkt 7.2 des Ergänzenden Sozialplans der frühestmögliche Renteneintritt im Sinne von § 6 Abs. 1 Punkt 1.5 des Vorsorglichen Sozialplans dem Zeitpunkt entspricht, zu dem der Mitarbeiter erstmals eine der gesetzlichen Altersrenten, auch eine solche mit Abschlägen wegen vorzeitiger Inanspruchnahme, in Anspruch nehmen kann.

51 Wie in Randnr. 27 des vorliegenden Urteils festgestellt, sieht der Vorsorgliche Sozialplan für diese Arbeitnehmer jedoch lediglich die Minderung des Abfindungsbetrags bei Entlassung vor.

52 Dabei entspricht zum einen die Abfindung für den betroffenen Arbeitnehmer gemäß § 6 Punkt 1.5 des Vorsorglichen Sozialplans dem geringeren nach der Standardformel oder der Sonderformel errechneten Betrag; der Empfänger hat jedoch die Garantie, dass ihm zumindest die Hälfte des sich nach der Standardformel ergebenden Betrags tatsächlich gezahlt wird. Wie aus der in Randnr. 14 des vorliegenden Urteils wiedergegebenen Tabelle hervorgeht, steigt zudem der Altersfaktor, der ein Koeffizient der Standardformel und der Sonderformel ist, schrittweise ab dem Alter von 18 Jahren (0,35) bis zum Alter von 57 Jahren (1,70). Erst bei einem Alter von 59 Jahren beginnt dieser Faktor abzunehmen (1,50) und erreicht beim Alter von 64 Jahren sein Minimum (0,30). Zum anderen hat der betroffene Arbeitnehmer gemäß § 6 Punkt 1.5 Unterabs. 3, auch wenn das Ergebnis nach der Sonderformel gleich null ist, Anspruch auf Zahlung einer Abfindung, die der Hälfte der Standardformel-Abfindung entspricht.

53 Hinsichtlich der Beurteilung durch das vorlegende Gericht ist darauf hinzuweisen, dass § 6 Abs. 1 Punkt 1.5 des Vorsorglichen Sozialplans die Frucht einer von den Arbeitnehmer- und den Arbeitgebervertretern ausgehandelten Vereinbarung ist, die damit ihr als Grundrecht anerkanntes Recht auf Kollektivverhandlungen ausgeübt haben. Dass es damit den Sozialpartnern überlassen ist, einen Ausgleich zwischen ihren Interessen festzulegen, bietet eine nicht unerhebliche Flexibilität, da jede der Parteien gegebenenfalls die Vereinbarung kündigen kann (vgl. in diesem Sinne Urteil vom 12. Oktober 2010, Rosenbladt, C-45/09, Slg. 2010, I-9391, Randnr. 67).

54 Nach alledem ist auf die dritte Frage zu antworten, dass Art. 2 Abs. 2 und Art. 6 Abs. 1 der Richtlinie 2000/78 dahin auszulegen sind, dass sie einer Regelung eines betrieblichen Systems der sozialen Sicherheit nicht entgegenstehen, die vorsieht, dass bei Mitarbeitern, die älter als 54 Jahre sind und denen betriebsbedingt gekündigt wird, die ihnen zustehende Abfindung auf der Grundlage des frühestmöglichen Rentenbeginns berechnet wird und diesen Arbeitnehmern im Vergleich zur Standardberechnungsmethode, nach der sich die Abfindung insbesondere nach der Dauer der Betriebszugehörigkeit richtet, eine geringere als die sich nach der Standardmethode ergebende Abfindungssumme, mindestens jedoch die Hälfte dieser Summe, zu zahlen ist.

Zur vierten Frage

55 Mit seiner vierten Frage möchte das vorlegende Gericht wissen, ob Art. 2 Abs. 2 der Richtlinie 2000/78 dahin auszulegen ist, dass er einer Regelung eines betrieblichen Systems der sozialen Sicherheit entgegensteht, die vorsieht, dass bei Mitarbeitern, die älter als 54 Jahre sind und denen betriebsbedingt gekündigt wird, die ihnen zustehende Abfindung auf der Grundlage des frühestmöglichen Rentenbeginns berechnet wird und im Vergleich zur Standardberechnungsmethode, nach der sich die Abfindung insbesondere nach der Dauer der Betriebszugehörigkeit richtet, eine geringere als die sich nach der Standardmethode ergebende Abfindungssumme, mindestens jedoch die Hälfte dieser Summe, zu zahlen ist und bei der Anwendung der alternativen Berechnungsmethode auf die Möglichkeit, eine vorzeitige Altersrente wegen einer Behinderung zu erhalten, abgestellt wird.

56 Was erstens die Frage betrifft, ob § 6 Abs. 1 Punkt 1.5 des Vorsorglichen Sozialplans in Verbindung mit § 7 Punkt 7.2 des Ergänzenden Sozialplans eine Ungleichbehandlung wegen der Behinderung im Sinne von Art. 2 Abs. 1 der Richtlinie 2000/78 enthält, ist festzustellen, dass der Abfindungsbetrag für den betroffenen Arbeitnehmer bei Entlassung gemäß § 7 Punkt 7.2 unter Berücksichtigung des frühestmöglichen Renteneintritts gemindert wird. Der Bezug einer Altersrente setzt jedoch ein Mindestalter voraus, und dieses Alter ist bei Schwerbehinderten anders.

57 Wie die Generalanwältin in Nr. 50 ihrer Schlussanträge ausgeführt hat, wird die erste Komponente bei der Berechnungsmethode nach der Sonderformel für einen schwerbehinderten Arbeitnehmer immer niedriger sein als für einen gleichaltrigen nichtbehinderten Arbeitnehmer. Dass dieser Berechnung das Renteneintrittsalter dem Anschein nach neutral zugrunde liegt, führt im vorliegenden Fall zu dem Ergebnis, dass

schwerbehinderte Arbeitnehmer, die die Möglichkeit haben, früher, und zwar mit 60 Jahren statt mit 63 Jahren wie nichtbehinderte Arbeitnehmer, in Rente zu gehen, wegen ihrer Schwerbehinderung eine geringere Entlassungsabfindung erhalten.

58 Wie aus den Ausführungen von Herrn Odar hervorgeht und wie Baxter in der mündlichen Verhandlung eingeräumt hat, hätte die Entlassungsabfindung, die er erhalten hätte, wenn er nicht schwerbehindert wäre, 570 839,47 Euro betragen.

59 Folglich ergibt sich aus § 6 Abs. 1 Punkt 1.5 des Vorsorglichen Sozialplans in Verbindung mit § 7 Punkt 7.2 des Ergänzenden Sozialplans, wonach einem schwerbehinderten Arbeitnehmer bei Entlassung ein geringerer Abfindungsbetrag zu zahlen ist als einem nichtbehinderten Arbeitnehmer, eine mittelbar auf dem Kriterium der Behinderung im Sinne von Art. 1 in Verbindung mit Art. 2 Abs. 2 Buchst. a der Richtlinie 2000/78 beruhende Ungleichbehandlung.

60 Zweitens ist zu prüfen, ob sich schwerbehinderte Arbeitnehmer, die einer kurz vor dem Renteneintritt stehenden Altersgruppe angehören, in einem Kontext, wie er von der im Ausgangsverfahren in Rede stehenden Bestimmung geregelt wird, in einer Situation befinden, die mit der nichtbehinderter Arbeitnehmer, die derselben Altersgruppe angehören, im Sinne von Art. 2 Abs. 2 Buchst. a der Richtlinie 2000/78 vergleichbar ist. Die deutsche Regierung macht nämlich geltend, dass diese beiden Gruppen von Arbeitnehmern sich in Bezug auf ihren Rentenanspruch in objektiv verschiedenen Ausgangssituationen befänden.

61 Hierzu ist festzustellen, dass sich Arbeitnehmer, die kurz vor dem Renteneintritt stehenden Altersgruppen angehören, in einer Situation befinden, die mit der der anderen vom Sozialplan betroffenen Arbeitnehmer vergleichbar ist, da ihr Arbeitsverhältnis mit ihrem Arbeitgeber aus demselben Grund und unter denselben Voraussetzungen endet.

62 Der schwerbehinderten Arbeitnehmern gewährte Vorteil, der darin besteht, dass sie ab Erreichen eines Alters, das drei Jahre niedriger ist als bei nichtbehinderten Arbeitnehmern, eine Altersrente in Anspruch nehmen können, kann sie nämlich gegenüber diesen Arbeitnehmern nicht in eine besondere Situation bringen.

63 Gemäß Art. 2 Abs. 2 Buchst. b der Richtlinie 2000/78 ist zu prüfen, ob die Ungleichbehandlung dieser beiden Gruppen von Arbeitnehmern durch ein rechtmäßiges Ziel sachlich gerechtfertigt ist, ob die zu dessen Erreichung eingesetzten Mittel angemessen sind und ob sie nicht über das hinausgehen, was zur Erreichung des vom deutschen Gesetzgeber verfolgten Ziels erforderlich ist.

64 Hierzu ist zum einen in den Randnrn. 43 bis 45 des vorliegenden Urteils festgestellt worden, dass Ziele wie die mit § 6 Abs. 1 Punkt 1.5 des Vorsorglichen Sozialplans verfolgten grundsätzlich eine Ungleichbehandlung wegen des Alters, wie in Art. 6 Abs. 1 Unterabs. 1 der Richtlinie 2000/78 vorgesehen, als „objektiv und angemessen" „im Rahmen des nationalen Rechts" rechtfertigen können. Zum anderen erscheint eine solche nationale Vorschrift, wie aus Randnr. 49 des vorliegenden Urteils hervorgeht, nicht offensichtlich unangemessen, um das legitime Ziel einer Beschäftigungspolitik wie der vom deutschen Gesetzgeber verfolgten zu erreichen.

65 Zur Prüfung, ob § 6 Abs. 1 Punkt 1.5 des Vorsorglichen Sozialplans in Verbindung mit § 7 Punkt 7.2 des Ergänzenden Sozialplans über das zur Erreichung der verfolgten Ziele Erforderliche hinausgeht, ist diese Vorschrift in dem Kontext zu betrachten, in den sie sich einfügt, und sind die Nachteile zu berücksichtigen, die sie für die Betroffenen bewirken kann.

66 Baxter und die deutsche Regierung machen im Wesentlichen geltend, die Minderung des Betrags der Entlassungsabfindung, die Herr Odar erhalten habe, sei durch den Schwerbehinderten gewährten Vorteil gerechtfertigt, der darin bestehe, dass sie ab einem Alter, das drei Jahre niedriger sei als bei nichtbehinderten Arbeitnehmern, eine Altersrente in Anspruch nehmen könnten.

67 Dieser Argumentation kann jedoch nicht gefolgt werden. Zum einen liegt eine Diskriminierung wegen der Behinderung vor, wenn die streitige Maßnahme nicht durch

objektive Faktoren, die nichts mit dieser Diskriminierung zu tun haben, gerechtfertigt ist (vgl. entsprechend Urteile vom 6. April 2000, Jørgensen, C-226/98, Slg. 2000, I-2447, Randnr. 29, vom 23. Oktober 2003, Schönheit und Becker, C-4/02 und C-5/02, Slg. 2003, I-12575, Randnr. 67, sowie vom 12. Oktober 2004, Wippel, C-313/02, Slg. 2004, I-9483, Randnr. 43). Zum anderen liefe diese Argumentation darauf hinaus, die praktische Wirksamkeit der nationalen Vorschriften, die den genannten Vorteil vorsehen, zu beeinträchtigen, deren Daseinsberechtigung allgemein darin besteht, den Schwierigkeiten und besonderen Risiken Rechnung zu tragen, mit denen schwerbehinderte Arbeitnehmer konfrontiert sind.

68 Somit haben die Sozialpartner bei der Verfolgung des legitimen Ziels einer gerechten Verteilung der begrenzten finanziellen Mittel, die für einen Sozialplan zur Verfügung stehen, entsprechend den Bedürfnissen der betroffenen Arbeitnehmer relevante Gesichtspunkte, die insbesondere die schwerbehinderten Arbeitnehmer betreffen, unberücksichtigt gelassen.

69 Sie haben nämlich sowohl das Risiko für Schwerbehinderte, die im Allgemeinen größere Schwierigkeiten als nichtbehinderte Arbeitnehmer haben, sich wieder in den Arbeitsmarkt einzugliedern, als auch die Tatsache verkannt, dass dieses Risiko steigt, je mehr sie sich dem Renteneintrittsalter nähern. Diese Personen haben jedoch spezifische Bedürfnisse im Zusammenhang sowohl mit dem Schutz, den ihr Zustand erfordert, als auch mit der Notwendigkeit, dessen mögliche Verschlechterung zu berücksichtigen. Wie die Generalanwältin in Nr. 68 ihrer Schlussanträge ausgeführt hat, ist dem Risiko Rechnung zu tragen, dass Schwerbehinderte unabweisbaren finanziellen Aufwendungen im Zusammenhang mit ihrer Behinderung ausgesetzt sind und/oder dass sich diese finanziellen Aufwendungen mit zunehmendem Alter erhöhen.

70 Die im Ausgangsverfahren in Rede stehende Maßnahme bewirkt folglich dadurch, dass sie bei betriebsbedingter Kündigung zur Zahlung eines Abfindungsbetrags an einen schwerbehinderten Arbeitnehmer führt, der geringer ist als die Abfindung, die ein nichtbehinderter Arbeitnehmer erhält, eine übermäßige Beeinträchtigung der legitimen Interessen schwerbehinderter Arbeitnehmer und geht daher über das hinaus, was zur Erreichung der vom deutschen Gesetzgeber verfolgten sozialpolitischen Ziele erforderlich ist.

71 Die sich aus § 6 Abs. 1 Punkt 1.5 des Vorsorglichen Sozialplans ergebende Ungleichbehandlung kann deshalb nicht gemäß Art. 2 Abs. 2 Buchst. b Ziff. i der Richtlinie 2000/78 gerechtfertigt werden.

72 Nach alledem ist auf die vierte Frage zu antworten, dass Art. 2 Abs. 2 der Richtlinie 2000/78 dahin auszulegen ist, dass er einer Regelung eines betrieblichen Systems der sozialen Sicherheit entgegensteht, die vorsieht, dass bei Mitarbeitern, die älter als 54 Jahre sind und denen betriebsbedingt gekündigt wird, die ihnen zustehende Abfindung auf der Grundlage des frühestmöglichen Rentenbeginns berechnet wird und im Vergleich zur Standardberechnungsmethode, nach der sich die Abfindung insbesondere nach der Dauer der Betriebszugehörigkeit richtet, eine geringere als die sich nach der Standardmethode ergebende Abfindungssumme, mindestens jedoch die Hälfte dieser Summe, zu zahlen ist und bei der Anwendung der alternativen Berechnungsmethode auf die Möglichkeit, eine vorzeitige Altersrente wegen einer Behinderung zu erhalten, abgestellt wird.

Kosten

73 Für die Parteien des Ausgangsverfahrens ist das Verfahren ein Zwischenstreit in dem bei dem vorlegenden Gericht anhängigen Rechtsstreit; die Kostenentscheidung ist daher Sache dieses Gerichts. Die Auslagen anderer Beteiligter für die Abgabe von Erklärungen vor dem Gerichtshof sind nicht erstattungsfähig.

Aus diesen Gründen hat der Gerichtshof (Zweite Kammer) für Recht erkannt:

1. **Art. 2 Abs. 2 und Art. 6 Abs. 1 der Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die**

Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf sind dahin auszulegen, dass sie einer Regelung eines betrieblichen Systems der sozialen Sicherheit nicht entgegenstehen, die vorsieht, dass bei Mitarbeitern, die älter als 54 Jahre sind und denen betriebsbedingt gekündigt wird, die ihnen zustehende Abfindung auf der Grundlage des frühestmöglichen Rentenbeginns berechnet wird und im Vergleich zur Standardberechnungsmethode, nach der sich die Abfindung insbesondere nach der Dauer der Betriebszugehörigkeit richtet, eine geringere als die sich nach der Standardmethode ergebende Abfindungssumme, mindestens jedoch die Hälfte dieser Summe, zu zahlen ist.

2. **Art. 2 Abs. 2 der Richtlinie 2000/78 ist dahin auszulegen, dass er einer Regelung eines betrieblichen Systems der sozialen Sicherheit entgegensteht, die vorsieht, dass bei Mitarbeitern, die älter als 54 Jahre sind und denen betriebsbedingt gekündigt wird, die ihnen zustehende Abfindung auf der Grundlage des frühestmöglichen Rentenbeginns berechnet wird und im Vergleich zur Standardberechnungsmethode, nach der sich die Abfindung insbesondere nach der Dauer der Betriebszugehörigkeit richtet, eine geringere als die sich nach der Standardmethode ergebende Abfindungssumme, mindestens jedoch die Hälfte dieser Summe, zu zahlen ist und bei der Anwendung der alternativen Berechnungsmethode auf die Möglichkeit, eine vorzeitige Altersrente wegen einer Behinderung zu erhalten, abgestellt wird.**

Unterschriften

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* Verfahrenssprache: Deutsch.

ARRÊT DE LA COUR (quatrième chambre)

4 juillet 2013 (*)

«Manquement d'État – Directive 2000/78/CE – Article 5 – Création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail – Personnes handicapées – Mesures de transposition insuffisantes»

Dans l'affaire C-312/11,

ayant pour objet un recours en manquement au titre de l'article 258 TFUE, introduit le 20 juin 2011,

Commission européenne, représentée par M. J. Enegren et M^me^ C. Cattabriga, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République italienne, représentée par M^me^ G. Palmieri, en qualité d'agent, assistée de M^me^ C. Gerardis, avvocato dello Stato, ayant élu domicile à Luxembourg,

partie défenderesse,

LA COUR (quatrième chambre),

composée de M. L. Bay Larsen, faisant fonction de président de la quatrième chambre, M. J.-C. Bonichot, M^mes^ C. Toader, A. Prechal et M. E. Jarašiūnas (rapporteur), juges,

avocat général: M. Y. Bot,

greffier: M. A. Calot Escobar,

vu la procédure écrite,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 Par sa requête, la Commission européenne demande à la Cour de constater que, en ne contraignant pas tous les employeurs à prévoir des aménagements raisonnables pour toutes les personnes handicapées, la République italienne a manqué à son obligation de transposer correctement et pleinement l'article 5 de la directive 2000/78/CE du Conseil, du 27 novembre 2000, portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail (JO L 303, p. 16).

Le cadre juridique

Le droit international

2 La convention des Nations unies relative aux droits des personnes handicapées, qui a été approuvée au nom de la Communauté européenne par la décision 2010/48/CE du Conseil,

du 26 novembre 2009 (JO 2010, L 23, p. 35, ci-après la «convention de l'ONU»), énonce, à son considérant e):

«Reconnaissant que la notion de handicap évolue et que le handicap résulte de l'interaction entre des personnes présentant des incapacités et les barrières comportementales et environnementales qui font obstacle à leur pleine et effective participation à la société sur la base de l'égalité avec les autres».

3 Aux termes de l'article 1er de cette convention:

«La présente Convention a pour objet de promouvoir, protéger et assurer la pleine et égale jouissance de tous les droits de l'homme et de toutes les libertés fondamentales par les personnes handicapées et de promouvoir le respect de leur dignité intrinsèque.

Par personnes handicapées, on entend des personnes qui présentent des incapacités physiques, mentales, intellectuelles ou sensorielles durables dont l'interaction avec diverses barrières peut faire obstacle à leur pleine et effective participation à la société sur la base de l'égalité avec les autres.»

4 Selon l'article 2, quatrième alinéa, de ladite convention, «[o]n entend par 'aménagement raisonnable' les modifications et ajustements nécessaires et appropriés n'imposant pas de charge disproportionnée ou indue apportés, en fonction des besoins dans une situation donnée, pour assurer aux personnes handicapées la jouissance ou l'exercice, sur la base de l'égalité avec les autres, de tous les droits de l'homme et de toutes les libertés fondamentales».

Le droit de l'Union

5 Les considérants 11, 16, 17, 20 et 21 de la directive 2000/78 énoncent:

«(11) La discrimination fondée sur la religion ou les convictions, un handicap, l'âge ou l'orientation sexuelle peut compromettre la réalisation des objectifs du traité CE, notamment un niveau d'emploi et de protection sociale élevé, le relèvement du niveau et de la qualité de la vie, la cohésion économique et sociale, la solidarité et la libre circulation des personnes.

[...]

(16) La mise en place de mesures destinées à tenir compte des besoins des personnes handicapées au travail remplit un rôle majeur dans la lutte contre la discrimination fondée sur un handicap.

(17) La présente directive n'exige pas qu'une personne qui n'est pas compétente, ni capable ni disponible pour remplir les fonctions essentielles du poste concerné ou pour suivre une formation donnée soit recrutée, promue ou reste employée ou qu'une formation lui soit dispensée, sans préjudice de l'obligation de prévoir des aménagements raisonnables pour les personnes handicapées.

[...]

(20) Il convient de prévoir des mesures appropriées, c'est-à-dire des mesures efficaces et pratiques destinées à aménager le poste de travail en fonction du handicap, par exemple en procédant à un aménagement des locaux ou à une adaptation des équipements, des rythmes de travail, de la répartition des tâches ou de l'offre de moyens de formation ou d'encadrement.

(21) Afin de déterminer si les mesures en question donnent lieu à une charge disproportionnée, il convient de tenir compte notamment des coûts financiers et autres qu'elles impliquent, de la taille et des ressources financières de l'organisation ou de l'entreprise et de la possibilité d'obtenir des fonds publics ou toute autre aide.»

6 L'article 1er de la directive 2000/78 dispose:

«La présente directive a pour objet d'établir un cadre général pour lutter contre la discrimination fondée sur la religion ou les convictions, [le] handicap, l'âge ou l'orientation sexuelle, en ce qui concerne l'emploi et le travail, en vue de mettre en œuvre, dans les États membres, le principe de l'égalité de traitement.»

7 Aux termes de l'article 2 de cette directive, intitulé «Concept de discrimination»:

«1. Aux fins de la présente directive, on entend par 'principe de l'égalité de traitement' l'absence de toute discrimination directe ou indirecte, fondée sur un des motifs visés à l'article 1er.

2. Aux fins du paragraphe 1:

a) une discrimination directe se produit lorsqu'une personne est traitée de manière moins favorable qu'une autre ne l'est, ne l'a été ou ne le serait dans une situation comparable, sur la base de l'un des motifs visés à l'article 1er;

b) une discrimination indirecte se produit lorsqu'une disposition, un critère ou une pratique apparemment neutre est susceptible d'entraîner un désavantage particulier pour des personnes d'une religion ou de convictions, d'un handicap, d'un âge ou d'une orientation sexuelle donnés, par rapport à d'autres personnes, à moins que:

i) cette disposition, ce critère ou cette pratique ne soit objectivement justifié par un objectif légitime et que les moyens de réaliser cet objectif ne soient appropriés et nécessaires, ou que

ii) dans le cas des personnes d'un handicap donné, l'employeur ou toute personne ou organisation auquel s'applique la présente directive ne soit obligé, en vertu de la législation nationale, de prendre des mesures appropriées conformément aux principes prévus à l'article 5 afin d'éliminer les désavantages qu'entraîne cette disposition, ce critère ou cette pratique.

[...]»

8 L'article 3 de la directive 2000/78 définit le champ d'application de celle-ci de la manière suivante:

«1. Dans les limites des compétences conférées à la Communauté, la présente directive s'applique à toutes les personnes, tant pour le secteur public que pour le secteur privé, y compris les organismes publics, en ce qui concerne:

[...]

c) les conditions d'emploi et de travail, y compris les conditions de licenciement et de rémunération;

[...]»

9 L'article 5 de cette directive prévoit:

«Afin de garantir le respect du principe de l'égalité de traitement à l'égard des personnes handicapées, des aménagements raisonnables sont prévus. Cela signifie que l'employeur prend les mesures appropriées, en fonction des besoins dans une situation concrète, pour permettre à une personne handicapée d'accéder à un emploi, de l'exercer ou d'y progresser, ou pour qu'une formation lui soit dispensée, sauf si ces mesures imposent à l'employeur une charge disproportionnée. Cette charge n'est pas disproportionnée lorsqu'elle est compensée de façon suffisante par des mesures existant dans le cadre de la politique menée dans l'État membre concerné en faveur des personnes handicapées.»

Le droit italien

10 La loi n° 104 – loi-cadre pour l'assistance, l'intégration sociale et les droits des personnes handicapées (legge n.° 104 – Legge-quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate), du 5 février 1992 (supplément ordinaire à la GURI nº 39, du 17 février 1992, ci-après la «loi n° 104/1992»), dispose à son article 3:

«1. Par personne handicapée, on entend toute personne présentant une déficience physique, psychique ou sensorielle, stable ou progressive, constituant la cause de difficultés dans l'apprentissage, les relations avec autrui ou l'intégration professionnelle, et de nature à engendrer un processus défavorable sur le plan social ou de marginalisation.

2. Les personnes handicapées ont droit aux prestations établies en leur faveur en fonction de la nature et de la consistance de la déficience, de la capacité individuelle globale résiduelle et de l'efficacité des soins de réadaptation fonctionnelle.

[...]»

11 L'article 8 de ladite loi prévoit, en tant que méthodes d'insertion et d'intégration sociales des personnes handicapées, «des mesures permettant de favoriser leur pleine intégration dans le monde du travail, sous une forme individuelle ou associée, ainsi que la protection de leur emploi, y compris au moyen d'incitations diverses».

12 Aux termes de l'article 17, paragraphes 1 et 5, de la même loi:

«1. Les régions [...] se chargent de l'insertion des personnes handicapées dans les cours ordinaires de formation professionnelle des centres publics et privés et garantissent aux élèves handicapés qui ne seraient pas en mesure d'utiliser les méthodes d'apprentissage ordinaires, l'acquisition d'une qualification [...] À cette fin, les régions fournissent aux centres [de formation professionnelle] les subsides et équipements nécessaires.

[...]

5. [...] [U]ne partie du fonds commun [...] est destinée à des initiatives de formation et de placement sous forme expérimentale, telles que les stages, les contrats de formation, les actions territoriales de travail guidé et les cours de préemploi [...]»

13 L'article 18 de la loi n° 104/1992 énonce:

«1. Les régions fixent, dans le délai de six mois à compter de la date d'entrée en vigueur de la présente loi, la réglementation concernant l'institution et la tenue du registre régional des entités, institutions, coopératives sociales, de travail, de services, et des centres de travail guidé, associations et organisations de volontariat qui réalisent des activités visant à favoriser l'insertion et l'intégration professionnelles des personnes handicapées.

[...]

4. Les rapports des communes, des groupements de communes et groupements entre communes et provinces, des groupements intercommunaux des régions de montagne et des unités sanitaires locales, avec les organismes visés au paragraphe 1 sont régis par des conventions répondant au projet type [...]

[...]

6. Les régions peuvent, par l'adoption de lois propres:

a) réglementer les aménagements consentis individuellement aux personnes handicapées en matière d'accès au poste de travail et pour la mise en route et la réalisation d'activités professionnelles indépendantes;

b) réglementer les incitations, les aménagements et les aides accordés aux employeurs, y compris aux fins d'adapter le poste de travail pour le recrutement d'une personne handicapée.»

14 L'article 20, paragraphe 1, de la loi n° 104/1992 dispose:

«La personne handicapée passe les épreuves d'examen des concours publics et pour l'habilitation aux professions, avec les aides nécessaires et les délais supplémentaires éventuellement nécessaires au regard du handicap particulier.»

15 La loi n° 381 sur la réglementation des coopératives sociales (legge n.°381 – Disciplina delle cooperative sociali), du 8 novembre 1991 (GURI n° 283, du 3 décembre 1991, p. 3, ci-après la «loi n° 381/1991»), prévoit à son article 4, paragraphes 1 et 2:

«1. Dans les coopératives [...] sont considérées personnes défavorisées les personnes handicapées physiques, psychiques et sensorielles [...]

2. Les personnes défavorisées [...] doivent représenter au moins 30 % des travailleurs de la coopérative et, d'une façon compatible avec leur état subjectif, être membres de la coopérative [...]»

16 La loi n° 68 portant normes relatives au droit au travail des personnes handicapées (legge n° 68 – Norme per il diritto al lavoro dei disabili), du 12 mars 1999 (supplément ordinaire à la GURI n° 68, du 23 mars 1999, ci-après la «loi n° 68/1999»), concerne le traitement des personnes handicapées en matière d'emploi. L'article 1er, paragraphes 1 et 7, de cette loi dispose:

«1. La présente loi vise à promouvoir l'insertion et l'intégration professionnelles des personnes handicapées dans le monde du travail grâce à des services de suivi et de placement ciblé. Elle est applicable:

a) aux personnes en âge de travailler qui présentent des déficiences physiques, psychiques, sensorielles ou un handicap mental, dont la réduction de la capacité à travailler est supérieure à 45 %, attestée par les commissions compétentes en matière de reconnaissance de l'invalidité civile, conformément au barème d'invalidité pour handicaps et maladies invalidantes [...], sur la base de la classification internationale des déficiences, élaborée par l'Organisation mondiale de la santé;

b) aux personnes atteintes d'une invalidité professionnelle dont le taux d'invalidité est supérieur à 33 % [...]

c) aux personnes non voyantes ou sourdes-muettes [...]

d) aux personnes invalides de guerre, invalides civiles de guerre et invalides de service [...]

[...]

7. Les employeurs, qu'ils soient publics ou privés, sont tenus de garantir le maintien de l'emploi des personnes qui, n'étant pas handicapées au moment de leur recrutement, se verraient affectées par un éventuel handicap du fait d'un accident de travail ou d'une maladie professionnelle.»

17 Aux termes de l'article 2 de ladite loi, on entend par «placement ciblé des personnes handicapées»:

«[...] la série d'instruments techniques et de support qui permettent d'évaluer de manière adéquate les personnes handicapées et leurs capacités de travail et d'insertion dans la fonction adaptée, par des analyses des postes de travail, des formes de suivi, des actions positives et des solutions aux problèmes liés à l'environnement de travail, aux outils et aux relations interpersonnelles sur le lieu quotidien de travail et de relation.»

18 L'article 3 de cette même loi, concernant les recrutements obligatoires et les quotas d'emplois réservés, dispose:

«1. Les employeurs publics et privés sont tenus d'employer des travailleurs appartenant aux catégories prévues à l'article 1er, à raison de:

a) 7 % des travailleurs engagés, si la structure compte plus de 50 employés;

b) deux travailleurs, si elle compte entre 36 et 50 employés;

c) un travailleur, si elle compte entre 15 et 35 employés.

2. Les employeurs du secteur privé qui comptent entre 15 et 35 employés sont soumis aux conditions fixées au paragraphe 1 uniquement pour les nouveaux recrutements.

3. Concernant les partis politiques, les organisations syndicales et les organisations qui, sans but lucratif, sont actives dans le domaine de la solidarité sociale, de l'assistance et de la réhabilitation, le quota d'emplois réservés prend en compte exclusivement le personnel technique, administratif et d'exécution et les conditions fixées au paragraphe 1 s'appliquent uniquement lors d'un nouveau recrutement.

4. Dans les services de police, de la protection civile et de la défense nationale, le placement ciblé des personnes handicapées est prévu uniquement dans les services administratifs.

[...]

6. Les organismes économiques publics sont soumis aux mêmes conditions que les employeurs du secteur privé.

[...]»

19 L'article 7, paragraphe 1, de la loi n° 68/1999 énonce:

«Afin de respecter l'obligation prévue à l'article 3, les employeurs recrutent les travailleurs en adressant la demande d'embauche aux bureaux compétents ou par la conclusion de conventions au sens de l'article 11 [...]»

20 L'article 10, paragraphes 2 et 3, de ladite loi prévoit:

«2. L'employeur ne peut pas demander à la personne handicapée une prestation qui n'est pas compatible avec ses déficiences.

3. En cas d'aggravation de son état de santé ou de changements significatifs dans l'organisation du travail, la personne handicapée peut demander de vérifier si les tâches qui lui ont été confiées sont compatibles avec son état de santé. De la même façon, l'employeur peut demander une évaluation de l'état de santé de la personne handicapée afin de vérifier si, en raison de ses déficiences, elle peut continuer d'être employée par l'entreprise. En cas de circonstance aggravante [...] incompatible avec la poursuite de l'activité professionnelle, ou s'il y a incompatibilité avec les changements dans l'organisation du travail, la personne handicapée a droit à la suspension non rémunérée de la relation de travail tant que l'incompatibilité persiste. Pendant cette période, le travailleur peut être amené à suivre une formation. [...]»

21 L'article 11, paragraphe 1, de la même loi dispose:

«Afin de favoriser l'insertion professionnelle des personnes handicapées, les bureaux compétents [...] peuvent conclure avec l'employeur des conventions ayant pour objet de définir un programme visant à atteindre les objectifs en matière d'emploi prévus dans la présente loi.»

22 Les articles 13 et 14 de la loi n° 68/1999 prévoient, respectivement, le versement d'une aide aux employeurs qui recrutent certaines catégories de personnes handicapées dans le cadre des conventions décrites à l'article 11 de cette loi et la création d'un fonds régional pour l'emploi des personnes handicapées destiné au financement de programmes régionaux d'insertion professionnelle et des services connexes.

23 Le décret législatif n° 81, sur la mise en œuvre de l'article 1er de la loi n° 123 du 3 août 2007 relative à la protection de la santé et de la sécurité sur le lieu de travail (decreto legislativo n.° 81 – Attuazione dell'articolo 1 della legge 3 agosto 2007, n. 123, in materia di tutela della salute e della sicurezza nei luoghi di lavoro), du 9 avril 2008 (supplément ordinaire à la GURI n° 101, du 30 avril 2008, ci-après le «décret législatif n° 81/2008»), dispose à son article 42, concernant l'adaptation des tâches à la condition de la personne concernée:

«1. L'employeur [...] met en œuvre les mesures indiquées par le médecin compétent et, si celles-ci concluent à l'inaptitude à la tâche spécifique, assigne au travailleur, lorsque cela est possible, des tâches équivalentes ou, à défaut, des tâches inférieures en lui garantissant le même traitement que celui correspondant à la tâche originaire.

[…]»

La procédure précontentieuse

24 Le 15 décembre 2006, la Commission a adressé à la République italienne une lettre de mise en demeure dans laquelle elle a informé cet État membre des lacunes constatées dans la transposition de la directive 2000/78 et lui a fixé un délai de deux mois pour présenter des observations.

25 Dans ses lettres en réponse des 16 février 2007 ainsi que 16 et 18 juin 2008, la République italienne a reconnu certaines lacunes constatées dans la lettre de mise en demeure et a annoncé l'adoption de mesures pour y remédier. Toutefois, elle a contesté les griefs concernant la transposition de l'article 5 de la directive 2000/78 en faisant valoir que la Commission n'avait pas suffisamment tenu compte des aménagements prévus en faveur des personnes handicapées dans la loi n° 68/1999.

26 N'étant pas pleinement satisfaite de ces réponses, la Commission a, le 29 octobre 2009, émis un avis motivé en réitérant ses griefs portant sur la mise en œuvre du principe de l'égalité de traitement en faveur des personnes handicapées en matière d'emploi prévu à l'article 5 de la directive 2000/78.

27 La République italienne a répondu à l'avis motivé par une note du 13 janvier 2010, en maintenant sa position.

28 C'est dans ces conditions que la Commission a introduit le présent recours.

Sur le recours

Argumentation des parties

29 Dans sa requête, la Commission expose que la directive 2000/78 a été transposée par la République italienne, en des termes généraux, par le décret législatif n° 216, sur la mise en œuvre de la directive 2000/78/CE en faveur de l'égalité de traitement en matière d'emploi et de travail (decreto legislativo n.° 216 – Attuazione della direttiva 2000/78/CE per la parità di trattamento in materia di occupazione e di condizioni di lavoro), du 9 juillet 2003 (GURI nº 187, du 13 août 2003, p. 4, ci-après le «décret législatif n° 216/2003»). Toutefois, ce décret législatif ne contiendrait pas toutes les mesures de mise en œuvre de la directive 2000/78 et, notamment, celles relatives à l'article 5 de celle-ci. Les dispositions concernant le traitement des personnes handicapées en matière d'emploi figureraient en effet dans la loi n° 68/1999.

30 Selon la Commission, il n'existe aucune disposition dans la législation italienne qui transpose l'obligation générale prévue à l'article 5 de la directive 2000/78.

31 Tout en reconnaissant que les dispositions de la loi n° 68/1999, sous certains aspects, offrent des garanties et des aménagements plus importants que ceux prévus à l'article 5 de la directive 2000/78, la Commission observe cependant que ces garanties et aménagements ne concernent pas toutes les personnes handicapées, ni tous les employeurs, ni même tous les différents aspects de la relation de travail.

32 La Commission constate, tout d'abord, que la loi n° 68/1999 ne s'applique qu'à certains types de personnes handicapées définis par cette loi.

33 Ensuite, la Commission soutient que de nombreuses dispositions de la loi n° 68/1999 ne concernent que certaines catégories d'entreprises et donc d'employeurs.

34 Enfin, la Commission considère que ladite loi ne prévoit pas d'aménagements raisonnables en faveur des personnes handicapées en ce qui concerne tous les différents aspects de la relation de travail.

35 Par ailleurs, l'application des aménagements prévus par la loi n° 68/1999 dépendrait de l'adoption de mesures ultérieures par les autorités locales ou de la conclusion de conventions spéciales entre ces dernières et les employeurs et ne conférerait donc pas aux personnes handicapées des droits qui pourraient être directement invoqués en justice.

36 La République italienne conclut au rejet du recours. Elle estime, dans son mémoire en défense, que la Commission n'a pas procédé à un examen complet de la législation tant nationale que régionale en vigueur en matière de protection des personnes handicapées, se limitant à affirmer de façon générale que les garanties de la loi n° 68/1999 ne concernent pas toutes les personnes handicapées et tous les employeurs, alors que la législation italienne en la matière est particulièrement fournie et n'est pas de la seule compétence de l'État.

37 À cet égard, elle cite, outre la loi n° 68/1999, les lois n^{os} 104/1992 et 381/1991, le décret législatif n° 81/2008 ainsi que le décret du président de la République n° 333 – règlement pour la mise en œuvre de la loi n° 68, du 12 mars 1999, portant normes relatives au droit au travail des personnes handicapées (decreto del presidente della Repubblica n.° 333 – Regolamento di esecuzione per l'attuazione della legge 12 marzo 1999, n. 68, recante norme per il diritto al lavoro dei disabili), du 10 octobre 2000 (GURI n° 270, du 18 novembre 2000, p. 2, ci-après le «décret n° 333/2000»). De plus, il existerait des lois régionales visant, en application de la loi n° 104/1992, à instituer et à tenir les registres régionaux des entités réalisant des activités destinées à favoriser l'insertion et l'intégration professionnelles des personnes handicapées.

38 S'agissant, en premier lieu, du grief de la Commission selon lequel la législation italienne ne s'appliquerait qu'à certaines personnes handicapées, la République italienne fait observer que la Commission ne donne aucune explication sur la notion uniforme de «handicap» que l'ensemble des États membres devraient prendre en compte et que ni la directive 2000/78 ni la jurisprudence de la Cour ne fournissent de définition concrète et spécifique de l'invalidité ou du handicap.

39 Selon la République italienne, l'arrêt du 11 juillet 2006, Chacón Navas (C-13/05, Rec. p. I-6467), cité par la Commission dans sa requête, contient une définition du handicap suffisamment générale pour en permettre une adaptation selon les principes d'adéquation et de proportionnalité visés à l'article 5 de la directive 2000/78. Cet article préciserait que les formes de protection doivent être établies en fonction des exigences propres aux situations concrètes, à savoir en fonction du degré de gravité du handicap. Dès lors, il serait demandé aux États membres de prévoir, dans leur législation nationale, des formes de protection des personnes handicapées en se référant au niveau de limitation résultant des déficiences physiques, mentales ou psychiques affectant la participation de la personne concernée à la vie professionnelle.

40 La République italienne estime que la loi n° 104/1992 fournit une conception du handicap pleinement conforme à la réglementation de l'Union ainsi qu'une conception de l'adéquation et de la proportionnalité des mesures à adopter selon la gravité du handicap conforme au texte de l'article 5 de la directive 2000/78.

41 En ce qui concerne la loi n° 68/1999, dont l'application serait limitée à certaines catégories de personnes handicapées, elle fait valoir que ces catégories sont définies non pas sur la base d'un critère propre à la législation italienne, mais par renvoi à la classification internationale des handicaps élaborée par l'Organisation mondiale de la santé.

42 À cet égard, elle observe que la notion de «handicap» n'est pas une notion uniquement juridique et du droit de l'Union, mais constitue une notion de nature scientifique et sociale de portée mondiale, considérée comme le seul critère de la législation italienne pour l'élaboration des barèmes de handicap figurant dans la loi n° 68/1999. Ces barèmes de handicap, utilisés pour qualifier les handicaps par rapport à l'activité professionnelle exercée, constitueraient un élément de référence objectif, conforme au principe de proportionnalité visé à l'article 5 de la directive 2000/78, permettant l'adoption de diverses mesures favorables plus ou moins fortes en fonction du degré et de la gravité du handicap, allant jusqu'à un droit au recrutement obligatoire pour les personnes dont le taux de handicap dépasse un certain pourcentage.

43 La loi n° 104/1992 réglementerait, quant à elle, par des dispositions d'application immédiate de nature détaillée et concrète, l'intégration sociale de toute personne handicapée et les modalités de mise en œuvre de cette intégration, la formation professionnelle ainsi que l'intégration professionnelle. Cette loi concernerait toutes les personnes handicapées et tous les employeurs.

44 S'agissant, en deuxième lieu, du grief selon lequel les dispositions de la loi n° 68/1999 ne concerneraient que certains employeurs, la République italienne reconnaît que cette loi ne s'applique qu'aux entreprises d'au moins quinze employés, en leur imposant le recrutement obligatoire de personnes ayant un certain taux de handicap. Elle considère que l'existence de cette limitation à l'application de ladite loi est cependant justifiée dans la mesure où, afin d'engager une personne handicapée, il est nécessaire que l'employeur ait certaines capacités dimensionnelles et organisationnelles. Ladite limitation respecterait le principe de proportionnalité.

45 Toutefois, cela ne signifierait pas que les entreprises comptant moins de quinze employés ne soient pas soumises à des règles particulières destinées à éliminer les inégalités de traitement liées au handicap.

46 En troisième lieu, quant au grief de la Commission relatif à l'absence d'aménagements raisonnables en faveur des personnes handicapées concernant tous les aspects de la relation de travail, la République italienne indique que la loi n° 68/1999 prévoit des conventions d'insertion professionnelle. Celles-ci seraient conclues entre l'employeur et le service provincial pour les personnes handicapées territorialement compétent et devraient prévoir la durée et les modalités d'embauche. Des conventions pourraient être également conclues avec les employeurs non soumis aux obligations prévues par la loi n° 68/1999.

47 De plus, la République italienne souligne que les services compétents peuvent accorder aux employeurs privés des mesures d'incitation, à savoir une aide d'un certain pourcentage du coût salarial du travailleur handicapé et le remboursement forfaitaire partiel des dépenses nécessaires à l'adaptation du poste de travail. Ces incitations pourraient également être étendues aux employeurs privés qui, même s'ils ne sont pas soumis aux obligations prévues par la loi n° 68/1999, procèdent au recrutement de personnes handicapées pour une durée indéterminée.

48 Elle ajoute que les régions mènent une politique active pour l'emploi et la formation professionnelle des personnes défavorisées.

49 Concernant les aménagements en faveur des personnes handicapées, la République italienne indique que le décret législatif n° 81/2008, applicable à toutes les personnes

handicapées, prévoit l'adaptation des tâches à la condition de la personne concernée. Elle invoque également, sur ce point, la loi n° 381/1991, qui régit le fonctionnement des coopératives sociales destinées à l'insertion professionnelle des personnes handicapées au sein de ces coopératives.

50 Par ailleurs, l'affirmation de la Commission selon laquelle les personnes handicapées ne pourraient pas invoquer directement en justice les droits que la législation italienne leur attribue est, selon la République italienne, dénuée de fondement. Le décret législatif n° 216/2003 aurait en effet prévu une protection juridictionnelle, sur le plan civil, du principe d'égalité de traitement, sans distinguer en fonction de la gravité du handicap. Sur le plan du droit public, le décret n° 333/2000 prévoirait un système de sanctions à plusieurs niveaux en cas de violation des obligations prévues par la loi n° 68/1999.

51 La Commission affirme, dans son mémoire en réplique, que, à aucun moment, au cours de la procédure précontentieuse, la République italienne n'a mentionné l'existence, dans son ordre juridique national, d'autres dispositions que celles contenues dans la loi n° 68/1999, qui seraient de nature à compléter les mesures prévues par cette dernière. Dans sa correspondance, la défenderesse aurait toujours prétendu que les dispositions de la loi n° 68/1999 suffisaient amplement à garantir la pleine transposition de l'article 5 de la directive 2000/78.

52 La Commission considère, au demeurant, que les dispositions citées par la République italienne ne sauraient être considérées, même examinées globalement, comme des mesures suffisantes pour transposer l'article 5 de la directive 2000/78 et que, partant, elles ne remettent pas en cause le bien-fondé des griefs avancés dans la présente procédure.

53 En définitive, la Commission estime que le système italien de promotion de l'insertion professionnelle des personnes handicapées est essentiellement fondé sur un ensemble de mesures d'incitation, de facilités et d'initiatives à la charge des autorités publiques et repose, pour une infime partie seulement, sur des obligations imposées aux employeurs. Or, l'article 5 de la directive 2000/78, lu à la lumière des considérants 20 et 21 de celle-ci, établirait un système d'obligations à la charge de ces derniers, qui ne sauraient être remplacées par les mesures d'incitation et les aides fournies par les autorités publiques.

54 La République italienne, dans son mémoire en duplique, reproche à la Commission de faire une interprétation trop littérale de l'article 5 de la directive 2000/78, qui est substantiellement différente de celle figurant dans la requête de cette institution et qui est plus radicale et plus extensive que celle qui pourrait résulter d'une simple lecture des termes employés audit article ainsi que d'une approche raisonnable et proportionnée.

55 Par ailleurs, la République italienne considère que rien dans le texte de la directive 2000/78 ne justifie la position de la Commission selon laquelle la seule modalité acceptable et propre à transposer l'article 5 de cette directive serait celle d'imposer des obligations aux employeurs à l'égard de tous les travailleurs handicapés, et non celle consistant à organiser un système public et privé de nature à soutenir l'employeur et la personne handicapée.

Appréciation de la Cour

56 S'agissant du grief de la Commission selon lequel la législation italienne ne s'appliquerait qu'à certaines personnes handicapées, il convient de rappeler que, si, certes, la notion de «handicap» n'est pas définie dans la directive 2000/78 elle-même, la Cour a cependant déjà jugé, aux points 38 et 39 de l'arrêt du 11 avril 2013, HK Danmark (C-335/11 et C-337/11, non encore publié au Recueil), que, au regard de la convention de l'ONU, cette notion doit être entendue comme visant une limitation, résultant notamment d'atteintes physiques, mentales ou psychiques durables, dont l'interaction avec diverses barrières peut faire obstacle à la pleine et effective participation de la personne concernée à la vie professionnelle sur la base de l'égalité avec les autres travailleurs.

57 Par suite, l'expression «personnes handicapées» employée à l'article 5 de la directive 2000/78 doit être interprétée comme englobant toutes les personnes atteintes d'un handicap correspondant à la définition énoncée au point précédent.

58 Ensuite, s'agissant du grief de la Commission selon lequel la législation italienne ne respecterait pas l'obligation de prévoir des «aménagements raisonnables» au sens dudit article 5, il y a lieu de rappeler que, conformément à l'article 2, quatrième alinéa, de la convention de l'ONU, les «aménagements raisonnables» sont «les modifications et ajustements nécessaires et appropriés n'imposant pas de charge disproportionnée ou indue apportés, en fonction des besoins dans une situation donnée, pour assurer aux personnes handicapées la jouissance ou l'exercice, sur la base de l'égalité avec les autres, de tous les droits de l'homme et de toutes les libertés fondamentales». Il s'ensuit que ladite disposition préconise une définition large de la notion d'«aménagements raisonnables» (arrêt HK Danmark, précité, point 53).

59 Ainsi, s'agissant de la directive 2000/78, la Cour a jugé, au point 54 de l'arrêt HK Danmark, précité, que ladite notion devait être entendue comme visant l'élimination des diverses barrières qui entravent la pleine et effective participation des personnes handicapées à la vie professionnelle sur la base de l'égalité avec les autres travailleurs.

60 Il ressort du libellé de l'article 5 de la directive 2000/78, lu à la lumière des considérants 20 et 21 de celle-ci, que les États membres doivent établir, dans leur législation, une obligation pour les employeurs de prendre les mesures appropriées, c'est-à-dire des mesures efficaces et pratiques, telles que, notamment, un aménagement des locaux, une adaptation des équipements, des rythmes de travail ou de la répartition des tâches, en prenant en compte chaque situation individuelle, pour permettre à toute personne handicapée d'accéder à un emploi, de l'exercer ou d'y progresser, ou pour qu'une formation lui soit dispensée sans imposer à l'employeur une charge disproportionnée. De telles mesures, ainsi que la Cour l'a jugé au point 64 de l'arrêt HK Danmark, précité, peuvent aussi consister en une réduction du temps de travail.

61 Il y a lieu de souligner que l'obligation imposée par l'article 5 de la directive 2000/78 de prendre, le cas échéant, les mesures appropriées vise l'ensemble des employeurs. Ces mesures ne doivent pas, toutefois, leur imposer une charge disproportionnée.

62 Il s'ensuit que, contrairement aux arguments de la République italienne exposés au point 55 du présent arrêt, il ne suffit pas, pour transposer correctement et pleinement l'article 5 de la directive 2000/78, d'édicter des mesures publiques d'incitation et d'aide, mais il incombe aux États membres d'imposer à tous les employeurs l'obligation de prendre des mesures efficaces et pratiques, en fonction des besoins dans des situations concrètes, en faveur de toutes les personnes handicapées, portant sur les différents aspects de l'emploi et du travail et permettant à ces personnes d'accéder à un emploi, de l'exercer ou d'y progresser, ou pour qu'une formation leur soit dispensée.

63 Or, en l'occurrence, il convient d'observer que la loi n° 104/1992 prévoit que l'insertion et l'intégration sociales des personnes handicapées sont réalisées par des mesures permettant de favoriser leur pleine insertion dans le monde du travail, sous une forme individuelle ou associée, ainsi que la protection de leur emploi. Elle comporte des dispositions relatives à l'intégration scolaire et à la formation professionnelle et prévoit en particulier des aides à la charge des régions. Par ailleurs, la loi n° 104/1992 donne compétence aux régions pour réglementer les aménagements d'accès au poste de travail et l'installation d'activités professionnelles indépendantes pour les personnes handicapées, ainsi que les incitations, les aménagements et les aides accordés aux employeurs, y compris aux fins d'adapter le poste de travail. Il ne ressort pas de cette loi-cadre qu'elle garantit que tous les employeurs sont tenus de prendre des mesures efficaces et pratiques, en fonction des besoins dans des situations concrètes, en faveur des personnes handicapées, ainsi que l'exige l'article 5 de la directive 2000/78.

64 La loi n° 381/1991, quant à elle, contient des règles relatives aux coopératives sociales dont au moins 30 % des employés doivent être des personnes défavorisées au sens de ladite loi. Destinée à l'insertion professionnelle des personnes handicapées au moyen de telles structures, elle ne contient pas non plus de disposition imposant à tous les employeurs l'obligation de prendre des mesures appropriées, en fonction des besoins dans des situations concrètes, au sens de l'article 5 de la directive 2000/78.

65 En ce qui concerne la loi n° 68/1999, celle-ci a pour seul objet de favoriser l'accès à l'emploi de certaines personnes handicapées et n'a pas vocation à réglementer ce qu'exige l'article 5 de la directive 2000/78.

66 S'agissant du décret législatif n° 81/2008, il y a lieu de relever que celui-ci ne régit qu'un aspect des mesures appropriées prescrites à l'article 5 de la directive 2000/78, à savoir l'adaptation des tâches au handicap de la personne concernée.

67 Au vu de ce qui précède, il apparaît que la législation italienne, même appréciée dans son ensemble, n'impose pas à l'ensemble des employeurs l'obligation de prendre, le cas échéant, des mesures efficaces et pratiques, en fonction des besoins dans des situations concrètes, en faveur de toutes les personnes handicapées portant sur les différents aspects de l'emploi et du travail et permettant à ces personnes d'accéder à un emploi, de l'exercer ou d'y progresser, ou pour qu'une formation leur soit dispensée. Partant, elle n'assure pas une transposition correcte et complète de l'article 5 de la directive 2000/78.

68 Par conséquent, il convient de constater que, en n'instituant pas d'obligation pour tous les employeurs de mettre en place, en fonction des besoins dans des situations concrètes, des aménagements raisonnables pour toutes les personnes handicapées, la République italienne a manqué à son obligation de transposer correctement et pleinement l'article 5 de la directive 2000/78.

Sur les dépens

69 En vertu de l'article 138, paragraphe 1, du règlement de procédure de la Cour, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La Commission ayant conclu à la condamnation de la République italienne et celle-ci ayant succombé en ses moyens, il y a lieu de la condamner aux dépens.

Par ces motifs, la Cour (quatrième chambre) déclare et arrête:

1) En n'instituant pas d'obligation pour tous les employeurs de mettre en place, en fonction des besoins dans des situations concrètes, des aménagements raisonnables pour toutes les personnes handicapées, la République italienne a manqué à son obligation de transposer correctement et pleinement l'article 5 de la directive 2000/78/CE du Conseil, du 27 novembre 2000, portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail.

2) La République italienne est condamnée aux dépens.

Signatures

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* Langue de procédure: l'italien.

URTEIL DES GERICHTSHOFS (Zweite Kammer)

11. April 2013(*)

„Sozialpolitik – Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen – Richtlinie 2000/78/EG – Gleichbehandlung in Beschäftigung und Beruf – Art. 1, 2 und 5 – Verbot der Diskriminierung wegen einer Behinderung – Entlassung – Vorliegen einer Behinderung – Fehlzeiten des Arbeitnehmers wegen seiner Behinderung – Pflicht zum Treffen von Vorkehrungen – Teilzeitbeschäftigung – Länge der Kündigungsfrist"

In den verbundenen Rechtssachen C-335/11 und C-337/11

betreffend Vorabentscheidungsersuchen nach Art. 267 AEUV, eingereicht vom Sø- og Handelsret (Dänemark) mit Entscheidungen vom 29. Juni 2011, beim Gerichtshof eingegangen am 1. Juli 2011, in den Verfahren

HK Danmark, handelnd für Jette Ring,

gegen

Dansk almennyttigt Boligselskab (C-335/11)

und

HK Danmark, handelnd für Lone Skouboe Werge,

gegen

Dansk Arbejdsgiverforening, handelnd für die Pro Display A/S in Konkurs (C-337/11),

erlässt

DER GERICHTSHOF (Zweite Kammer)

unter Mitwirkung der Kammerpräsidentin R. Silva de Lapuerta, des Vizepräsidenten des Gerichtshofs K. Lenaerts in Wahrnehmung der Aufgaben eines Richters der Zweiten Kammer sowie der Richter G. Arestis, A. Arabadjiev (Berichterstatter) und J. L. da Cruz Vilaça,

Generalanwältin: J. Kokott,

Kanzler: C. Strömholm, Verwaltungsrätin,

aufgrund des schriftlichen Verfahrens und auf die mündliche Verhandlung vom 18. Oktober 2012,

unter Berücksichtigung der Erklärungen

– von HK Danmark, handelnd für Frau Ring, vertreten durch J. Goldschmidt, advokat,

– von HK Danmark, handelnd für Frau Skouboe Werge, vertreten durch M. Østergård, advokat,

– der Dansk almennyttigt Boligselskab, vertreten durch C. Emmeluth und L. Greisen, advokater,

– der Dansk Arbejdsgiverforening, handelnd für die Pro Display A/S in Konkurs, vertreten durch T. Skyum und L. Greisen, advokater,

– der dänischen Regierung, zunächst vertreten durch C. Vang, dann durch V. Pasternak Jørgensen als Bevollmächtigte,

– der belgischen Regierung, vertreten durch L. Van den Broeck als Bevollmächtigte,

– von Irland, vertreten durch D. O'Hagan als Bevollmächtigten im Beistand von C. Power, BL,

– der griechischen Regierung, vertreten durch D. Tsagkaraki als Bevollmächtigte,

– der italienischen Regierung, vertreten durch G. Palmieri als Bevollmächtigte im Beistand von C. Gerardis, avvocato dello Stato,

– der polnischen Regierung, vertreten durch M. Szpunar, J. Faldyga und M. Załęka als Bevollmächtigte,

– der Regierung des Vereinigten Königreichs, vertreten durch K. Smith, Barrister,

– der Europäischen Kommission, vertreten durch M. Simonsen und J. Enegren als Bevollmächtigte,

nach Anhörung der Schlussanträge der Generalanwältin in der Sitzung vom 6. Dezember 2012

folgendes

Urteil

1 Die Vorabentscheidungsersuchen betreffen die Auslegung der Art. 1, 2 und 5 der Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf (ABl. L 303, S. 16).

2 Diese Ersuchen ergehen in zwei Rechtsstreitigkeiten zwischen HK Danmark (im Folgenden: HK), handelnd für Frau Ring, und der Dansk almennyttigt Boligselskab (im Folgenden: DAB) zum einen und HK, handelnd für Frau Skouboe Werge, und der Dansk Arbejdsgiverforening, handelnd für die Pro Display A/S in Konkurs (im Folgenden: Pro Display), zum anderen über die Rechtmäßigkeit der Entlassung von Frau Ring und Frau Skouboe Werge.

Rechtsrahmen

Völkerrecht

3 Im Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen, das mit dem Beschluss 2010/48/EG des Rates vom 26. November 2009 (ABl. 2010, L 23, S. 35, im Folgenden: VN-Übereinkommen) im Namen der Europäischen Gemeinschaft genehmigt wurde, heißt es in Buchst. e der Präambel:

„in der Erkenntnis, dass das Verständnis von Behinderung sich ständig weiterentwickelt und dass Behinderung aus der Wechselwirkung zwischen Menschen mit Beeinträchtigungen und einstellungs- und umweltbedingten Barrieren entsteht, die sie an der vollen, wirksamen und gleichberechtigten Teilhabe an der Gesellschaft hindern".

4 Art. 1 dieses Übereinkommens sieht vor:

„Zweck dieses Übereinkommens ist es, den vollen und gleichberechtigten Genuss aller Menschenrechte und Grundfreiheiten durch alle Menschen mit Behinderungen zu fördern, zu schützen und zu gewährleisten und die Achtung der ihnen innewohnenden Würde zu fördern.

Zu den Menschen mit Behinderungen zählen Menschen, die langfristige körperliche, seelische, geistige oder Sinnesbeeinträchtigungen haben, welche sie in Wechselwirkung mit verschiedenen Barrieren an der vollen, wirksamen und gleichberechtigten Teilhabe an der Gesellschaft hindern können."

5 Nach Art. 2 Abs. 4 dieses Übereinkommens „bedeutet ‚angemessene Vorkehrungen' notwendige und geeignete Änderungen und Anpassungen, die keine unverhältnismäßige oder unbillige Belastung darstellen und die, wenn sie in einem bestimmten Fall erforderlich sind, vorgenommen werden, um zu gewährleisten, dass Menschen mit Behinderungen gleichberechtigt mit anderen alle Menschenrechte und Grundfreiheiten genießen oder ausüben können".

Unionsrecht

6 Die Erwägungsgründe 6 und 8 der Richtlinie 2000/78 lauten:

„(6) In der Gemeinschaftscharta der sozialen Grundrechte der Arbeitnehmer wird herausgestellt, wie wichtig die Bekämpfung jeder Art von Diskriminierung und geeignete Maßnahmen zur sozialen und wirtschaftlichen Integration älterer Menschen und behinderter Menschen sind.

…

(8) In den vom Europäischen Rat auf seiner Tagung vom 10. und 11. Dezember 1999 in Helsinki angenommenen beschäftigungspolitischen Leitlinien für das Jahr 2000 wird die Notwendigkeit unterstrichen, günstigere Bedingungen für die Entstehung eines Arbeitsmarktes zu schaffen, der soziale Integration fördert; dies soll durch ein Bündel aufeinander abgestimmter Maßnahmen geschehen, die darauf abstellen, Diskriminierungen bestimmter gesellschaftlicher Gruppen, wie behinderter Menschen, zu bekämpfen. Ferner wird betont, dass der Unterstützung älterer Arbeitnehmer mit dem Ziel der Erhöhung ihres Anteils an der Erwerbsbevölkerung besondere Aufmerksamkeit gebührt."

7 In den Erwägungsgründen 16 und 17 dieser Richtlinie heißt es:

„(16) Maßnahmen, die darauf abstellen, den Bedürfnissen behinderter Menschen am Arbeitsplatz Rechnung zu tragen, spielen eine wichtige Rolle bei der Bekämpfung von Diskriminierungen aufgrund von Behinderungen.

(17) Mit dieser Richtlinie wird unbeschadet der Verpflichtung, für Menschen mit Behinderung angemessene Vorkehrungen zu treffen, nicht die Einstellung, der berufliche Aufstieg, die Weiterbeschäftigung oder die Teilnahme an Aus- und Weiterbildungsmaßnahmen einer Person vorgeschrieben, wenn diese Person für die Erfüllung der wesentlichen Funktionen des Arbeitsplatzes oder zur Absolvierung einer bestimmten Ausbildung nicht kompetent, fähig oder verfügbar ist."

8 Die Erwägungsgründe 20 und 21 der Richtlinie lauten:

„(20) Es sollten geeignete Maßnahmen vorgesehen werden, d. h. wirksame und praktikable Maßnahmen, um den Arbeitsplatz der Behinderung entsprechend einzurichten, z. B. durch eine entsprechende Gestaltung der Räumlichkeiten oder eine Anpassung des Arbeitsgeräts, des Arbeitsrhythmus, der Aufgabenverteilung oder des Angebots an Ausbildungs- und Einarbeitungsmaßnahmen.

(21) Bei der Prüfung der Frage, ob diese Maßnahmen zu übermäßigen Belastungen führen, sollten insbesondere der mit ihnen verbundene finanzielle und sonstige Aufwand sowie die Größe, die finanziellen Ressourcen und der Gesamtumsatz der

Organisation oder des Unternehmens und die Verfügbarkeit von öffentlichen Mitteln oder anderen Unterstützungsmöglichkeiten berücksichtigt werden."

9 Zweck dieser Richtlinie 2000/78 ist nach ihrem Art. 1 „die Schaffung eines allgemeinen Rahmens zur Bekämpfung der Diskriminierung wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung in Beschäftigung und Beruf im Hinblick auf die Verwirklichung des Grundsatzes der Gleichbehandlung in den Mitgliedstaaten".

10 Art. 2 („Der Begriff ‚Diskriminierung'") der Richtlinie sieht vor:

„(1) Im Sinne dieser Richtlinie bedeutet ‚Gleichbehandlungsgrundsatz', dass es keine unmittelbare oder mittelbare Diskriminierung wegen eines der in Artikel 1 genannten Gründe geben darf.

(2) Für die Zwecke des Absatzes 1

a) liegt eine unmittelbare Diskriminierung vor, wenn eine Person wegen eines der in Artikel 1 genannten Gründe in einer vergleichbaren Situation eine weniger günstige Behandlung erfährt, als eine andere Person erfährt, erfahren hat oder erfahren würde;

b) liegt eine mittelbare Diskriminierung vor, wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren Personen mit einer bestimmten Religion oder Weltanschauung, einer bestimmten Behinderung, eines bestimmten Alters oder mit einer bestimmten sexuellen Ausrichtung gegenüber anderen Personen in besonderer Weise benachteiligen können, es sei denn:

i) diese Vorschriften, Kriterien oder Verfahren sind durch ein rechtmäßiges Ziel sachlich gerechtfertigt, und die Mittel sind zur Erreichung dieses Ziels angemessen und erforderlich, oder

ii) der Arbeitgeber oder jede Person oder Organisation, auf die diese Richtlinie Anwendung findet, ist im Falle von Personen mit einer bestimmten Behinderung aufgrund des einzelstaatlichen Rechts verpflichtet, geeignete Maßnahmen entsprechend den in Artikel 5 enthaltenen Grundsätzen vorzusehen, um die sich durch diese Vorschrift, dieses Kriterium oder dieses Verfahren ergebenden Nachteile zu beseitigen.

…"

11 Art. 5 („Angemessene Vorkehrungen für Menschen mit Behinderung") der Richtlinie bestimmt:

„Um die Anwendung des Gleichbehandlungsgrundsatzes auf Menschen mit Behinderung zu gewährleisten, sind angemessene Vorkehrungen zu treffen. Das bedeutet, dass der Arbeitgeber die geeigneten und im konkreten Fall erforderlichen Maßnahmen ergreift, um den Menschen mit Behinderung den Zugang zur Beschäftigung, die Ausübung eines Berufes, den beruflichen Aufstieg und die Teilnahme an Aus- und Weiterbildungsmaßnahmen zu ermöglichen, es sei denn, diese Maßnahmen würden den Arbeitgeber unverhältnismäßig belasten. Diese Belastung ist nicht unverhältnismäßig, wenn sie durch geltende Maßnahmen im Rahmen der Behindertenpolitik des Mitgliedstaats ausreichend kompensiert wird."

Dänisches Recht

12 § 2 des Gesetzes über das Rechtsverhältnis zwischen Arbeitgebern und Arbeitnehmern (lov om retsforholdet mellem arbejdsgivere og funktionærer, Funktionærlov, im Folgenden: FL) lautet:

„(1) Der Arbeitsvertrag zwischen dem Arbeitgeber und dem Angestellten kann nur unter Einhaltung einer Kündigungsfrist gemäß den nachstehenden Vorschriften durch Kündigung

beendet werden. Das Gleiche gilt bei Beendigung eines befristeten Arbeitsvertrags vor Ende der Vertragslaufzeit.

(2) Die Kündigung durch den Arbeitgeber hat zu erfolgen mit einer Kündigungsfrist von mindestens

1. einem Monat zum Monatsende während der ersten sechs Monate des Arbeitsverhältnisses,

2. drei Monaten zum Monatsende nach den ersten sechs Monaten des Arbeitsverhältnisses.

(3) Die Kündigungsfrist nach Abs. 2 Nr. 2 erhöht sich um einen Monat für jedes dritte Beschäftigungsjahr, jedoch höchstens auf sechs Monate."

13 § 5 FL, der u. a. einen Anspruch des Angestellten auf vollen Lohn während einer Erkrankung vorsieht, bestimmt:

„(1) Ist der Angestellte wegen Krankheit außerstande, seine Arbeit zu verrichten, so ist das darauf beruhende Fernbleiben vom Dienst als gerechtfertigte Arbeitsverhinderung des Angestellten anzusehen, es sei denn, er hat die Krankheit während des Bestehens des Arbeitsverhältnisses vorsätzlich oder grob fahrlässig herbeigeführt oder bei seiner Einstellung arglistig verschwiegen, dass er an der betreffenden Krankheit litt.

(2) Durch schriftliche Vereinbarung kann jedoch für das einzelne Dienstverhältnis bestimmt werden, dass dem Angestellten mit einer Kündigungsfrist von einem Monat zum Monatsende gekündigt werden kann, wenn der Angestellte innerhalb eines Zeitraums von zwölf aufeinanderfolgenden Monaten Lohn während Krankenzeiten von insgesamt 120 Tagen bezogen hat. Die Kündigung ist nur gültig, wenn sie in unmittelbarem Anschluss am Ende der 120 Krankheitstage und noch während der Erkrankung des Angestellten erklärt wird, wohingegen es die Gültigkeit der Kündigung nicht berührt, dass der Angestellte nach der Kündigung die Arbeit wieder aufgenommen hat."

14 Die Richtlinie 2000/78 wurde mit dem Gesetz Nr. 1417 vom 22. Dezember 2004 zur Änderung des Gesetzes über das Verbot der Ungleichbehandlung auf dem Arbeitsmarkt u. a. m. (lov nr. 1417 af 22 december 2004 om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m. v., im Folgenden: Antidiskriminierungsgesetz) in das dänische Recht umgesetzt. § 2a dieses Gesetzes sieht vor:

„Der Arbeitgeber hat die geeigneten und im konkreten Fall erforderlichen Maßnahmen zu ergreifen, um den Menschen mit Behinderung den Zugang zur Beschäftigung, die Ausübung eines Berufs, den beruflichen Aufstieg und die Teilnahme an Aus- und Weiterbildungsmaßnahmen zu ermöglichen. Dies gilt jedoch nicht, wenn diese Maßnahmen den Arbeitgeber unverhältnismäßig belasten würden. Diese Belastung ist nicht unverhältnismäßig, wenn sie durch öffentliche Maßnahmen kompensiert wird."

Ausgangsverfahren und Vorlagefragen

15 Frau Ring war seit 1996 bei der Gesellschaft für sozialen Wohnungsbau Boligorganisation Samvirke in Lyngby (Dänemark) und seit dem 17. Juli 2000 bei DAB, die Samvirke übernommen hatte, beschäftigt. Zwischen dem 6. Juni 2005 und dem 24. November 2005 war Frau Ring wiederholt abwesend. In den ärztlichen Bescheinigungen war u. a. angegeben, dass sie an ständigen Schmerzen im Bereich der Lendenwirbelsäule leide, die nicht behandelbar seien. Es war nicht möglich, vorherzusagen, ob sie irgendwann wieder eine Vollzeitbeschäftigung aufnehmen kann.

16 Mit Schreiben vom 24. November 2005 kündigte DAB Frau Ring gemäß § 5 Abs. 2 FL.

17 Aus den dem Gerichtshof vorliegenden Akten geht hervor, dass der Arbeitsplatz nach dieser Kündigung umgestaltet wurde. DAB hat einen Kostenvoranschlag vom 3. September 2008

über einen Gesamtbetrag von „ungefähr 305 000 DKK (+ Marge)" für „einen Empfangstresen und einige Arbeitsplätze dahinter" sowie „die Erneuerung des Bodenbelags" und das Aufstellen von „höhenverstellbaren Tischen" vorgelegt.

18 Am 1. Februar 2006 trat Frau Ring eine neue Stelle als Empfangssekretärin bei dem Unternehmen ADRA Danmark mit einer Arbeitszeit von 20 Wochenstunden an. Die Parteien des Ausgangsverfahrens in der Rechtssache C-335/11 sind sich darüber einig, dass es sich bei ihrem Arbeitsplatz um einen gewöhnlichen Arbeitsplatz handelt, der u. a. mit einem höhenverstellbaren Tisch ausgestattet ist.

19 Frau Skouboe Werge war seit 1998 bei Pro Display als Sekretärin/Direktionsassistentin beschäftigt. Am 19. Dezember 2003 hatte sie einen Verkehrsunfall, bei dem sie ein Schleudertrauma erlitt. Sie war deshalb ungefähr drei Wochen krankgemeldet. Danach fehlte sie nur einzelne Tage krankheitsbedingt. Am 4. November 2004 teilte der Leiter der Buchhaltung von Pro Display per E-Mail den übrigen Mitarbeitern mit, dass sich Frau Skouboe Werge mit ihrem Einverständnis vier Wochen, in denen sie nur ungefähr vier Stunden pro Tag arbeiten werde, teilweise in Krankheitsurlaub befinden werde. Pro Display ließ sich das Gehalt von Frau Skouboe Werge in Höhe der Krankentagegelder erstatten.

20 Am Montag, den 10. Januar 2005 meldete sich Frau Skouboe Werge für die volle Arbeitszeit krank. Mit E-Mail vom 14. Januar 2005 teilte sie dem Geschäftsführer von Pro Display mit, dass es ihr nach wie vor sehr schlecht gehe und dass sie am gleichen Tag einen Termin bei einem Facharzt habe. Aus einer ärztlichen Bescheinigung vom 17. Januar 2005 geht hervor, dass sie den Arzt an diesem Tag aufsuchte und erklärte, dass sie seit dem 10. Januar 2005 arbeitsunfähig sei. Der Arzt ging davon aus, dass die Arbeitsunfähigkeit noch einen weiteren Monat andauern werde. In einer ärztlichen Bescheinigung vom 23. Februar 2005 stellt dieser Arzt fest, dass er zur Dauer der Arbeitsunfähigkeit keine Angaben machen könne.

21 Mit Schreiben vom 21. April 2005 wurde Frau Skouboe Werge mit einer Kündigungsfrist von einem Monat zum 31. Mai 2005 gekündigt.

22 In einem Klärungsverfahren beim Jobcenter Randers wurde festgestellt, dass Frau Skouboe Werge ungefähr acht Stunden pro Woche bei langsamem Tempo arbeiten könne. Im Juni 2006 wurde sie wegen ihrer Arbeitsunfähigkeit invalidisiert. Im Jahr 2007 setzte die Arbejdsskadestyrelse (Nationales Amt für Arbeitsunfälle und Berufskrankheiten) den Grad der Beeinträchtigung von Frau Skouboe Werge auf 10 % und die Verminderung der Erwerbsfähigkeit auf 50 %, später auf 65 %, fest.

23 Im Namen und für Rechnung der beiden Klägerinnen der Ausgangsverfahren handelnd erhob HK, eine Gewerkschaft, beim Sø- og Handelsret eine Schadensersatzklage gegen die beiden Arbeitgeber auf der Grundlage des Antidiskriminierungsgesetzes. HK macht geltend, dass bei den beiden Arbeitnehmerinnen eine Behinderung vorgelegen habe und dass ihre Arbeitgeber ihnen gemäß der in Art. 5 der Richtlinie 2000/78 vorgesehenen Verpflichtung, Vorkehrungen zu treffen, eine Arbeitszeitverkürzung hätten anbieten müssen. Außerdem sei § 5 Abs. 2 FL auf diese beiden Arbeitnehmerinnen nicht anwendbar, da ihre krankheitsbedingten Fehlzeiten auf ihre Behinderung zurückzuführen seien.

24 In beiden Ausgangsverfahren bestreiten die Arbeitgeber, dass der Gesundheitszustand der Klägerinnen der Ausgangsverfahren unter den Begriff „Behinderung" im Sinne der Richtlinie 2000/78 fällt, da die einzige Funktionsbeeinträchtigung, die bei ihnen vorläge, darin bestehe, dass sie nicht in der Lage seien, eine Vollzeitbeschäftigung auszuüben. Die Arbeitgeber bestreiten auch, dass eine Arbeitszeitverkürzung unter die in Art. 5 dieser Richtlinie angesprochenen Maßnahmen fällt. Schließlich machen sie geltend, dass die Entlassung eines behinderten Arbeitnehmers bei krankheitsbedingten Fehlzeiten, die auf seiner Behinderung beruhen, nach § 5 Abs. 2 FL keine Diskriminierung begründe und daher nicht gegen die Richtlinie verstoße.

25 Das vorlegende Gericht führt aus, dass der Gerichtshof in Randnr. 45 des Urteils vom 11. Juli 2006, Chacón Navas (C-13/05, Slg. 2006, I-6467), entschieden habe, dass die Einschränkung der Fähigkeit, am Berufsleben teilzuhaben, nur dann unter den Begriff „Behinderung" falle, wenn wahrscheinlich sei, dass sie von langer Dauer sei.

26 Unter diesen Umständen hat das Sø- og Handelsret beschlossen, die Verfahren auszusetzen und dem Gerichtshof folgende, in den Rechtssachen C-335/11 und C-337/11 gleichlautende Fragen zur Vorabentscheidung vorzulegen:

1. a) Ist jede Person, die aufgrund physischer, mentaler oder psychischer Beeinträchtigungen während eines Zeitraums, der hinsichtlich der Dauer die Anforderungen erfüllt, die in Randnr. 45 des Urteils Chacón Navas aufgeführt sind, ihre Arbeit nicht oder nur in begrenztem Umfang ausüben kann, vom Begriff der Behinderung im Sinne der Richtlinie 2000/78 umfasst?

   b) Kann ein Zustand, der durch eine ärztlich diagnostizierte unheilbare Krankheit verursacht ist, vom Begriff der Behinderung im Sinne der Richtlinie umfasst sein?

   c) Kann ein Zustand, der durch eine ärztlich diagnostizierte vorübergehende Krankheit verursacht ist, vom Begriff der Behinderung im Sinne der Richtlinie umfasst sein?

2. Ist eine dauerhafte Funktionsbeeinträchtigung, die keinen Bedarf an besonderen Hilfsmitteln oder Ähnlichem zur Folge hat und die allein oder im Wesentlichen darin besteht, dass die betreffende Person nicht zu einer Vollzeittätigkeit in der Lage ist, als Behinderung in dem Sinne anzusehen, in dem dieser Ausdruck in der Richtlinie 2000/78 verwendet wird?

3. Gehört eine Herabsetzung der Arbeitszeiten zu den von Art. 5 der Richtlinie 2000/78 umfassten Maßnahmen?

4. Verbietet es die Richtlinie 2000/78, eine nationale Rechtsvorschrift, nach der ein Arbeitgeber einem Arbeitnehmer mit verkürzter Kündigungsfrist kündigen darf, wenn der Arbeitnehmer innerhalb von zwölf aufeinanderfolgenden Monaten Lohn während Krankheitszeiten von insgesamt 120 Tagen bezogen hat, auf einen Arbeitnehmer anzuwenden, der als behindert im Sinne der Richtlinie anzusehen ist, wenn

   a) die Abwesenheit durch die Behinderung verursacht ist

   oder

   b) die Abwesenheit darauf zurückzuführen ist, dass der Arbeitgeber nicht die geeigneten und im konkreten Fall erforderlichen Maßnahmen ergriffen hat, um einer Person mit einer Behinderung die Ausübung ihres Berufs zu ermöglichen?

27 Mit Beschluss des Präsidenten des Gerichtshofs vom 4. August 2011 sind die Rechtssachen C-335/11 und C-337/11 zu gemeinsamem schriftlichen und mündlichen Verfahren und zu gemeinsamer Entscheidung verbunden worden.

Zu den Vorlagefragen

Vorbemerkungen

28 Vorab ist daran zu erinnern, dass die Organe der Europäischen Union, wenn von dieser internationale Übereinkünfte geschlossen werden, nach Art. 216 Abs. 2 AEUV an solche Übereinkünfte gebunden sind; die Übereinkünfte haben daher gegenüber den Rechtsakten der Union Vorrang (Urteil vom 21. Dezember 2011, Air Transport Association of America u. a., C-366/10, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 50 und die dort angeführte Rechtsprechung).

29 Es ist weiter darauf hinzuweisen, dass der Vorrang der von der Union geschlossenen völkerrechtlichen Verträge vor den Bestimmungen des abgeleiteten Rechts es gebietet, diese Bestimmungen nach Möglichkeit in Übereinstimmung mit diesen Verträgen auszulegen (Urteil vom 22. November 2012, Digitalnet u. a., C-320/11, C-330/11, C-382/11 und

C-383/11, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 39 und die dort angeführte Rechtsprechung).

30 Dem Beschluss 2010/48 ist zu entnehmen, dass die Union das VN-Übereinkommen genehmigt hat. Die Bestimmungen dieses Übereinkommens bilden folglich seit dessen Inkrafttreten einen integrierenden Bestandteil der Unionsrechtsordnung (vgl. in diesem Sinne Urteil vom 30. April 1974, Haegeman, 181/73, Slg. 1974, 449, Randnr. 5).

31 Ferner ergibt sich aus der Anlage zu Anhang II dieses Beschlusses, dass in den Bereichen selbständige Lebensführung, soziale Eingliederung, Arbeit und Beschäftigung die Richtlinie 2000/78 zu den Rechtsakten der Union gehört, die durch das VN-Übereinkommen erfasste Angelegenheiten betreffen.

32 Daraus folgt, dass die Richtlinie 2000/78 nach Möglichkeit in Übereinstimmung mit diesem Übereinkommen auszulegen ist.

33 Die Fragen des vorlegenden Gerichts sind im Licht dieser Erwägungen zu beantworten.

Zur ersten und zur zweiten Frage

34 Mit seiner ersten und seiner zweiten Frage, die zusammen zu prüfen sind, möchte das vorlegende Gericht wissen, ob der Begriff „Behinderung" im Sinne der Richtlinie 2000/78 dahin auszulegen ist, dass er den Gesundheitszustand einer Person erfasst, die ihre Arbeit aufgrund physischer, geistiger oder psychischer Beeinträchtigungen über einen wahrscheinlich langen Zeitraum oder dauerhaft nicht oder nur in begrenztem Umfang verrichten kann. Es möchte außerdem wissen, ob dieser Begriff dahin auszulegen ist, dass er einen Zustand, der durch eine ärztlich diagnostizierte unheilbare Krankheit verursacht ist, erfasst, dass er auch einen Zustand, der durch eine ärztlich diagnostizierte heilbare Krankheit verursacht ist, erfasst und dass es für die Frage, ob der Gesundheitszustand einer Person unter diesen Begriff fällt, auf die Art der Maßnahmen ankommt, die der Arbeitgeber ergreifen muss.

35 Vorab ist festzustellen, dass die Richtlinie 2000/78 nach ihrem Art. 1 die Schaffung eines allgemeinen Rahmens zur Bekämpfung von Diskriminierungen in Beschäftigung und Beruf aus einem der in diesem Artikel genannten Gründe bezweckt, zu denen die Behinderung zählt (vgl. Urteil Chacón Navas, Randnr. 41). Diese Richtlinie gilt nach ihrem Art. 3 Abs. 1 Buchst. c im Rahmen der auf die Europäische Union übertragenen Zuständigkeiten für alle Personen u. a. in Bezug auf die Entlassungsbedingungen.

36 Der Begriff „Behinderung" ist in der Richtlinie 2000/78 selbst nicht definiert. Deshalb hat der Gerichtshof in Randnr. 43 des Urteils Chacón Navas entschieden, dass dieser Begriff so zu verstehen ist, dass er eine Einschränkung erfasst, die insbesondere auf physische, geistige oder psychische Beeinträchtigungen zurückzuführen ist und die ein Hindernis für die Teilhabe des Betreffenden am Berufsleben bildet.

37 Das VN-Übereinkommen, das die Europäische Union mit dem Beschluss vom 26. November 2009, also nach der Verkündung des Urteils Chacón Navas, ratifiziert hat, erkennt in Buchst. e seiner Präambel an, dass „das Verständnis von Behinderung sich ständig weiterentwickelt und dass Behinderung aus der Wechselwirkung zwischen Menschen mit Beeinträchtigungen und einstellungs- und umweltbedingten Barrieren entsteht, die sie an der vollen, wirksamen und gleichberechtigten Teilhabe an der Gesellschaft hindern". So bestimmt Art. 1 Abs. 2 dieses Übereinkommens, dass zu den Menschen mit Behinderungen Menschen zählen, „die langfristige körperliche, seelische, geistige oder Sinnesbeeinträchtigungen haben, welche sie in Wechselwirkung mit verschiedenen Barrieren an der vollen, wirksamen und gleichberechtigten Teilhabe an der Gesellschaft hindern können".

38 In Anbetracht der Erwägungen in den Randnrn. 28 bis 32 des vorliegenden Urteils ist der Begriff „Behinderung" so zu verstehen, dass er eine Einschränkung erfasst, die insbesondere auf physische, geistige oder psychische Beeinträchtigungen zurückzuführen ist, die in

Wechselwirkung mit verschiedenen Barrieren den Betreffenden an der vollen und wirksamen Teilhabe am Berufsleben, gleichberechtigt mit den anderen Arbeitnehmern, hindern können.

39 Außerdem ergibt sich aus Art. 1 Abs. 2 des VN-Übereinkommens, dass die körperlichen, seelischen, geistigen oder Sinnesbeeinträchtigungen „langfristig" sein müssen.

40 Ferner ist, wie die Generalanwältin in Nr. 32 ihrer Schlussanträge ausgeführt hat, nicht ersichtlich, dass die Richtlinie 2000/78 nur Behinderungen erfassen will, die angeboren sind oder von Unfällen herrühren, und Behinderungen, die durch eine Krankheit verursacht sind, ausschlösse. Für den Anwendungsbereich dieser Richtlinie je nach Ursache der Behinderung zu differenzieren, würde nämlich ihrem Ziel selbst, die Gleichbehandlung zu verwirklichen, widersprechen.

41 Es ist daher festzustellen, dass eine heilbare oder unheilbare Krankheit unter den Begriff „Behinderung" im Sinne der Richtlinie 2000/78 fallen kann, wenn sie eine Einschränkung mit sich bringt, die insbesondere auf physische, geistige oder psychische Beeinträchtigungen zurückzuführen ist, die in Wechselwirkung mit verschiedenen Barrieren den Betreffenden an der vollen und wirksamen Teilhabe am Berufsleben, gleichberechtigt mit den anderen Arbeitnehmern, hindern können, und wenn diese Einschränkung von langer Dauer ist.

42 Dagegen fällt eine Krankheit, die keine solche Einschränkung mit sich bringt, nicht unter den Begriff „Behinderung" im Sinne der Richtlinie 2000/78. Krankheit als solche kann nämlich nicht als ein weiterer Grund neben denen angesehen werden, derentwegen Personen zu diskriminieren nach der Richtlinie 2000/78 verboten ist (vgl. Urteil Chacón Navas, Randnr. 57).

43 Dass der Betreffende seine Arbeit nur in begrenztem Umfang ausüben kann, steht einer Subsumierung seines Gesundheitszustands unter den Begriff „Behinderung" nicht entgegen. Entgegen dem Vorbringen von DAB und Pro Display ist eine Behinderung nicht unbedingt mit dem vollständigen Ausschluss von der Arbeit oder vom Berufsleben verbunden.

44 Insoweit ist der Begriff „Behinderung", wie er sich aus Randnr. 38 des vorliegenden Urteils ergibt, so zu verstehen, dass er eine Beeinträchtigung der Ausübung einer beruflichen Tätigkeit erfasst, nicht aber, wie DAB und Pro Display geltend machen, die Unmöglichkeit, eine solche Tätigkeit auszuüben. Der Gesundheitszustand von Menschen mit Behinderung, die – zumindest Teilzeit – arbeiten können, kann daher unter den Begriff „Behinderung" fallen. Eine Auslegung wie die von DAB und Pro Display vertretene wäre überdies unvereinbar mit dem Ziel der Richtlinie 2000/78, die insbesondere Menschen mit Behinderung Zugang zur Beschäftigung oder die Ausübung eines Berufs ermöglichen soll.

45 Ferner hängt die Feststellung des Vorliegens einer Behinderung nicht von der Art der zu treffenden Vorkehrungsmaßnahmen, wie z. B. der Verwendung besonderer Hilfsmittel, ab. Die Definition des Begriffs „Behinderung" im Sinne von Art. 1 der Richtlinie 2000/78 geht der Bestimmung und Beurteilung der in Art. 5 der Richtlinie ins Auge gefassten geeigneten Vorkehrungsmaßnahmen voraus.

46 Gemäß dem 16. Erwägungsgrund der Richtlinie 2000/78 soll mit solchen Maßnahmen den Bedürfnissen von Menschen mit Behinderung Rechnung getragen werden. Sie sind daher Folge und nicht Tatbestandsmerkmal der Behinderung. Auch kann mit den im 20. Erwägungsgrund dieser Richtlinie angesprochenen Maßnahmen oder Vorkehrungen die Verpflichtung aus Art. 5 der Richtlinie erfüllt werden; dies gilt aber nur dann, wenn überhaupt eine Behinderung vorliegt.

47 Aus den vorstehenden Erwägungen ergibt sich, dass auf die erste und die zweite Frage zu antworten ist, dass der Begriff „Behinderung" im Sinne der Richtlinie 2000/78 dahin auszulegen ist, dass er einen Zustand einschließt, der durch eine ärztlich diagnostizierte heilbare oder unheilbare Krankheit verursacht wird, wenn diese Krankheit eine Einschränkung mit sich bringt, die insbesondere auf physische, geistige oder psychische Beeinträchtigungen zurückzuführen ist, die in Wechselwirkung mit verschiedenen Barrieren den Betreffenden an der vollen und wirksamen Teilhabe am Berufsleben, gleichberechtigt mit den anderen Arbeitnehmern, hindern können, und wenn diese Einschränkung von langer

Dauer ist. Für die Frage, ob der Gesundheitszustand einer Person unter diesen Begriff fällt, kommt es nicht auf die Art der Maßnahmen an, die der Arbeitgeber ergreifen muss.

Zur dritten Frage

48 Mit seiner dritten Frage möchte das vorlegende Gericht wissen, ob Art. 5 der Richtlinie 2000/78 dahin auszulegen ist, dass die Verkürzung der Arbeitszeit eine der in dieser Vorschrift genannten Vorkehrungsmaßnahmen darstellen kann.

49 Nach dieser Vorschrift ist der Arbeitgeber verpflichtet, geeignete Maßnahmen zu ergreifen, insbesondere um Menschen mit Behinderung den Zugang zur Beschäftigung, die Ausübung eines Berufs und den beruflichen Aufstieg zu ermöglichen. Insoweit enthält der 20. Erwägungsgrund der Richtlinie eine nicht abschließende Aufzählung solcher Maßnahmen, die die Arbeitsumgebung, die Arbeitsorganisation und/oder die Aus- und Fortbildung betreffen können.

50 Weder in Art. 5 der Richtlinie 2000/78 noch in ihrem 20. Erwägungsgrund wird die Verkürzung der Arbeitszeit erwähnt. Allerdings ist der in diesem Erwägungsgrund enthaltene Begriff „Arbeitsrhythmus" auszulegen, um feststellen zu können, ob eine Arbeitszeitverkürzung darunter fallen kann.

51 DAB und Pro Display machen hierzu geltend, dass dieser Begriff Gesichtspunkte erfasst wie die Organisation des Arbeitsrhythmus und des Arbeitstakts, z. B. im Rahmen eines Herstellungsprozesses, sowie der Pausen, um die Belastung des behinderten Arbeitnehmers so weit wie möglich zu verringern.

52 Es ergibt sich jedoch weder aus dem 20. Erwägungsgrund noch aus irgendeiner anderen Bestimmung der Richtlinie 2000/78, dass der Unionsgesetzgeber den Begriff „Arbeitsrhythmus" auf solche Gesichtspunkte beschränken und die Gestaltung der Arbeitszeit, insbesondere die Möglichkeit für Menschen mit Behinderung, die nicht oder nicht mehr Vollzeit arbeiten können, ihre Arbeit in Teilzeit zu verrichten, ausschließen wollte.

53 Nach Art. 2 Abs. 4 des VN-Übereinkommens sind „angemessene Vorkehrungen notwendige und geeignete Änderungen und Anpassungen, die keine unverhältnismäßige oder unbillige Belastung darstellen und die, wenn sie in einem bestimmten Fall erforderlich sind, vorgenommen werden, um zu gewährleisten, dass Menschen mit Behinderungen gleichberechtigt mit anderen alle Menschenrechte und Grundfreiheiten genießen oder ausüben können". Daraus folgt, dass diese Bestimmung eine weite Definition des Begriffs „angemessene Vorkehrungen" enthält.

54 Im Zusammenhang mit der Richtlinie 2000/78 ist dieser Begriff somit dahin zu verstehen, dass er die Beseitigung der verschiedenen Barrieren umfasst, die die volle und wirksame Teilhabe der Menschen mit Behinderung am Berufsleben, gleichberechtigt mit den anderen Arbeitnehmern, behindern.

55 Da zum einen der 20. Erwägungsgrund der Richtlinie 2000/78 und Art. 2 Abs. 4 des VN-Übereinkommens nicht nur materielle, sondern auch organisatorische Maßnahmen ansprechen und zum anderen der Begriff „Arbeitsrhythmus" als Takt oder Geschwindigkeit, mit der die Arbeit verrichtet wird, zu verstehen ist, lässt sich nicht ausschließen, dass eine Arbeitszeitverkürzung eine der in Art. 5 dieser Richtlinie genannten Vorkehrungen sein kann.

56 Es ist ferner darauf hinzuweisen, dass die im 20. Erwägungsgrund der Richtlinie 2000/78 enthaltene Aufzählung angemessener Maßnahmen zur Einrichtung des Arbeitsplatzes entsprechend der Behinderung nicht abschließend ist, so dass eine Arbeitszeitverkürzung, selbst wenn sie nicht unter den Begriff „Arbeitsrhythmus" fiele, in Fällen, in denen sie es dem Arbeitnehmer ermöglicht, seine Arbeit entsprechend dem mit Art. 5 dieser Richtlinie verfolgten Ziel weiter auszuüben, als eine Vorkehrungsmaßnahme im Sinne dieser Vorschrift angesehen werden kann.

57 Nach dem 17. Erwägungsgrund der Richtlinie 2000/78 wird jedoch unbeschadet der Verpflichtung, für Menschen mit Behinderung angemessene Vorkehrungen zu treffen, zu denen eine etwaige Verkürzung ihrer Arbeitszeit gehört, nicht die Einstellung, der berufliche Aufstieg oder die Weiterbeschäftigung einer Person vorgeschrieben, wenn diese für die Erfüllung der wesentlichen Funktionen des Arbeitsplatzes nicht kompetent, fähig oder verfügbar ist.

58 Darüber hinaus müssen nach Art. 5 der Richtlinie die Vorkehrungen, auf die Menschen mit Behinderung Anspruch haben, in dem Sinne angemessen sein, dass sie den Arbeitgeber nicht unverhältnismäßig belasten.

59 In den Ausgangsverfahren ist es daher Sache des nationalen Gerichts zu prüfen, ob die Arbeitszeitverkürzung als Vorkehrungsmaßnahme die Arbeitgeber unverhältnismäßig belasten würde.

60 Wie sich aus dem 21. Erwägungsgrund der Richtlinie 2000/78 ergibt, sollten in diesem Zusammenhang insbesondere der mit einer solchen Maßnahme verbundene finanzielle und sonstige Aufwand sowie die Größe, die finanziellen Ressourcen und der Gesamtumsatz des Unternehmens und die Verfügbarkeit von öffentlichen Mitteln oder anderen Unterstützungsmöglichkeiten berücksichtigt werden.

61 Insoweit ist zu beachten, dass in einem Verfahren nach Art. 267 AEUV, das auf einer klaren Aufgabentrennung zwischen den nationalen Gerichten und dem Gerichtshof beruht, jede Beurteilung des Sachverhalts in die Zuständigkeit des vorlegenden Gerichts fällt. Um diesem eine sachdienliche Antwort zu geben, kann ihm der Gerichtshof jedoch im Geist der Zusammenarbeit mit den nationalen Gerichten alle Hinweise geben, die er für erforderlich hält (Urteil vom 15. April 2010, Sandström, C-433/05, Slg. 2010, I-2885, Randnr. 35 und die dort angeführte Rechtsprechung).

62 Für diese Beurteilung kann der vom vorlegenden Gericht angeführte Umstand relevant sein, dass DAB unmittelbar nach der Kündigung von Frau Ring eine Stellenanzeige für eine(n) Büroangestellte(n) in Teilzeit, d. h. 22 Stunden pro Woche, für ihr Büro in Lyngby aufgegeben hat. Den dem Gerichtshof vorliegenden Akten lässt sich nichts dafür entnehmen, dass Frau Ring nicht fähig gewesen wäre, diese Teilzeitstelle zu bekleiden, oder dafür, weshalb ihr die Stelle nicht angeboten wurde. Das vorlegende Gericht hat ferner ausgeführt, dass Frau Ring kurz nach ihrer Entlassung eine neue Stelle als Empfangssekretärin bei einem anderen Unternehmen angetreten habe und dass ihre tatsächliche Arbeitszeit 20 Wochenstunden betrage.

63 Darüber hinaus sieht das dänische Recht, wie die dänische Regierung in der mündlichen Verhandlung ausgeführt hat, die Möglichkeit vor, den Unternehmen öffentliche Hilfen für die Vorkehrungen zu gewähren, die den Zugang von Menschen mit Behinderung zum Arbeitsmarkt erleichtern sollen, insbesondere Initiativen, die den Arbeitgebern einen Anreiz bieten sollen, Menschen mit Behinderung einzustellen und weiterzubeschäftigen.

64 Demnach ist auf die dritte Frage zu antworten, dass Art. 5 der Richtlinie 2000/78 dahin auszulegen ist, dass die Verkürzung der Arbeitszeit eine der in dieser Vorschrift genannten Vorkehrungsmaßnahmen darstellen kann. Es ist Sache des nationalen Gerichts, zu beurteilen, ob unter den Umständen der Ausgangsverfahren die Verkürzung der Arbeitszeit als Vorkehrungsmaßnahme eine unverhältnismäßige Belastung des Arbeitgebers darstellt.

Zu Frage 4 Buchst. b

65 Mit seiner Frage 4 Buchst. b möchte das vorlegende Gericht wissen, ob die Richtlinie 2000/78 dahin auszulegen ist, dass sie einer nationalen Bestimmung, nach der ein Arbeitgeber einen Arbeitsvertrag mit einer verkürzten Kündigungsfrist beenden kann, wenn der betroffene behinderte Arbeitnehmer innerhalb der letzten zwölf Monate krankheitsbedingt 120 Tage mit Entgeltfortzahlung abwesend war, entgegensteht, wenn diese Fehlzeiten darauf zurückzuführen sind, dass der Arbeitgeber nicht gemäß der Verpflichtung nach Art. 5 dieser Richtlinie, angemessene Vorkehrungen zu treffen, die geeigneten Maßnahmen ergriffen hat.

66 Der Umstand, dass ein Arbeitgeber es unterlassen hat, diese Maßnahmen zu ergreifen, kann in Anbetracht der sich aus Art. 5 der Richtlinie 2000/78 ergebenden Verpflichtung zur Folge haben, dass die Fehlzeiten eines behinderten Arbeitnehmers auf die Untätigkeit des Arbeitgebers und nicht auf die Behinderung des Arbeitnehmers zurückzuführen sind.

67 Sollte das nationale Gericht feststellen, dass die Fehlzeiten der Arbeitnehmerinnen im vorliegenden Fall darauf zurückzuführen sind, dass der Arbeitgeber keine geeigneten Vorkehrungsmaßnahmen ergriffen hat, stünde die Richtlinie 2000/78 der Anwendung einer nationalen Bestimmung wie der in den Ausgangsverfahren fraglichen entgegen.

68 In Anbetracht der vorstehenden Erwägungen ist auf die Frage 4 Buchst. b zu antworten, dass die Richtlinie 2000/78 dahin auszulegen ist, dass sie einer nationalen Bestimmung, nach der ein Arbeitgeber einen Arbeitsvertrag mit einer verkürzten Kündigungsfrist beenden kann, wenn der betroffene behinderte Arbeitnehmer innerhalb der letzten zwölf Monate krankheitsbedingt 120 Tage mit Entgeltfortzahlung abwesend war, entgegensteht, wenn diese Fehlzeiten darauf zurückzuführen sind, dass der Arbeitgeber nicht gemäß der Verpflichtung nach Art. 5 dieser Richtlinie, angemessene Vorkehrungen zu treffen, die geeigneten Maßnahmen ergriffen hat.

Zu Frage 4 Buchst. a

69 Mit seiner Frage 4 Buchst. a möchte das vorlegende Gericht wissen, ob die Richtlinie 2000/78 dahin auszulegen ist, dass sie einer nationalen Bestimmung, nach der ein Arbeitgeber einen Arbeitsvertrag mit einer verkürzten Kündigungsfrist beenden kann, wenn der betroffene behinderte Arbeitnehmer innerhalb der letzten zwölf Monate krankheitsbedingt 120 Tage mit Entgeltfortzahlung abwesend war, entgegensteht, wenn diese Fehlzeiten auf seine Behinderung zurückzuführen sind.

70 Es ist davon auszugehen, dass das vorlegende Gericht mit dieser Frage den Fall meint, dass § 5 Abs. 2 FL auf Menschen mit Behinderungen nach einer krankheitsbedingten Abwesenheit angewandt wird, die ganz oder teilweise auf die Behinderung und nicht darauf zurückzuführen ist, dass der Arbeitgeber nicht gemäß der Verpflichtung nach Art. 5 dieser Richtlinie, angemessene Vorkehrungen zu treffen, die geeigneten Maßnahmen ergriffen hat.

71 Wie der Gerichtshof in Randnr. 48 des Urteils Chacón Navas festgestellt hat, greift eine Benachteiligung wegen einer Behinderung nur dann in den Schutzbereich der Richtlinie 2000/78 ein, wenn sie eine Diskriminierung im Sinne von Art. 2 Abs. 1 der Richtlinie darstellt. Der unter diese Richtlinie fallende behinderte Arbeitnehmer muss nämlich gegen jedwede Diskriminierung im Verhältnis zu einem nichtbehinderten Arbeitnehmer geschützt werden. Es stellt sich daher die Frage, ob die in den Ausgangsverfahren fragliche nationale Bestimmung zu einer Diskriminierung von Menschen mit Behinderung führen kann.

72 Zur Frage, ob die in den Ausgangsverfahren fragliche nationale Bestimmung eine auf der Behinderung beruhende Ungleichbehandlung enthält, ist festzustellen, dass § 5 Abs. 2 FL, der krankheitsbedingte Fehlzeiten betrifft, in gleicher Weise auf behinderte und nichtbehinderte Menschen anwendbar ist, die krankheitsbedingt mehr als 120 Tage abwesend sind. Unter diesen Umständen kann nicht davon ausgegangen werden, dass diese Bestimmung eine unmittelbar auf der Behinderung beruhende Ungleichbehandlung im Sinne von Art. 1 in Verbindung mit Art. 2 Abs. 2 Buchst. a der Richtlinie 2000/78 schafft.

73 In diesem Zusammenhang ist darauf hinzuweisen, dass eine Person, deren Arbeitgeber den Arbeitsvertrag mit einer verkürzten Kündigungsfrist ausschließlich wegen Krankheit beendet, nicht von dem durch die Richtlinie 2000/78 zur Bekämpfung der Diskriminierung wegen einer Behinderung geschaffenen allgemeinen Rahmen erfasst wird (vgl. entsprechend Urteil Chacón Navas, Randnr. 47).

74 § 5 Abs. 2 FL enthält somit keine unmittelbare auf der Behinderung beruhende Diskriminierung, da er auf ein Kriterium abstellt, das nicht untrennbar mit der Behinderung verbunden ist.

75 Zur Frage, ob diese Bestimmung zu einer mittelbar auf der Behinderung beruhenden Ungleichbehandlung führen kann, ist festzustellen, dass die Berücksichtigung von Fehlzeiten wegen mit der Behinderung in Zusammenhang stehenden Krankheiten bei der Berechnung krankheitsbedingter Fehlzeiten darauf hinausläuft, eine mit der Behinderung in Zusammenhang stehende Krankheit mit dem allgemeinen Begriff der Krankheit gleichzusetzen. Die Begriffe „Behinderung" und „Krankheit" lassen sich aber, wie der Gerichtshof in Randnr. 44 des Urteils Chacón Navas ausgeführt hat, nicht schlicht und einfach einander gleichsetzen.

76 Hierzu ist festzustellen, dass ein behinderter Arbeitnehmer einem höheren Risiko ausgesetzt ist, dass ihm gegenüber die in § 5 Abs. 2 FL vorgesehene verkürzte Kündigungsfrist angewandt wird, als ein nicht behinderter Arbeitnehmer. Im Vergleich zu einem Arbeitnehmer ohne Behinderung trägt ein Arbeitnehmer mit Behinderung nämlich, wie die Generalanwältin in Nr. 67 ihrer Schlussanträge ausgeführt hat, ein zusätzliches Risiko, an einer mit seiner Behinderung zusammenhängenden Krankheit zu erkranken. Er ist somit einem höheren Risiko ausgesetzt, krankheitsbedingte Fehltage anzusammeln und damit die in § 5 Abs. 2 FL vorgesehene Grenze von 120 Tagen zu erreichen. Diese 120-Tage-Regel kann daher Arbeitnehmer mit Behinderung benachteiligen und so zu einer mittelbar auf der Behinderung beruhenden Ungleichbehandlung im Sinne von Art. 2 Abs. 2 Buchst. b der Richtlinie 2000/78 führen.

77 Nach Ziff. i dieser Bestimmung ist zu prüfen, ob diese Ungleichbehandlung durch ein rechtmäßiges Ziel sachlich gerechtfertigt ist, ob die zu dessen Erreichung eingesetzten Mittel angemessen sind und ob sie nicht über das hinausgehen, was zur Erreichung des vom dänischen Gesetzgeber verfolgten Ziels erforderlich ist.

78 Zum Ziel des § 5 Abs. 2 FL führt die dänische Regierung aus, dass es darum gehe, den Arbeitgebern einen Anreiz zu bieten, Arbeitnehmer, bei denen ein besonderes Risiko besteht, dass sie krankheitsbedingt wiederholt abwesend sind, einzustellen und weiterzubeschäftigen, indem es ihnen ermöglicht wird, diese Arbeitnehmer später mit einer verkürzten Kündigungsfrist zu entlassen, wenn die Fehlzeiten von sehr langer Dauer sind. Als Gegenleistung könnten diese Arbeitnehmer während der Dauer ihrer Krankheit in ihrer Beschäftigung verbleiben.

79 Diese Regel bringe daher die Interessen des Arbeitgebers und des Arbeitnehmers in Einklang und entspreche ganz der allgemeinen Regulierung des dänischen Arbeitsmarkts, die auf einer Kombination aus Flexibilität und Vertragsfreiheit einerseits und dem Schutz der Arbeitnehmer andererseits beruhe.

80 DAB und Pro Display weisen darauf hin, dass die in § 5 Abs. 2 FL vorgesehene 120-Tage-Regel kranke Arbeitnehmer schütze, da ein Arbeitgeber, der ihrer Anwendbarkeit zugestimmt habe, im Allgemeinen geneigt sei, länger zu warten, bevor er einen solchen Arbeitnehmer entlasse.

81 Es ist darauf hinzuweisen, dass die Mitgliedstaaten über einen weiten Wertungsspielraum nicht nur bei der Entscheidung über die Verfolgung eines bestimmten sozial- und beschäftigungspolitischen Ziels, sondern auch bei der Festlegung der für seine Erreichung geeigneten Maßnahmen verfügen (vgl. in diesem Sinne Urteile vom 5. Juli 2012, Hörnfeldt, C-141/11, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 32, und vom 6. Dezember 2012, Odar, C-152/11, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 47).

82 Der Gerichtshof hat bereits entschieden, dass die Förderung von Einstellungen unbestreitbar ein legitimes Ziel der Sozial- oder Beschäftigungspolitik der Mitgliedstaaten darstellt und dass diese Wertung offensichtlich auch für Instrumente der nationalen Arbeitsmarktpolitik gelten muss, die für bestimmte Arbeitnehmergruppen die Chancen auf Eingliederung in das Erwerbsleben verbessern sollen (vgl. Urteil vom 16. Oktober 2007, Palacios de la Villa, C-411/05, Slg. 2007, I-8531, Randnr. 65). Auch eine Maßnahme zur Förderung der Flexibilität des Arbeitsmarkts kann als eine beschäftigungspolitische Maßnahme angesehen werden.

83 Daher können Ziele der Art, wie die dänische Regierung sie angeführt hat, grundsätzlich im Rahmen des nationalen Rechts eine auf der Behinderung beruhende Ungleichbehandlung, wie sie sich aus § 5 Abs. 2 FL ergibt, im Sinne von Art. 2 Abs. 2 Buchst. b Ziff. i der Richtlinie 2000/78 sachlich rechtfertigen.

84 Ferner muss geprüft werden, ob die zur Erreichung dieser Ziele eingesetzten Mittel angemessen und erforderlich sind und ob sie nicht über das zur Erreichung dieser Ziele Erforderliche hinausgehen.

85 Die dänische Regierung vertritt die Ansicht, dass mit § 5 Abs. 2 FL zum einen das Ziel, die Einstellung und die Weiterbeschäftigung von Personen, die zumindest potenziell nur eingeschränkt arbeitsfähig seien, zu ermöglichen, und zum anderen das höherrangige Ziel eines flexiblen, auf vertraglichen Vereinbarungen beruhenden und sicheren Arbeitsmarkts auf die angemessenste Weise erreicht werden könne.

86 DAB und Pro Display weisen insoweit darauf hin, dass der Arbeitgeber, der dem im Krankheitsurlaub befindlichen Arbeitnehmer das Entgelt zahle, nach der dänischen Regelung über die Krankentagegelder Anspruch auf Erstattung dieser Tagegelder durch die kommunalen Behörden des Wohnorts des Arbeitnehmers habe. Dieser Anspruch sei jedoch auf 52 Wochen beschränkt, und die Tagegelder seien niedriger als das tatsächliche Entgelt. § 5 Abs. 2 FL gewährleiste daher ein angemessenes Gleichgewicht zwischen den hinsichtlich der krankheitsbedingten Fehlzeiten widerstreitenden Interessen des Arbeitnehmers und des Arbeitgebers.

87 Angesichts des weiten Wertungsspielraums, der den Mitgliedstaaten nicht nur bei der Entscheidung über die Verfolgung eines bestimmten sozial- und beschäftigungspolitischen Ziels, sondern auch bei der Festlegung der für seine Erreichung geeigneten Maßnahmen zusteht, erscheint ihre Auffassung, dass eine Maßnahme wie die 120-Tage-Regel des § 5 Abs. 2 FL zur Erreichung der vorgenannten Ziele angemessen sein kann, nicht unvernünftig.

88 Es ist nämlich davon auszugehen, dass diese Regel den Arbeitgebern dadurch, dass sie das Recht vorsieht, Arbeitnehmer, die krankheitsbedingt mehr als 120 Tage abwesend sind, unter Anwendung einer verkürzten Kündigungsfrist zu entlassen, einen Anreiz zur Einstellung und Weiterbeschäftigung bietet.

89 Zur Prüfung der Frage, ob die 120-Tage-Regel des § 5 Abs. 2 FL über das zur Erreichung der verfolgten Ziele Erforderliche hinausgeht, ist diese Vorschrift in dem Kontext zu betrachten, in den sie sich einfügt, und sind die Nachteile zu berücksichtigen, die sie für die Betroffenen bewirken kann (vgl. in diesem Sinne Urteil Odar, Randnr. 65).

90 Es ist Sache des vorlegenden Gerichts, zu prüfen, ob der dänische Gesetzgeber es bei der Verfolgung der rechtmäßigen Ziele, die Einstellung kranker Personen einerseits und ein angemessenes Gleichgewicht zwischen den widerstreitenden Interessen des Arbeitnehmers und des Arbeitgebers andererseits zu fördern, unterlassen hat, relevante Gesichtspunkte zu berücksichtigen, die insbesondere Arbeitnehmer mit Behinderung betreffen.

91 Insoweit darf das Risiko für Menschen mit Behinderung, die im Allgemeinen größere Schwierigkeiten als nichtbehinderte Arbeitnehmer haben, sich wieder in den Arbeitsmarkt einzugliedern, und die spezifische Bedürfnisse im Zusammenhang mit dem Schutz haben, den ihr Zustand erfordert, nicht verkannt werden (vgl. in diesem Sinne Urteil Odar, Randnrn. 68 und 69).

92 In Anbetracht der vorstehenden Erwägungen ist auf die Frage 4 Buchst. a zu antworten, dass die Richtlinie 2000/78 dahin auszulegen ist, dass sie einer nationalen Bestimmung, nach der ein Arbeitgeber einen Arbeitsvertrag mit einer verkürzten Kündigungsfrist beenden kann, wenn der betroffene behinderte Arbeitnehmer innerhalb der letzten zwölf Monate krankheitsbedingt 120 Tage mit Entgeltfortzahlung abwesend war, entgegensteht, wenn diese Fehlzeiten auf seine Behinderung zurückzuführen sind, es sei denn, diese Bestimmung verfolgt ein rechtmäßiges Ziel und geht nicht über das zu dessen Erreichung Erforderliche hinaus, was zu prüfen Sache des vorlegenden Gerichts ist.

Kosten

93 Für die Parteien der Ausgangsverfahren ist das Verfahren ein Zwischenstreit in den bei dem vorlegenden Gericht anhängigen Rechtsstreitigkeiten; die Kostenentscheidung ist daher Sache dieses Gerichts. Die Auslagen anderer Beteiligter für die Abgabe von Erklärungen vor dem Gerichtshof sind nicht erstattungsfähig.

Aus diesen Gründen hat der Gerichtshof (Zweite Kammer) für Recht erkannt:

1. **Der Begriff „Behinderung" im Sinne der Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf ist dahin auszulegen, dass er einen Zustand einschließt, der durch eine ärztlich diagnostizierte heilbare oder unheilbare Krankheit verursacht wird, wenn diese Krankheit eine Einschränkung mit sich bringt, die insbesondere auf physische, geistige oder psychische Beeinträchtigungen zurückzuführen ist, die in Wechselwirkung mit verschiedenen Barrieren den Betreffenden an der vollen und wirksamen Teilhabe am Berufsleben, gleichberechtigt mit den anderen Arbeitnehmern, hindern können, und wenn diese Einschränkung von langer Dauer ist. Für die Frage, ob der Gesundheitszustand einer Person unter diesen Begriff fällt, kommt es nicht auf die Art der Maßnahmen an, die der Arbeitgeber ergreifen muss.**

2. **Art. 5 der Richtlinie 2000/78 ist dahin auszulegen, dass die Verkürzung der Arbeitszeit eine der in dieser Vorschrift genannten Vorkehrungsmaßnahmen darstellen kann. Es ist Sache des nationalen Gerichts, zu beurteilen, ob unter den Umständen der Ausgangsverfahren die Verkürzung der Arbeitszeit als Vorkehrungsmaßnahme eine unverhältnismäßige Belastung des Arbeitgebers darstellt.**

3. **Die Richtlinie 2000/78 ist dahin auszulegen, dass sie einer nationalen Bestimmung, nach der ein Arbeitgeber einen Arbeitsvertrag mit einer verkürzten Kündigungsfrist beenden kann, wenn der betroffene behinderte Arbeitnehmer innerhalb der letzten zwölf Monate krankheitsbedingt 120 Tage mit Entgeltfortzahlung abwesend war, entgegensteht, wenn diese Fehlzeiten darauf zurückzuführen sind, dass der Arbeitgeber nicht gemäß der Verpflichtung nach Art. 5 dieser Richtlinie, angemessene Vorkehrungen zu treffen, die geeigneten Maßnahmen ergriffen hat.**

4. **Die Richtlinie 2000/78 ist dahin auszulegen, dass sie einer nationalen Bestimmung, nach der ein Arbeitgeber einen Arbeitsvertrag mit einer verkürzten Kündigungsfrist beenden kann, wenn der betroffene behinderte Arbeitnehmer innerhalb der letzten zwölf Monate krankheitsbedingt 120 Tage mit Entgeltfortzahlung abwesend war, entgegensteht, wenn diese Fehlzeiten auf seine Behinderung zurückzuführen sind, es sei denn, diese Bestimmung verfolgt ein rechtmäßiges Ziel und geht nicht über das zu dessen Erreichung Erforderliche hinaus, was zu prüfen Sache des vorlegenden Gerichts ist.**

Unterschriften

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* Verfahrenssprache: Dänisch.

SCHLUSSANTRÄGE DER GENERALANWÄLTIN
Juliane Kokott
vom 6. Dezember 2012(1)

Verbundene Rechtssachen C-335/11 und C-337/11

HK Danmark, handelnd für Jette Ring
gegen
Dansk Almennyttigt Boligselskab DAB

und

HK Danmark, handelnd für Lone Skouboe Werge
gegen
Pro Display A/S in Konkurs

(Vorabentscheidungsersuchen des Sø- og Handelsretten [Dänemark])

„Gleichbehandlung in Beschäftigung und Beruf – Richtlinie 2000/78/EG – Verbot der Diskriminierung wegen einer Behinderung – Begriff der Behinderung – Abgrenzung Krankheit und Behinderung – Angemessene Vorkehrungen für Menschen mit Behinderung – Mittelbare Diskriminierung – Rechtfertigung"

I – Einleitung

1. Wann liegt eine Behinderung im Sinne der Richtlinie 2000/78/EG zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf(2) vor, und wie ist der Begriff der Behinderung von dem der Krankheit abzugrenzen? Diese Frage steht im Mittelpunkt der vorliegenden Vorabentscheidungsverfahren. Der Gerichtshof ist somit aufgerufen, seine in der Rechtssache Chacón Navas(3) erarbeitete Definition des Behinderungsbegriffs zu präzisieren.

2. Darüber hinaus geht es darum, was unter angemessenen Vorkehrungen für Menschen mit Behinderung zu verstehen ist, die der Arbeitgeber nach Art. 5 der Richtlinie 2000/78 zu ergreifen hat. Schließlich fragt das vorlegende Gericht danach, ob eine wegen Krankheitsfehlzeiten verkürzte Kündigungsfrist eine Diskriminierung wegen einer Behinderung darstellen kann.

II – Rechtlicher Rahmen

A – *Völkerrecht*

3. In dem Übereinkommen der Vereinten Nationen vom 13. Dezember 2006 über die Rechte von Menschen mit Behinderungen(4) heißt es in der Präambel, Buchst. e: „in der

Erkenntnis, dass das Verständnis von Behinderung sich ständig weiterentwickelt und dass Behinderung aus der Wechselwirkung zwischen Menschen mit Beeinträchtigungen und einstellungs- und umweltbedingten Barrieren entsteht, die sie an der vollen, wirksamen und gleichberechtigten Teilhabe an der Gesellschaft hindern".

4. Art. 1 Abs. 2 des Übereinkommens enthält folgende Begriffsbestimmung:

„Zu den Menschen mit Behinderungen zählen Menschen, die langfristige körperliche, seelische, geistige oder Sinnesbeeinträchtigungen haben, welche sie in Wechselwirkung mit verschiedenen Barrieren an der vollen, wirksamen und gleichberechtigten Teilhabe an der Gesellschaft hindern können."

B – *Unionsrecht*

5. Der 20. Erwägungsgrund der Richtlinie 2000/78 bestimmt:

„Es sollten geeignete Maßnahmen vorgesehen werden, d. h. wirksame und praktikable Maßnahmen, um den Arbeitsplatz der Behinderung entsprechend einzurichten, z. B. durch eine entsprechende Gestaltung der Räumlichkeiten oder eine Anpassung des Arbeitsgeräts, des Arbeitsrhythmus, der Aufgabenverteilung oder des Angebots an Ausbildungs- und Einarbeitungsmaßnahmen."

6. Gemäß Art. 2 Abs. 2 Buchst. b der Richtlinie 2000/78 liegt eine mittelbare Diskriminierung vor, „wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren Personen mit einer bestimmten Religion oder Weltanschauung, einer bestimmten Behinderung, eines bestimmten Alters oder mit einer bestimmten sexuellen Ausrichtung gegenüber anderen Personen in besonderer Weise benachteiligen können, es sei denn:

i) diese Vorschriften, Kriterien oder Verfahren sind durch ein rechtmäßiges Ziel sachlich gerechtfertigt, und die Mittel sind zur Erreichung dieses Ziels angemessen und erforderlich, oder

…"

7. Art. 5 der Richtlinie 2000/78 sieht unter der Überschrift „Angemessene Vorkehrungen für Menschen mit Behinderung" Folgendes vor:

„Um die Anwendung des Gleichbehandlungsgrundsatzes auf Menschen mit Behinderung zu gewährleisten, sind angemessene Vorkehrungen zu treffen. Das bedeutet, dass der Arbeitgeber die geeigneten und im konkreten Fall erforderlichen Maßnahmen ergreift, um den Menschen mit Behinderung den Zugang zur Beschäftigung, die Ausübung eines Berufes, den beruflichen Aufstieg und die Teilnahme an Aus- und Weiterbildungsmaßnahmen zu ermöglichen, es sei denn, diese Maßnahmen würden den Arbeitgeber unverhältnismäßig belasten. Diese Belastung ist nicht unverhältnismäßig, wenn sie durch geltende Maßnahmen im Rahmen der Behindertenpolitik des Mitgliedstaates ausreichend kompensiert wird."

C – *Nationales Recht*

8. Die Umsetzung der Richtlinie 2000/78 in das dänische Recht ist durch das Forskelsbehandlingslov(5) erfolgt. Nach § 7 dieses Gesetzes besteht die Möglichkeit, bei Verstoß gegen das Diskriminierungsverbot oder Unterlassung der erforderlichen Maßnahmen durch den Arbeitgeber Schadensersatz geltend zu machen.

9. Das Funktionærlov(6) regelt die rechtliche Beziehung zwischen Arbeitgeber und Arbeitnehmer/Angestelltem.

10. § 5 FL Abs. 2 enthält eine besondere Bestimmung zur Kündigung eines Arbeitsverhältnisses wegen Krankheit des Arbeitnehmers und bestimmt:

„Durch schriftliche Vereinbarung kann jedoch für das einzelne Dienstverhältnis bestimmt werden, dass dem Angestellten mit einer Kündigungsfrist von 1 Monat zum Monatsende gekündigt werden kann, wenn der Angestellte innerhalb eines Zeitraums von 12 aufeinanderfolgenden Monaten Lohn während Krankenzeiten von insgesamt 120 Tagen bezogen hat. Die Kündigung ist nur gültig, wenn sie in unmittelbarem Anschluss am Ende der 120 Krankheitstage und noch während der Erkrankung des Angestellten erklärt wird, wohingegen es die Gültigkeit der Kündigung nicht berührt, dass der Angestellte nach der Kündigung die Arbeit wieder aufgenommen hat. …"

III – Sachverhalt und Ausgangsverfahren

11. Die vorliegenden Vorabentscheidungsverfahren gehen zurück auf zwei von dem Handels- og Kontorfunktionærernes Forbund Danmark (HK)(7) für die Arbeitnehmerinnen Jette Ring und Lone Skouboe Werge im Jahr 2006 erhobene Klagen, mit denen Schadensersatz nach dem dänischen Gleichbehandlungsgesetz wegen Diskriminierung aufgrund einer Behinderung geltend gemacht wurde. Für beide Arbeitsverhältnisse war die Geltung des § 5 Abs. 2 FL vereinbart worden.

A – *Rechtssache C-335/11*

12. Im Fall Ring liegt dem nationalen Verfahren folgender Sachverhalt zugrunde:

13. Frau Ring war seit dem Jahr 2000 bei der Firma Dansk Almennyttigt Boligselskab (DAB) als Mitarbeiterin im Kundencenter beschäftigt. Zwischen Juni 2005 bis zur Kündigung im November 2005 war sie krankheitsbedingt während mehrerer Zeiträume abwesend; die Fehlzeiten betrugen zusammen über 120 Tage. Die für die Fehlzeiten vorgelegten ärztlichen Bescheinigungen verwiesen vornehmlich auf chronische Rückenbeschwerden, die u. a. anderem auf Arthroseveränderungen an den Lendenwirbeln zurückzuführen waren und sich in konstanten Schmerzen im Lendenwirbelbereich äußerten. Nachdem die behandelnden Ärzte von einer Versteifung der Lendenwirbel durch natürliches Zusammenwachsen ausgingen, bestanden keine weiteren Behandlungsoptionen. Mögliche Maßnahmen zur Linderung dieser Beschwerden während der Arbeitszeit von Frau Ring, etwa die Anschaffung eines höhenverstellbaren Tisches für ihren Arbeitsplatz oder das Angebot einer Teilzeittätigkeit, erfolgten nicht. Grundsätzlich bot DAB jedoch Teilzeitstellen an.

14. Aufgrund der akkumulierten Fehlzeiten wurde Frau Ring mit nach § 5 Abs. 2 FL verkürzter Kündigungsfrist gekündigt. Unmittelbar nach der Kündigung von Frau Ring gab DAB eine Anzeige für eine Teilzeitstelle mit einer vergleichbaren Aufgabenbeschreibung für ein nahe gelegenes Regionalbüro auf. Frau Ring trat eine neue Stelle als Empfangssekretärin bei einer anderen Firma an, bei der ihr ein höhenverstellbarer Tisch zur Verfügung gestellt und ihre tatsächliche Arbeitszeit auf 20 Stunden pro Woche festgelegt wurde. Die Anstellung erfolgte in Vollzeit nach der dänischen Flexjob-Regelung mit 50 % Lohnkostenerstattung(8).

B – *Rechtssache C-337/11*

15. Im Fall Skouboe Werge hat das Sø- og Handelsret folgenden Sachverhalt mitgeteilt:

16. Frau Skouboe Werge war seit dem Jahr 1998 als Verwaltungsassistentin bei der Firma Pro Display beschäftigt. Nachdem sie im Dezember 2003 bei einem Verkehrsunfall ein Schleudertrauma erlitten hatte und drei Wochen krankgeschrieben war, nahm sie zunächst ihre Vollzeittätigkeit bei Pro Display wieder auf. Als gegen Ende des Jahres 2004 deutlich wurde, dass Frau Skouboe Werge noch immer unter den Nachwirkungen des Schleudertraumas litt, erhielt sie eine Krankmeldung für vorläufig vier Wochen, aufgrund deren sie nur ca. vier Stunden pro Tag arbeitete. Im Januar 2005 meldete sich Frau Skouboe Werge wegen anhaltender Beschwerden für die volle Arbeitszeit krank. Daraufhin wurde ihr unter Anwendung der 120-Tage-Regelung des § 5 Abs. 2 FL mit einer Kündigungsfrist von einem Monat zum 31. Mai 2005 gekündigt.

17. Die Beschwerden von Frau Skouboe Werge äußerten sich in verschiedenen Symptomen, insbesondere durch auf die Schultern ausstrahlende Schmerzen im Nacken, Kieferprobleme, Müdigkeit, Konzentrations- und Erinnerungsstörungen,

Formulierungsschwierigkeiten, übermäßige Lärmempfindlichkeit, niedrige Stressschwelle und Schwindel. Im Juni 2006 wurde Frau Skouboe Werge daher aufgrund der Einschätzung ihrer Arbeitsfähigkeit auf ca. acht Stunden pro Woche bei langsamem Tempo eine vorgezogene Altersrente bewilligt. Zudem wurde durch Entscheidung der Behörde für Arbeitsunfälle und Berufskrankheiten der Grad der Behinderung von Frau Skouboe Werge auf 10 % und die Verminderung ihrer Erwerbsfähigkeit auf 65 % festgesetzt.

18. In den Ausgangsverfahren vertrat HK die Ansicht, dass eine Kündigung der Arbeitnehmerinnen mit verkürzter Kündigungsfrist nach der Regelung des § 5 Abs. 2 FL ausgeschlossen gewesen sei, da dies gegen das Diskriminierungsverbot wegen Behinderung gemäß der Richtlinie 2000/78 verstoße. Dem vorlegenden Gericht stellt sich daher die Frage, wie „Behinderung" im Sinne der Richtlinie 2000/78 zu definieren ist.

IV – Vorabentscheidungsersuchen und Verfahren vor dem Gerichtshof

19. Mit Beschlüssen vom 29. Juni 2011, in der Kanzlei des Gerichtshofs eingegangen am 1. Juli 2011, hat der Sø- og Handelsret die Verfahren jeweils ausgesetzt und dem Gerichtshof folgende Fragen zur Vorabentscheidung vorgelegt:

1. a) Ist jede Person, die aufgrund physischer, mentaler oder psychischer Beeinträchtigungen während eines Zeitraums, der hinsichtlich der Dauer die Anforderung gemäß Randnr. 45 des Urteils des Gerichtshofs in der Rechtssache C-13/05 (Chacón Navas) erfüllt, ihre Arbeit nicht oder nur in begrenztem Umfang ausüben kann, vom Begriff der Behinderung im Sinne der Richtlinie umfasst?

   b) Kann ein Zustand, der durch eine ärztlich diagnostizierte unheilbare Krankheit verursacht ist, vom Begriff der Behinderung im Sinne der Richtlinie umfasst sein?

   c) Kann ein Zustand, der durch eine ärztlich diagnostizierte vorübergehende Krankheit verursacht ist, vom Begriff der Behinderung im Sinne der Richtlinie umfasst sein?

2. Ist eine dauerhafte Funktionsbeeinträchtigung, die keinen Bedarf an besonderen Hilfsmitteln oder Ähnlichem zur Folge hat und die allein oder im Wesentlichen darin besteht, dass die betreffende Person nicht zu einer Vollzeittätigkeit in der Lage ist, als Behinderung in dem Sinne anzusehen, in dem dieser Ausdruck in der Richtlinie 2000/78 verwendet wird?

3. Gehört eine Herabsetzung der Arbeitszeiten zu den von Art. 5 der Richtlinie 2000/78 umfassten Maßnahmen?

4. Verbietet es die Richtlinie 2000/78, eine nationale Rechtsvorschrift, nach der ein Arbeitgeber einem Arbeitnehmer mit verkürzter Kündigungsfrist kündigen darf, wenn der Arbeitnehmer innerhalb von zwölf aufeinanderfolgenden Monaten Lohn während Krankheitszeiten von insgesamt 120 Tagen bezogen hat, auf einen Arbeitnehmer anzuwenden, der als behindert im Sinne der Richtlinie anzusehen ist, wenn

a) die Abwesenheit durch die Behinderung verursacht ist?

oder

b) die Abwesenheit darauf zurückzuführen ist, dass der Arbeitgeber nicht die geeigneten und im konkreten Fall erforderlichen Maßnahmen ergriffen hat, um einer Person mit einer Behinderung die Ausübung ihres Berufs zu ermöglichen?

20. Mit Beschluss vom 4. August 2011 hat der Präsident des Gerichtshofs die Rechtssachen C-335/11 und C-337/11 zu gemeinsamem schriftlichem und mündlichem Verfahren sowie zu gemeinsamer Entscheidung verbunden.

21. Neben den Parteien des Ausgangsrechtsstreits haben die Regierungen Dänemarks, Irlands, Polens und des Vereinigten Königreichs sowie die Europäische Kommission am

schriftlichen und mündlichen Verfahren vor dem Gerichtshof teilgenommen. Darüber hinaus haben die Regierungen Belgiens und Griechenlands schriftliche Erklärungen abgegeben.

V – Würdigung

22. Die erste und die zweite Frage des Sø- og Handelsret sind zusammen zu beantworten, da beide die Definition des Behinderungsbegriffs betreffen (dazu unter A). Die dritte Frage hat die Ausgestaltung und den Umfang von Vorkehrungen, die der Arbeitgeber nach Art. 5 der Richtlinie 2000/78 zu ergreifen hat, zum Gegenstand (dazu unter B). Zuletzt ist die vierte Frage und damit die Verkürzung der Kündigungsfrist wegen krankheitsbedingten Fehlens als diskriminierende Vorschrift zu prüfen (dazu unter C).

A – *Erste und zweite Vorlagefrage*

1. Definition des Behinderungsbegriffs

23. Die Richtlinie 2000/78 enthält selbst keine Definition des Begriffs Behinderung.

24. Der Gerichtshof war bereits in der Rechtssache Chacón Navas aufgerufen, diesen Begriff unionsautonom zu definieren. Danach erfasst der Begriff Behinderung eine „Einschränkung, die insbesondere auf physische, geistige oder psychische Beeinträchtigungen zurückzuführen ist und die ein Hindernis für die Teilhabe des Betreffenden am Berufsleben bildet“(9). Zudem muss es wahrscheinlich sein, dass die Einschränkung von langer Dauer ist(10).

25. Im Jahr 2010 – und damit einige Jahre nach dem Urteil in der Rechtssache Chacón Navas – ratifizierte die Europäische Union das Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen. Das UN-Übereinkommen verweist zunächst in seiner Präambel darauf, dass der Begriff der Behinderung dynamisch zu verstehen ist und sich das Verständnis von Behinderung ständig weiterentwickelt(11). Art. 1 des Abkommens enthält dann eine Begriffsdefinition. Danach zählen zu den „Menschen mit Behinderungen … Menschen, die langfristige körperliche, seelische, geistige oder Sinnesbeeinträchtigungen haben, welche sie in Wechselwirkung mit verschiedenen Barrieren an der vollen, wirksamen und gleichberechtigten Teilhabe an der Gesellschaft hindern können“.

26. Aus Art. 216 Abs. 2 AEUV folgt, dass die von der Union geschlossenen internationalen Übereinkünfte die Unionsorgane und die Mitgliedstaaten binden. Die von der Union geschlossenen internationalen Übereinkünfte sind ab ihrem Inkrafttreten wesentlicher („integraler“) Bestandteil der Unionsrechtsordnung.(12) Daher sind Bestimmungen des abgeleiteten Unionsrechts nach Möglichkeit in Übereinstimmung mit den völkerrechtlichen Verpflichtungen der Union auszulegen(13).

27. Der Begriff der Behinderung nach der Richtlinie 2000/78 dürfte daher nicht hinter dem Schutzbereich zurückbleiben, den das UN-Übereinkommen eröffnet. Nach der Definition des UN-Übereinkommens ergibt sich das Hindernis für die Teilhabe an der Gesellschaft aus der „Wechselwirkung mit verschiedenen Barrieren“. Insofern könnte sich in bestimmten Konstellationen ergeben, dass die Definition des Urteil Chacón Navas hinter der Definition des UN-Übereinkommens zurückbleibt und völkerrechtskonform auszulegen wäre.

28. In den vorliegenden Fällen liegt der Kern des Problems allerdings nicht im Bereich des Definitionselements „Barrieren“. Das vorlegende Gericht möchte wissen, ob ein Zustand, der durch eine ärztlich diagnostizierte unheilbare oder vorübergehende heilbare Krankheit verursacht ist, vom Begriff der Behinderung erfasst sein kann. Weder die Definition des Urteils Chacón Navas noch jene des UN-Übereinkommens geben aus sich selbst heraus eine Antwort auf die Fragen des vorlegenden Gerichts. Denn abgesehen von dem Erfordernis einer langfristigen Einschränkung enthalten beide Definitionen keine expliziten Kriterien für die Abgrenzung von Behinderung und Krankheit.

29. Zur Beantwortung der Fragen des vorlegenden Gerichts ist im Folgenden daher die Abgrenzung von Krankheit und Behinderung zu erörtern.

2. Abgrenzung von Behinderung und Krankheit

30. In seinem Urteil Chacón Navas hat der Gerichtshof festgestellt, dass Arbeitnehmer nicht schon in den Schutzbereich der Richtlinie 2000/78 fallen, sobald sich bei ihnen irgendeine Krankheit manifestiert(14). Der Gerichtshof unterscheidet damit zwischen Krankheit und Behinderung. Denn eine „Krankheit" ist in der Richtlinie nicht als eigenes verbotenes Diskriminierungsmerkmal aufgeführt.

31. Der Gerichtshof hat aber nur eine „Krankheit als solche" vom Anwendungsbereich der Richtlinie ausgenommen(15). Dem Urteil Chacón Navas ist nicht zu entnehmen, dass eine Krankheit als Ursache einer Behinderung die Qualifizierung als Behinderung entfallen lässt. Schließlich hat der Gerichtshof auch in seinem zweiten Urteil zu einer behinderungsbedingten Diskriminierung präzisiert, dass dem Urteil Chacón Navas nicht zu entnehmen ist, dass der sachliche Geltungsbereich dieser Richtlinie restriktiv ausgelegt werden müsse(16).

32. Insbesondere ist nicht ersichtlich, dass die Richtlinie 2000/78 nur Behinderungen erfassen will, die angeboren sind oder von Unfällen herrühren. Für den Anwendungsbereich der Richtlinie je nach Ursache der Behinderung zu differenzieren, wäre willkürlich und würde damit selbst dem Ziel der Richtlinie, die Gleichbehandlung zu verwirklichen, widersprechen.

33. Es ist also zu trennen zwischen der Krankheit als möglicher Ursache der Beeinträchtigung und der daraus resultierenden Beeinträchtigung. Umfasst vom Schutz der Richtlinie ist auch die aus einer Krankheit resultierende dauerhafte Einschränkung, die zu einem Hindernis für die Teilhabe am Berufsleben führt.

34. In den vorliegenden Fällen geht es um körperliche Beeinträchtigungen, die sich u. a. in Schmerzen und Unbeweglichkeit äußern. Die Abgrenzung von Krankheit und Behinderung ist vorliegend daher einfacher als in dem Fall, den der oberste Gerichtshof der Vereinigten Staaten von Amerika zu entscheiden hatte, in dem dieser festgestellt hat, dass auch eine *symptomlose* HIV-Infektion eine Behinderung im Sinne des Anti-Discrimination Act darstellen kann(17). Ob die Beschwerden einer Person in einem konkreten Sachverhalt eine Einschränkung darstellen, unterliegt der Beurteilung des mitgliedstaatlichen Gerichts.

35. Dem Wortlaut der Richtlinie 2000/78 sind keine Anhaltspunkte für eine Begrenzung des Anwendungsbereichs auf einen bestimmten Schweregrad der Behinderung zu entnehmen(18). Da diese Frage jedoch weder vom vorlegenden Gericht gestellt wurde, noch zwischen den Verfahrensbeteiligten erörtert wurde, ist sie hier nicht abschließend zu entscheiden.

36. Für das Vorliegen einer Behinderung ist darüber hinaus ausschlaggebend, dass die Einschränkung wahrscheinlich von „langer Dauer" ist(19). Das UN-Übereinkommen spricht insofern davon, dass es sich um eine „langfristige"(20) Beeinträchtigung handeln muss. Inhaltlich erkenne ich hierin keinen Unterschied.

37. Die lange Dauer wird bei einer Einschränkung, die auf einer unheilbaren Krankheit beruht, in der Regel zu bejahen sein. Aber auch eine im Prinzip heilbare Krankheit kann einen so langen Verlauf bis zur vollständigen Heilung nehmen, dass die Einschränkung von langer Dauer ist. Und auch bei einer grundsätzlich heilbaren Krankheit kann eine langfristige Einschränkung zurückbleiben. Gerade bei chronischen Krankheiten kann sich der Übergang von einer (behandelbaren) Krankheit zu einer voraussichtlich dauerhaften Einschränkung, die dann erst den Charakter einer Behinderung hat, als fließender Prozess darstellen. Erst wenn die Prognose einer dauerhaften Einschränkung vorliegt, ist von einer Behinderung zu sprechen.

38. Allein aus der Feststellung, ob eine Krankheit an sich heilbar oder unheilbar, dauerhaft oder vorübergehend ist, kann daher kein definitiver Schluss auf das spätere Vorliegen einer dauerhaften Einschränkung gezogen werden.

3. Bedarf an besonderen Hilfsmitteln

39. Das vorlegende Gericht fragt darüber hinaus, ob die Annahme einer Behinderung die Notwendigkeit besonderer Hilfsmittel voraussetzt oder ob es genügt, dass die Ableistung der vollständigen Arbeitszeit nicht mehr möglich ist.

40. Der Begriff der Behinderung nach der Richtlinie setzt nicht die Notwendigkeit besonderer Hilfsmittel voraus.

41. Art. 5 der Richtlinie 2000/78 macht deutlich, dass zunächst das Bestehen einer Behinderung festgestellt werden muss, um anschließend die geeigneten und erforderlichen Maßnahmen zu ergreifen. Der 20. Erwägungsgrund liefert Anhaltspunkte dafür, was unter entsprechenden Maßnahmen zu verstehen sein kann, und nennt u. a., dass der „Arbeitsplatz der Behinderung entsprechend einzurichten" ist. Die Notwendigkeit besonderer Einrichtungen und Hilfsmittel ist also *Folge* der Feststellung der Behinderung und nicht Teil der Definition des Behinderungsbegriffs.

42. Auch vor dem Hintergrund von Sinn und Zweck der Richtlinie kann die Notwendigkeit besonderer Hilfsmittel als Teil der Definition nicht überzeugen. Behinderungen im Sinne der Richtlinie können auf physischen, psychischen oder seelischen Beeinträchtigungen beruhen. Die Forderung nach der Notwendigkeit besonderer Hilfsmittel scheint aber nur vom Leitbild eines Menschen geprägt, der körperliche Beeinträchtigungen hat. Würde man Hilfsmittel als zwingendes Element des Behinderungsbegriffs verlangen, wären schon die in der Richtlinie explizit angesprochenen seelischen oder psychischen Beeinträchtigungen nicht erfasst, da sie in der Regel auch keine Hilfsmittel erforderlich machen. Ein solches Erfordernis würde auch gerade diejenigen Behinderten benachteiligen, deren Behinderung nicht durch ein Hilfsmittel ausgeglichen oder gemildert werden kann und die bereits aus diesem Grund in der Regel eher schwerer betroffen sind als andere.

43. Im Ergebnis kommt es daher allein darauf an, ob ein Hindernis für die Teilhabe am Berufsleben vorliegt.

44. DAB und Pro Display haben vorgetragen, dass nur als behindert angesehen werden könne, wer vollständig vom Berufsleben ausgeschlossen sei, weshalb eine nur reduzierte Arbeitsleistung für die Einstufung als Behinderung nicht ausreiche. Dies überzeugt nicht. Schon nach allgemeinem Sprachverständnis umfasst der Begriff „Hindernis für die Teilhabe am Berufsleben" auch nur partielle Schranken und nicht nur einen generellen „Ausschluss" vom Berufsleben.

45. Für eine Einbeziehung von Menschen, deren Hindernis für die Teilnahme am Berufsleben darin liegt, dass sie nicht Vollzeit arbeiten können, spricht auch der 17. Erwägungsgrund der Richtlinie. Dieser sieht vor, dass der Schutzbereich der Richtlinie solche Arbeitnehmer erfasst, die grundsätzlich „für die Erfüllung der wesentlichen Funktionen des Arbeitsplatzes … kompetent, fähig oder verfügbar" sind. Die Richtlinie zielt folglich gerade auf den Schutz solcher Personen ab, die grundsätzlich am Arbeitsleben – wenn auch eventuell in begrenztem Umfang bzw. durch besondere Vorkehrungen – teilhaben können. Somit setzt die Anwendbarkeit der Richtlinie keinen Ausschluss der betroffenen Person vom Berufsleben voraus.

46. Als Zwischenergebnis ist folglich festzuhalten, dass der Begriff Behinderung eine Einschränkung umfasst, die insbesondere auf physische, geistige oder psychische Beeinträchtigungen zurückzuführen ist und die ein Hindernis für die Teilhabe des Betreffenden am Berufsleben darstellt. Für die Definition der Behinderung ist es unerheblich, dass die Beeinträchtigung durch eine Krankheit verursacht wurde; allein entscheidend ist, ob die Einschränkung von langer Dauer ist. Auch eine Funktionsbeeinträchtigung von langer Dauer, die keinen Bedarf an besonderen Hilfsmitteln zur Folge hat und die allein oder im Wesentlichen darin besteht, dass die betreffende Person nicht zu einer Vollzeittätigkeit in der Lage ist, ist als Behinderung im Sinne der Richtlinie 2000/78 anzusehen.

B – *Dritte Vorlagefrage*

47. Mit seiner dritten Vorlagefrage möchte der Sø- og Handelsret wissen, ob zu den angemessenen Vorkehrungen für Menschen mit Behinderung auch eine Herabsetzung der Arbeitszeit gehören kann.

48. Art. 5 Satz 1 der Richtlinie 2000/78 sieht vor, dass angemessene Vorkehrungen zu treffen sind, um die Anwendung des Gleichbehandlungsgrundsatzes auf Menschen mit Behinderung zu gewährleisten. Das bedeutet, dass der Arbeitgeber die „geeigneten und im konkreten Fall erforderlichen Maßnahmen" zu ergreifen hat, um den Menschen mit Behinderung den Zugang zur Beschäftigung, die Ausübung eines Berufs, den beruflichen Aufstieg und die Teilnahme an Aus- und Weiterbildungsmaßnahmen zu ermöglichen. Die Verpflichtung des Arbeitgebers entfällt, wenn ihn die Maßnahmen unverhältnismäßig belasten würden.

49. Ziel dieser Vorschrift ist es, nicht nur die Gleich*behandlung*, sondern die Gleich*stellung* eines behinderten Menschen durchzusetzen und ihm dadurch die Ausübung eines Berufs zu ermöglichen.

50. Art. 5 der Richtlinie 2000/78 selbst legt lediglich fest, dass die Maßnahmen „geeignet und im konkreten Fall erforderlich" sein müssen, um den Zugang zur Beschäftigung etc. zu ermöglichen.

51. Jedoch erläutert der 20. Erwägungsgrund der Richtlinie die Vorschrift näher. Danach sind „wirksame und praktikable Maßnahmen" vorzusehen, „um den Arbeitsplatz der Behinderung entsprechend einzurichten, z. B. durch eine entsprechende Gestaltung der Räumlichkeiten oder eine Anpassung des Arbeitsgeräts, des Arbeitsrhythmus, der Aufgabenverteilung oder des Angebots an Ausbildungs- und Einarbeitungsmaßnahmen".

52. Die Herabsetzung der Arbeitszeiten könnte von dem dort explizit aufgeführten Beispiel der „Anpassung des Arbeitsrhythmus" erfasst sein. DAB und Pro Display sind allerdings der Auffassung, dass „Arbeitsrhythmus" sich gerade nicht auf die Arbeitszeiten, sondern lediglich auf die Arbeitsleistung und das Arbeitstempo oder die Verteilung der Arbeitsaufgaben unter den Mitarbeitern beziehe.

53. Selbst wenn man der Auffassung ist, dass die Herabsetzung der Arbeitszeiten nicht unter die „Anpassung des Arbeitsrhythmus" fällt, ist meiner Ansicht nach die Herabsetzung der Arbeitszeit von Art. 5 der Richtlinie erfasst.

54. Denn es geht schon aus dem Wortlaut des 20. Erwägungsgrundes hervor, dass dieser nur eine beispielhafte Aufzählung enthält und nicht abschließend zu verstehen ist. Allein aus der Tatsache, dass die Herabsetzung der Arbeitszeit dort nicht ausdrücklich aufgeführt ist, kann nicht geschlossen werden, dass sie von Art. 5 der Richtlinie nicht erfasst ist.

55. DAB und Pro Display verweisen darüber hinaus darauf, dass der Begriff der Arbeitszeiten in der Richtlinie nicht erwähnt und auch in den Vorarbeiten zur Richtlinie nicht diskutiert worden sei. Auch sei der Begriff der Herabsetzung der Arbeitszeit so eng mit der Teilzeitrichtlinie(21) verknüpft, dass entsprechende Anträge nur nach dieser zu beurteilen seien.

56. Der Unionsgesetzgeber hat jedoch den Wortlaut von Art. 5 weit gefasst. Er spricht allgemein von Maßnahmen, die Menschen mit Behinderung den Zugang zur Beschäftigung ermöglichen. Eine Herabsetzung der Arbeitszeit kann zweifelsohne geeignet sein, einem Menschen mit Behinderung die Ausübung eines Berufs zu ermöglichen.

57. Insofern stützt auch der 20. Erwägungsgrund ein weites Verständnis von Art. 5. Aus ihm folgt nämlich, dass entgegen der Ansicht von DAB und Pro Display nicht nur physische, sondern auch organisatorische Maßnahmen umfasst sind. Die „entsprechende Gestaltung der Räumlichkeiten" oder die „Anpassung des Arbeitsgeräts" beziehen sich auf die Beseitigung physischer Schranken, wohingegen mit der „Anpassung des Arbeitsrhythmus, der Aufgabenverteilung oder des Angebots an Ausbildungs- und Einarbeitungsmaßnahmen" Maßnahmen mit organisatorischem Charakter erwähnt sind. Dies entspricht insbesondere

dem Verständnis von Behinderung nach dem UN-Übereinkommen, wonach für eine Einschränkung nicht nur physische, sondern auch sonstige, insbesondere gesellschaftliche Barrieren relevant sind.

58. Auch Sinn und Zweck der Richtlinie 2000/78 sprechen für eine Einbeziehung von Teilzeitbeschäftigung. Diese verlangt individuell abgestimmte Maßnahmen zu einer Gleichstellung und damit einer verbesserten Teilhabe von Menschen mit Behinderung am Berufsleben(22). Entscheidend muss daher sein, ob eine bestimmte Maßnahme dazu führen kann, dass ein Mensch mit Behinderung einen Beruf ergreifen oder seinen Beruf weiterhin ausüben kann. Vor diesem Hintergrund entspricht es gerade Sinn und Zweck der Richtlinie, behinderte Arbeitnehmer, die zumindest teilweise arbeiten können, nicht gänzlich vom Arbeitsmarkt auszuschließen, sondern ihnen durch das Angebot einer Teilzeitbeschäftigung eine adäquate Teilhabe am Berufsleben zu ermöglichen. Es ist nicht zu erkennen, dass die Richtlinie nur Maßnahmen wie den Einbau eines Aufzugs oder rollstuhlgerechter Sanitäranlagen – was ebenfalls aufwändig und kostenträchtig sein kann – verlangt, aber eine Reduzierung der Arbeitszeit nicht erfasst sein kann.

59. Zwar ist der Einwand von DAB und Pro Display nicht von der Hand zu weisen, dass eine Teilzeittätigkeit unter bestimmten Umständen einen starken Eingriff in das Rechtsverhältnis zwischen Arbeitgeber und Arbeitnehmer darstellt und zu einer Belastung für den Arbeitgeber führen kann. Dies kann aber ebenso für die beispielhaft aufgeführte Anpassung der Räumlichkeiten gelten. Aus diesem Grund stellt Art. 5 Satz 2 die Verpflichtung des Arbeitgebers aber auch unter die Bedingung, dass die Maßnahmen den Arbeitgeber nicht unverhältnismäßig belasten dürfen. Insofern fordert die Richtlinie einen angemessenen Ausgleich zwischen den Interessen des behinderten Arbeitnehmers, Maßnahmen zu seiner Unterstützung zu erfahren, und des Arbeitgebers, der Eingriffe in seine Betriebsorganisation sowie wirtschaftliche Einbußen nicht ohne Weiteres hinnehmen muss.

60. Als Zwischenergebnis ist somit festzuhalten, dass eine Herabsetzung der Arbeitszeit zu den von Art. 5 der Richtlinie 2000/78 umfassten Maßnahmen gehören kann. Es obliegt dem nationalen Gericht, im Einzelfall festzustellen, ob eine solche Maßnahme zu einer unverhältnismäßigen Belastung des Arbeitgebers führt.

C – *Vierte Vorlagefrage*

1. Erster Teil der vierten Vorlagefrage

61. Mit dem ersten Teil der vierten Vorlagefrage will der Sø- og Handelsret wissen, inwieweit eine nationale Rechtsvorschrift im Widerspruch zur Richtlinie 2000/78 steht, die eine Kündigung mit verkürzter Frist bei krankheitsbedingtem Fehlen erlaubt, sofern sie auch in Konstellationen angewendet wird, in denen die Abwesenheit durch die Behinderung verursacht ist.

62. Die Richtlinie 2000/78 verbietet gemäß Art. 1 in Verbindung mit Art. 2 Abs. 2 die unmittelbare oder mittelbare Diskriminierung wegen Behinderung in Beschäftigung und Beruf. Eine unmittelbare Diskriminierung liegt danach vor, wenn eine Person wegen einer Behinderung in einer vergleichbaren Situation eine weniger günstige Behandlung erfährt als eine andere Person. Eine mittelbare Diskriminierung ist zu bejahen, wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren Personen mit einer Behinderung gegenüber anderen Personen in besonderer Weise benachteiligen können, es sei denn, dies kann gerechtfertigt werden. Der sachliche Geltungsbereich der Richtlinie umfasst gemäß Art. 3 Abs. 1 Buchst. c explizit die Entlassungsbedingungen. Im Folgenden ist daher zunächst zu prüfen, ob in der verkürzten Kündigungsfrist eine unmittelbare oder mittelbare Benachteiligung zu sehen ist und gegebenenfalls, ob eine solche gerechtfertigt werden kann.

a) Benachteiligung

63. Vorab möchte ich aber zunächst den Prüfungsgegenstand präzisieren: Das vorlegende Gericht fragt nur nach der Unionsrechtskonformität der Bestimmung, aus der sich die Verkürzung der Kündigungsfrist wegen Krankheitsfehlzeiten ergibt.

64. Eine andere, nach der Fallkonstellation naheliegende Frage wäre, inwiefern Fehlzeiten, die mit einer Behinderung oder behinderungsbedingten Krankheit in Zusammenhang stehen, überhaupt ein zulässiger Kündigungsgrund sein können. Der Gerichtshof hat bereits festgestellt, dass die Richtlinie einer Kündigung entgegensteht, die unter Berücksichtigung der Verpflichtung des Arbeitgebers, angemessene Vorkehrungen zu treffen, nicht dadurch gerechtfertigt ist, dass die betreffende Person für die Erfüllung der wesentlichen Funktionen ihres Arbeitsplatzes nicht verfügbar ist(23) Im Gegenschluss könnte hieraus gefolgert werden, dass eine Kündigung zulässig ist, wenn die erforderlichen Vorkehrungen zur Anpassung des Arbeitsplatzes für den Arbeitgeber eine unverhältnismäßige Belastung darstellen würden oder der Arbeitnehmer wegen seiner Fehlzeiten für die wesentlichen Funktionen des Arbeitsplatzes nicht verfügbar ist. Meiner Ansicht nach dürfte mit dieser Feststellung des Gerichtshofs die Frage der Zulässigkeit einer Kündigung aufgrund behinderungsbedingter Krankheitsfehlzeiten jedoch noch nicht abschließend geklärt sein. In Beantwortung der vorgelegten Frage befasse ich mich im Folgenden aber ausschließlich mit der Verkürzung der Kündigungsfrist.

65. Wenn ein Arbeitnehmer mit Behinderung wegen einer „allgemeinen" Krankheit fehlt, führt die Berücksichtigung der Krankheitszeiten für die Verkürzung der Kündigungsfrist nicht zu einer Benachteiligung im Vergleich zu einem Arbeitnehmer ohne Behinderung. Denn die Wahrscheinlichkeit, an einer Krankheit wie beispielsweise einer Grippe zu erkranken, hängt in der Regel nicht mit der Behinderung zusammen und trifft Arbeitnehmer mit und ohne Behinderung gleichermaßen.

66. Im vorliegenden Zusammenhang geht es aber um Fehlzeiten, die auf einer Behinderung beruhen. § 5 Abs. 2 FL ist auf den ersten Blick neutral, da er sich auf alle Arbeitnehmer bezieht, die wegen Krankheit mehr als 120 Tage gefehlt haben. Er führt daher nicht zu einer unmittelbaren Diskriminierung Behinderter. Denn diese Bestimmung knüpft weder direkt an das verbotene Differenzierungskriterium der Behinderung an, noch nimmt sie eine Ungleichbehandlung aufgrund eines Kriteriums vor, das mit der Behinderung untrennbar verbunden ist. Eine Behinderung führt nämlich nicht in jedem Fall zwangsläufig zu Erkrankungen und Krankheitsfehlzeiten, so dass nicht von einer Untrennbarkeit gesprochen werden kann.

67. Hierin liegt jedoch eine mittelbare Benachteiligung. Sofern die Krankheit nämlich mit einer Behinderung zusammenhängt, werden ungleiche Sachverhalte gleich behandelt. Arbeitnehmer mit einer Behinderung haben in der Regel ein viel höheres Risiko an einer mit ihrer jeweiligen Behinderung zusammenhängenden Krankheit zu erkranken als Arbeitnehmer ohne eine Behinderung. Diese kann nur eine „allgemeine" Krankheit treffen. An einer solchen können aber Arbeitnehmer mit Behinderung darüber hinaus auch noch erkranken. Die Bestimmung zur verkürzten Kündigungsfrist ist somit eine Vorschrift, die Arbeitnehmer mit einer Behinderung gegenüber Arbeitnehmern ohne eine Behinderung mittelbar benachteiligt.

68. Der Einwand einiger Verfahrensbeteiligter, aufgrund des Anspruchs der Arbeitnehmer, die Art ihrer Erkrankung nicht offenlegen zu müssen, sei eine Differenzierung zwischen „allgemeinen" Krankheiten und solchen, die auf der Behinderung beruhen, nicht praktikabel, überzeugt nicht. Denn es gibt Möglichkeiten, wie beides miteinander in Einklang gebracht werden kann, etwa über einen Vertrauensarzt.

b) Rechtfertigung

69. Nach Art. 2 Abs. 2 Buchst. b Ziff. i ist eine Vorschrift wie § 5 Abs. 2 FL gerechtfertigt, wenn durch sie ein legitimes Ziel verfolgt wird und die Mittel zur Erreichung dieses Ziels angemessen und erforderlich sind. Diese Formulierung enthält die allgemeinen im Unionsrecht anerkannten Anforderungen an die Rechtfertigung einer Ungleichbehandlung(24).

70. Die Regelung muss also geeignet sein zur Erreichung eines legitimen Ziels. Sie muss darüber hinaus erforderlich sein, d. h. das angestrebte legitime Ziel darf nicht durch ein milderes, gleich geeignetes Mittel erreicht werden können. Schließlich muss die Regelung

auch verhältnismäßig im engeren Sinne sein, d. h., sie darf keine Nachteile verursachen, die außer Verhältnis zu den angestrebten Zielen stehen(25).

71. Bei der Prüfung dieser Kriterien ist zu beachten, dass in der Rechtsprechung anerkannt ist, dass die Mitgliedstaaten über einen weiten Ermessensspielraum bei der Wahl der Maßnahmen zur Erreichung ihrer Ziele im Bereich der Arbeits- und Sozialpolitik verfügen(26).

72. Der Vorlagebeschluss enthält keine Informationen zu den Zielen, die mit § 5 Abs. 2 FL verfolgt werden. Dies macht eine Beurteilung schwierig. Es wird daher Sache des vorlegenden Gerichts sein, die Rechtfertigung der streitigen Regelung abschließend zu beurteilen.

73. Die dänische Regierung hat vorgetragen, § 5 Abs. 2 FL versuche einen gerechten Interessenausgleich zwischen Arbeitgebern und Arbeitnehmern im Falle langer Abwesenheiten wegen Krankheit herzustellen. Letztlich diene er aber insbesondere den Interessen der Arbeitnehmer. Durch die verkürzte Kündigungsfrist im Falle einer langen Krankheitsabwesenheit würde für den Arbeitgeber ein Anreiz geschaffen, einem erkrankten Arbeitnehmer nicht zum frühestmöglichen Zeitpunkt zu kündigen, sondern ihn erst einmal weiterzubeschäftigen, weil der Arbeitgeber wisse, dass bei sehr langen Fehlzeiten dann im Ausgleich die Kündigungsfrist verringert ist.

74. Diese verfolgten Ziele sind legitim, und die Regelung ist angesichts des Ermessensspielraums der Mitgliedstaaten auch nicht offensichtlich ungeeignet(27), um sie zu erreichen. Eine alternative, aber weniger einschneidende Maßnahme müsste sich in das übrige System der arbeitsrechtlichen Regelungen einfügen können. Ob ein solches Mittel vorstellbar ist, ist daher ohne weitere Informationen schwer zu beurteilen.

75. Entscheidend ist, ob die durch die verkürzte Kündigungsfrist in ihrer gegenwärtigen Form bedingten Nachteile für Arbeitnehmer mit Behinderung in einem angemessen Verhältnis zu den angestrebten Zielen stehen, ob sie also nicht zu einer übermäßigen Beeinträchtigung der Betroffenen führt. Dieses verlangt, dass ein gerechter Ausgleich zwischen den verschiedenen widerstreitenden Interessen gefunden wird(28). Insofern ist fraglich, ob eine angemessene Regelung nicht auch den Schweregrad der Behinderung und die Wiedereinstellungschancen des betroffenen Arbeitnehmers mit in den Blick nehmen müsste. Je schwerer die Behinderung und je schwieriger die Suche nach einer neuen Beschäftigung sein wird, desto wichtiger ist die Länge der Kündigungsfrist für den Arbeitnehmer. Dies im Einzelnen zu beurteilen, ist Sache des vorlegenden Gerichts.

76. Als Ergebnis des ersten Teils der vierten Vorlagefrage ist somit festzuhalten, dass die Richtlinie 2000/78 dahin auszulegen ist, dass sie einer nationalen Regelung entgegensteht, nach der ein Arbeitgeber einem Arbeitnehmer wegen Krankheitsfehlzeiten mit verkürzter Kündigungsfrist kündigen darf, wenn die Krankheit auf der Behinderung beruht. Das gilt nicht, wenn die Benachteiligung gemäß Art. 2 Abs. 2 Buchst. b Ziff. i der Richtlinie 2000/78 durch ein legitimes Ziel sachlich gerechtfertigt ist und die Mittel zur Erreichung dieses Ziels angemessen und erforderlich sind.

2. Zweiter Teil der vierten Vorlagefrage

77. Mit dem zweiten Teil der vierten Vorlagefrage möchte das vorlegende Gericht schließlich wissen, ob die Richtlinie 2000/78 einer Verkürzung der Kündigungsfrist entgegensteht, wenn die Abwesenheit des Arbeitnehmers darauf zurückzuführen ist, dass der Arbeitgeber nicht die angemessenen Vorkehrungen gemäß Art. 5 der Richtlinie getroffen hat, um einer Person mit einer Behinderung die Ausübung ihres Berufs zu ermöglichen.

78. Im Rahmen der Frage, welche Vorkehrungen angemessen im Sinne von Art. 5 der Richtlinie sind, findet bereits eine Verhältnismäßigkeitsprüfung statt. Hierbei wird unter Abwägung der Interessen des behinderten Arbeitnehmers und seines Arbeitgebers geklärt, ob die zu treffenden Vorkehrungen dem Arbeitgeber zuzumuten sind. Trifft nun der Arbeitgeber diese ihm zumutbaren angemessenen Vorkehrungen nicht, kommt er also seiner Verpflichtung aus Art. 5 der Richtlinie nicht nach, darf ihm hieraus kein rechtlicher Vorteil

entstehen. Die Verpflichtung des Art. 5 der Richtlinie 2000/78 würde leer laufen, wenn die Unterlassung von verhältnismäßigen Maßnahmen eine Benachteiligung eines behinderten Arbeitnehmers rechtfertigen könnte. Nach Sinn und Zweck dieser Vorschrift können daher aus der Unterlassung einer Maßnahme resultierende Fehlzeiten des Arbeitnehmers eine Verkürzung der Kündigungsfrist nicht rechtfertigen.

79. Beruht die Anwendung der verkürzten Kündigungsfrist auf Fehlzeiten des Arbeitnehmers, die dadurch verursacht wurden, dass der Arbeitgeber angemessene Vorkehrungen nach Art. 5 der Richtlinie 2000/78 nicht ergriffen hat, stellt dies daher eine nicht zu rechtfertigende Benachteiligung dar.

VI – Ergebnis

80. Nach alledem schlage ich dem Gerichtshof vor, die Vorlagefragen wie folgt zu beantworten:

1. a) Der Begriff Behinderung im Sinne der Richtlinie 2000/78/EG zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf umfasst eine Einschränkung, die insbesondere auf physische, geistige oder psychische Beeinträchtigungen zurückzuführen ist und die ein Hindernis für die Teilhabe des Betreffenden am Berufsleben darstellt.

b) Für die Definition der Behinderung ist es unerheblich, dass die Beeinträchtigung durch eine Krankheit verursacht wurde; allein entscheidend ist, ob die Einschränkung wahrscheinlich von langer Dauer ist.

c) Auch eine Funktionsbeeinträchtigung von langer Dauer, die keinen Bedarf an besonderen Hilfsmitteln zur Folge hat und die allein oder im Wesentlichen darin besteht, dass die betreffende Person nicht zu einer Vollzeittätigkeit in der Lage ist, ist als Behinderung im Sinne der Richtlinie 2000/78 anzusehen.

2. Eine Herabsetzung der Arbeitszeit kann zu den von Art. 5 der Richtlinie 2000/78 umfassten Maßnahmen gehören. Es obliegt dem nationalen Gericht, im Einzelfall festzustellen, ob eine solche Maßnahme zu einer unverhältnismäßigen Belastung des Arbeitgebers führt.

3. Die Richtlinie 2000/78 ist dahin auszulegen, dass sie einer nationalen Regelung entgegensteht, nach der ein Arbeitgeber einem Arbeitnehmer wegen Krankheitsfehlzeiten mit verkürzter Kündigungsfrist kündigen darf, wenn die Krankheit auf der Behinderung beruht. Das gilt nicht, wenn die Benachteiligung gemäß Art. 2 Abs. 2 Buchst. b Ziff. i der Richtlinie 2000/78 durch ein legitimes Ziel sachlich gerechtfertigt ist und die Mittel zur Erreichung dieses Ziels angemessen und erforderlich sind. Beruht die Anwendung der verkürzten Kündigungsfrist jedoch auf Fehlzeiten des Arbeitnehmers, die dadurch verursacht wurden, dass der Arbeitgeber keine angemessenen Vorkehrungen nach Art. 5 der Richtlinie 2000/78 ergriffen hat, stellt dies eine nicht zu rechtfertigende Benachteiligung dar.

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1 – Originalsprache: Deutsch.

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2 – Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf, ABl. L 303, S. 16, im Folgenden: Richtlinie 2000/78.

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3 – Urteil vom 11. Juli 2006, Chacón Navas (C-13/05, Slg. 2006, I-6467).

4 – Ratifiziert von der Europäischen Union am 23. Dezember 2010; im Folgenden: UN-Übereinkommen. Siehe Beschluss des Rates 2010/48/EG vom 26. November 2009 über den Abschluss des Übereinkommens, ABl. 2010, L 23, S. 35.

5 – Lov om forbud mod forskelsbehandling på arbejdsmarkedet (Gesetz über die Gleichbehandlung auf dem Arbeitsmarkt).

6 – Lov om retsforholdet mellem arbejdsgivere og funktionærer Funktionærlov (Angestelltengesetz), im Folgenden: FL.

7 – Verband der Handels- und Büroangestellten Dänemark.

8 – Bei der flexjob-Regelung handelt es sich um eine dänische Regelung staatlicher Lohnzuschüsse bei Beschäftigung von Menschen mit dauerhaft verminderter Arbeitsfähigkeit.

9 – Urteil Chacón Navas (zitiert in Fn. 3, Randnr. 43).

10 – Ebd., Randnr. 45.

11 – So auch Generalanwalt Geelhoed in seinen Schlussanträgen in der Rechtssache Chacón Navas (zitiert in Fn. 3, Nr. 66).

12 – Vgl. in diesem Sinne Urteile vom 10. September 1996, Kommission/Deutschland (C-61/94, Slg. 1996, I-3989, Randnr. 52), vom 12. Januar 2006, Algemene Scheeps Agentuur Dordrecht (C-311/04, Slg. 2006, I-609, Randnr. 25), vom 3. Juni 2008, Intertanko u. a. (C-308/06, Slg. 2008, I-4057, Randnr. 42), sowie vom 3. September 2008, Kadi und Al Barakaat International Foundation/Rat und Kommission (C-402/05 P und C-415/05 P, Slg. 2008, I-6351, Randnr. 307), und vom 21. Dezember 2011, Air Transport Association of America u. a. (C-366/10, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 50).

13 – Vgl. Urteile Kommission/Deutschland (zitiert in Fn. 12, Randnr. 52), vom 14. Juli 1998, Bettati (C-341/95, Slg. 1998, I-4355, Randnr. 20), vom 9. Januar 2003, Petrotub und Republica (C-76/00 P, Slg. 2003, I-79, Randnr. 57), und vom 14. Mai 2009, Internationaal Verhuis- en Transportbedrijf Jan de Lely (C-161/08, Slg. 2009, I-4075, Randnr. 38).

14 – Urteil Chacón Navas (zitiert in Fn. 3, Randnr. 46).

15 – Ebd., Randnr. 57.

16 – Urteil vom 17. Juli 2008, Coleman (C-303/06, Slg. 2008, I-5603, Randnr. 46).

17 – US Surpreme Court, Bragdon v. Abbott, 524 US 624 [1998], § 12102 Abs. 1 (A) des ADA 1990 bejaht dann eine Behinderung, wenn „a physical … impairment that substantially limits one or more of [an individual's] major life activities" vorliegt.

18 – Auch der Europäische Gerichtshof für Menschenrechte hat eine Erkrankung an Diabetes mellitus Typ I, die von den nationalen Behörden als geringfügig eingestuft wurde, als Behinderung für die Zwecke des Diskriminierungsschutzes anerkannt, EGMR, Urteil vom 30. April 2009 (Glor/Schweiz, Nr. 13444/04).

19 – Urteil Chacón Navas (zitiert in Fn. 3, Randnr. 45).

20 – In der englischen Sprachfassung: „long-term [..]impairments", in der französischen Sprachfassung: „incapacités […] durables".

21 – Richtlinie 97/81/EG des Rates vom 15. Dezember 1997 zu der von UNICE, CEEP und EGB geschlossenen Rahmenvereinbarung über Teilzeitarbeit, ABl. L 14, S. 9.

22 – Siehe Erwägungsgründe 8, 9, 11 und 16 der Richtlinie 2000/78.

23 – Urteil Chacón Navas (zitiert in Fn. 3, Randnr. 51).

24 – Siehe bereits meine Schlussanträge vom 6. Mai 2010, Andersen (C-499/08, Slg. 2010, I-9343, Nr. 42).

25 – Urteile vom 12. Juli 2001, Jippes u. a. (C-189/01, Slg. 2001, I-5689, Randnr. 81), vom 7. Juli 2009, S.P.C.M. u. a. (C-558/07, Slg. 2009, I-5783, Randnr. 41), und vom 8. Juli 2010, Afton Chemical (C-343/09, Slg. 2010, I-7023, Randnr. 45 und die dort angeführte Rechtsprechung).

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26 – Vgl. aus dem Bereich der Altersdiskriminierung Urteile vom 16. Oktober 2007, Palacios de la Villa (C-411/05, Slg. 2007, I-8531, Randnr. 68), und vom 12. Oktober 2010, Rosenbladt (C-45/09, Slg. 2010, I-9391, Randnr. 41).

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27 – Vgl. hierzu Urteile Palacios de la Villa (zitiert in Fn. 26, Randnr. 72) und vom 12. Januar 2010, Petersen (C-341/08, Slg. 2010, I-47, Randnr. 70).

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28 – Vgl. hierzu meine Schlussanträge in der Rechtssache Andersen (zitiert in Fn. 24, Nr. 68) und meine Stellungnahme vom 2. Oktober 2012, Kommission/Ungarn (C-286/12, noch nicht in der amtlichen Sammlung veröffentlicht, Nr. 78).

URTEIL DES GERICHTSHOFS (Große Kammer)

17. Juli 2008(*)

„Sozialpolitik – Richtlinie 2000/78/EG – Gleichbehandlung in Beschäftigung und Beruf – Art. 1, Art. 2 Abs. 1, 2 Buchst. a und 3 und Art. 3 Abs. 1 Buchst. c – Unmittelbare Diskriminierung wegen einer Behinderung – Belästigung im Zusammenhang mit einer Behinderung – Entlassung eines Arbeitnehmers, der selbst keine Behinderung hat, dessen Kind aber behindert ist – Einbeziehung – Beweislast"

In der Rechtssache C-303/06

betreffend ein Vorabentscheidungsersuchen nach Art. 234 EG, eingereicht vom Employment Tribunal London South (Vereinigtes Königreich) mit Entscheidung vom 6. Juli 2006, beim Gerichtshof eingegangen am 10. Juli 2006, in dem Verfahren

S. Coleman

gegen

Attridge Law,

Steve Law

erlässt

DER GERICHTSHOF (Große Kammer)

unter Mitwirkung des Präsidenten V. Skouris, der Kammerpräsidenten P. Jann, C. W. A. Timmermans, A. Rosas, K. Lenaerts und A. Tizzano sowie der Richter M. Ilešič, J. Klučka, A. Ó Caoimh (Berichterstatter), T. von Danwitz und A. Arabadjiev,

Generalanwalt: M. Poiares Maduro,

Kanzler: L. Hewlett, Hauptverwaltungsrätin,

aufgrund des schriftlichen Verfahrens und auf die mündliche Verhandlung vom 9. Oktober 2007,

unter Berücksichtigung der Erklärungen

– von Frau Coleman, vertreten durch R. Allen, QC, und P. Michell, Barrister,

– der Regierung des Vereinigten Königreichs, vertreten durch V. Jackson als Bevollmächtigte im Beistand von N. Paines, QC,

– der griechischen Regierung, vertreten durch K. Georgiadis und Z. Chatzipavlou als Bevollmächtigte,

– von Irland, vertreten durch N. Travers, BL,

– der italienischen Regierung, vertreten durch I. M. Braguglia als Bevollmächtigten im Beistand von W. Ferrante, avvocato dello Stato,

– der litauischen Regierung, vertreten durch D. Kriaučiūnas als Bevollmächtigten,

– der niederländischen Regierung, vertreten durch H. G. Sevenster und C. ten Dam als Bevollmächtigte,

– der schwedischen Regierung, vertreten durch A. Falk als Bevollmächtigte,

– der Kommission der Europäischen Gemeinschaften, vertreten durch J. Enegren und N. Yerrell als Bevollmächtigte,

nach Anhörung der Schlussanträge des Generalanwalts in der Sitzung vom 31. Januar 2008

folgendes

Urteil

1 Das Vorabentscheidungsersuchen betrifft die Auslegung der Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf (ABl. L 303, S. 16).

2 Dieses Ersuchen ergeht im Rahmen eines Rechtsstreits zwischen Frau Coleman, Klägerin des Ausgangsverfahrens, und Attridge Law, einer Anwaltskanzlei, sowie einem Partner dieser Kanzlei, Herrn Steve Law, (im Folgenden gemeinsam: ehemaliger Arbeitgeber), wegen ihrer, wie Frau Coleman vorträgt, erzwungenen Kündigung.

Rechtlicher Rahmen

Gemeinschaftsrecht

3 Die Richtlinie 2000/78 wurde auf der Grundlage von Art. 13 EG erlassen. Ihre Erwägungsgründe 6, 11, 16, 17, 20, 27, 31 und 37 lauten:

„(6) In der Gemeinschaftscharta der sozialen Grundrechte der Arbeitnehmer wird anerkannt, wie wichtig die Bekämpfung jeder Art von Diskriminierung und geeignete Maßnahmen zur sozialen und wirtschaftlichen Eingliederung älterer Menschen und von Menschen mit Behinderung sind.

…

(11) Diskriminierungen wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung können die Verwirklichung der im EG-Vertrag festgelegten Ziele unterminieren, insbesondere die Erreichung eines hohen Beschäftigungsniveaus und eines hohen Maßes an sozialem Schutz, die Hebung des Lebensstandards und der Lebensqualität, den wirtschaftlichen und sozialen Zusammenhalt, die Solidarität sowie die Freizügigkeit.

…

(16) Maßnahmen, die darauf abstellen, den Bedürfnissen von Menschen mit Behinderung am Arbeitsplatz Rechnung zu tragen, spielen eine wichtige Rolle bei der Bekämpfung von Diskriminierungen wegen einer Behinderung.

(17) Mit dieser Richtlinie wird unbeschadet der Verpflichtung, für Menschen mit Behinderung angemessene Vorkehrungen zu treffen, nicht die Einstellung, der berufliche Aufstieg, die Weiterbeschäftigung oder die Teilnahme an Aus- und Weiterbildungsmaßnahmen einer Person vorgeschrieben, wenn diese Person für die Erfüllung der wesentlichen Funktionen des Arbeitsplatzes oder zur Absolvierung einer bestimmten Ausbildung nicht kompetent, fähig oder verfügbar ist.

…

(20) Es sollten geeignete Maßnahmen vorgesehen werden, d. h. wirksame und praktikable Maßnahmen, um den Arbeitsplatz der Behinderung entsprechend einzurichten, z. B. durch eine entsprechende Gestaltung der Räumlichkeiten oder eine Anpassung des Arbeitsgeräts, des Arbeitsrhythmus, der Aufgabenverteilung oder des Angebots an Ausbildungs- und Einarbeitungsmaßnahmen.

…

(27) Der Rat hat in seiner Empfehlung 86/379/EWG vom 24. Juli 1986 [ABl. L 225, S. 43] zur Beschäftigung von Behinderten in der Gemeinschaft einen Orientierungsrahmen festgelegt, der Beispiele für positive Aktionen für die Beschäftigung und Berufsbildung von Menschen mit Behinderung anführt; in seiner Entschließung vom 17. Juni 1999 betreffend gleiche Beschäftigungschancen für behinderte Menschen [ABl. C 186, S. 3] hat er bekräftigt, dass es wichtig ist, insbesondere der Einstellung, der Aufrechterhaltung des Beschäftigungsverhältnisses sowie der beruflichen Bildung und dem lebensbegleitenden Lernen von Menschen mit Behinderung besondere Aufmerksamkeit zu widmen.

…

(31) Eine Änderung der Regeln für die Beweislast ist geboten, wenn ein glaubhafter Anschein einer Diskriminierung besteht. Zur wirksamen Anwendung des Gleichbehandlungsgrundsatzes ist eine Verlagerung der Beweislast auf die beklagte Partei erforderlich, wenn eine solche Diskriminierung nachgewiesen ist. Allerdings obliegt es dem Beklagten nicht, nachzuweisen, dass der Kläger einer bestimmten Religion angehört, eine bestimmte Weltanschauung hat, eine bestimmte Behinderung aufweist, ein bestimmtes Alter oder eine bestimmte sexuelle Ausrichtung hat.

…

(37) Im Einklang mit dem Subsidiaritätsprinzip nach Artikel 5 des EG-Vertrags kann das Ziel dieser Richtlinie, nämlich die Schaffung gleicher Ausgangsbedingungen in der Gemeinschaft bezüglich der Gleichbehandlung in Beschäftigung und Beruf, auf der Ebene der Mitgliedstaaten nicht ausreichend erreicht werden und kann daher wegen des Umfangs und der Wirkung der Maßnahme besser auf Gemeinschaftsebene verwirklicht werden. Im Einklang mit dem Verhältnismäßigkeitsprinzip nach jenem Artikel geht diese Richtlinie nicht über das für die Erreichung dieses Ziels erforderliche Maß hinaus."

4 Art. 1 der Richtlinie 2000/78 lautet: „Zweck dieser Richtlinie ist die Schaffung eines allgemeinen Rahmens zur Bekämpfung der Diskriminierung wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung in Beschäftigung und Beruf im Hinblick auf die Verwirklichung des Grundsatzes der Gleichbehandlung in den Mitgliedstaaten."

5 Art. 2 („Der Begriff ‚Diskriminierung'") Abs. 1 bis 3 der Richtlinie 2000/78 bestimmt:

„(1) Im Sinne dieser Richtlinie bedeutet ‚Gleichbehandlungsgrundsatz', dass es keine unmittelbare oder mittelbare Diskriminierung wegen eines der in Artikel 1 genannten Gründe geben darf.

(2) Im Sinne des Absatzes 1

a) liegt eine unmittelbare Diskriminierung vor, wenn eine Person wegen eines der in Artikel 1 genannten Gründe in einer vergleichbaren Situation eine weniger günstige Behandlung erfährt, als eine andere Person erfährt, erfahren hat oder erfahren würde;

b) liegt eine mittelbare Diskriminierung vor, wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren Personen mit einer bestimmten Religion oder Weltanschauung, einer bestimmten Behinderung, eines bestimmten Alters oder mit einer bestimmten sexuellen Ausrichtung gegenüber anderen Personen in besonderer Weise benachteiligen können, es sei denn:

i) diese Vorschriften, Kriterien oder Verfahren sind durch ein rechtmäßiges Ziel sachlich gerechtfertigt, und die Mittel sind zur Erreichung dieses Ziels angemessen und erforderlich, oder

ii) der Arbeitgeber oder jede Person oder Organisation, auf die diese Richtlinie Anwendung findet, ist im Falle von Personen mit einer bestimmten Behinderung aufgrund des einzelstaatlichen Rechts verpflichtet, geeignete Maßnahmen entsprechend den in Artikel 5 enthaltenen Grundsätzen vorzusehen, um die sich durch diese Vorschrift, dieses Kriterium oder dieses Verfahren ergebenden Nachteile zu beseitigen.

(3) Unerwünschte Verhaltensweisen, die mit einem der Gründe nach Artikel 1 in Zusammenhang stehen und bezwecken oder bewirken, dass die Würde der betreffenden Person verletzt und ein von Einschüchterungen, Anfeindungen, Erniedrigungen, Entwürdigungen oder Beleidigungen gekennzeichnetes Umfeld geschaffen wird, sind Belästigungen, die als Diskriminierung im Sinne von Absatz 1 gelten. In diesem Zusammenhang können die Mitgliedstaaten den Begriff ‚Belästigung' im Einklang mit den einzelstaatlichen Rechtsvorschriften und Gepflogenheiten definieren.

…"

6 Art. 3 Abs. 1 der Richtlinie 2000/78 bestimmt:

„Im Rahmen der auf die Gemeinschaft übertragenen Zuständigkeiten gilt diese Richtlinie für alle Personen in öffentlichen und privaten Bereichen, einschließlich öffentlicher Stellen, in Bezug auf

…

c) die Beschäftigungs- und Arbeitsbedingungen, einschließlich der Entlassungsbedingungen und des Arbeitsentgelts;

…"

7 Art. 5 („Angemessene Vorkehrungen für Menschen mit Behinderung") dieser Richtlinie sieht vor:

„Um die Anwendung des Gleichbehandlungsgrundsatzes auf Menschen mit Behinderung zu gewährleisten, sind angemessene Vorkehrungen zu treffen. Das bedeutet, dass der Arbeitgeber die geeigneten und im konkreten Fall erforderlichen Maßnahmen ergreift, um den Menschen mit Behinderung den Zugang zur Beschäftigung, die Ausübung eines Berufes, den beruflichen Aufstieg und die Teilnahme an Aus- und Weiterbildungsmaßnahmen zu ermöglichen, es sei denn, diese Maßnahmen würden den Arbeitgeber unverhältnismäßig belasten. …"

8 Art. 7 („Positive und spezifische Maßnahmen") der Richtlinie 2000/78 lautet:

„(1) Der Gleichbehandlungsgrundsatz hindert die Mitgliedstaaten nicht daran, zur Gewährleistung der völligen Gleichstellung im Berufsleben spezifische Maßnahmen beizubehalten oder einzuführen, mit denen Benachteiligungen wegen eines in Artikel 1 genannten Diskriminierungsgrunds verhindert oder ausgeglichen werden.

(2) Im Falle von Menschen mit Behinderung steht der Gleichbehandlungsgrundsatz weder dem Recht der Mitgliedstaaten entgegen, Bestimmungen zum Schutz der Gesundheit und der Sicherheit am Arbeitsplatz beizubehalten oder zu erlassen, noch steht er Maßnahmen entgegen, mit denen Bestimmungen oder Vorkehrungen eingeführt oder beibehalten werden sollen, die einer Eingliederung von Menschen mit Behinderung in die Arbeitswelt dienen oder diese Eingliederung fördern."

9 Art. 10 („Beweislast") der Richtlinie bestimmt:

„(1) Die Mitgliedstaaten ergreifen im Einklang mit ihrem nationalen Gerichtswesen die erforderlichen Maßnahmen, um zu gewährleisten, dass immer dann, wenn Personen, die sich durch die Nichtanwendung des Gleichbehandlungsgrundsatzes für verletzt halten und bei einem Gericht oder einer anderen zuständigen Stelle Tatsachen glaubhaft machen, die das Vorliegen einer unmittelbaren oder mittelbaren Diskriminierung vermuten lassen, es dem Beklagten obliegt zu beweisen, dass keine Verletzung des Gleichbehandlungsgrundsatzes vorgelegen hat.

(2) Absatz 1 lässt das Recht der Mitgliedstaaten, eine für den Kläger günstigere Beweislastregelung vorzusehen, unberührt."

10 Nach Art. 18 Abs. 1 der Richtlinie 2000/78 mussten die Mitgliedstaaten die erforderlichen Rechts- und Verwaltungsvorschriften erlassen, um dieser Richtlinie spätestens zum 2. Dezember 2003 nachzukommen. In Abs. 2 dieses Artikels heißt es jedoch:

„Um besonderen Bedingungen Rechnung zu tragen, können die Mitgliedstaaten erforderlichenfalls eine Zusatzfrist von drei Jahren ab dem 2. Dezember 2003, d. h. insgesamt sechs Jahre, in Anspruch nehmen, um die Bestimmungen dieser Richtlinie über die Diskriminierung wegen des Alters und einer Behinderung umzusetzen. In diesem Fall setzen sie die Kommission unverzüglich davon in Kenntnis. Ein Mitgliedstaat, der die Inanspruchnahme dieser Zusatzfrist beschließt, erstattet der Kommission jährlich Bericht über die von ihm ergriffenen Maßnahmen zur Bekämpfung der Diskriminierung wegen des Alters und einer Behinderung und über die Fortschritte, die bei der Umsetzung der Richtlinie erzielt werden konnten. Die Kommission erstattet dem Rat jährlich Bericht."

11 Da das Vereinigte Königreich Großbritannien und Nordirland eine solche Zusatzfrist für die Umsetzung der Richtlinie beantragt hatte, lief die Umsetzungsfrist für diesen Mitgliedstaat erst am 2. Dezember 2006 ab.

Nationales Recht

12 Das Gesetz von 1995 über Diskriminierung wegen einer Behinderung (Disability Discrimination Act 1995) (im Folgenden: DDA) soll im Wesentlichen bewirken, dass Diskriminierungen gegenüber Menschen mit Behinderung, insbesondere im Zusammenhang mit der Beschäftigung, rechtswidrig sind.

13 Bei der Umsetzung der Richtlinie 2000/78 in die Rechtsordnung des Vereinigten Königreichs wurde der zweite Teil des DDA, in dem Fragen der Beschäftigung geregelt sind, durch das Gesetz von 2003 zur Änderung des Gesetzes von 1995 über Diskriminierung wegen einer Behinderung (Disability Discrimination Act 1995 [Amendment] Regulations 2003), das am 1. Oktober 2004 in Kraft getreten ist, geändert.

14 Nach Section 3 A (1) DDA in der Fassung des Gesetzes von 2003 (im Folgenden: DDA 2003)

„… wird eine Person mit Behinderung diskriminiert, wenn jemand

a) sie aus einem Grund, der mit ihrer Behinderung im Zusammenhang steht, weniger günstig behandelt als er andere Personen, für die dieser Grund nicht gilt oder gelten würde, behandelt oder behandeln würde, und

b) er nicht beweisen kann, dass diese Behandlung gerechtfertigt ist".

15 Nach Section 3 A (4) DDA 2003 kann die Behandlung einer Person mit Behinderung auf keinen Fall gerechtfertigt sein, wenn sie einer unmittelbaren Diskriminierung im Sinne von Section 3 A (5) gleichkommt, die lautet:

„Eine Person mit Behinderung wird unmittelbar diskriminiert, wenn jemand diese Person wegen ihrer Behinderung weniger günstig behandelt, als er eine Person behandelt oder behandeln würde, die diese bestimmte Behinderung nicht hat und die die gleichen oder nicht

merklich verschiedenen Eigenschaften, einschließlich der Fähigkeiten, hat wie die Person mit Behinderung."

16 Der Begriff der Belästigung wird in Section 3 B DDA 2003 wie folgt definiert:

„1. … eine Person mit Behinderung wird belästigt, wenn jemand sich ihr gegenüber aus einem Grund, der mit ihrer Behinderung im Zusammenhang steht, auf eine unerwünschte Weise verhält und damit bezweckt oder bewirkt,

a) die Würde der Person mit Behinderung zu verletzen oder

b) ein von Einschüchterungen, Anfeindungen, Erniedrigungen, Entwürdigungen oder Beleidigungen gekennzeichnetes Umfeld zu schaffen.

2. Ein Verhalten hat die in Abs. 1 Buchst. a und b genannte Wirkung, wenn unter Berücksichtigung aller Umstände und insbesondere der Empfindungen der Person mit Behinderung vernünftigerweise von einer solchen Wirkung auszugehen ist."

17 Nach Section 4 (2)(d) DDA 2003 ist es einem Arbeitgeber verboten, eine bei ihm beschäftigte Person mit Behinderung durch Entlassung oder Zufügung irgendeines anderen Schadens zu diskriminieren.

18 Nach Section 4 (3)(a) und (b) DDA 2003 ist es einem als solcher handelnden Arbeitgeber auch verboten, eine behinderte Person, die bei ihm beschäftigt ist oder sich bei ihm beworben hat, zu belästigen.

Ausgangsverfahren und Vorlagefragen

19 Frau Coleman arbeitete ab Januar 2001 als Anwaltssekretärin für ihren ehemaligen Arbeitgeber.

20 Im Jahr 2002 gebar sie einen Sohn, der an apnoischen Anfällen und an angeborener Laryngomalazie und Bronchomalazie leidet. Der Zustand ihres Sohnes erfordert eine spezialisierte und besondere Pflege. Die für ihn erforderliche Pflege wird im Wesentlichen von der Klägerin des Ausgangsverfahrens geleistet.

21 Am 4. März 2005 stimmte sie einer freiwilligen Entlassung („voluntary redundancy") zu, wodurch der Vertrag mit ihrem ehemaligen Arbeitgeber beendet wurde.

22 Am 30. August 2005 reichte sie beim Employment Tribunal London South eine Klage ein, mit der sie vorbringt, wegen der Tatsache, dass sie Hauptbetreuerin eines behinderten Kindes sei, Opfer einer erzwungenen sozialwidrigen Kündigung („unfair constructive dismissal") gewesen zu sein und eine weniger günstige Behandlung als die anderen Arbeitnehmer erfahren zu haben. Durch diese Behandlung sei sie gezwungen gewesen, ihr Arbeitsverhältnis mit ihrem ehemaligen Arbeitgeber zu beenden.

23 Aus der Vorlageentscheidung ergibt sich, dass der maßgebliche Sachverhalt des Ausgangsverfahrens noch nicht vollständig ermittelt wurde, da sich die Vorlagefragen nur als Vorfragen stellten. Das vorlegende Gericht setzte die Entscheidung über den Teil der Klage aus, der die Entlassung von Frau Coleman betrifft, am 17. Februar 2006 führte es aber eine vorbereitende Anhörung über den Klagegrund der Diskriminierung durch.

24 Bei diesem Gericht stellt sich die Vorfrage, ob sich die Klägerin des Ausgangsverfahrens auf die Bestimmungen des nationalen Rechts, insbesondere diejenigen zur Umsetzung der Richtlinie 2000/78, stützen kann, um gegenüber ihrem ehemaligen Arbeitgeber geltend zu machen, dass sie wegen einer Benachteiligung im Zusammenhang mit der Behinderung ihres Sohnes diskriminiert worden sei.

25 Aus der Vorlageentscheidung ergibt sich, dass der Klage von Frau Coleman beim vorlegenden Gericht nach nationalem Recht nicht stattgegeben werden könnte, wenn die Auslegung der Richtlinie 2000/78 durch den Gerichtshof der Auslegung widersprechen sollte, die von Frau Coleman befürwortet wird.

26 Aus der Vorlageentscheidung ergibt sich weiter, dass nach dem Recht des Vereinigten Königreichs das angerufene Gericht bei einer vorbereitenden Anhörung über eine Rechtsfrage davon ausgeht, dass sich der Sachverhalt wie vom Kläger dargestellt ereignet hat. Im Ausgangsverfahren wird von folgendem Sachverhalt ausgegangen:

– Als Frau Coleman aus dem Mutterschaftsurlaub zurückkam, weigerte sich ihr ehemaliger Arbeitgeber, sie an ihren früheren Arbeitsplatz zurückkehren zu lassen; die Eltern nicht behinderter Kinder hätten unter diesen Umständen auf ihre frühere Stelle zurückkehren dürfen.

– Er lehnte es auch ab, ihr die gleichen flexiblen Arbeitszeiten und die gleichen Arbeitsbedingungen zu gewähren wie ihren Kollegen, die keine behinderten Kinder haben.

– Frau Coleman wurde als „faul" bezeichnet, wenn sie freinehmen wollte, um ihr Kind zu betreuen, während Eltern nicht behinderter Kinder diese Möglichkeit gewährt wurde.

– Die offizielle Beschwerde, die sie gegen ihre schlechte Behandlung einreichte, wurde nicht sachgemäß behandelt, und sie sah sich gezwungen, sie zurückzuziehen.

– Es gab unangemessene und verletzende Bemerkungen sowohl in Bezug auf sie selbst als auch in Bezug auf ihr Kind. Es wurden keine solchen Bemerkungen gemacht, wenn andere Arbeitnehmer freinehmen oder eine gewisse Flexibilität beantragen mussten, um sich um ihre nicht behinderten Kinder zu kümmern.

– Da sie gelegentlich wegen Problemen im Zusammenhang mit dem Zustand ihres Kindes zu spät kam, wurde ihr gesagt, dass sie entlassen werde, wenn sie erneut zu spät komme. Eine solche Drohung wurde gegenüber anderen Arbeitnehmern mit nicht behinderten Kindern, die aus den gleichen Gründen zu spät kamen, nicht ausgesprochen.

27 Da das Employment Tribunal London South der Ansicht ist, dass der bei ihm anhängige Rechtsstreit Fragen nach der Auslegung des Gemeinschaftsrechts aufwirft, hat es beschlossen, das Verfahren auszusetzen und dem Gerichtshof folgende Fragen zur Vorabentscheidung vorzulegen:

1. Schützt die Richtlinie 2000/78 im Rahmen des Verbots der Diskriminierung wegen einer Behinderung nur Menschen vor unmittelbarer Diskriminierung und Belästigungen, die selbst eine Behinderung haben?

2. Falls die erste Frage verneint wird, schützt die Richtlinie 2000/78 auch Arbeitnehmer, die zwar nicht selbst eine Behinderung haben, aber wegen ihrer Beziehung zu einem Menschen mit Behinderung eine weniger günstige Behandlung erfahren oder belästigt werden?

3. Wenn ein Arbeitgeber einen Arbeitnehmer weniger günstig behandelt, als er andere Arbeitnehmer behandelt oder behandeln würde, und feststeht, dass der Grund für die Behandlung des Arbeitnehmers darin liegt, dass dieser einen Sohn mit Behinderung hat, den er betreut, stellt diese Behandlung dann eine unmittelbare Diskriminierung dar, die den durch die Richtlinie 2000/78 festgelegten Grundsatz der Gleichbehandlung verletzt?

4. Wenn ein Arbeitgeber einen Arbeitnehmer belästigt und feststeht, dass der Grund für die Behandlung des Arbeitnehmers darin liegt, dass er einen Sohn mit Behinderung

hat, den er betreut, stellt diese Belästigung dann eine Verletzung des durch die Richtlinie 2000/78 festgelegten Grundsatzes der Gleichbehandlung dar?

Zur Zulässigkeit

28 Die niederländische Regierung ist zwar der Ansicht, dass den Fragen des vorlegenden Gerichts ein echter Rechtsstreit zugrunde liege, stellt jedoch die Zulässigkeit des Vorabentscheidungsersuchens wegen des Umstands in Frage, dass noch nicht der gesamte Sachverhalt der Rechtssache ermittelt ist, da es sich um Vorfragen im Rahmen einer vorbereitenden Anhörung handelt. Sie trägt vor, bei einer solchen vorbereitenden Anhörung gehe das nationale Gericht davon aus, dass sich der Sachverhalt so ereignet habe, wie er von der Klägerin dargestellt worden sei.

29 Insoweit ist daran zu erinnern, dass Art. 234 EG den Rahmen für eine enge Zusammenarbeit zwischen den nationalen Gerichten und dem Gerichtshof schafft, die auf einer Verteilung der Aufgaben zwischen ihnen beruht. Aus Art. 234 Abs. 2 EG geht klar hervor, dass es Sache des nationalen Gerichts ist, darüber zu entscheiden, in welchem Verfahrensstadium es ein Vorabentscheidungsersuchen an den Gerichtshof richten soll (vgl. Urteile vom 10. März 1981, Irish Creamery Milk Suppliers Association u. a., 36/80 und 71/80, Slg. 1981, 735, Randnr. 5, und vom 30. März 2000, JämO, C-236/98, Slg. 2000, I-2189, Randnr. 30).

30 Im Ausgangsverfahren hat das vorlegende Gericht festgestellt, dass Frau Coleman, sollte die Auslegung der Richtlinie 2000/78 durch den Gerichtshof nicht mit der von ihr befürworteten Auslegung übereinstimmen, in der Sache nicht obsiegen könnte. Das vorlegende Gericht hat somit, wie es nach den Rechtsvorschriften des Vereinigten Königreichs erlaubt ist, entschieden, die Frage zu prüfen, ob diese Richtlinie dahin auszulegen ist, dass sie auf die Entlassung eines Arbeitnehmers in einer Situation wie der von Frau Coleman anzuwenden ist, bevor es ermittelt, ob diese tatsächlich benachteiligt oder belästigt worden ist. Deshalb wurden die Vorlagefragen unter der Annahme gestellt, dass sich der Sachverhalt so ereignet hat, wie er in Randnr. 26 des vorliegenden Urteils dargelegt worden ist.

31 Wenn der Gerichtshof, wie hier, mit einem Ersuchen um Auslegung des Gemeinschaftsrechts befasst ist, das nicht offensichtlich ohne Bezug zur Realität oder zum Gegenstand des Ausgangsrechtsstreits ist, und über die erforderlichen Angaben verfügt, um eine sachdienliche Antwort auf die ihm gestellten Fragen zur Anwendbarkeit der Richtlinie 2000/78 auf diesen Rechtsstreit zu geben, muss er darauf antworten; er braucht nicht selbst den angenommenen Sachverhalt zu prüfen, auf den sich das vorlegende Gericht gestützt hat; die Annahme wird vom vorlegenden Gerichts später nachzuprüfen sein, falls sich dies als erforderlich erweisen sollte (vgl. in diesem Sinne Urteil vom 27. Oktober 1993, Enderby, C-127/92, Slg. 1993, I-5535, Randnr. 12).

32 Das Vorabentscheidungsersuchen ist daher als zulässig anzusehen.

Zu den Vorlagefragen

Zum ersten Teil der ersten Frage sowie zur zweiten und zur dritten Frage

33 Mit diesen Fragen, die zusammen zu prüfen sind, möchte das vorlegende Gericht wissen, ob die Richtlinie 2000/78 und insbesondere die Art. 1 und 2 Abs. 1 und 2 Buchst. a dahin auszulegen sind, dass sie eine unmittelbare Diskriminierung wegen einer Behinderung nur gegenüber einem Arbeitnehmer, der selbst behindert ist, verbieten oder ob der Grundsatz der Gleichbehandlung und das Verbot der unmittelbaren Diskriminierung auch für einen Arbeitnehmer gelten, der selbst nicht behindert ist, der aber, wie im Ausgangsverfahren, wegen einer Behinderung seines Kindes benachteiligt wird, für das er selbst im Wesentlichen die Pflegeleistungen erbringt, die dessen Zustand erfordert.

34 Nach Art. 1 der Richtlinie 2000/78 ist deren Zweck die Schaffung eines allgemeinen Rahmens zur Bekämpfung der Diskriminierung wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung in Beschäftigung und Beruf.

35 Art. 2 Abs. 1 dieser Richtlinie definiert den Gleichbehandlungsgrundsatz dahin, dass es keine unmittelbare oder mittelbare Diskriminierung wegen eines der in Art. 1 genannten Gründe, somit einschließlich der Behinderung, geben darf.

36 Gemäß Art. 2 Abs. 2 Buchst. a dieser Richtlinie liegt eine unmittelbare Diskriminierung vor, wenn eine Person u. a. wegen einer Behinderung in einer vergleichbaren Situation eine weniger günstige Behandlung erfährt, als eine andere Person erfährt, erfahren hat oder erfahren würde.

37 Gemäß ihrem Art. 3 Abs. 1 Buchst. c gilt die Richtlinie 2000/78 im Rahmen der auf die Gemeinschaft übertragenen Zuständigkeiten für alle Personen in öffentlichen und privaten Bereichen, einschließlich öffentlicher Stellen, in Bezug auf die Beschäftigungs- und Arbeitsbedingungen, einschließlich der Entlassungsbedingungen und des Arbeitsentgelts.

38 Somit ergibt sich aus diesen Bestimmungen der Richtlinie 2000/78 nicht, dass der Gleichbehandlungsgrundsatz, den sie gewährleisten soll, auf Personen beschränkt ist, die selbst eine Behinderung im Sinne der Richtlinie haben. Ihr Zweck ist vielmehr, in Beschäftigung und Beruf jede Form der Diskriminierung aus Gründen einer Behinderung zu bekämpfen. Der für diesen Bereich in der Richtlinie 2000/78 verankerte Gleichbehandlungsgrundsatz gilt nicht für eine bestimmte Kategorie von Personen, sondern in Bezug auf die in ihrem Art. 1 genannten Gründe. Diese Auslegung wird durch den Wortlaut von Art. 13 EG untermauert, der die Rechtsgrundlage der Richtlinie 2000/78 ist und in dem der Gemeinschaft die Zuständigkeit übertragen wird, geeignete Vorkehrungen zu treffen, um Diskriminierungen u. a. aus Gründen einer Behinderung zu bekämpfen.

39 Zwar enthält die Richtlinie 2000/78 eine Reihe von Bestimmungen, die, wie sich aus deren Wortlaut selbst ergibt, nur für Behinderte gelten. So bestimmt ihr Art. 5, dass angemessene Vorkehrungen zu treffen sind, um die Anwendung des Gleichbehandlungsgrundsatzes auf Menschen mit Behinderung zu gewährleisten. Das bedeutet, dass der Arbeitgeber die geeigneten und im konkreten Fall erforderlichen Maßnahmen ergreifen muss, um den Menschen mit Behinderung den Zugang zur Beschäftigung, die Ausübung eines Berufs, den beruflichen Aufstieg und die Teilnahme an Aus- und Weiterbildungsmaßnahmen zu ermöglichen, es sei denn, diese Maßnahmen würden den Arbeitgeber unverhältnismäßig belasten.

40 Art. 7 Abs. 2 der Richtlinie sieht auch vor, dass im Falle von Menschen mit Behinderung der Gleichbehandlungsgrundsatz weder dem Recht der Mitgliedstaaten, Bestimmungen zum Schutz der Gesundheit und der Sicherheit am Arbeitsplatz beizubehalten oder zu erlassen, noch Maßnahmen entgegensteht, mit denen Bestimmungen oder Vorkehrungen eingeführt oder beibehalten werden sollen, die einer Eingliederung von Menschen mit Behinderung in die Arbeitswelt dienen oder diese Eingliederung fördern.

41 Die Regierung des Vereinigten Königreichs sowie die griechische, die italienische und die niederländische Regierung sind der Ansicht, dass im Licht sowohl der in den beiden vorausgehenden Randnummern genannten Vorschriften als auch der Erwägungsgründe 16, 17 und 27 der Richtlinie 2000/78 das in dieser vorgesehene Verbot der unmittelbaren Diskriminierung nicht dahin ausgelegt werden könne, dass es auch eine Situation wie die der Klägerin des Ausgangsverfahrens erfasse, da diese selbst nicht behindert sei. Auf die Bestimmungen dieser Richtlinie könnten sich nur Personen berufen, die in einer Situation, die mit der anderer Personen vergleichbar sei, wegen spezifischer, ihnen eigener Merkmale weniger günstig behandelt oder benachteiligt würden.

42 Dass sich die in den Randnrn. 39 und 40 des vorliegenden Urteils erwähnten Bestimmungen spezifisch auf Menschen mit einer Behinderung beziehen, folgt jedoch aus dem Umstand, dass es sich entweder um Bestimmungen handelt, die eine positive Diskriminierung zugunsten der behinderten Person selbst betreffen, oder um spezifische Maßnahmen, die

ohne Bedeutung wären oder die sich als unverhältnismäßig erweisen könnten, wenn sie nicht auf Menschen mit Behinderung beschränkt wären. Wie sich aus den Erwägungsgründen 16 und 20 dieser Richtlinie ergibt, handelt es sich um Maßnahmen, mit denen den Bedürfnissen behinderter Menschen bei der Arbeit Rechnung getragen und der Arbeitsplatz der Behinderung dieser Menschen entsprechend ausgestaltet werden soll. Mit solchen Maßnahmen soll somit speziell die Eingliederung behinderter Menschen in das Arbeitsleben ermöglicht und gefördert werden, und deshalb können sie nur diese Menschen sowie die Pflichten betreffen, die ihren Arbeitgebern und gegebenenfalls den Mitgliedstaaten ihnen gegenüber obliegen.

43 Somit kann aus der Tatsache, dass die Richtlinie 2000/78 Bestimmungen enthält, mit denen speziell den Bedürfnissen behinderter Menschen Rechnung getragen werden soll, nicht der Schluss gezogen werden, dass der dort verankerte Gleichbehandlungsgrundsatz restriktiv auszulegen ist, d. h. in dem Sinn, dass er nur unmittelbare Diskriminierungen wegen der Behinderung verbietet und ausschließlich Menschen mit Behinderung selbst betrifft. Zudem bezieht sich der sechste Erwägungsgrund dieser Richtlinie, indem er auf die Gemeinschaftscharta der sozialen Grundrechte der Arbeitnehmer hinweist, sowohl auf die Bekämpfung jeder Art von Diskriminierung als auch auf die Notwendigkeit, geeignete Maßnahmen zur sozialen und wirtschaftlichen Eingliederung von Menschen mit Behinderung zu treffen.

44 Die Regierung des Vereinigten Königreichs sowie die italienische und die niederländische Regierung tragen weiter vor, dass sich eine restriktive Auslegung des sachlichen Anwendungsbereichs der Richtlinie 2000/78 aus dem Urteil vom 11. Juli 2006, Chacón Navas (C-13/05, Slg. 2006, I-6467), ergebe. Nach Ansicht der italienischen Regierung hat der Gerichtshof in diesem Urteil den Begriff der Behinderung und seine Erheblichkeit im Arbeitsverhältnis restriktiv ausgelegt.

45 Im Urteil Chacón Navas hat der Gerichtshof den Begriff der Behinderung definiert und in den Randnrn. 51 und 52 dieses Urteils ausgeführt, dass das Verbot der Diskriminierung wegen einer Behinderung bei Entlassungen nach Art. 2 Abs. 1 und Art. 3 Abs. 1 Buchst. c der Richtlinie 2000/78 einer Entlassung wegen einer Behinderung entgegensteht, die unter Berücksichtigung der Verpflichtung, angemessene Vorkehrungen für Menschen mit Behinderung zu treffen, nicht dadurch gerechtfertigt ist, dass die betreffende Person für die Erfüllung der wesentlichen Aufgaben ihres Arbeitsplatzes nicht kompetent, fähig oder verfügbar ist. Aus einer solchen Auslegung ergibt sich jedoch nicht, dass der in Art. 2 Abs. 1 dieser Richtlinie definierte Gleichbehandlungsgrundsatz und das Verbot der unmittelbaren Diskriminierung nach Art. 2 Abs. 2 Buchst. a dieser Richtlinie nicht auf eine Situation, wie sie im Ausgangsverfahren in Rede steht, anwendbar sein können, wenn eine Benachteiligung eines Arbeitnehmers wegen der Behinderung seines Kindes erfolgte, für das er selbst im Wesentlichen die Pflegeleistungen erbringt, die dessen Zustand erfordert.

46 Zwar hat der Gerichtshof in Randnr. 56 des Urteils Chacón Navas ausgeführt, dass der Geltungsbereich der Richtlinie im Hinblick auf Art. 13 EG nicht über die Diskriminierungen wegen der in Art. 1 dieser Richtlinie abschließend aufgezählten Gründe hinaus ausgedehnt werden darf, so dass eine Person, die von ihrem Arbeitgeber ausschließlich wegen Krankheit entlassen wurde, nicht in den von der Richtlinie 2000/78 geschaffenen allgemeinen Rahmen fällt, er hat jedoch nicht entschieden, dass der Gleichbehandlungsgrundsatz und der sachliche Geltungsbereich dieser Richtlinie hinsichtlich dieser Gründe restriktiv ausgelegt werden müssen.

47 Wie sich aus den Randnrn. 34 und 38 des vorliegenden Urteils ergibt, verfolgt die Richtlinie 2000/78 das Ziel, einen allgemeinen Rahmen zur Bekämpfung der Diskriminierung in Beschäftigung und Beruf wegen eines der in Art. 1 der Richtlinie genannten Gründe zu schaffen, zu denen u. a. die Behinderung zählt, und dies im Hinblick auf die Umsetzung des Gleichbehandlungsgrundsatzes in den Mitgliedstaaten. Aus dem 37. Erwägungsgrund der Richtlinie ergibt sich, dass es auch ihr Ziel ist, gleiche Ausgangsbedingungen in der Gemeinschaft bezüglich der Gleichbehandlung in Beschäftigung und Beruf zu schaffen.

48 Wie Frau Coleman, die litauische und die schwedische Regierung sowie die Kommission geltend machen, würden diese Ziele und die praktische Wirksamkeit der Richtlinie gefährdet, wenn ein Arbeitnehmer in der Situation der Klägerin des Ausgangsverfahrens sich nicht auf

das Verbot der unmittelbaren Diskriminierung in Art. 2 Abs. 2 Buchst. a dieser Richtlinie berufen könnte, wenn nachgewiesen wurde, dass er wegen der Behinderung seines Kindes in einer vergleichbaren Situation eine weniger günstige Behandlung erfahren hat, als ein anderer Arbeitnehmer erfährt, erfahren hat oder erfahren würde, und zwar auch dann, wenn der Arbeitnehmer selbst nicht behindert ist.

49 Insoweit ergibt sich aus dem elften Erwägungsgrund dieser Richtlinie, dass der Gemeinschaftsgesetzgeber auch der Ansicht war, dass Diskriminierungen wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung die Verwirklichung der im Vertrag festgelegten Ziele, insbesondere hinsichtlich der Beschäftigung, unterminieren können.

50 Zwar ist in einer Situation wie der des Ausgangsverfahrens die Person, die unmittelbar diskriminiert wurde, selbst nicht behindert, doch ist nach Ansicht von Frau Coleman der Grund für die weniger günstige Behandlung, der sie ausgesetzt gewesen sei, sehr wohl eine Behinderung. Wie sich aus Randnr. 38 des vorliegenden Urteils ergibt, gilt die Richtlinie 2000/78, die darauf gerichtet ist, im Bereich Beschäftigung und Beruf jede Form der Diskriminierung wegen einer Behinderung zu bekämpfen, nicht für eine bestimmte Kategorie von Personen, sondern in Bezug auf die in ihrem Art. 1 genannten Gründe.

51 Wird festgestellt, dass ein Arbeitnehmer in einer Situation, wie sie im Ausgangsverfahren in Rede steht, wegen einer Behinderung unmittelbar diskriminiert wird, könnte eine Auslegung der Richtlinie, nach der ihre Anwendung auf Personen beschränkt ist, die selbst behindert sind, dieser Richtlinie einen großen Teil ihrer praktischen Wirksamkeit nehmen und den Schutz, den sie gewährleisten soll, mindern.

52 Was die für eine Situation wie im Ausgangsverfahren geltende Beweislast anbelangt, ist daran zu erinnern, dass nach Art. 10 Abs. 1 der Richtlinie 2000/78 die Mitgliedstaaten im Einklang mit ihrem nationalen Gerichtswesen die erforderlichen Maßnahmen ergreifen müssen, um zu gewährleisten, dass immer dann, wenn Personen, die sich durch die Nichtanwendung des Gleichbehandlungsgrundsatzes für verletzt halten und bei einem Gericht oder einer anderen zuständigen Stelle Tatsachen glaubhaft machen, die das Vorliegen einer unmittelbaren oder mittelbaren Diskriminierung vermuten lassen, es dem Beklagten obliegt, zu beweisen, dass keine Verletzung des Gleichbehandlungsgrundsatzes vorgelegen hat. Gemäß Abs. 2 dieses Artikels lässt dessen Abs. 1 das Recht der Mitgliedstaaten, eine für den Kläger günstigere Beweislastregelung vorzusehen, unberührt.

53 Im Ausgangsverfahren ist es somit Sache von Frau Coleman, gemäß Art. 10 Abs. 1 der Richtlinie 2000/78 Tatsachen glaubhaft zu machen, die das Vorliegen einer nach dieser Richtlinie verbotenen unmittelbaren Diskriminierung wegen einer Behinderung vermuten lassen.

54 Nach dieser Bestimmung der Richtlinie 2000/78 und deren 31. Erwägungsgrund ist eine Änderung der Regeln für die Beweislast geboten, wenn ein glaubhafter Anschein einer Diskriminierung besteht. Sollte Frau Coleman Tatsachen glaubhaft machen, die das Vorliegen einer unmittelbaren Diskriminierung vermuten ließen, würde die tatsächliche Umsetzung des Gleichbehandlungsgrundsatzes somit verlangen, dass die Beweislast bei den Beklagten des Ausgangsverfahrens liegt, die beweisen müssten, dass dieser Grundsatz nicht verletzt worden ist.

55 In diesem Zusammenhang könnten die Beklagten des Ausgangsverfahrens das Vorliegen eines solchen Verstoßes bestreiten, indem sie mit allen rechtlich vorgesehenen Mitteln beweisen, dass die Behandlung des Arbeitnehmers durch objektive Faktoren gerechtfertigt ist, die mit einer Diskriminierung wegen einer Behinderung und der Beziehung dieses Arbeitnehmers zu einem Menschen mit Behinderung nichts zu tun haben.

56 Nach alledem ist auf den ersten Teil der ersten Frage sowie auf die zweite und die dritte Frage zu antworten, dass die Richtlinie 2000/78 und insbesondere ihre Art. 1 und 2 Abs. 1 und 2 Buchst. a dahin auszulegen sind, dass das dort vorgesehene Verbot der unmittelbaren Diskriminierung nicht auf Personen beschränkt ist, die selbst behindert sind. Erfährt ein Arbeitnehmer, der selbst nicht behindert ist, durch einen Arbeitgeber eine weniger günstige

Behandlung, als sie ein anderer Arbeitnehmer in einer vergleichbaren Situation erfährt, erfahren hat oder erfahren würde, und ist nachgewiesen, dass die Benachteiligung des Arbeitnehmers wegen der Behinderung seines Kindes erfolgt ist, für das er im Wesentlichen die Pflegeleistungen erbringt, deren es bedarf, so verstößt eine solche Behandlung gegen das Verbot der unmittelbaren Diskriminierung in Art. 2 Abs. 2 Buchst. a der Richtlinie 2000/78.

Zum zweiten Teil der ersten Frage und zur vierten Frage

57 Mit diesen Fragen, die zusammen zu prüfen sind, möchte das vorlegende Gericht wissen, ob die Richtlinie 2000/78 und insbesondere die Art. 1 und 2 Abs. 1 und 3 dahin auszulegen sind, dass sie eine Belästigung, die mit einer Behinderung in Zusammenhang steht, nur gegenüber einem Arbeitnehmer verbieten, der selbst behindert ist, oder ob das Verbot der Belästigung auch für einen Arbeitnehmer gilt, der selbst nicht behindert ist, der aber, wie im Ausgangsverfahren, Opfer eines unerwünschten Verhaltens ist, das eine Belästigung darstellt, die mit der Behinderung seines Kindes in Zusammenhang steht, für das er selbst im Wesentlichen die Pflegeleistungen erbringt, die dessen Zustand erfordert.

58 Da die Belästigung nach Art. 2 Abs. 3 der Richtlinie 2000/78 als eine Form der Diskriminierung im Sinne von Abs. 1 dieses Artikels angesehen wird, sind diese Richtlinie und insbesondere ihre Art. 1 und 2 Abs. 1 und 3 aus den gleichen Gründen, wie sie in den Randnrn. 34 bis 51 des vorliegenden Urteils dargelegt worden sind, dahin auszulegen, dass sie sich nicht darauf beschränken, eine Belästigung gegenüber Personen zu verbieten, die selbst behindert sind.

59 Wird nachgewiesen, dass das unerwünschte Verhalten, das eine Belästigung gegenüber einem Arbeitnehmer darstellt, der selbst nicht behindert ist, im Zusammenhang mit der Behinderung seines Kindes steht, für das er im Wesentlichen die Pflegeleistungen erbringt, deren es bedarf, so verstößt ein solches Verhalten gegen den in der Richtlinie 2000/78 verankerten Gleichbehandlungsgrundsatz und insbesondere gegen das Belästigungsverbot nach Art. 2 Abs. 3 dieser Richtlinie.

60 Insoweit ist jedoch daran zu erinnern, dass nach dem Wortlaut von Art. 2 Abs. 3 der Richtlinie 2000/78 die Mitgliedstaaten den Begriff Belästigung im Einklang mit den einzelstaatlichen Rechtsvorschriften und Gepflogenheiten definieren können.

61 Was die Beweislast in einer Situation, wie sie im Ausgangsverfahren in Rede steht, anbelangt, gelten für die Belästigung, die als eine Form der Diskriminierung im Sinne von Art. 2 Abs. 1 der Richtlinie 2000/78 angesehen wird, die gleichen Regeln, wie sie in den Randnrn. 52 bis 55 des vorliegenden Urteils dargelegt worden sind.

62 Folglich ist, wie sich auch aus Randnr. 54 des vorliegenden Urteils ergibt, gemäß Art. 10 Abs. 1 der Richtlinie 2000/78 und ihrem 31. Erwägungsgrund eine Änderung der Regeln für die Beweislast geboten, wenn ein glaubhafter Anschein einer Diskriminierung besteht. Sollte Frau Coleman Tatsachen glaubhaft machen, die das Vorliegen einer Belästigung vermuten lassen, würde die tatsächliche Umsetzung des Gleichbehandlungsgrundsatzes somit verlangen, dass die Beweislast bei den Beklagten des Ausgangsverfahrens liegt, die beweisen müssten, dass unter den Umständen des vorliegenden Falles keine Belästigung stattgefunden hat.

63 Nach alledem ist auf den zweiten Teil der ersten Frage und auf die vierte Frage zu antworten, dass die Richtlinie 2000/78 und insbesondere ihre Art. 1 und 2 Abs. 1 und 3 dahin auszulegen sind, dass das dort vorgesehene Verbot der Belästigung nicht auf Personen beschränkt ist, die selbst behindert sind. Wird nachgewiesen, dass ein unerwünschtes Verhalten, das eine Belästigung darstellt und dem ein Arbeitnehmer ausgesetzt ist, der selbst nicht behindert ist, im Zusammenhang mit der Behinderung seines Kindes steht, für das er im Wesentlichen die Pflegeleistungen erbringt, deren es bedarf, so verstößt ein solches Verhalten gegen das Verbot der Belästigung in Art. 2 Abs. 3 der Richtlinie 2000/78.

Kosten

64 Für die Parteien des Ausgangsverfahrens ist das Verfahren ein Zwischenstreit in dem bei dem vorlegenden Gericht anhängigen Rechtsstreit; die Kostenentscheidung ist daher Sache dieses Gerichts. Die Auslagen anderer Beteiligter für die Abgabe von Erklärungen vor dem Gerichtshof sind nicht erstattungsfähig.

Aus diesen Gründen hat der Gerichtshof (Große Kammer) für Recht erkannt:

1. **Die Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf und insbesondere ihre Art. 1 und 2 Abs. 1 und 2 Buchst. a sind dahin auszulegen, dass das dort vorgesehene Verbot der unmittelbaren Diskriminierung nicht auf Personen beschränkt ist, die selbst behindert sind. Erfährt ein Arbeitnehmer, der selbst nicht behindert ist, durch einen Arbeitgeber eine weniger günstige Behandlung, als sie ein anderer Arbeitnehmer in einer vergleichbaren Situation erfährt, erfahren hat oder erfahren würde, und ist nachgewiesen, dass die Benachteiligung des Arbeitnehmers wegen der Behinderung seines Kindes erfolgt ist, für das er im Wesentlichen die Pflegeleistungen erbringt, deren es bedarf, so verstößt eine solche Behandlung gegen das Verbot der unmittelbaren Diskriminierung in Art. 2 Abs. 2 Buchst. a der Richtlinie 2000/78.**

2. **Die Richtlinie 2000/78 und insbesondere ihre Art. 1 und 2 Abs. 1 und 3 sind dahin auszulegen, dass das dort vorgesehene Verbot der Belästigung nicht auf Personen beschränkt ist, die selbst behindert sind. Wird nachgewiesen, dass ein unerwünschtes Verhalten, das eine Belästigung darstellt und dem ein Arbeitnehmer ausgesetzt ist, der selbst nicht behindert ist, im Zusammenhang mit der Behinderung seines Kindes steht, für das er im Wesentlichen die Pflegeleistungen erbringt, deren es bedarf, so verstößt ein solches Verhalten gegen das Verbot der Belästigung in Art. 2 Abs. 3 der Richtlinie 2000/78.**

Unterschriften

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* Verfahrenssprache: Englisch.

URTEIL DES GERICHTSHOFES (Große Kammer)
11. Juli 2006*

In der Rechtssache C-13/05

betreffend ein Vorabentscheidungsersuchen nach Artikel 234 EG, eingereicht vom Juzgado de lo Social Nr. 33 Madrid (Spanien) mit Entscheidung vom 7. Januar 2005, beim Gerichtshof eingegangen am 19. Januar 2005, in dem Verfahren

Sonia Chacón Navas

gegen

Eurest Colectividades SA

erlässt

DER GERICHTSHOF (Große Kammer)

unter Mitwirkung des Präsidenten V. Skouris, der Kammerpräsidenten P. Jann, C. W. A. Timmermans, A. Rosas, K. Schiemann und J. Makarczyk sowie des Richters J.-P. Puissochet, der Richterin N. Colneric (Berichterstatterin) und der Richter K. Lenaerts, P. Kūris, E. Juhász, E. Levits und A. Ó Caoimh,

* Verfahrenssprache: Spanisch.

Generalanwalt: L. A. Geelhoed,
Kanzler: R. Grass,

aufgrund des schriftlichen Verfahrens,

unter Berücksichtigung der Erklärungen

— der Eurest Colectividades SA, vertreten durch R. Sanz García-Muro, abogada,

— der spanischen Regierung, vertreten durch E. Braquehais Conesa als Bevollmächtigten,

— der tschechischen Regierung, vertreten durch T. Boček als Bevollmächtigten,

— der deutschen Regierung, vertreten durch M. Lumma und C. Schulze-Bahr als Bevollmächtigte,

— der niederländischen Regierung, vertreten durch H. G. Sevenster als Bevollmächtigte,

— der österreichischen Regierung, vertreten durch C. Pesendorfer als Bevollmächtigte,

— der Regierung des Vereinigten Königreichs, vertreten durch C. White als Bevollmächtigte im Beistand von T. Ward, Barrister,

— der Kommission der Europäischen Gemeinschaften, vertreten durch I. Martinez del Peral Cagigal und D. Martin als Bevollmächtigte,

nach Anhörung der Schlussanträge des Generalanwalts in der Sitzung vom 16. März 2006

folgendes

Urteil

1 Das Vorabentscheidungsersuchen betrifft die Auslegung der Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf (ABl. L 303, S. 16) in Bezug auf die Diskriminierung wegen einer Behinderung und, hilfsweise, ein etwaiges Verbot der Diskriminierung wegen Krankheit.

2 Das Ersuchen ergeht in einem Rechtsstreit zwischen Frau Chacón Navas (im Folgenden: Klägerin) und der Gesellschaft Eurest Colectividades SA (im Folgenden: Beklagte) wegen Entlassung während einer krankheitsbedingten Arbeitsunterbrechung.

Rechtlicher Rahmen

Gemeinschaftsrecht

3 Artikel 136 Absatz 1 EG lautet:

„Die Gemeinschaft und die Mitgliedstaaten verfolgen eingedenk der sozialen Grundrechte, wie sie in der am 18. Oktober 1961 in Turin unterzeichneten Europäischen Sozialcharta und in der Gemeinschaftscharta der sozialen Grundrechte der Arbeitnehmer von 1989 festgelegt sind, folgende Ziele: die Förderung der Beschäftigung, die Verbesserung der Lebens- und Arbeitsbedingungen, um dadurch auf dem Wege des Fortschritts ihre Angleichung zu ermöglichen, einen angemessenen sozialen Schutz, den sozialen Dialog, die Entwicklung des Arbeitskräftepotenzials im Hinblick auf ein dauerhaft hohes Beschäftigungsniveau und die Bekämpfung von Ausgrenzungen."

4 Artikel 137 Absätze 1 und 2 EG verleiht der Gemeinschaft Zuständigkeiten zur Unterstützung und Ergänzung der Tätigkeit der Mitgliedstaaten zur Verwirklichung der Ziele des Artikels 136 EG, u. a. auf den Gebieten der beruflichen Eingliederung der aus dem Arbeitsmarkt ausgegrenzten Personen und der Bekämpfung sozialer Ausgrenzung.

5 Die Richtlinie 2000/78 wurde auf der Grundlage von Artikel 13 EG in seiner Fassung vor dem Vertrag von Nizza erlassen, der vorsieht:

„Unbeschadet der sonstigen Bestimmungen dieses Vertrags kann der Rat im Rahmen der durch den Vertrag auf die Gemeinschaft übertragenen Zuständigkeiten auf Vorschlag der Kommission und nach Anhörung des Europäischen Parlaments

einstimmig geeignete Vorkehrungen treffen, um Diskriminierungen aus Gründen des Geschlechts, der Rasse, der ethnischen Herkunft, der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung zu bekämpfen."

6 Artikel 1 der Richtlinie 2000/78 bestimmt:

„Zweck dieser Richtlinie ist die Schaffung eines allgemeinen Rahmens zur Bekämpfung der Diskriminierung wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung in Beschäftigung und Beruf im Hinblick auf die Verwirklichung des Grundsatzes der Gleichbehandlung in den Mitgliedstaaten."

7 In den Begründungserwägungen dieser Richtlinie heißt es:

„(11) Diskriminierungen wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung können die Verwirklichung der im EG-Vertrag festgelegten Ziele unterminieren, insbesondere die Erreichung eines hohen Beschäftigungsniveaus und eines hohen Maßes an sozialem Schutz, die Hebung des Lebensstandards und der Lebensqualität, den wirtschaftlichen und sozialen Zusammenhalt, die Solidarität sowie die Freizügigkeit.

(12) Daher sollte jede unmittelbare oder mittelbare Diskriminierung wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung in den von der Richtlinie abgedeckten Bereichen gemeinschaftsweit untersagt werden. ...

...

(16) Maßnahmen, die darauf abstellen, den Bedürfnissen von Menschen mit Behinderung am Arbeitsplatz Rechnung zu tragen, spielen eine wichtige Rolle bei der Bekämpfung von Diskriminierungen wegen einer Behinderung.

(17) Mit dieser Richtlinie wird unbeschadet der Verpflichtung, für Menschen mit Behinderung angemessene Vorkehrungen zu treffen, nicht die Einstellung, der berufliche Aufstieg, die Weiterbeschäftigung oder die Teilnahme an Aus- und Weiterbildungsmaßnahmen einer Person vorgeschrieben, wenn diese Person für die Erfüllung der wesentlichen Funktionen des Arbeitsplatzes oder zur Absolvierung einer bestimmten Ausbildung nicht kompetent, fähig oder verfügbar ist.

...

(27) Der Rat hat in seiner Empfehlung 86/379/EWG vom 24. Juli 1986 zur Beschäftigung von Behinderten in der Gemeinschaft [ABl. L 225, S. 43] einen Orientierungsrahmen festgelegt, der Beispiele für positive Aktionen für die Beschäftigung und Berufsbildung von Menschen mit Behinderung anführt; in seiner Entschließung vom 17. Juni 1999 betreffend gleiche Beschäftigungschancen für behinderte Menschen hat er bekräftigt, dass es wichtig ist, insbesondere der Einstellung, der Aufrechterhaltung des Beschäftigungsverhältnisses sowie der beruflichen Bildung und dem lebensbegleitenden Lernen von Menschen mit Behinderung besondere Aufmerksamkeit zu widmen."

8 Artikel 2 Absätze 1 und 2 der Richtlinie 2000/78 sieht vor:

„(1) Im Sinne dieser Richtlinie bedeutet ‚Gleichbehandlungsgrundsatz', dass es keine unmittelbare oder mittelbare Diskriminierung wegen eines der in Artikel 1 genannten Gründe geben darf.

(2) Im Sinne des Absatzes 1

a) liegt eine unmittelbare Diskriminierung vor, wenn eine Person wegen eines der in Artikel 1 genannten Gründe in einer vergleichbaren Situation eine weniger günstige Behandlung erfährt, als eine andere Person erfährt, erfahren hat oder erfahren würde;

b) liegt eine mittelbare Diskriminierung vor, wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren Personen mit einer bestimmten Religion oder Weltanschauung, einer bestimmten Behinderung, eines bestimmten Alters oder mit einer bestimmten sexuellen Ausrichtung gegenüber anderen Personen in besonderer Weise benachteiligen können, es sei denn:

i) diese Vorschriften, Kriterien oder Verfahren sind durch ein rechtmäßiges Ziel sachlich gerechtfertigt, und die Mittel sind zur Erreichung dieses Ziels angemessen und erforderlich, oder

ii) der Arbeitgeber oder jede Person oder Organisation, auf die diese Richtlinie Anwendung findet, ist im Falle von Personen mit einer bestimmten Behinderung aufgrund des einzelstaatlichen Rechts verpflichtet, geeignete Maßnahmen entsprechend den in Artikel 5 enthaltenen Grundsätzen vorzusehen, um die sich durch diese Vorschrift, dieses Kriterium oder dieses Verfahren ergebenden Nachteile zu beseitigen."

9 Artikel 3 dieser Richtlinie lautet:

„(1) Im Rahmen der auf die Gemeinschaft übertragenen Zuständigkeiten gilt diese Richtlinie für alle Personen in öffentlichen und privaten Bereichen, einschließlich öffentlicher Stellen, in Bezug auf

...

c) die Beschäftigungs- und Arbeitsbedingungen, einschließlich der Entlassungsbedingungen und des Arbeitsentgelts;

...“

10 Artikel 5 dieser Richtlinie bestimmt:

„Um die Anwendung des Gleichbehandlungsgrundsatzes auf Menschen mit Behinderung zu gewährleisten, sind angemessene Vorkehrungen zu treffen. Das bedeutet, dass der Arbeitgeber die geeigneten und im konkreten Fall erforderlichen Maßnahmen ergreift, um den Menschen mit Behinderung den Zugang zur Beschäftigung, die Ausübung eines Berufes, den beruflichen Aufstieg und die Teilnahme an Aus- und Weiterbildungsmaßnahmen zu ermöglichen, es sei denn, diese Maßnahmen würden den Arbeitgeber unverhältnismäßig belasten. Diese Belastung ist nicht unverhältnismäßig, wenn sie durch geltende Maßnahmen im Rahmen der Behindertenpolitik des Mitgliedstaates ausreichend kompensiert wird.“

11 Nummer 26 der auf der Tagung des Europäischen Rates vom 9. Dezember 1989 in Straßburg angenommenen Gemeinschaftscharta der sozialen Grundrechte der Arbeitnehmer, auf die Artikel 136 Absatz 1 EG verweist, lautet:

„Alle Behinderten müssen unabhängig von der Ursache und Art ihrer Behinderung konkrete ergänzende Maßnahmen, die ihre berufliche und soziale Eingliederung fördern, in Anspruch nehmen können.

Diese Maßnahmen zur Verbesserung der Lebensbedingungen müssen sich je nach den Fähigkeiten der Betreffenden auf berufliche Bildung, Ergonomie, Zugänglichkeit, Mobilität, Verkehrsmittel und Wohnung erstrecken."

Nationales Recht

12 Artikel 14 der spanischen Verfassung lautet:

„Alle Spanier sind vor dem Gesetz gleich, und niemand darf wegen seiner Abstammung, seiner Rasse, seines Geschlechts, seiner Religion, seiner Anschauungen oder sonstiger persönlicher oder sozialer Umstände oder Verhältnisse benachteiligt oder bevorzugt werden."

13 Das Real Decreto Legislativo Nr. 1/1995 vom 24. März 1995 zur Genehmigung der Neufassung des Gesetzes über das Estatuto de los Trabajadores (BOE Nr. 75 vom 29. März 1995, S. 9654, im Folgenden: Arbeitnehmerstatut) unterscheidet zwischen rechtswidriger und nichtiger Kündigung.

14 Artikel 55 Absätze 5 und 6 des Arbeitnehmerstatuts bestimmt:

„(5) Die Kündigung ist nichtig, wenn ihr Motiv einer der in der Verfassung oder im Gesetz verbotenen Diskriminierungsgründe ist oder wenn sie unter Verstoß gegen die Grundrechte und Grundfreiheiten des Arbeitnehmers erfolgt.

...

(6) Eine nichtige Kündigung bewirkt die sofortige Wiederherstellung des Beschäftigungsverhältnisses mit dem Arbeitnehmer und die Zahlung des nicht erhaltenen Arbeitsentgelts."

15 Nach Artikel 56 Absätze 1 und 2 des Arbeitnehmerstatuts verliert der Arbeitnehmer im Fall der Rechtswidrigkeit der Kündigung seinen Arbeitsplatz und ihm wird eine Entschädigung gezahlt, es sei denn, der Arbeitgeber entscheidet sich für die Wiedereinstellung.

16 In Bezug auf das Verbot der Diskriminierung in den Arbeitsbeziehungen bestimmt Artikel 17 des Arbeitnehmerstatuts in der Fassung des Gesetzes 62/2003 vom 30. Dezember 2003 zur Einführung steuerlicher, verwaltungsrechtlicher und sozialer Maßnahmen (BOE Nr. 313 vom 31. Dezember 2003, S. 46874), mit dem die Richtlinie 2000/78 in spanisches Recht umgesetzt werden soll:

„(1) Als null und nichtig gelten Verordnungsvorschriften, Klauseln von Tarifverträgen, Einzelarbeitsverträge und einseitige Entscheidungen des Arbeitgebers, die zu einer unmittelbaren oder mittelbaren Benachteiligung aufgrund des Alters oder einer Behinderung führen oder in Bezug auf die Beschäftigung, insbesondere das Arbeitsentgelt, die Arbeitszeit und andere Arbeitsbedingungen aufgrund des Geschlechts, der Herkunft einschließlich der Rasse und der ethnischen Herkunft, des Familienstands, der sozialen Zugehörigkeit, der Religion oder der Weltanschauung, aufgrund politischer Ideen, der sexuellen Ausrichtung, der Zugehörigkeit oder Nichtzugehörigkeit zu einer Gewerkschaft oder des Beitritts oder Nichtbeitritts zu gewerkschaftlichen Vereinbarungen, Verwandtschaft mit anderen Arbeitnehmern im Betrieb und der Sprache im spanischen Staat begünstigen oder benachteiligen.

..."

Ausgangsverfahren und Vorlagefragen

17 Die Klägerin arbeitete für die Beklagte, einen auf Verpflegungsdienste spezialisierten Betrieb. Sie war seit dem 14. Oktober 2003 krankgeschrieben, und nach Informationen der für ihre Behandlung zuständigen Stellen des öffentlichen Gesundheitsdienstes war mit einer Wiederaufnahme ihrer Berufstätigkeit kurzfristig nicht zu rechnen. Das vorlegende Gericht macht keinerlei Angaben zu der Krankheit, an der die Klägerin leidet.

18 Am 28. Mai 2004 teilte die Beklagte der Klägerin ohne Angabe von Gründen ihre Kündigung mit, erkannte gleichzeitig aber die Rechtswidrigkeit der Kündigung an und bot ihr eine Entschädigung an.

19 Am 29. Juni 2004 erhob Frau Chacón Navas eine Klage gegen Eurest und trug vor, dass ihre Kündigung nichtig sei, da sie wegen ihrer achtmonatigen Arbeitsunterbrechung ungleich behandelt und diskriminiert worden sei. Sie beantragte, die Beklagte zu verurteilen, sie wieder auf ihrem Arbeitsplatz einzustellen.

20 Das vorlegende Gericht führt aus, mangels anderweitigen Vortrags oder Nachweises in den Akten sei aufgrund der Umkehr der Beweislast davon auszugehen, dass der Klägerin allein aus dem Grund gekündigt worden sei, dass sie krankgeschrieben war.

21 Das vorlegende Gericht weist darauf hin, dass es in der spanischen Rechtsprechung Präzedenzfälle gebe, wonach diese Art der Kündigung als rechtswidrig, nicht aber als nichtig qualifiziert werde, da Krankheit im spanischen Recht nicht ausdrücklich zu den Gründen zähle, aus denen eine Diskriminierung in den Beziehungen zwischen Privatpersonen verboten sei.

22 Zwischen Krankheit und Behinderung bestehe jedoch ein ursächlicher Zusammenhang. Für die Definition des Begriffes „Behinderung" sei die International Classification of Functioning, Disability and Health (ICF) (Internationale Klassifikation der Funktionsfähigkeit, Behinderung und Gesundheit) der Weltgesundheitsorganisation heranzuziehen. Danach sei „Behinderung" ein Oberbegriff, der Schädigungen, Beeinträchtigungen der Aktivität und Beeinträchtigungen der Teilhabe umfasse. Krankheit könne Schädigungen verursachen, die eine Behinderung des Einzelnen darstellten.

23 Da Krankheit häufig zu einer irreversiblen Behinderung führen könne, müssten die Arbeitnehmer rechtzeitig auf der Grundlage des Verbotes der Diskriminierung wegen einer Behinderung geschützt werden. Die gegenteilige Auffassung könnte den vom Gesetzgeber angestrebten Schutz zunichte machen, da so die Anwendung unkontrollierter diskriminierender Maßnahmen ermöglicht würde.

24 Für den Fall, dass Behinderung und Krankheit als zwei unterschiedliche Begriffe angesehen würden und die Gemeinschaftsregelung auf den letztgenannten Begriff nicht unmittelbar anwendbar sei, schlägt das vorlegende Gericht vor, festzustellen, dass Krankheit ein nicht speziell genanntes Identitätsmerkmal sei, das den Gründen hinzuzufügen sei, derentwegen Personen zu diskriminieren nach der Richtlinie 2000/78 verboten sei. Diese Feststellung ergebe sich aus einer Auslegung der Artikel 13 EG, 136 EG und 137 EG in Verbindung mit Artikel II-21 des Entwurfs des Vertrages über eine Verfassung für Europa.

25 Unter diesen Umständen hat das Juzgado de lo Social Nr. 33 Madrid das Verfahren ausgesetzt und dem Gerichtshof folgende Fragen zur Vorabentscheidung vorgelegt:

1. Bezieht die Richtlinie 2000/78 insofern, als sie in ihrem Artikel 1 einen allgemeinen Rahmen zur Bekämpfung der Diskriminierung wegen einer Behinderung schafft, eine Arbeitnehmerin in ihren Schutzbereich ein, der von ihrem Betrieb ausschließlich wegen Krankheit gekündigt worden ist?

2. Hilfsweise und für den Fall, dass Krankheitszustände nicht in den Bereich des Schutzes fallen, den die Richtlinie 2000/78 gegen die Diskriminierung aus Gründen der Behinderung gewährt, und die erste Frage verneint wird:

Kann die Krankheit als ein weiteres Identitätsmerkmal neben denen angesehen werden, die als Grund einer Diskriminierung anzunehmen die Richtlinie 2000/78 verbietet?

Zur Zulässigkeit des Vorabentscheidungsersuchens

26 Die Kommission hegt Zweifel an der Zulässigkeit der vorgelegten Fragen, weil es der Wiedergabe des Sachverhalts im Vorlagebeschluss an Klarheit mangele.

27 Hierzu ist festzustellen, dass der Gerichtshof über ausreichende Informationen verfügt, um eine sachdienliche Antwort auf die Vorlagefragen geben zu können, auch wenn keine Angaben zur Art und etwaigen Entwicklung der Krankheit der Klägerin vorliegen.

28 Der Vorlageentscheidung ist nämlich zu entnehmen, dass der Klägerin, die krankgeschrieben und nicht in der Lage war, kurzfristig ihre Berufstätigkeit wieder aufzunehmen, nach Ansicht des vorlegenden Gerichts allein deshalb gekündigt worden war, weil sie krankgeschrieben war. Aus dieser Entscheidung geht auch hervor, dass das vorlegende Gericht einen ursächlichen Zusammenhang zwischen Krankheit und Behinderung annimmt und meint, dass ein Arbeitnehmer in der Lage der Klägerin auf der Grundlage des Verbotes der Diskriminierung wegen einer Behinderung geschützt werden müsse.

29 Die in erster Linie gestellte Frage betrifft insbesondere die Auslegung des Begriffes „Behinderung" im Sinne der Richtlinie 2000/78. Die Auslegung dieses Begriffes durch den Gerichtshof soll dem vorlegenden Gericht die Prüfung ermöglichen, ob die Klägerin zum Zeitpunkt ihrer Kündigung aufgrund ihrer Krankheit behindert im Sinne der Richtlinie war und deswegen unter den Schutz des Artikels 3 Absatz 1 Buchstabe c dieser Richtlinie fiel.

30 Die hilfsweise gestellte Frage bezieht sich auf Krankheit als „Identitätsmerkmal" und betrifft daher Krankheiten aller Art.

31 Nach Ansicht der Beklagten ist das Vorabentscheidungsersuchen unzulässig, weil die spanischen Gerichte, insbesondere das Tribunal Supremo, in der Vergangenheit unter Berücksichtigung der Gemeinschaftsregelung bereits entschieden hätten, dass die Kündigung eines krankgeschriebenen Arbeitnehmers als solche keine Diskriminierung darstelle. Der Umstand, dass ein nationales Gericht eine Gemeinschaftsregelung bereits ausgelegt hat, kann jedoch nicht zur Unzulässigkeit eines Vorabentscheidungsersuchens führen.

32 Was das Argument der Beklagten angeht, es sei davon auszugehen, dass sie der Klägerin unabhängig von der krankheitsbedingten Arbeitsunterbrechung gekündigt habe, weil ihre Dienste zu diesem Zeitpunkt nicht mehr benötigt worden seien, so ist daran zu erinnern, dass in einem Verfahren nach Artikel 234 EG, der auf einer klaren Aufgabentrennung zwischen den nationalen Gerichten und dem Gerichtshof beruht, die Beurteilung des Sachverhalts in die Zuständigkeit des vorlegenden Gerichts fällt. Ebenso hat nur das nationale Gericht, das mit dem Rechtsstreit befasst ist und in dessen die zu erlassende gerichtliche Entscheidung fällt, Verantwortungsbereiche im Hinblick auf die Besonderheiten der Rechtssache sowohl die Erforderlichkeit einer Vorabentscheidung für den Erlass seines Urteils als auch die Erheblichkeit der dem Gerichtshof vorzulegenden Fragen zu beurteilen. Daher ist der Gerichtshof grundsätzlich gehalten, über ihm vorgelegte Fragen zu befinden,

wenn diese die Auslegung des Gemeinschaftsrechts betreffen (vgl. insbesondere Urteile vom 25. Februar 2003 in der Rechtssache C-326/00, IKA, Slg. 2003, I-1703, Randnr. 27, und vom 12. April 2005 in der Rechtssache C-145/03, Keller, Slg. 2005, I-2529, Randnr. 33).

33 Der Gerichtshof hat jedoch auch darauf hingewiesen, dass es ihm in Ausnahmefällen obliegt, zur Prüfung seiner eigenen Zuständigkeit die Umstände zu untersuchen, unter denen er von dem innerstaatlichen Gericht angerufen wird (vgl. in diesem Sinne Urteil vom 16. Dezember 1981 in der Rechtssache 244/80, Foglia, Slg. 1981, 3045, Randnr. 21). Er kann die Entscheidung über die Vorlagefrage eines nationalen Gerichts nur ablehnen, wenn die erbetene Auslegung des Gemeinschaftsrechts offensichtlich in keinem Zusammenhang mit der Realität oder dem Gegenstand des Ausgangsrechtsstreits steht, wenn das Problem hypothetischer Natur ist oder wenn er nicht über die tatsächlichen oder rechtlichen Angaben verfügt, die für eine sachdienliche Beantwortung der ihm vorgelegten Fragen erforderlich sind (vgl. u. a. Urteile vom 13. März 2001 in der Rechtssache C-379/98, PreussenElektra, Slg. 2001, I-2099, Randnr. 39, und vom 19. Februar 2002 in der Rechtssache C-35/99, Arduino, Slg. 2002, I-1529, Randnr. 25).

34 Da im vorliegenden Fall keine dieser Bedingungen erfüllt ist, ist das Vorabentscheidungsersuchen zulässig.

Zu den Vorlagefragen

Zur ersten Frage

35 Mit seiner ersten Frage möchte das vorlegende Gericht wissen, ob der durch die Richtlinie 2000/78 zur Bekämpfung der Diskriminierung wegen einer Behinderung geschaffene allgemeine Rahmen den Schutz einer Person gewährleistet, der von ihrem Arbeitgeber ausschließlich wegen Krankheit gekündigt worden ist.

36 Die Richtlinie 2000/78 gilt nach ihrem Artikel 3 Absatz 1 Buchstabe c im Rahmen der auf die Gemeinschaft übertragenen Zuständigkeiten für alle Personen u. a. in Bezug auf die Entlassungsbedingungen.

37 In diesen Grenzen gilt der durch die Richtlinie 2000/78 zur Bekämpfung der Diskriminierung wegen einer Behinderung geschaffene allgemeine Rahmen daher für Kündigungen.

38 Zur Beantwortung der Vorlagefrage ist erstens der Begriff „Behinderung" im Sinne der Richtlinie 2000/78 auszulegen und zweitens zu prüfen, inwieweit Menschen mit Behinderung durch die Richtlinie gegen Kündigungen geschützt sind.

Zum Begriff „Behinderung"

39 Der Begriff „Behinderung" ist in der Richtlinie 2000/78 selbst nicht definiert. Für die Bestimmung dieses Begriffes verweist die Richtlinie auch nicht auf das Recht der Mitgliedstaaten.

40 Aus den Erfordernissen der einheitlichen Anwendung des Gemeinschaftsrechts wie auch des Gleichheitsgrundsatzes ergibt sich jedoch, dass den Begriffen einer Vorschrift des Gemeinschaftsrechts, die für die Bestimmung ihres Sinnes und ihrer Tragweite nicht ausdrücklich auf das Recht der Mitgliedstaaten verweist, normalerweise in der gesamten Gemeinschaft eine autonome und einheitliche Auslegung zu geben ist, die unter Berücksichtigung des Zusammenhangs der Vorschrift und des mit der betreffenden Regelung verfolgten Zieles zu ermitteln ist (vgl. u. a. Urteile vom 18. Januar 1984 in der Rechtssache 327/82, Ekro, Slg. 1984, 107, Randnr. 11, und vom 9. März 2006 in der Rechtssache C-323/03, Kommission/Spanien, Slg. 2006, I-2161, Randnr. 32).

41 Wie aus Artikel 1 der Richtlinie 2000/78 hervorgeht, ist deren Zweck die Schaffung eines allgemeinen Rahmens zur Bekämpfung von Diskriminierungen in Beschäftigung und Beruf aus einem der in diesem Artikel genannten Gründe, zu denen die Behinderung zählt.

42 Unter Berücksichtigung dieses Zieles ist der Begriff „Behinderung" im Sinne der Richtlinie 2000/78 gemäß der in Randnummer 40 dieses Urteils wiedergegebenen Regel autonom und einheitlich auszulegen.

43 Die Richtlinie 2000/78 soll Diskriminierungen bestimmter Art in Beschäftigung und Beruf bekämpfen. In diesem Zusammenhang ist der Begriff „Behinderung" so zu verstehen, dass er eine Einschränkung erfasst, die insbesondere auf physische, geistige oder psychische Beeinträchtigungen zurückzuführen ist und die ein Hindernis für die Teilhabe des Betreffenden am Berufsleben bildet.

44 Mit der Verwendung des Begriffes „Behinderung" in Artikel 1 dieser Richtlinie hat der Gesetzgeber jedoch bewusst ein Wort gewählt, das sich von dem der „Krankheit" unterscheidet. Daher lassen sich die beiden Begriffe nicht schlicht und einfach einander gleichsetzen.

45 In der sechzehnten Begründungserwägung der Richtlinie 2000/78 heißt es: „Maßnahmen, die darauf abstellen, den Bedürfnissen von Menschen mit Behinderung am Arbeitsplatz Rechnung zu tragen, spielen eine wichtige Rolle bei der Bekämpfung von Diskriminierungen wegen einer Behinderung." Die Bedeutung, die der Gemeinschaftsgesetzgeber Maßnahmen zur Einrichtung des Arbeitsplatzes nach Maßgabe der Behinderung beigemessen hat, zeigt, dass er an Fälle gedacht hat, in denen die Teilhabe am Berufsleben über einen langen Zeitraum eingeschränkt ist. Damit die Einschränkung unter den Begriff „Behinderung" fällt, muss daher wahrscheinlich sein, dass sie von langer Dauer ist.

46 Die Richtlinie 2000/78 enthält keinen Hinweis darauf, dass Arbeitnehmer aufgrund des Verbotes der Diskriminierung wegen einer Behinderung in den Schutzbereich der Richtlinie fallen, sobald sich irgendeine Krankheit manifestiert.

47 Aus den vorstehenden Erwägungen ergibt sich, dass eine Person, der von ihrem Arbeitgeber ausschließlich wegen Krankheit gekündigt worden ist, nicht von dem durch die Richtlinie 2000/78 zur Bekämpfung der Diskriminierung wegen einer Behinderung geschaffenen allgemeinen Rahmen erfasst wird.

Zum Schutz von Menschen mit Behinderung auf dem Gebiet der Kündigung

48 Eine Benachteiligung wegen einer Behinderung greift nur dann in den Schutzbereich der Richtlinie 2000/78 ein, wenn sie eine Diskriminierung im Sinne des Artikels 2 Absatz 1 der Richtlinie darstellt.

49 Nach der siebzehnten Begründungserwägung der Richtlinie 2000/78 wird unbeschadet der Verpflichtung, für Menschen mit Behinderung angemessene Vorkehrungen zu treffen, nicht die Einstellung, der berufliche Aufstieg oder die Weiterbeschäftigung einer Person vorgeschrieben, wenn diese Person für die Erfüllung der wesentlichen Funktionen des Arbeitsplatzes nicht kompetent, fähig oder verfügbar ist.

50 Nach Artikel 5 der Richtlinie 2000/78 sind angemessene Vorkehrungen zu treffen, um die Anwendung des Gleichbehandlungsgrundsatzes auf Menschen mit Behinderung zu gewährleisten. Nach dieser Bestimmung bedeutet das, dass der

Arbeitgeber die geeigneten und im konkreten Fall erforderlichen Maßnahmen ergreift, um den Menschen mit Behinderung den Zugang zur Beschäftigung, die Ausübung eines Berufes und den beruflichen Aufstieg zu ermöglichen, es sei denn, diese Maßnahmen würden den Arbeitgeber unverhältnismäßig belasten.

51 Das Verbot der Diskriminierung wegen einer Behinderung bei Entlassungen nach den Artikeln 2 Absatz 1 und 3 Absatz 1 Buchstabe c der Richtlinie 2000/78 steht der Entlassung wegen einer Behinderung entgegen, die unter Berücksichtigung der Verpflichtung, angemessene Vorkehrungen für Menschen mit Behinderung zu treffen, nicht dadurch gerechtfertigt ist, dass die betreffende Person für die Erfüllung der wesentlichen Funktionen ihres Arbeitsplatzes nicht kompetent, fähig oder verfügbar ist.

52 Nach alledem ist auf die erste Vorlagefrage zu antworten, dass

— eine Person, der von ihrem Arbeitgeber ausschließlich wegen Krankheit gekündigt worden ist, nicht von dem durch die Richtlinie 2000/78 zur Bekämpfung der Diskriminierung wegen einer Behinderung geschaffenen allgemeinen Rahmen erfasst wird;

— das Verbot der Diskriminierung wegen einer Behinderung bei Entlassungen nach den Artikeln 2 Absatz 1 und 3 Absatz 1 Buchstabe c der Richtlinie 2000/78 der Entlassung wegen einer Behinderung entgegensteht, die unter Berücksichtigung der Verpflichtung, angemessene Vorkehrungen für Menschen mit Behinderung zu treffen, nicht dadurch gerechtfertigt ist, dass die betreffende Person für die Erfüllung der wesentlichen Funktionen ihres Arbeitsplatzes nicht kompetent, fähig oder verfügbar ist.

Zur zweiten Frage

53 Mit seiner zweiten Frage möchte das vorlegende Gericht wissen, ob Krankheit als ein weiterer Grund neben denen angesehen werden kann, derentwegen Personen zu diskriminieren nach der Richtlinie 2000/78 verboten ist.

54 Hierzu ist festzustellen, dass der EG-Vertrag keine Bestimmung enthält, die die Diskriminierung wegen einer Krankheit als solcher verbietet.

55 Artikel 13 EG und Artikel 137 EG in Verbindung mit Artikel 136 EG enthalten lediglich eine Regelung der Zuständigkeiten der Gemeinschaft. Im Übrigen betrifft Artikel 13 EG über die Diskriminierung wegen einer Behinderung hinaus nicht auch diejenige wegen einer Krankheit als solcher und kann daher keine Rechtsgrundlage für Maßnahmen des Rates zur Bekämpfung einer solchen Diskriminierung sein.

56 Zwar gehört zu den Grundrechten als integraler Bestandteil der allgemeinen Grundsätze des Gemeinschaftsrechts u. a. das allgemeine Diskriminierungsverbot. Dieses ist für die Mitgliedstaaten somit verbindlich, wenn die im Ausgangsverfahren in Rede stehende innerstaatliche Situation in den Anwendungsbereich des Gemeinschaftsrechts fällt (vgl. in diesem Sinne Urteile vom 12. Dezember 2002 in der Rechtssache C-442/00, Rodríguez Caballero, Slg. 2002, I-11915, Randnrn. 30 und 32, sowie vom 12. Juni 2003 in der Rechtssache C-112/00, Schmidberger, Slg. 2003, I-5659, Randnr. 75 und die angeführte Rechtsprechung). Daraus ergibt sich jedoch nicht, dass der Geltungsbereich der Richtlinie 2000/78 in entsprechender Anwendung über die Diskriminierungen wegen der in Artikel 1 dieser Richtlinie abschließend aufgezählten Gründe hinaus ausgedehnt werden darf.

57 Folglich ist auf die zweite Frage zu antworten, dass Krankheit als solche nicht als ein weiterer Grund neben denen angesehen werden kann, derentwegen Personen zu diskriminieren nach der Richtlinie 2000/78 verboten ist.

Kosten

58 Für die Parteien des Ausgangsverfahrens ist das Verfahren ein Zwischenstreit in dem bei dem vorlegenden Gericht anhängigen Rechtsstreit; die Kostenentscheidung ist daher Sache dieses Gerichts. Die Auslagen anderer Beteiligter für die Abgabe von Erklärungen vor dem Gerichtshof sind nicht erstattungsfähig.

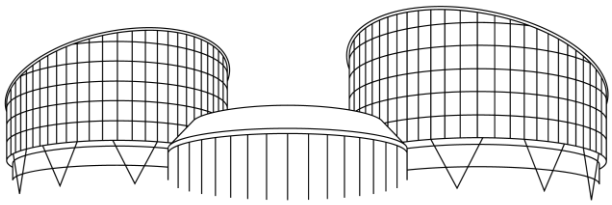
Aus diesen Gründen hat der Gerichtshof (Große Kammer) für Recht erkannt:

1. **Eine Person, der von ihrem Arbeitgeber ausschließlich wegen Krankheit gekündigt worden ist, wird nicht von dem durch die Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf zur Bekämpfung der Diskriminierung wegen einer Behinderung geschaffenen allgemeinen Rahmen erfasst.**

2. **Das Verbot der Diskriminierung wegen einer Behinderung bei Entlassungen nach den Artikeln 2 Absatz 1 und 3 Absatz 1 Buchstabe c der Richtlinie 2000/78 steht der Entlassung wegen einer Behinderung entgegen, die unter Berücksichtigung der Verpflichtung, angemessene Vorkehrungen für Menschen mit Behinderung zu treffen, nicht dadurch gerechtfertigt ist, dass die betreffende Person für die Erfüllung der wesentlichen Funktionen ihres Arbeitsplatzes nicht kompetent, fähig oder verfügbar ist.**

3. **Krankheit als solche kann nicht als ein weiterer Grund neben denen angesehen werden, derentwegen Personen zu diskriminieren nach der Richtlinie 2000/78 verboten ist.**

Unterschriften



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF LASHIN v. RUSSIA

(Application no. 33117/02)

JUDGMENT

STRASBOURG

22 January 2013

FINAL

22/04/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Lashin v. Russia,

The European Court of Human Rights (Chamber), sitting as a Chamber composed of:

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Nina Vajić,
Anatoly Kovler,
Khanlar Hajiyev,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*

and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 18 December 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 33117/02) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Aleksandr Petrovich Lashin ("the applicant"), on 29 July 2002.

2. The applicant, who had been granted legal aid, was represented by Mr D. Bartenev, a lawyer practising in St Petersburg. The Russian Government ("the Government") were represented by Mr G. Matyushkin, the Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant complained, in particular, about his status as a legally incapacitated person, his non-voluntary commitment to a psychiatric hospital and his inability to marry.

4. By a decision of 6 January 2011, the Court declared the application partly admissible.

5. The applicant and the Government each filed further written observations on the merits (Rule 59 § 1 of the Rules of Court). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1960 and lives in Omsk.

A. Deprivation of legal capacity

7. The applicant suffers from schizophrenia, which was first diagnosed in 1987. In the 1980s and early 1990s he was employed as a bus driver, but in 1995 he stopped working. The applicant kept writing nonsensical letters to state officials and lodged numerous administrative complaints and lawsuits. At some point he started giving money and clothes to strangers and invited them to his house, explaining it by religious considerations. Such behaviour led to recurrent conflicts with his wife. The applicant became irritable, aggressive and once in 1996 tried to strangulate her. As a result, they divorced. In 1998 the applicant was officially given the "2nd degree disability" status due to his mental disorder.

8. Between 1989 and 17 July 2000 the applicant was hospitalised nine times in the Omsk Regional Psychiatric Hospital. As follows from the opinion of the Serbskiy Institute of 19 August 1999 (a leading State psychiatric research centre based in Moscow) during that period the applicant considered himself as a "defender of justice", believed that he knew important State secrets, and claimed that there was a conspiracy against him. Amongst other things, he challenged his diagnosis, complained of his confinement to the hospital, threatened the doctors who had been treating him in the Omsk Regional Psychiatric Hospital, and tried to institute criminal proceedings against them. The report did not mention any incidence of violence or self-destructive behaviour after 1996, and it was not alleged that during that period the applicant was unable to take care of himself in everyday life. However, it is clear that his mental condition had a persistent character, and that he kept harassing doctors from the Omsk Regional Psychiatric Hospital with complaints and litigations.

9. On 5 April 2000 the applicant underwent an examination in the Omsk Regional Psychiatric Hospital by a panel of doctors, who confirmed the previous diagnosis and the opinion by the Serbskiy Institute and concluded that the applicant was "incapable of understanding the meaning of his actions and was unable to control them".

10. On 16 June 2000, following an application by the public prosecutor, the Kuybyshevskiy District Court of Omsk declared the applicant legally incapacitated because of his illness. The hearing took place in the absence of the applicant. On 30 August 2000 the Omsk Regional Court upheld the decision of the District Court.

11. On an unspecified date the Omsk Municipal Public Health Department appointed the applicant's father as his guardian.

B. Attempts to restore legal capacity

1. First request

12. On 2 October 2000 the applicant's daughter brought court proceedings seeking to restore his legal capacity. Her request was supported by the applicant's father as guardian. The plaintiffs claimed that the applicant's mental state had significantly improved and requested that the court conduct a new psychiatric examination of his health. As the plaintiffs did not trust doctors from the Omsk Regional Psychiatric Hospital, they insisted that the process of the psychiatric examination of the applicant be recorded on a videotape.

13. On 27 October 2000 the court commissioned a psychiatric examination of the applicant, but refused to order a video recording of it. The expert examination was entrusted to the Omsk Regional Psychiatric Hospital. However, the applicant failed to submit himself for an examination at the hospital, so the examination was not conducted.

14. On 19 March 2001 the Sovetskiy District Court of Omsk decided to confirm the status of legal incapacity and maintain the applicant's guardianship. It is unclear whether the applicant was present at the hearing. The court noted that because the new expert examination could not be conducted due to the applicant's failure to cooperate, the results of the examination of 5 April 2000 were still applicable. It appears that the decision of 19 March 2001 was not appealed against.

2. Second request

15. On 9 July 2001 the applicant's father (as guardian) instituted court proceedings challenging the medical report of 5 April 2000 by the Omsk Regional Psychiatric Hospital which had served as grounds for declaring the applicant legally incapacitated. He also sought restoration of the applicant's legal capacity. Since the plaintiffs did not trust doctors from the Omsk Regional Psychiatric Hospital they requested that the court commission a panel of experts from the Independent Psychiatric Association of Russia, a non-State professional association of psychiatrists, based in Moscow, to assess the applicant's mental capacity.

16. On 26 February 2002 the Kuybyshevskiy District Court held a hearing in the applicant's absence, having decided in particular that:

> "... [the applicant's] mental condition prevented him from taking part in the hearing, and, moreover, [his] presence would be prejudicial to his health".

The court further refused to commission a new expert examination by a non-State psychiatric association, on the ground that only State-run

institutions were allowed by law to conduct such examinations and issue reports. The relevant part of the District Court judgment reads as follows:

> "... under section 1 of the Psychiatric Care Act ... State forensic examination activity in judicial proceedings is carried out by State forensic examination institutions, and consists of organising and implementing the forensic examination".

In conclusion the court found that the expert report of 5 April 2000 was still valid, that the applicant continued to suffer from a mental disorder and that, therefore, his status as a legally incapacitated person should be maintained.

17. The applicant's father (as his guardian) appealed to the Omsk Regional Court, which on 15 May 2002 upheld the judgment of 26 February 2002.

C. Confinement of the applicant in the psychiatric hospital

18. Some time later the applicant's father solicited an opinion from Dr S., a psychiatrist not affiliated with the Omsk Regional Psychiatric Hospital, concerning the applicant's mental condition. Dr S. examined the applicant and on 1 July 2002 he submitted a report according to which the applicant's mental illness was not as serious as claimed by the doctors at the Omsk Regional Psychiatric Hospital.

19. On an unspecified date in 2002 the applicant's father, as his guardian, delivered a power of attorney to a third person, mandating that person to act in the applicant's name. However, a notary public refused to certify the power of attorney, on the basis that under the law a guardian should represent his ward personally and could not confer his duties on a third person. The applicant's father brought proceedings against the notary public in court, but to no avail: on 10 October 2002 the Sovetskiy District Court of Omsk confirmed the lawfulness of the refusal.

20. On 2 December 2002 the applicant and his fiancée, Ms D., requested that the municipality register their marriage. According to the applicant, they received no reply from the municipality.

21. On 4 December 2002 a district psychiatrist (*uchastkovyi psikhiatr*) examined the applicant and concluded that the latter suffered from "paranoid schizophrenia with paraphrenic delusion of reformism". The psychiatrist delivered a hospitalisation order, which relied strongly on the "nonsensical complaints" lodged by the applicant's representatives.

22. On 6 December 2002 the Guardianship Council of the Omsk Region decided to strip the applicant's father of his status as the applicant's guardian. The decision was taken by the Guardianship Council without the applicant or his father being heard.

23. By virtue of the hospitalisation order the applicant was placed in the Omsk Regional Psychiatric Hospital on 9 December 2002. According to the

applicant, he and his father unambiguously opposed this provisional placement in the hospital.

24. On the same day a panel of three doctors from the Omsk Regional Psychiatric Hospital examined the applicant and concluded that he should stay in the hospital. They mostly based themselves on the medical history of the applicant that had led to the deprivation of legal capacity. The report stated that the worsening of the applicant's mental condition was demonstrated by the numerous complaints by which he had tried to recover his legal capacity and challenge the actions of the hospital.

25. On 10 December 2002 the Omsk Municipal Public Health Authority approved the decision taken by the Guardianship Council on 6 December 2002. From that moment on the applicant's father ceased to be his guardian and, according to the Government, the functions of the applicant's guardian were performed by the municipal authorities, namely the Omsk Public Health Authority.

26. On 11 December 2002 the Omsk Regional Psychiatric Hospital requested that the Kuybyshevskiy District Court authorise the applicant's further confinement. On the same day the judge, in accordance with section 33 of the Psychiatric Care Act, ordered that the applicant be held in the hospital for such time as was necessary for the examination of his case. The provisional order issued by the judge was a one-sentence annotation on the hospitalisation order of 4 December 2002: "I hereby authorise detention [in hospital] pending the examination [of the case] on the merits".

27. Having been informed of that ruling, the applicant asked the hospital staff to release him for home treatment. The hospital staff refused, however, and prohibited him from seeing his relatives or talking to them.

28. On 15 December 2002 the applicant lodged an application with the court for his release from the Omsk Regional Psychiatric Hospital. However, the judge informed the applicant by letter that such a provisional placement of a patient in a psychiatric hospital for a period necessary for the examination of the case on the merits was not subject to judicial review.

29. On 17 December 2002 the District Court held a hearing in the presence of the applicant, the applicant's father, the public prosecutor, and a representative of the hospital. From the case file it appears that the participants and the judge himself were not aware that the applicant's father was no longer the applicant's guardian.

30. At that hearing the applicant and his father claimed that the applicant's condition did not require hospitalisation. They insisted that the hospital had not proved the medical necessity of such a measure. The applicant and his father referred to the report by Dr. S. of 1 July 2002 (see paragraph 18 above). In order to clarify the matter, the applicant asked the court to commission a fresh medical examination of his mental health, in order to establish whether there had been any deterioration. The court rejected the request, while at the same time admitting the applicant's

medical record in evidence. At the end of the day the hearing was adjourned to 24 December 2002.

31. On 20 December 2002 the Guardianship Council appointed the administration of the Omsk Regional Psychiatric Hospital as the applicant's guardian and delivered an authorisation for his extended confinement in the hospital.

32. On 24 December 2002, without holding a hearing, the District Court closed the proceedings because the hospital, as the applicant's only legitimate guardian, had revoked its request for authorisation of his confinement. The applicant's confinement was thus considered to be "voluntary", and therefore did not require court approval.

33. On the same day, the applicant's father and fiancée asked the court to give them a copy of the decision, so that they could lodge an appeal. The judge refused because the applicant's father, who was no longer his guardian, could not act on behalf of the applicant. The court also denied a request to consider the applicant's fiancée to be his representative.

34. On 27 January 2003, the applicant's fiancée wrote a letter to the Guardianship Council where she requested that the council appoint her as the guardian of "her husband, Mr. Lashin". There is no information whether she received any reply.

35. On an unspecified date the applicant's father lodged an appeal against the decision of 24 December 2002. On 10 February 2003 the Regional Court refused to examine the appeal on the grounds that the applicant's father had no right to represent his son and that no decision on the merits of the case had been taken by the first-instance court.

36. On 2 February 2003 the applicant's fiancée lodged a supervisory review appeal, which was returned to her without examination on 13 February 2003 on the basis that she had no power to represent the applicant.

37. In the following months the applicant's father and fiancée lodged several criminal-law complaints against the hospital and its doctors. Their complaints were addressed to various state authorities and the courts. It appears that none of those complaints was successful.

38. On an unspecified date the applicant's father challenged the decision of the Guardianship Council of 6 December 2002, as approved by the municipal authorities on 10 December 2002, stripping him of his status as the applicant's guardian. On 16 July 2003 the Kuybyshevskiy District Court of Omsk upheld the decision of the Guardianship Council. The District Court found that the applicant's father had neglected his duties on many occasions and had tried to entrust the guardianship to a third party, referring in particular to the episode concerning the power of attorney (see paragraph 19 above). The court also noted that the applicant's father had failed to secure appropriate medical treatment for the applicant as prescribed by the doctors, as a result of which the applicant's condition had

worsened. According to the applicant, he lodged an appeal against that decision.

39. In their letters to the Court of 28 July 2002 and 25 July 2003 the applicant and his fiancée informed the Court of their desire to marry.

40. On 10 October 2003 the Guardianship Council decided to appoint the applicant's daughter as his guardian. That decision was approved by the municipality on 17 October 2003.

41. On 10 December 2003 the applicant was released from the town hospital. The medical report issued in connection with the applicant's discharge indicated that his mental health during his confinement had been predominantly characterised by "litigious" ideas similar to those he had presented at the time of his admission.

42. It appears that in 2006 the applicant's relatives brought court proceedings seeking to restore the applicant's full legal capacity. The Court has not been provided with any information about the outcome of those proceedings.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. Legal capacity

1. Substantive provisions

43. Under Article 21 of the Civil Code of the Russian Federation of 1994, any individual aged 18 or more has, as a rule, full legal capacity (*дееспособность*), which is defined as "the ability to acquire and enjoy civil rights, [and] create and fulfil civil obligations by his own acts". Under Article 22 of the Civil Code, legal capacity can be limited, but only on the grounds defined by law and within a procedure prescribed by law.

44. According to Article 29 of the Civil Code, a person who cannot understand or control his or her actions as a result of a mental disease may be declared legally incapacitated by a court and placed in the care of a guardian (*опека*). All legal transactions on behalf of the incapacitated person are concluded by his guardian. In practical terms this means that the guardian ensures mandatory representation of the incapacitated person in all matters concerning his property, income, work relations, travel and residence, social contacts and so on. The incapacitated person can be declared fully capable if the grounds on which he or she was declared incapacitated cease to exist.

45. Article 30 of the Civil Code provides for the partial limitation of legal capacity. If a person's addiction to alcohol or drugs is creating serious financial difficulties for his family, he can be declared partially incapacitated. That means that he is unable to conclude large-scale

transactions. He can, however, dispose of his salary or pension and make small transactions, under the control of his guardian.

46. Under Article 35 (4), where a person deprived of legal capacity is placed under the supervision of a medical institution, that medical institution must take on the functions of the guardian.

47. It follows from Article 39 (3) of the Civil Code that the guardianship authority may revoke the authority of a guardian who neglects his duties.

2. Incapacitation proceedings

48. Article 258 of the Code of Civil Procedure of 1964, as in force at the material time (hereinafter "the old CCP"), established that members of the family of the person concerned, a prosecutor, a guardianship authority or a psychiatric hospital, as well as "trade unions and other organisations", might apply to a court seeking to deprive a person of his legal capacity. The court, if there was evidence of a mental disorder, was required to commission a forensic psychiatric examination of the person concerned (Article 260). The case was required to be heard in the presence of the person concerned, provided that his presence was compatible with his state of health, and also in the presence of the prosecutor and a representative of the guardianship authority (*орган опеки и попечительства*, Article 261 paragraph 2 of the old CCP). Under Article 263 of the old CCP it was possible for legal capacity to be restored by a court decision upon the application of the guardian or the persons listed in Article 258, but not based on the application of the person declared incapacitated.

49. Article 32 of the old CCP provided that a person declared incapacitated could not bring an action before the courts. The guardian was entitled to do so in order to protect the rights of the incapacitated person.

B. Confinement to a psychiatric hospital

50. The Psychiatric Care Act of 1992, as amended (hereinafter "the Act"), stipulates that any recourse to psychiatric aid must be voluntary. However, a person declared fully incapacitated may be subjected to psychiatric treatment at the request or with the consent of his official guardian (section 4 of the Act).

51. Section 5 (3) of the Act provides that the rights and freedoms of persons with mental illnesses cannot be limited solely based on their diagnosis or the fact that they have undergone treatment in a psychiatric hospital.

52. Under section 5 of the Act a patient in a psychiatric hospital can have a legal representative. However, pursuant to section 7 (2) the interests of a person declared fully incapacitated are represented by his official guardian or, in absence of an officially appointed guardian, the administration of the psychiatric hospital where the patient is confined.

53. Section 28 (1) of the Act ("Grounds for hospitalisation") provides that a person suffering from a mental disorder may be placed in a psychiatric hospital for further examination or treatment on the basis of a decision by a psychiatrist or on the basis of a court order. Section 28 (3) and (4) states that a person declared incapacitated can be placed in a psychiatric hospital at the request or with the consent of his guardian. This hospitalisation is regarded as voluntary and, unlike non-voluntary hospitalisation, does not require court approval (sections 29 and 33 of the Act).

54. Section 29 sets out the grounds for non-voluntary placement in a psychiatric hospital in the following terms:

> "A mentally disturbed individual may be hospitalised in a psychiatric hospital against his will or the will of his legal representative and before a court decision [on the matter] has been taken, if the individual's examination or treatment can only be carried out in in-patient care, and the mental disorder is severe enough to give rise to:
>
> a) a direct danger to the person or to others, or
>
> b) the individual's helplessness, i.e. inability to take care of himself, or
>
> c) a significant health impairment as a result of a deteriorating mental condition, if the affected person were to be left without psychiatric care."

55. Section 32 of the Act specifies the procedure for the examination of patients compulsorily confined in a hospital:

> "1. A person placed in a psychiatric hospital on the grounds defined by section 29 of the present Act shall be subject to compulsory examination within 48 hours by a panel of psychiatrists of the hospital, who shall take a decision as to the need for hospitalisation. ...
>
> 2. If hospitalisation is considered necessary, the conclusion of the panel of psychiatrists shall be forwarded to the court having territorial jurisdiction over the hospital, within 24 hours, for a decision as to the person's further confinement in the hospital."

56. Sections 33-35 set out the procedure for judicial review of applications for the non-voluntary in-patient treatment of mentally ill persons:

Section 33

> "1. Non-voluntary hospitalisation for in-patient psychiatric care on the grounds laid down in section 29 of the present Act shall be subject to review by the court having territorial jurisdiction over the hospital.
>
> 2. An application for the non-voluntary placement of a person in a psychiatric hospital shall be filed by a representative of the hospital where the person is detained ...
>
> 3. A judge who accepts an application for review shall simultaneously order the person's detention in a psychiatric hospital for the term necessary for that review."

Section 34

"1. An application for the non-voluntary placement of a person in a psychiatric hospital shall be reviewed by a judge, on the premises of the court or hospital, within five days of receipt of the application.

2. The person shall be allowed to participate personally in the hearing to determine whether he should be hospitalised. If, based on information provided by a representative of the psychiatric hospital, the person's mental state does not allow him to participate personally in the hearing, the application shall be reviewed by the judge on the hospital's premises. ..."

Section 35

"1. After examining the application on the merits, the judge shall either grant or refuse it. ..."

57. On 5 March 2009 the Constitutional Court of Russia adopted Ruling No. 544-*O-P* in which it examined the compatibility of sections 32 and 34 (1) and (2) of the Psychiatric Care Act with Article 22 of the Constitution of the Russian Federation, which provides that a person can be arrested without a court order for a maximum period of forty-eight hours. The Constitutional Court found that the Psychiatric Care Act did not allow non-voluntary hospitalisation in a mental clinic for more than fourty-eight hours without a court order (point 2.3 of the Ruling). It appears from the last paragraph of point 2.2 of the Ruling that the Constitutional Court did not consider that an interim decision taken by a judge by virtue of section 33 (3) of the Act qualified as a "court order" within the meaning of Article 22 of the Constitution, since the judge in such a situation did not examine the reasons for the confinement and had no power to release the person concerned. However, the Constitutional Court did not declare the relevant provisions of the Psychiatric Care Act unconstitutional.

58. Section 36 (3) of the Act provides for the courts to verify every six months whether the patient's non-voluntary confinement continues to be necessary.

59. Section 37 (2) establishes the rights of a patient in a psychiatric hospital. In particular, the patient has the right to communicate with his lawyer without censorship. However, under section 37 (3) the doctor may limit the patient's rights to correspond with other persons, have telephone conversations and meet visitors.

60. Section 47 of the Act provides that the doctors' actions are open to appeal before a court. Section 48 stipulates *inter alia* that the person whose rights are affected by the actions of the psychiatric institution must participate in the court proceedings if it is compatible with his or her mental condition.

C. State and private expert institutions

61. The State Forensic Expert Activities Act of 2001 (no. 73-FZ) defines the basic principles of the functioning and organisation of the State forensic institutions, which are supposed to assist judges, prosecutors and investigators in their professional activities where technical or scientific knowledge in a particular field is needed. Section 41 of that Act provides that forensic examination may be conducted by experts not belonging to the State forensic institutions, in accordance with Russia's procedural laws.

62. Article 75 of the old CCP provided that an expert examination had to be entrusted to "experts of the appropriate expert institutions or to other specialists appointed by the court. Any person having the appropriate knowledge [to give expert evidence] might be called [to testify before the court]."

D. Family Code

63. Article 14 of the Family Code of the Russian Federation of 1995 (Federal Law No. 223-FZ) makes it impossible to marry if at least one of the would-be spouses has been declared incapable by a court because of a mental illness.

64. Under Article 16 of the Family Code a marriage may be dissolved at the request of the guardian of a spouse who has been declared incapable by the court.

E. International instruments concerning legal capacity and confinement to a psychiatric institution

65. On 23 February 1999 the Committee of Ministers of the Council of Europe adopted "Principles concerning the legal protection of incapable adults", Recommendation No. R (99) 4. The relevant provisions of these Principles read as follows:

Principle 2 – Flexibility in legal response

"1. The measures of protection and other legal arrangements available for the protection of the personal and economic interests of incapable adults should be sufficient, in scope or flexibility, to enable suitable legal responses to be made to different degrees of incapacity and various situations. ...

4. The range of measures of protection should include, in appropriate cases, those which do not restrict the legal capacity of the person concerned."

Principle 3 – Maximum reservation of capacity

"1. The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete

removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.

2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so. ..."

Principle 6 – Proportionality

"1. Where a measure of protection is necessary it should be proportionate to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned.

2. The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention. ..."

Principle 13 – Right to be heard in person

"The person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity."

Principle 14 – Duration review and appeal

"1. Measures of protection should, whenever possible and appropriate, be of limited duration. Consideration should be given to the institution of periodical reviews. ...

3. There should be adequate rights of appeal."

66. The United Nations Convention on the Rights of Persons with Disabilities (the "CRPD"), which Russia signed on 24 September 2008 and ratified on 25 September 2012, provides in Article 12 (3) that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life". Article 12 (4) stipulates:

"States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity ... are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests. ..."

Article 23 (a) of the CRPD establishes that "the right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognised."

F. Comparative law

67. A comparative law research concerning the law of persons with mental disabilities to marry and covering 25 member States of the Council of Europe demonstrated that in approximately one half (13/25) of the States

an incapacitation decision automatically leads to the loss of the right to marry. In approximately one third (9/25) of them a guardian's consent to the conclusion of marriage of an incapacitated person is needed. An express ban on the right to marry for mentally disabled persons is in place in six of the 25 member States. The language and procedures used to verify the legal consequences of the mental insufficiency in the marital sphere vary considerably from one member State to another.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

68. The applicant complained about his inability to have his legal incapacity reviewed. The Court will examine this complaint under Article 8, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties' submissions

1. The Government

69. The Government started by summarising provisions of the Russian legislation on legal capacity. They admitted that deprivation of legal capacity would constitute an interference with the private life of the person concerned. However, in the applicant's case it had been necessary in view of his diagnosis – schizophrenia, twice confirmed by doctors at the Serbskiy Institute in Moscow and the Omsk Regional Psychiatric Hospital, in 1999 and 2000 respectively. In particular, the psychiatric examination report prepared in 2000 concluded that the applicant was incapable of understanding the meaning of his actions and unable to control them. The incapacitation decision had thus been taken in order to protect the interests of other people, as well as his own interests. Such a limitation of his rights was provided for by Article 29 of the Civil Code and had therefore been "lawful". The decision to deprive him of legal capacity had been taken in the applicant's absence because he was in a psychiatric hospital at that time and his appearance before the court could therefore have been prejudicial to his health. The option of taking a decision without seeing the person

concerned was provided for under Article 261 of the Code of Civil Procedure. The case had been heard by courts at two levels of jurisdiction, which had both concluded that the applicant's illness warranted the deprivation of his legal capacity.

70. The Government further indicated that the applicant's father had ceased to be his guardian on 10 December 2002, when the Public Health Authority approved the decision of the Guardianship Council. Between 10 and 20 December 2002 the applicant had no guardian.

2. The applicant

71. The applicant argued that the decision of 26 February 2002 had been procedurally flawed. The judge conducted the hearing in the applicant's absence without giving any explanation as to why the latter's mental health prevented him from attending the hearing. The applicant acknowledged that he had suffered from some psychiatric problems, but there had been no indication that the applicant was aggressive or incapable of understanding the proceedings. It was therefore important for the judge responsible for deciding whether to restore the applicant's legal capacity to form a personal opinion about his mental capacity.

72. During the 2002 proceedings the applicant's representatives had requested that the District Court commission an independent medical body (a panel of experts from the Independent Psychiatric Association of Russia) to assess his mental capacity. This application was dismissed because in the court's view the law did not allow private entities to perform such assessments. However, Section 41 of the State Forensic Expert Activities Act explicitly stated the contrary. Moreover, Article 75 of the old CCP had provided for expert assessments to be performed by experts from the relevant institutions or by other specialists appointed by the court.

73. The applicant also stressed that, having rejected the request to commission an independent panel of experts, the District Court had not made arrangements for any other expert assessment of his mental capacity. The only State expert psychiatric institution in the Omsk Region was the Omsk Regional Psychiatric Hospital whose actions the applicant had challenged in the proceedings in question, and which had previously sought the incapacity in 2000 by applying to the prosecutor's office. It would have been contrary to the principle of equality of arms to appoint experts from the respondent hospital to assess the applicant's mental capacity.

74. The applicant also complained that after the transferral of the guardianship on 20 December 2002 to the Omsk Regional Psychiatric Hospital he had lost any possibility to have his legal capacity reviewed.

75. As to the substance of the domestic decisions, the applicant recalled that he had been entirely deprived of his legal capacity in accordance with Article 29 of the Civil Code, that is to say on the sole basis that he suffered from a mental disorder. In 2002 the judge had simply reiterated the

conclusion of the 2000 expert report and of the incapacity judgment, without establishing the actual mental capacity of the applicant at the time of the hearing. Thus, in the court's view, the mere diagnosis of a mental disability had been enough to strip the applicant of all his fundamental rights. The judge had not examined the applicant's actual capacity in any meaningful way in order to establish whether his mental health still prevented him from understanding the meaning of his actions and from controlling them. In any event, the existing legislative framework had not left the judge any other choice than to declare the person concerned fully incapacitated. The Russian Civil Code distinguished between full capacity and full incapacity, but did not provide for any borderline situation, except for drug or alcohol addicts.

B. The Court's assessment

76. The Court notes that the applicant's complaint is two-fold. First, he complained that his Article 8 rights had been breached in the 2002 proceedings seeking the restoration of his legal capacity. Second, he complained that after 20 December 2002 he had no possibility to have his legal incapacity reviewed. The Court will start its analysis by addressing the first limb of the applicant's complaint.

1. The applicant's attempts to recover his legal capacity until 20 December 2002

77. The Court recalls that deprivation of legal capacity may amount to an interference with the private life of the person concerned (see *Matter v. Slovakia*, no. 31534/96, § 68, 5 July 1999, and *Shtukaturov v. Russia*, no. 44009/05, § 83, ECHR 2008). The Government in the present case did not contest that the applicant's incapacitation had amounted to such an interference, and the Court does not see any reason to hold otherwise, especially in view of various serious limitations to the applicant's personal autonomy which that measure entailed.

78. Under the six-month rule in Article 35 of the Convention the Court is precluded from examining the original incapacitation proceedings of 2000. That being said, the Court may examine the applicant's situation under Article 8 of the Convention insofar as his attempts to have his capacity restored in 2002 are concerned (see the admissibility decision of 6 January 2011 in the present case).

79. An issue arises as to whether the applicant's inability to obtain the review of his status must be examined in terms of the interference by the State with his Article 8 rights or rather in view of the positive obligations of the State under that provision. The Court recalls in this respect that whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under

paragraph 1 of Article 8 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole (see *Oluić v. Croatia*, no. 61260/08, § 46, 20 May 2010, with further references). This approach is fully applicable in the case at hand: the Court will examine whether a fair balance was struck between his Article 8 rights and any other legitimate interest, private or public, which may have been at stake in the 2002 proceedings.

80. The Court accepts that depriving someone of his legal capacity and maintaining that status may pursue a number of legitimate aims, such as to protect the interests of the person affected by the measure. In deciding whether legal capacity may be restored, and to what extent, the national authorities have a certain margin of appreciation. It is in the first place for the national courts to evaluate the evidence before them; the Court's task is to review under the Convention the decisions of those authorities (see, *mutatis mutandis*, *Winterwerp v. the Netherlands*, 24 October 1979, § 40, Series A no. 33; *Luberti v. Italy*, 23 February 1984, Series A no. 75, § 27; and *Shtukaturov v. Russia*, cited above, § 67).

81. That being said, the extent of the State's margin of appreciation in this context depends on two major factors. First, where the measure under examination has such a drastic effect on the applicant's personal autonomy as in the present case (compare *X. and Y. v. Croatia*, no. 5193/09, § 102, 3 November 2011), the Court is prepared to subject the reasoning of the domestic authorities to a somewhat stricter scrutiny. Second, the Court will pay special attention to the quality of the domestic procedure (see *Shtukaturov v. Russia*, cited above, § 91). Whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8 (see *Görgülü v. Germany*, no. 74969/01, § 52, 26 February 2004).

(a) Procedural aspects

82. As to the procedural aspect of the domestic decisions, the Court first of all observes that on 26 February 2002 the domestic court refused to restore the applicant's legal capacity. The court made this decision without seeing or hearing him (see paragraph 16 above). The Court recalls that in such cases the individual concerned is not only an interested party but also the main object of the court's examination (see *X. and Y.*, cited above, § 83, with further references; see also *mutatis mutandis, Winterwerp,* cited above, § 74). There are possible exceptions from the rule of personal presence (see, as an example, *Berková v. Slovakia*, no. 67149/01, §§ 138 et seq., 24 March 2009); however, departure from this rule is possible only where the domestic court carefully examined this issue. In the present case, however,

the District Court merely stated that the applicant's personal presence would be "prejudicial to his health", and there is no evidence that the court ever sought a doctor's opinion on that particular question, namely what effect appearing in court might have had on the applicant. The Court is not aware of any other obstacles to the applicant's personal appearance in court. The Court considers that a simple assumption that a person suffering from schizophrenia must be excluded from the proceedings is not sufficient.

83. The second aspect of the domestic proceedings of concern to the Court is the refusal of the domestic court to commission a new psychiatric examination of the applicant (see paragraphs 14 and 16 above). The Court recalls its findings in *Stanev v. Bulgaria* [GC] (no. 36760/06, § 241), ECHR 2012) where it held, in the context of the right of access to court under Article 6 § 1, that "the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned".

84. The Court observes that in February 2002 more than a year and a half had elapsed since the original incapacitation decision had been taken in June 2000 (see paragraph 10 above). Nothing in the case file indicates that the applicant's condition was irreversible, or that the time elapsed since his incapacitation was too short for the question to be examined again. The Court concludes that in these circumstances the applicant was entitled to a full review of his status, which, as a matter of principle, should have included some sort of fresh expert assessment of his condition.

85. The applicant asked for a fresh examination of his mental condition and asked the court to entrust it to a non-State medical institution. However, the court refused on the sole ground that it was prohibited by law. The Court is not aware of any norm in Russian law that would prohibit a court from seeking an expert opinion from a clinic or a doctor not belonging to the State system of public health institutions. The Government did not refer to any such norm either. The fact that there is a State-run system of forensic institutions (see the domestic court's reasoning in paragraph 16 above) does not mean that they have a monopoly on providing expert opinions to the courts. On the contrary, Russian law at the time explicitly permitted examinations by experts not belonging to the State forensic institutions (see paragraph 61 above). The domestic court's decision in this respect appears to have no basis in the domestic law.

86. Further, the Court does not see what prevented the domestic court from seeking a fresh expert opinion from experts not directly affiliated with the Omsk Regional Psychiatric Hospital. The Court observes that one of the reasons for the applicant's many hospitalisations in the Omsk Regional Psychiatric Hospital were his numerous complaints about the doctors of that institution. His incapacitation was also based on the opinion of the doctors from that hospital. Nevertheless, when the applicant sought to restore his legal capacity (see paragraphs 12 et seq. above), the District Court entrusted his examination to the same hospital. In such circumstances the applicant's

demand was not frivolous: first, he refused to submit himself for an examination in the Omsk Regional Hospital, and then he asked for an examination by the doctors from the Independent Psychiatric Association of Russia (see paragraph 15 above).

87. The Court reiterates that where the opinion of an expert is likely to play a decisive role in the proceedings, as in the case at hand, the expert's neutrality becomes an important requirement which should be given due consideration. Lack of neutrality may result in a violation of the equality of arms guarantee under Article 6 of the Convention (see, *mutatis mutandis*, *Sara Lind Eggertsdóttir v. Iceland*, no. 31930/04, § 47, 5 July 2007, with further references). In the Court's opinion an expert's neutrality is equally important in the context of incapacitation proceedings, where the person's most basic rights under Article 8 are at stake.

88. The Court notes that the applicant never categorically refused to submit himself to an examination, and that he doubted the neutrality of the doctors from the Omsk Regional Psychiatric Hospital. Without taking a position as to whether his doubts were well-founded, the Court considers that in such circumstances it was the District Court's duty to make arrangements for a fresh examination of the applicant by an independent psychiatric institution – not necessarily private, but lacking direct affiliation to the Omsk Regional Psychiatric Hospital. The Government have not referred to any serious considerations that might have prevented the court from seeking such an examination.

89. The Court recalls that according to the judgment of 26 February 2002 the applicant continued to suffer from a mental disorder which had warranted his incapacitation in 2000. However, in a situation where the court did not see the person concerned personally and did not obtain a fresh assessment of his mental condition, such a conclusion cannot be regarded as reliable.

(b) Substantive aspects

90. As to the substance of the domestic decisions, the Court observes that the judgment of 26 February 2002 relied on the medical report prepared in 2000. The Court does not cast doubt on the findings of that report, in particular that in 2000 the applicant suffered from schizophrenia. However, the Court recalls that in the *Shtukaturov* case, cited above, § 94, it held that "the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation. By analogy with cases concerning deprivation of liberty, in order to justify full incapacitation the mental disorder must be "of a kind or degree" warranting such a measure". In *Shtukaturov* the Court found that in the domestic proceedings the issue of "the kind and degree" of the applicant's mental illness remained unresolved.

91. In the present case the Court faces essentially the same situation as in *Shtukaturov*. On the one hand, it is clear that the applicant suffered from a

serious and persistent mental disorder: he had delusory ideas, was a vexatious litigant, etc. On the other hand, the Serbskiy Institute report of 1999 did not refer to any particular incident of violent, self-destructive or otherwise grossly irresponsible behaviour on the part of the applicant since 1996, and did not allege that the applicant was completely unable to take care of himself (see paragraph 8 above).

92. The Court is ready to admit that some measure of protection in respect of the applicant might have been advisable. However, the Russian Civil Code did not provide for any intermediate form of limitation of legal capacity for mentally ill persons – this existed only in respect of drug or alcohol addicts (*ibid.*, § 95). Therefore, the domestic court in the present case, as in *Shtukaturov*, had no other choice than to apply and maintain full incapacity – the most stringent measure which meant total loss of autonomy in nearly all areas of life. That measure was, in the opinion of the Court and in the light of materials of the case, disproportionate to the legitimate aim pursued.

(c) Conclusion

93. In sum, the confirmation of the applicant's incapacity status in 2002 based on the report of 2000 was not justified for at least two reasons: first, because no fresh assessment of the applicant's mental condition was made (either by the doctors, or by the court itself) and the applicant was not personally present in court, and, second, because it is doubtful whether the applicant's mental condition, as described in the report of 2000, required full incapacitation. Therefore, there was a breach of Article 8 of the Convention on that account.

2. The applicant's inability to restore his legal capacity after 20 December 2002

94. The Court will now turn to the applicant's situation after 20 December 2002, when the guardianship was transferred to the Omsk Regional Psychiatric Hospital (see paragraph 31 above). The Court recalls that before that date the applicant's guardian (his father) supported the applicant's attempts to restore legal capacity. Afterwards, the situation changed when the guardianship was transferred to the hospital administration. It is clear from the materials of the case that the hospital sought the applicant's confinement and was opposed to his attempts to recover his legal capacity. Thus, from 20 December 2002 onwards, the applicant had no opportunity of challenging his status.

95. Subsequently, the applicant's father tried to reinstate himself as the applicant's guardian (see paragraph 38 above). If successful, he would have been able to challenge the applicant's status again. However, the attempt failed with the judgment of 16 July 2003 by the Kuybyshevskiy District Court, which appears to have been the final decision on that matter. From

that date onwards the applicant was fully dependant on the psychiatric hospital.

96. The Court recalls its findings in the *Shtukaturov* case, cited above, § 90, where it criticised the Russian law on incapacitation in the following terms:

> " [T]he Court notes that the interference with the applicant's private life was very serious. As a result of his incapacitation the applicant became fully dependant on his official guardian in almost all areas of life. Furthermore, "full incapacitation" was applied for an indefinite period and could not, as the applicant's case shows, be challenged otherwise than through the guardian, who opposed any attempts to discontinue the measure ..."

In the present case the situation was identical: the applicant could only challenge his status through the guardian, who opposed any attempts to discontinue the measure. That situation continued at least until 10 October 2003, when the applicant's daughter was appointed as his guardian (see paragraph 40 above). It is unclear whether she wished to restore the applicant's status: the Court does not have sufficient information about the proceedings allegedly initiated in 2006 by the applicant's relatives (see paragraph 42 above). Be that as it may, it is clear that at least during the time when the role of the applicant's guardian was assumed by the psychiatric hospital the applicant was unable to institute any legal proceedings to challenge his status.

97. The Court reiterates that in the vast majority of cases where the ability of a person to reason and to act rationally is affected by a mental illness, his situation is subject to change. This is why the Principles concerning the legal protection of incapable adults of 1999 (see paragraph 65 above, Principle 14), recommend a periodical re-assessment of the condition of such persons. A similar requirement follows from Article 12 (4) of the CPRD (see paragraph 66 above). In *Stanev*, cited above, the Court observed that "there is now a trend at European level towards granting legally incapacitated persons direct access to the courts to seek restoration of their capacity" (§ 243). In Russia at the time the law neither provided for an automatic review nor for a direct access to the court for an incapacitated person, so the latter was fully dependant on his guardian in this respect (see, *mutatis mutandis*, *Salontaji-Drobnjak v. Serbia*, no. 36500/05, § 134, 13 October 2009). Where, as in the present case, the guardian opposed the review of the status of his ward, the latter had no effective legal remedy to challenge the status. Having regard to what was at stake for the applicant, the Court concludes that his inability for a considerable period of time to assert his rights under Article 8 was incompatible with the requirements of that provision of the Convention. Consequently, there was a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

98. The applicant complained that his confinement in a psychiatric hospital in 2002-2003 was contrary to Article 5 §§ 1 (e) and 4 of the Convention, which read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (e) the lawful detention of persons ... of unsound mind ...;
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. The parties' submissions

1. The Government

99. The Government claimed that the applicant's rights under Article 5 of the Convention had not been violated. As to the placement of the applicant in a psychiatric hospital in December 2002, the Government indicated that he had been taken there at the request of the district psychiatrist. Upon his arrival at the hospital the applicant had been immediately examined by a doctor on duty. In the ensuing forty-eight hours he had been examined by a panel of three psychiatrists. Following that examination the hospital had sent a hospitalisation request to the court. Consequently, his confinement had been requested and authorised in accordance with the domestic procedural rules established in the Psychiatric Care Act of 1992.

100. Subsequently, his further hospitalisation had been ordered in connection with the state of his health. The applicant's mental illness had been diagnosed on many occasions. Thus, according to the letter of the Ministry of Public Health and Social Development, the applicant suffered from severe schizophrenia. He had thus been incapable of understanding his actions or controlling them. Occasionally he had been in remission, but without any stable improvement in his health. Towards the end of 2002 the applicant had suffered yet another deterioration of his mental condition. He had stopped taking his medicine and visiting the district psychiatrist regularly. As a result, without proper medical supervision and treatment, there had been a risk of further deterioration of his health. In such circumstances the doctors, in accordance with the Psychiatric Care Act of 1992, had ordered the applicant's confinement against his will.

101. As to the legal remedies in force at the material time, the Government submitted that the applicant's father had been stripped of his guardianship in accordance with the law. The applicant's further

hospitalisation had been requested by the hospital, which, from 20 December 2002, had been appointed to act as his guardian. The proceedings concerning the applicant's confinement had been terminated because, after the appointment of the hospital as his guardian, his confinement had become, in domestic law, voluntary. The first-instance court had examined the case on the merits because the judge had not been informed by the parties of the decision of the Guardianship Council stripping the applicant's father of his guardianship. Under the domestic law, the applicant had been able to act, including before the courts, albeit only through his guardian.

2. The applicant

102. The applicant maintained that he had been admitted to the mental hospital against his own and his guardian's will. His psychiatric confinement in 2002 had probably been formally lawful, but his disorder had not been of a kind or degree warranting the confinement. It appears from the hospitalisation order that the psychiatrist had decided to confine the applicant in order to prevent him from lodging complaints. The Government had provided no explanation as to why the applicant's "reformist" behaviour indicated any real threat of further worsening of his state, if left without the prescribed treatment. The hospital's psychiatric report had never considered less restrictive measures such as out-patient treatment. The applicant had been detained in the mental hospital for a year, and upon his discharge his mental health remained the same as at the time of his admission.

103. The applicant noted that from 11 December 2002 his confinement had been authorised by the provisional detention order. However, in its decision of 5 March 2009 the Constitutional Court of the Russian Federation had held that a provisional detention order was not a judicial decision required in constitutional terms (see paragraph 57 above). Furthermore, in the present case the court had issued the order without hearing the applicant or his representative. Lastly, under Russian law its validity had been limited to five days, whereas the applicant had been detained pursuant to that provisional order at least until 20 December 2002, when his further confinement had been authorised by the Guardianship Council.

104. As regards the applicant's detention from 20 December 2002 onwards, the applicant noted that, formally speaking, his hospitalisation had become voluntary: the consent of the hospital – his new guardian and at the same time the detaining authority – had been considered sufficient under the domestic law for his indefinite detention without court order. In other words, he was detained on the basis of an administrative decision which was issued without the applicant being heard, and his objection to the hospital placement had been ignored. In the applicant's opinion, such consent was

no substitute for a judicial decision. His subsequent detention was therefore arbitrary.

105. The applicant further submitted that, under Russian law, the courts were required to verify every six months whether the patient's non-voluntary confinement continues to be necessary (see paragraph 58 above). It was not evident from the Government's submissions and from the documents appended thereto that the applicant had been regularly examined by a panel of psychiatrists in order to decide on the need for his continued confinement, and thus that the procedure prescribed by domestic law had been followed in this regard.

106. The applicant noted that the only way he could have applied for release from the hospital was through his guardian. However, since the detaining authority had become the applicant's guardian by virtue of law, it obtained unrestricted discretion to decide on the continuation of his detention. Thus, judicial review provided by Section 47 of the Psychiatric Care Act could not have been regarded as an effective remedy.

B. The Court's assessment

1. Compliance with Article 5 § 1

107. Insofar as the applicant's complaint under Article 5 § 1 of the Convention is concerned, his confinement in the mental hospital can be divided into two periods: between 9 and 20 December 2002, and after 20 December 2002, when the hospital became his guardian.

108. At the outset, the Court notes that it is not disputed by the parties that the applicant's confinement in the mental hospital constituted "deprivation of liberty" within the meaning of Article 5. The Government also conceded that the applicant had been confined against his will, even though subsequently the newly appointed guardian had approved that measure.

(a) General principles

109. The Court reiterates that in order to comply with Article 5 § 1, the detention in issue must comply with two major requirements. First of all, it must be "lawful" in domestic terms, including the observance of a procedure prescribed by law; in this respect the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. Secondly, the Court's case-law under Article 5 requires that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness (see *Creangă v. Romania* [GC], no. 29226/03, § 84, 23 February 2012; *Herczegfalvy v. Austria*, 24 September 1992, § 63, Series A no. 244; see also *Venios v. Greece*, no. 33055/08, §§ 48, 5 July 2011, and

Karamanof v. Greece, no. 46372/09, §§ 40 et seq., 26 July 2011). That means that it does not suffice that the deprivation of liberty is in conformity with national law; it must also be necessary in the circumstances (see *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000-III).

110. As to the second of the above conditions, an individual cannot be deprived of his liberty as being of "unsound mind" unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement (i.e. where the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, or where he needs control and supervision to prevent him, for example, causing harm to himself or other persons - see *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 52, ECHR 2003-IV); thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see *Winterwerp*, cited above, § 39; *Shtukaturov*, cited above, § 114; and *Varbanov v. Bulgaria*, no. 31365/96, § 45, ECHR 2000-X).

(b) The period between 9 and 20 December 2002

111. The Court will first examine whether the applicant's detention between 9 and 20 December 2004 was lawful under domestic law. The Court observes that the parties involved in the proceedings at that moment seemed to be uncertain about the legal framework in which they operated. Thus, the Guardianship Council decided to strip the father of his status as guardian on 6 December 2002. It is difficult to say whether that decision became effective in its own right, or only upon further confirmation by the Public Health Authority (which was obtained on 10 December 2002). Be that as it may, during that period the hospital and the court acted as if the father was still the applicant's guardian and, therefore, as if the confinement in the mental hospital was "non-voluntary".

112. In this assumption, the provisions of Sections 32 et seq. of the Psychiatric Care Act of 1992 (see paragraphs 55 and 56 above) concerning non-voluntary confinement must have applied. According to the Act, the authorities may place a person in the "preliminary confinement" for eight days in order to decide whether his further confinement is necessary. Thus, the hospital has forty-eight hours to examine the patient (Section 32 (1) of the Act), and then twenty-four hours to submit a hospitalisation request to a competent judicial authority (Section 32 (2) of the Act), which, in turn, has five days to decide on that request (Section 34 (1) of the Act).

113. The Court notes that in 2009 the Constitutional Court examined the compatibility of those provisions with Article 22 of the Constitution (see paragraph 57 above). While the Psychiatric Care Act was not declared unconstitutional, the Ruling can reasonably be construed as requiring that a person confined in a psychiatric hospital obtain full judicial review of his situation not within eight days, as provided by the Act, but within forty-

eight hours – the maximum period of detention without a court order provided for by the Constitution. The Court observes, however, that the Ruling of the Constitutional Court was formulated in indecisive terms, and the validity of the Act was finally confirmed. In any event, nothing suggests that the 2009 Ruling should have had a retroactive effect and apply to the applicant's situation. The Court concludes, therefore, that the "lawfulness" of the applicant's confinement in 2002 must be established in terms of the provisions of the Psychiatric Care Act, as it could have reasonably be interpreted at the time of the events.

114. The applicant's initial admission to the Omsk Regional Psychiatric Hospital was ordered by a district psychiatrist on 4 December 2002 (see paragraph 21 above). It appears that at that stage the requirements of the law were respected: the applicant was suffering from a mental disorder and there was a decision of a psychiatrist to conduct his further examination in the hospital (see paragraph 53 above). After the applicant's placement in the hospital on 9 December 2002, the hospital, under Section 32 of the Act, had forty-eight hours to conduct a further assessment of the applicant's mental health and twenty-four hours to seek a hospitalisation order from the court (see paragraph 55 above). Although the panel examined the applicant on the same day, which was within the time-limits, the request for further detention was received by the court only on 11 December 2002, that is more than twenty-four hours. The court then had five days under the Act to examine the request and authorise further detention or order the applicant's release (see paragraph 56 above). That time-limit was not observed either – the first hearing on was held on 17 December 2002, and at the end of that hearing the judge, without taking any decision on the substance of the case, adjourned the hearing until 24 December 2002, although the Act did not provide for such a possibility (see *Rakevich v. Russia*, no. 58973/00, § 35, 28 October 2003). The Court concludes that the applicant's detention during this first period was not authorised in accordance with the procedure prescribed by the Psychiatric Care Act.

(c) The period after 20 December 2002

115. On 20 December 2002 the hospital, which had earlier requested the applicant's confinement, became the applicant's guardian by virtue of the decision of the Guardianship Council and in accordance with Article 35 (4) of the Civil Code. According to Section 28 of the Psychiatric Care Act, if the guardian consented to the hospitalisation it was deemed "voluntary", regardless of the actual wishes of the ward, and no court authorisation for the hospitalisation was required (see paragraph 53 above). The court proceedings concerning the applicant's confinement were consequently terminated.

116. The applicant's situation during the second period closely resembles the one examined by the Court in the *Shtukaturov* case (cited

above, § 21). The Court reiterates that confinement in a psychiatric hospital does not necessarily become "voluntary" in Convention terms because the consent of the guardian was obtained. Although it is sometimes difficult to discern the genuine will of a mentally ill person (see, for example, *Storck v. Germany*, no. 61603/00, § 74, ECHR 2005-V), the Court is confident that in the present case the applicant did not agree to the hospitalisation. This is clearly demonstrated by the fact that his confinement was originally regarded as non-voluntary by all the parties involved. Despite that, from 20 December 2002 it became possible to keep him confined without a court order. As a result, the applicant was unable to enjoy the safeguards associated with the judicial process. This factor alone is sufficient, in the Court's view, to conclude that the applicant's detention was incompatible with Article 5 § 1 of the Convention.

117. Moreover, the guardian was the same medical institution which had initiated the hospitalisation, which was responsible for the patient's further treatment and which had previously been attacked in court proceedings by the applicant. In other words, the impartiality of the newly appointed guardian vis-à-vis the applicant were open to doubt.

118. Finally, in the absence of a judicial decision on the substance of the applicant's situation, it is difficult to say whether his confinement was justified in the light of the criteria set out in the *Winterwerp* case, cited above, § 39. Having examined the reports prepared by the district psychiatrist on 4 December 2002 and by the panel of three doctors inform the Omsk Regional Psychiatric Hospital on 9 December 2002, the Court notes that the applicant did indeed suffer from schizophrenia. However, those reports mostly referred to the history of the applicant's illness and did not mention recent instances of aggressive or self-destructive behaviour. It appears that the major reason for the confinement in 2002 were his numerous complaints to various State bodies, in particular his complaints against his doctors, but those incidents were clearly not such as to warrant his confinement (cf. *Stanev v. Bulgaria*, cited above, § 157).

119. The Court reiterates that normally it would not review the opinion of a doctor whose impartiality and qualifications were not called into question and who had the benefit of direct contact with the patient. In the present case, however, the Court is prepared to take a critical view of the findings of the psychiatrists, mostly because (a) their conclusions were not submitted to judicial scrutiny at the domestic level, (b) their neutrality was open to doubt, and (c) their reports were not specific enough on points which are crucial for deciding whether compulsory hospitalisation was necessary.

(d) Conclusion

120. The above elements are sufficient for the Court to conclude that the applicant's hospitalisation between 9 December 2002 and 10 December 2003 was contrary to Article 5 § 1 of the Convention.

2. Compliance with Article 5 § 4 of the Convention

121. The Court reiterates the principle established in § 39 of the *Winterwerp* judgment to the effect that the validity of a person's continued confinement depends upon the persistence of mental illness of a kind or degree warranting compulsory confinement. The Psychiatric Care Act contains similar requirements, providing that the court should consider this issue every six months. However, its provisions concern only those who are confined to a hospital against their will. In domestic terms the applicant's detention was "voluntary" (see paragraph 53 above). Therefore, while the hospital remained the applicant's guardian, there was no possibility of automatic judicial review. In addition, the applicant himself, as an incapacitated person, was unable to seek release from the hospital. In a nearly identical situation the Court found that the inability of a patient of a psychiatric hospital to seek release from it otherwise than through his guardian, where there was no periodic judicial review of the lawfulness of his confinement, amounted to a violation of Article 5 § 4 of the Convention (see *D.D. v. Lithuania*, (no. 13469/06, §§ 164 et seq., 14 February 2012).

122. The Court concludes that in this situation the applicant was unable to "take proceedings by which the lawfulness of his detention [would] be decided ... by a court". There was, therefore, a breach of Article 5 § 4 of the Convention on this account.

III. ALLEGED VIOLATION OF ARTICLES 12 OF THE CONVENTION

123. The applicant complained that he had not been able to register a marriage with his fiancée. He referred to Article 12 of the Convention (right to marry), which reads as follows:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

124. The Court observes that the applicant's inability to marry was one of many legal consequences of his incapacity status. The Court has already found that the maintenance of that status (the only measure of protection applicable under the Russian Civil Code to mentally ill persons) was in the circumstances disproportionate and violated Article 8 of the Convention (see paragraph 97 above). In other words, the applicant was unable to marry primarily because of the same two major factors analysed under Article 8, namely the deficiencies in the domestic decision-making process and the rigidity of the Russian law on incapacity. In view of its findings under

Article 8 of the Convention, the Court considers that there is no need for a separate examination under Article 12 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

125. The applicant also complained that he did not have effective remedies under Article 13 of the Convention in connection with his complaints under Articles 8 and 12, set out above. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

126. The Court notes that in analysing the proportionality of the measure complained of under Article 8 it took account of the fact that the applicant had been unable to challenge that measure independently from his guardian, and that the applicant had not obtained an effective review of his status even when his guardian had sought it. In these circumstances the Court does not consider it necessary to re-examine the issue of effective remedies under Article 13 of the Convention separately (see *Shtukaturov*, cited above, §§ 132-133).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

127. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

128. The applicant claimed EUR 30,000 (thirty thousand euros) under the head of non-pecuniary damages. The Government disputed that figure as excessive and considered that the mere finding of a violation would constitute sufficient just satisfaction. The Court, taking into account the cumulative effect of the violations of the applicant's rights, their duration, and the fact that the applicant, who suffered from a mental disorder, was in a particularly vulnerable situation, and ruling on an equitable basis, awards the applicant EUR 25,000 in respect of non-pecuniary damage.

129. If, at the moment of payment of the award, the applicant is legally incapacitated, the Government should ensure that the amount awarded is transferred to the guardian, on the applicant's behalf and in his best interest.

B. Costs and expenses

130. The applicant did not ask for reimbursement of costs and expenses incurred in connection with the proceedings. The Court therefore does not award anything under this head.

C. Default interest

131. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention on account of the maintenance of the applicant's status as an incapacitated person and his inability to have it reviewed in 2002 and 2003;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention on account of the applicant's hospitalisation in the psychiatric hospital in 2002-2003;

3. *Holds* that there has been a violation of Article 5 § 4 of the Convention on account of the applicant's inability to obtain a review of the lawfulness of his detention in the psychiatric hospital;

4. *Holds* that it is not necessary to examine separately the applicant's complaint under Article 12 of the Convention;

5. *Holds* that it is not necessary to examine separately the applicant's complaint under Article 13 of the Convention;

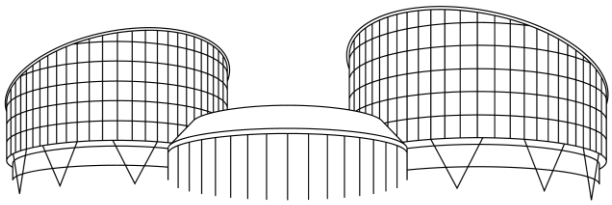
6. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 25,000 (twenty-five thousand euros) in respect of non-pecuniary damage, to be converted into the Russian Roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate

equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 January 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Registrar	Isabelle Berro-Lefèvre President



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF SÝKORA v. THE CZECH REPUBLIC

(Application no. 23419/07)

JUDGMENT

STRASBOURG

22 November 2012

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Sýkora v. the Czech Republic,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Dean Spielmann, *President,*
Mark Villiger,
Karel Jungwiert,
Boštjan M. Zupančič,
Angelika Nußberger,
André Potocki,
Paul Lemmens, *judges,*
and Stephen Phillips, *Deputy Section Registrar,*

Having deliberated in private on 23 October 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 23419/07) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Czech national, Mr Milan Sýkora ("the applicant"), on 30 May 2007.

2. The applicant was represented by Mr D. Zahumenský, Ms B. Bukovská, and Mr J. Fiala, lawyers from the Mental Disability Advocacy Center in Brno. The Czech Government ("the Government") were represented by their Agent, Mr Vít A. Schorm, of the Ministry of Justice.

3. The applicant alleged, in particular, that his right to liberty and private life had been violated on account of the removal of legal capacity from him and his subsequent detention in a psychiatric hospital.

4. On 29 June 2010 the application was communicated to the Government.

5. The applicant and the Government each submitted observations on the admissibility and merits. In addition, third-party comments were received from the Harvard Law School Project on Disability, which had been granted leave by the President of the Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1949 and lives in Brno. He is a person with a psycho-social disability. He has been treated in psychiatric hospitals in the past, most recently in 1995. He has not taken any medication for many years, because he considers that it has an adverse impact on his eyesight, and has used other methods to cope with his illness.

A. Proceedings concerning the removal of the applicant's legal capacity

7. In a judgment of 15 November 2000 the Brno Municipal Court (*městský soud*) deprived the applicant of his legal capacity at the request of the City of Brno, which maintained that the applicant had not collected his pension since 1996 because he did not have an identity card. The court based its decision on an expert report by Dr. H., who had concluded in 1998 that the applicant was suffering from paranoid schizophrenia. The applicant, although aware of the proceedings, was not summoned to appear before the court and the decision was not served on him, the court referring to an opinion of Dr. H., who was heard by the court and did not recommend that this be done. The applicant was represented by Ms. M., an employee of the court, who had never met him, did not participate at the hearing and took no substantive part in the proceedings. The judgment became final on 21 December 2000.

8. On an unspecified date the applicant became aware of the court's judgment and appealed. On 27 August 2001 the Brno Regional Court (*krajský soud*) quashed the first-instance decision and remitted the case to the Municipal Court which, in a judgment of 24 November 2004, again deprived the applicant of his legal capacity and appointed the City of Brno as his guardian.

9. It based its decision on a new expert report drawn up by Dr. H. on 20 May 2004 who, however, had not been able to examine the applicant because of his refusal to have any medical examinations. She concluded that there had been no improvement in the applicant's mental health since the first report. She reiterated her findings in the 1998 report that the applicant was unable to care for himself or to manage any property, and that he was dependent on others even for daily needs. The report further stated that the applicant's presence at the hearing would not be appropriate, because he did not understand the purpose of the proceedings and was denying his mental illness, but a court judgment could be sent to him. At a hearing, the expert stated that the notification of the court judgment to the applicant would not

worsen his health, but he would not understand. She thus recommended that the judgment not be sent to the applicant.

10. The court did not hear the applicant, who continued to be formally represented by a court employee. The judgment was not served on him and became final on 1 January 2005.

11. The applicant became aware of the judgment on 20 June 2006 and appealed on 4 July 2006. He stated that the court had not notified him about the institution and outcome of the incapacitation proceedings and that Dr. H had drawn up her expert opinion without examining him. The applicant was represented by a lawyer from the Mental Disability Advocacy Center ("the MDAC").

12. On 25 October 2006 the Regional Court again quashed the Municipal Court's judgment and sent the case back to it, disputing the relevance of the expert opinion which had been drawn up without the applicant being examined. It suggested that the Municipal Court should appoint a new expert.

13. On 19 September 2007 the Municipal Court decided not to deprive the applicant of his legal capacity, basing its decision on an expert report by Dr. B., who had concluded on 11 May 2007 that the applicant was mentally ill but did not show signs of schizophrenia, was not dangerous or aggressive and was fully capable of making legal assessments. The court heard the expert, the applicant, who was legally represented, and his guardian. The judgment became final on 23 November 2007.

14. In total the applicant was deprived of legal capacity from 21 December 2000 to 27 August 2001 and from 1 January 2005 to 25 October 2006, that is for two years and six months.

B. Proceedings for damages against the State

15. On 15 January 2008, in two separate documents, the applicant requested the Ministry of Justice to award him non-pecuniary damages for the unreasonable length of incapacitation proceedings and violations of other procedural rights.

16. The Ministry joined the two requests of the applicant and on 1 September 2008 awarded him 102,000 Czech korunas (CZK, 4,602 euros (EUR)) in damages for the unreasonable length of proceedings. Regarding the rest of the applicant's claims, the Ministry accepted that the judgments had not been served on the applicant and that his rights had therefore been violated. It stated, however, that a finding of a violation constituted in itself sufficient satisfaction for any non-pecuniary damage he might have sustained.

17. The applicant brought proceedings for damages at the Prague 2 District Court (*obvodní soud*), claiming violations of his procedural rights in the incapacitation proceedings.

18. On 12 November 2008 the District Court rejected the applicant's action. On the basis of established case-law it held that the alleged shortcomings in the incapacitation proceedings could not constitute irregular official conduct for which the State could be held responsible, because there had been a decision. The applicant could have claimed damages only for a decision that became final but was later quashed as illegal. That situation however did not arise in the present case.

19. On 10 December 2009 the Municipal Court upheld the judgment of the lower court.

20. On 16 February 2012 the Constitutional Court (*Ústavní soud*) dismissed a constitutional appeal by the applicant as manifestly ill-founded. It held that the legal opinion of the ordinary courts was not unconstitutional. It noted that by claiming damages for irregular official conduct the applicant had been trying to circumvent the fact that he had not met the conditions for claiming damages for an unlawful decision. Furthermore, the decisions for which the applicant was claiming damages had never become final and so could not have interfered with his rights.

C. The applicant's detention in the Brno-Černovice Psychiatric Hospital and the ensuing proceedings

21. On 9 November 2005 the applicant had a verbal, non-violent argument with his partner, Ms J., who called the police and an ambulance. Although the police found no signs of violence and the applicant's partner confirmed that the applicant had not been aggressive, the ambulance doctor decided to take the applicant to a psychiatric hospital. The applicant disagreed but did not resist.

22. At his admission to the Brno-Černovice Psychiatric Hospital, the applicant was subjected to two specialist medical examinations. They both concluded that the applicant suffered from schizophrenia. The applicant insisted at the examinations that there were no reasons for his detention. Despite his warning that neuroleptic psychiatric medication had a negative effect on his eyesight, he was nevertheless ordered to take the medication, and when he refused it was administered by injection. As a result, according to the applicant, his eyesight deteriorated.

23. On 10 November 2005 the applicant complained about his treatment in a letter to the director of the hospital, but his letter was retained by the staff; he was informed of this on 14 November 2005. He has never received any reply from the director.

24. On 11 November 2005 the hospital notified the Municipal Court of the applicant's involuntary admission so that the court could start to review its lawfulness under Article 191a of the Code of Civil Procedure. On an unspecified date the hospital contacted the applicant's guardian (the City of Brno) which, on 14 November 2005, consented to his detention. The

employee who signed the consent had never met the applicant and did not inform him that consent had been given.

25. On an unspecified date the applicant was moved to a department with a more lenient regime, but was still not allowed to leave.

26. On 14 November 2005 he contacted the MDAC. On the same day, an MDAC lawyer stated to the Municipal Court that the applicant's involuntary detention was unlawful, and requested his release.

27. On 29 November 2005 the applicant was released from the hospital. He stated that he suffered from impaired vision and mental health for almost a year as a consequence of the treatment he received in the hospital.

28. On an unspecified date a judge of the Municipal Court informed the MDAC lawyer that the applicant had been deprived of legal capacity and that a power of attorney therefore had to be signed by his guardian. Due to the applicant's poor health after his release from the hospital, the applicant was able to visit his guardian in an office of the City of Brno only on 8 November 2006. The employee of the City of Brno he approached refused however to sign the power of attorney. On the same day, the applicant himself asked the Municipal Court for a further review of the lawfulness of his involuntary admission to the psychiatric hospital. On 24 November 2006 he was told in a letter that no proceedings in that regard had been instituted.

29. On 2 January 2007 the applicant complained to the President of the Municipal Court about delays in the proceedings. On 5 March 2007 he received a reply that no such proceedings had been instituted because his guardian had consented to his detention.

30. On 31 January 2007 the applicant lodged a constitutional appeal (*ústavní stížnost*) alleging a violation of his rights to liberty, fair hearing, respect for private life and non-discrimination due to his involuntary hospitalisation and removal of his legal capacity.

31. On 8 January 2009 the Constitutional Court dismissed his constitutional appeal for non-exhaustion of ordinary remedies. Regarding the proceedings on the review of the lawfulness of his involuntary hospitalisation, the court held that the applicant had not lodged a complaint under section 174a of the Act on Courts and Judges (no. 6/2002) requesting the court to set a date for action. Regarding the incapacitation proceedings, it held that at the time the constitutional appeal was lodged those proceedings were pending before the Municipal Court.

32. On 6 February 2009 the applicant lodged a new complaint of delays in the proceedings on the review of the lawfulness of his involuntary admission to the psychiatric hospital, and requested the court to set a date for action. On 13 March 2009 the Regional Court refused his request on the grounds that since the applicant was no longer detained no proceedings on lawfulness of his detention had been held, so there were no proceedings in which any delays could be found and which could be expedited.

33. On 21 May 2009 the applicant lodged a constitutional appeal, claiming that his psychiatric detention had never been reviewed by a court.

34. On 11 January 2012 the Constitutional Court dismissed his constitutional appeal as unsubstantiated, holding that the courts had rightly not instituted proceedings to review the applicant's detention, because his guardian had consented to it, and moreover when the applicant had requested the continuation of the proceedings he was no longer detained, which was another reason why the proceedings had had to be abandoned. It added that the applicant could institute civil proceedings for damages against the hospital, in which the lawfulness of its actions could be reviewed.

II. RELEVANT DOMESTIC LAW

A. Civil Code (Act no. 40/1964) in force at the material time

35. Under Article 10 § 1, if a natural person, because of a mental disorder which is not temporary, is totally unable to make legal decisions, the court will deprive him of legal capacity.

36. Under Article 26, if natural persons are legally incapacitated, their guardians act in their name.

B. Code of Civil Procedure (Act no. 99/1963)

37. Under Article 191a a hospital which admits a patient against his or her will must inform an appropriate court within twenty-four hours; the court will review the lawfulness of the person's involuntary admission to the hospital.

C. The Public Health Care Act (Act no. 20/1966) in force at the material time

38. Under section 23(4)(b) a person may be compulsorily medically treated and even hospitalised if he appears to show signs of a mental illness and endangers himself or his surroundings.

D. Act no. 82/1998 on State liability for damage caused in the exercise of public authority by an irregularity in a decision or the conduct of proceedings

39. Under sections 7 and 8 individuals who suffer loss because of a final unlawful decision that is later quashed or changed are entitled to claim just satisfaction.

40. Section 13 provides that the State is also liable for damage caused by an irregularity in the conduct of proceedings, including non-compliance with the obligation to perform an act or to give a decision within the statutory time-limit.

III. RELEVANT INTERNATIONAL INSTRUMENTS

A. Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly on 13 December 2006 (Resolution A/RES/61/106)

41. This Convention entered into force on 3 May 2008. It was ratified by the Czech Republic on 28 September 2009. The relevant parts of the Convention provide:

Article 12
Equal recognition before the law

"1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests. ..."

Article 14
Liberty and security of person

"1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(*a*) Enjoy the right to liberty and security of person;

(*b*) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in

compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation."

B. Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults (adopted on 23 February 1999)

42. The relevant parts of this Recommendation read as follows:

Principle 3 – Maximum reservation of capacity

"1. The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.

2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so. ..."

Principle 6 – Proportionality

"1. Where a measure of protection is necessary it should be proportional to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned.

2. The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention. ..."

Principle 9 – Respect for wishes and feeling of the person concerned

"3. [This principle] also implies that a person representing or assisting an incapable adult should give him or her adequate information, whenever this is possible and appropriate, in particular concerning any major decision affecting him or her, so that he or she may express a view."

Principle 13 – Right to be heard in person

"The person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity."

Principle 14 – Duration, review and appeal

"1. Measures of protection should, whenever possible and appropriate, be of limited duration. Consideration should be given to the institution of periodical reviews ...

3. There should be adequate rights of appeal. ..."

Principle 16 – Adequate control

"There should be adequate control of the operation of measures of protection and of the acts and decisions of representatives."

Principle 19 – Limitation of powers of representatives

"1. It is for national law to determine which juridical acts are of such a highly personal nature that they can not be done by a representative.

2. It is also for national law to determine whether decisions by a representative on certain serious matters should require the specific approval of a court or other body..."

Principle 22 – Consent

"1. Where an adult, even if subject to a measure of protection, is in fact capable of giving free and informed consent to a given intervention in the health field, the intervention may only be carried out with his or her consent. The consent should be solicited by the person empowered to intervene.

2. Where an adult is not in fact capable of giving free and informed consent to a given intervention, the intervention may, nonetheless, be carried out provided that:

- it is for his or her direct benefit, and

authorisation has been given by his or her representative or by an authority or a person or body provided for by law.

3. ... Consideration should also be given to the need to provide for the authorisation of a court or other competent body in the case of certain serious types of intervention."

C. Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 7 April 2006 and from 21 to 24 June 2006

43. In this report the CPT also assessed the guardianship regime in the Czech Republic in connection with the admission of incapacitated persons to social care institutions and psychiatric hospitals. It noted that guardians have far-reaching powers with respect to their wards, and criticised the fact that they may also decide on the question of admission to a psychiatric hospital or a social care home (§ 149). It recommended that the Czech authorities consider incorporating the Council of Europe's Principles Concerning the Legal Protection of Incapable Adults and, in particular, Principle 19 (2), into the legal norms governing guardianship in the Czech Republic (§ 154).

D. Concluding Observations of the Human Rights Committee on the Czech Republic, 25 July 2007

44. The Committee expressed concern that confinement in psychiatric hospitals can be based on mere "signs of mental illness". It regretted that court reviews of admissions to psychiatric institutions do not sufficiently

ensure respect for the views of the patient, and that guardianship is sometimes assigned to attorneys who do not meet the patient. It concluded:

> "The State party should ensure that no medically unnecessary psychiatric confinement takes place, that all persons without full legal capacity are placed under guardianship that genuinely represents and defends the wishes and interest of those persons, and that an effective judicial review of the lawfulness of the admission and detention of such person in health institutions takes place in each case."

E. Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, Doc. no. E/CN.4/2005/51, 11 February 2005

45. In his report the Special Rapporteur emphasised that human rights must be supported by a system of accountability, and called for the introduction of appropriate safeguards against abuse of the rights of people with mental disabilities. He advocated that an independent review body must be made accessible to individuals with mental disabilities to periodically review cases of involuntary admission and treatment (§ 71). He was further concerned by the fact that guardianship had been overused and abused in the medical, as well as other, contexts, including at the most extreme level the compulsory admission of individuals with learning disabilities in psychiatric institutions (§ 79).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

46. The applicant complained that his admission and detention in the Brno-Černovice Psychiatric Hospital violated his right to liberty. He relied on Article 5 § 1 of the Convention, the relevant part of which reads:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

A. Admissibility

47. The Court first notes that the applicant was confined to a psychiatric hospital from 9 November 2005 to 29 November 2005, that is a total of twenty days, without his consent. While his confinement was confirmed

after five days by the guardian this does not alter the fact that the applicant was deprived of his liberty involuntarily and that his continued hospitalisation against his will constituted a deprivation of liberty within the meaning of that provision (see *Stanev v. Bulgaria* [GC], no. 36760/06, §§ 122-123, ECHR 2012; *D.D. v. Lithuania*, no. 13469/06, § 122, 14 February 2012; and *Shtukaturov v. Russia*, no. 44009/05, § 109, ECHR 2008).

48. The Government maintained that the applicant had lost his status as a victim after the Ministry of Justice had acknowledged that incorrect official procedure had taken place both as a result of delays in the proceedings and as a result of failure to serve courts' decisions on the applicant, and had awarded him CZK 102,000 (see paragraph 16 above). Even though the acknowledgement concerned the proceedings on legal capacity, this must be viewed in the context of the narrow inter-connection of these proceedings and the admission of the applicant to the hospital with the consent of his guardian.

49. The applicant disagreed, arguing that his right to liberty was not an issue in those proceedings, which concerned only his incapacitation.

50. The Court observes that while compensating the applicant for the unreasonable length of the incapacitation proceedings, the Ministry did not acknowledge a violation of the applicant's right to liberty. It cannot therefore be said that the authorities have acknowledged the breach of Article 5 of the Convention and afforded redress for it. As a result, the Government's objection must be dismissed.

51. The Government further argued that the applicant had failed to exhaust domestic remedies, pointing out that his first constitutional appeal had been dismissed for non-compliance with procedural requirements. Moreover, the applicant should have instituted proceedings for damages against the State on the basis that the Brno Municipal Court had failed to decide on the lawfulness of his involuntary admission to the hospital.

52. The applicant disagreed, maintaining that he could not claim compensation from the State for unlawful detention given that his detention had been based on the national law.

53. Regarding the dismissal of the applicant's first constitutional appeal for formal reasons, the Court notes that, subsequently, the applicant's second constitutional appeal was dismissed on the merits (see paragraph 33 above). It cannot therefore be said that the applicant failed to exhaust this remedy in compliance with the procedural requirements.

54. As regards the possibility of bringing an action for damages against the State, the Court recalls that the Constitutional Court, in its decision of 11 January 2012, found the approach of the courts in the applicant's case to have been lawful and constitutional. Moreover, the Government have failed to submit any example of a decision in which an action for damages in comparable circumstances was successful. The Court therefore concludes

that an action for damages was not a remedy which the applicant was required to exhaust, and dismisses the Government's objection of non-exhaustion of domestic remedies.

55. Lastly, the Government requested the Court to apply the admissibility criterion under Article 35 § 3 (b) of the Convention, maintaining that the applicant had suffered no significant disadvantage.

56. The Court does not accept that questions going to the lawfulness of a deprivation of liberty which lasted twenty days could constitute an "insignificant" disadvantage. It accordingly dismisses this objection.

57. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions of the parties and third-party intervener

58. The applicant complained that his detention could not have been justified under Article 5 § 1 (e) of the Convention because he was not a person of unsound mind of a kind or degree warranting compulsory confinement. He stated that his detention had been neither lawful nor in accordance with a procedure prescribed by law. He had been detained on the basis of retrospective consent given by his guardian, who had never met him and had showed no interest in his hospitalisation. In his view, the Convention did not allow guardians to decide on questions of such fundamental importance without court approval and thus his detention could not be lawful as there had been no safeguards against his detention. The guardian's powers were total and unchecked.

59. The Government maintained that the applicant had a serious and long term mental disorder. He had been taken to the health care institution as a result of an emergency call by Ms J., who had reported that the applicant was being aggressive and that she had felt threatened by him. It can therefore be assumed that from the perspective of the medical specialists at the time of the confinement, the applicant's disorder had required hospitalisation, even though the aggressive behaviour had not been confirmed and Ms J. later described it as fabricated.

60. They added that the applicant's hospitalisation had been in compliance with the domestic law. As far as compliance with the procedural criteria in the light of the requirements of the Convention was concerned, the Government left that assessment to the Court's discretion.

61. The Harvard Law School Project on Disability, as third party to the proceedings, referred in their submissions to the Convention on the Rights

of Persons with Disabilities, which the Court should, in their view, take into account in interpreting the Convention.

2. The Court's assessment

62. The Court reiterates that in order to comply with Article 5 § 1, the detention in issue must first of all be "lawful", including the observance of a procedure prescribed by law; in this respect the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. Moreover, any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness. Furthermore, the detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law; it must also be necessary in the circumstances (see *Stanev*, cited above, § 143).

The Court has outlined three minimum conditions for the lawful detention of an individual on the basis of unsoundness of mind under Article 5 § 1 (e) of the Convention: he must reliably be shown to be of unsound mind, that is, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement must depend upon the persistence of such a disorder (see *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33; and *Stanev*, cited above, § 145).

63. Moreover, a detention cannot be considered "lawful" within the meaning of Article 5 § 1 if the domestic procedure does not provide sufficient guarantees against arbitrariness (see *H.L. v. the United Kingdom*, no. 45508/99, § 124, ECHR 2004-IX; *Shtukaturov*, cited above, § 113; and *L.M. v. Latvia*, no. 26000/02, § 54, 19 July 2011). In addition, deprivations of liberty must be subject to thorough scrutiny by the domestic authorities (*Ťupa v. the Czech Republic*, no. 39822/07, §§ 37 and 61, 26 May 2011).

64. In the *H.L. v. the United Kingdom* case the Court found that the detention had not been lawful because of the absence of safeguards, understood both in the sense of procedural safeguards and of substantive guarantees to prevent arbitrariness (§ 120).

65. Turning to the present case, the Court first observes that the applicant was admitted to the psychiatric hospital as an emergency case, the doctors acting on the belief that he had been aggressive to his partner. He underwent two independent medical examinations on his admission and both doctors concluded that the applicant suffered from a mental disorder. Therefore, his detention was initially based on an objective medical expertise. However, before deciding whether also the other above

mentioned Winterwerp criteria were complied with in the present case, the Court must establish whether the applicant's detention was "lawful", in particular whether the domestic procedure provided sufficient guarantees against arbitrariness (see *L.M. v. Latvia*, cited above, § 45).

66. The Court notes that no domestic court reviewed the lawfulness of the applicant's detention as would be the normal procedure in cases of involuntary hospitalisations (see § 37 above). The reason was that since the guardian gave consent to the applicant's detention the applicant was considered, as a matter of domestic law, to be in the psychiatric hospital voluntarily. As a result, he was deprived of his liberty for twenty days solely on the basis of the consent of his guardian. The requirements for involuntary hospitalisation, both substantive in section 23(4)(b) of the Public Health Care Act and procedural in the Code of Civil Procedure, did not apply.

67. The Court observes that the opinions and reports issued by the various international bodies indicate a trend in international standards to require that detentions of incapacitated persons be accompanied by requisite procedural safeguards, namely by way of judicial review (see Principles 3, 16, 19 and 22 in paragraph 42 above; the views of the international bodies in paragraphs 42-44 above; and also *Ťupa v. the Czech Republic*, cited above, §§ 37 and 61). Judicial review, instituted automatically or brought about by the ward or some other suitable person, of a guardian's consent to deprivation of liberty of their ward could provide, in view of the Court, a relevant safeguard against arbitrariness. The trend towards such judicial review has not yet found full implementation in most Council of Europe Member States (see the Comparative Law part in *Stanev*, cited above, §§ 91-95), and it is not available in the Czech Republic in circumstances like the present case.

68. The Court observes that the only possible safeguard against arbitrariness in respect of the applicant's detention was the requirement that his guardian, which was the City of Brno, consent to the detention. However, the guardian consented to the applicant's detention without ever meeting or even consulting the applicant. Moreover, it has never been explained why it would have been impossible or inappropriate for the guardian to consult the applicant before taking this decision, as referred to in the relevant international standards (see Principle 9 in paragraph 42 above). Accordingly, the guardian's consent did not constitute a sufficient safeguard against arbitrariness.

69. There were no other substantive safeguards protecting the applicant from detention than the guardian's consent, which was not sufficient as found above. Even the protection of section 23(4)(b) of the Public Health Care Act was inapplicable once the guardian gave his consent.

70. The Court considers that, even after the applicant's detention became voluntary under domestic law, it was not lawful as it was not accompanied

by sufficient guarantees against arbitrariness. It is thus not necessary to consider the other arguments of the applicant.

71. There has accordingly been a violation of Article 5 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

72. The applicant further complained that he did not have any opportunity to seek a judicial review of his detention. He relied on Article 5 § 4 of the Convention:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Admissibility

73. The Government repeated their objection of inadmissibility already raised under Article 5 § 1 (see paragraphs 48, 51 and 55 above). They further maintained that Article 5 § 4 of the Convention was applicable only when a person was in detention, and that therefore this complaint as far as it concerned proceedings after 29 November 2005 was incompatible *ratione materiae* with the Convention.

74. The applicant disagreed. He challenged the accuracy of the Government's objection *ratione materiae*, and maintained furthermore that it was irrelevant, as his complaint concerned the absence of any opportunity to seek judicial review of his detention.

75. The Court has already rejected the Government's objection as to the victim status of the applicant above (see paragraph 50 above). As to their view that any disadvantage to the applicant was insignificant, the Court does not accept that the absence of an opportunity for the applicant to seek judicial review of his detention, which goes to the essence of Article 5 § 4 of the Convention, can constitute an insignificant disadvantage and, accordingly, dismisses the Government's objection.

76. The Court further agrees with the applicant that the question whether Article 5 § 4 applied to any proceedings after the applicant's release is not relevant to the present complaint.

77. It finally considers that the Government's objection of non-exhaustion of domestic remedies must be joined to the examination of the merits of the complaint (see *Rashed v. the Czech Republic*, no. 298/07, § 46, 27 November 2008).

78. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

79. The applicant complained that having been deprived of his legal capacity he had had no access to any judicial proceedings for a review of the lawfulness of his detention. He argued that Article 5 § 4 guaranteed this right to everyone, and therefore the consent of his guardian could not forfeit this right on his behalf without any safeguards. If that were the case the whole purpose of Article 5, which was to prevent arbitrary detentions, would be compromised.

80. The Government pointed out that under the domestic law the applicant had been admitted to the psychiatric hospital with the consent of his guardian. Moreover, his detention had not been particularly lengthy. Had it been a long-term detention the situation would have been different, as after the quashing of the Municipal Court's judgment depriving the applicant of his legal capacity, the applicant would no longer have been considered a patient detained by consent, and remedies in respect of his detention would have been available to him.

81. Article 5 § 4 of the Convention deals only with those remedies which must be made available during a person's detention with a view to that person obtaining speedy judicial review of the lawfulness of the detention leading, where appropriate, to his or her release (*Slivenko v. Latvia* [GC], no. 48321/99, § 158, ECHR 2003-X).

82. As to the substantive content of the provision, the Court has recently considered the requirements of Article 5 § 4 of the Convention in the case of *Stanev* (cited above). It recalled that Article 5 § 4 entitles detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions which are essential for the "lawfulness" of their deprivation of liberty (§ 168). The remedy must be accessible to the detained person and must afford the possibility of reviewing compliance with the conditions to be satisfied if the detention of a person of unsound mind is to be regarded as "lawful" for the purposes of Article 5 § 1 (e). The Convention requirement for an act of deprivation of liberty to be amenable to independent judicial scrutiny is of fundamental importance in the context of the underlying purpose of Article 5 of the Convention to provide safeguards against arbitrariness; in the case of mental illness, special procedural safeguards may be called for in order to protect the interests of persons who, on account of their mental illness, are not fully capable of acting for themselves (§ 170, with further references). In the case of *Shtukaturov* (cited above), the Court found that a remedy which could only be initiated through the applicant's mother – who was opposed to his release – did not satisfy the requirements of Article 5 § 4 (§ 124).

83. Turning to the present case, the Court notes that the applicant's detention lasted twenty days, which cannot be considered too short to initiate judicial review (compare for example, *a contrario*, *Slivenko*, cited

above, § 158 and *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 45, Series A no. 182). Accordingly, Article 5 § 4 is applicable in the present case.

84. The Court observes that the domestic courts were not empowered to intervene in the applicant's psychiatric confinement, the applicant having been considered to be in the psychiatric hospital voluntarily because of the consent of his guardian (see paragraph 66 above), and the Government did not indicate any other adequate remedy available to the applicant.

85. In the light of these considerations, the Court concludes that there were no proceedings in which the lawfulness of the applicant's detention could have been determined and his release ordered.

86. Consequently, it dismisses the Government's objection of failure to exhaust domestic remedies, and finds that there has been a violation of Article 5 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

87. The applicant complained that during his detention he had been subjected to medical treatment against his will which had negatively affected his health. He further complained that the total removal of his legal capacity had interfered with his right to private and family life and that the proceedings depriving him of legal capacity suffered from procedural deficiencies. He relied on Articles 6 and 8 of the Convention. The Court considers it appropriate to examine the complaints under Article 8, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

88. The Court first reiterates that under Article 35 § 1 it may only deal with a matter after all domestic remedies have been exhausted. Applicants must have provided the domestic courts with the opportunity, in principle intended to be afforded to Contracting States that have the primary responsibility for implementing and enforcing the guaranteed rights, of preventing or putting right the violations alleged against them. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *McFarlane v. Ireland* [GC], no. 31333/06,

§ 112, 10 September 2010; *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI; and *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V).

89. Regarding the complaint about the medical treatment in the psychiatric hospital, the Court notes that the applicant did not institute proceedings for damages against the hospital as he could have, at the latest from 25 October 2006, when the decision once to deprive him of legal capacity had been quashed. The Court considers that in these proceedings the question of compliance of the involuntary administration of medication with the applicant's rights would have been assessed and the actions of the psychiatric hospital could have been found unlawful and just satisfaction awarded to the applicant (see *Storck v. Germany*, no. 61603/00, §§ 24 and 40, ECHR 2005-V). The instant case, where the forced administration of medication lasted for twenty days, differs from the case of *X v. Finland* (no. 34806/04, § 220, 3 July 2012) where the Court did not consider a compensatory remedy sufficient, and required a preventive remedy because there the forced administration of medication lasted for almost a year. In failing to institute those proceedings, the applicant did not give the State the opportunity to put right the violations alleged against it before those allegations were submitted to the Convention institutions.

90. This part of the application must thus be rejected for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

91. Regarding the applicant's complaint about deprivation of legal capacity the Government maintained that he had lost his victim status. They referred to the decision of the Ministry of Justice acknowledging the violation of the applicant's rights by the failure to notify him of the judgments, which constituted sufficient just satisfaction given the limited time when the applicant had been deprived of his legal capacity and the not very severe consequences for the applicant.

92. The applicant argued that the consequences for him had been serious and that he had been deprived of his legal capacity for a substantial period of time.

93. The Court reiterates that an applicant may lose his victim status if two conditions are met: first, the authorities must have acknowledged, either expressly or in substance, the breach of the Convention and, second, they must have afforded redress for it. The alleged loss of the applicant's victim status involves an examination of the nature of the right in issue, the reasons advanced by the national authorities in their decision and the persistence of adverse consequences for the applicant after the decision. The appropriateness and sufficiency of redress depend on the nature of the violation complained of by the applicant (see *Sakhnovskiy v. Russia* [GC], no. 21272/03, §§ 67 and 70, 2 November 2010).

94. In the instant case the Court observes that the Ministry acknowledged a violation of the applicant's rights because the judgments

depriving him of his legal capacity had not been delivered to him but awarded no just satisfaction for that. The Court takes the view that such redress is only partial and insufficient under the case-law to deprive the applicant of his status of a victim for two primary reasons. First, the lack of delivery of the judgments, even though crucial, is just one of the applicant's complaints. The other alleged violations were thus not acknowledged. Second, a mere acknowledgement of a violation without affording redress is insufficient to deprive the applicant of his status as a victim in the context of deprivation of his legal capacity, which is a serious interference with his rights (see, *mutatis mutandis*, *Radaj v. Poland* (dec.), nos. 29537/95 and 35453/97, 21 March 2002).

95. The Court adds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

96. The applicant complained that the removal of his legal capacity had not been in accordance with the law, which was not sufficiently precise, nor was its application foreseeable. The law also had not provided sufficient procedural guarantees, only requiring that a decision must be based on an opinion of an expert who is, however, not even required to appear before the a court.

97. Furthermore, the interference had not pursued any legitimate aim and was not necessary in a democratic society. The court depriving him of legal capacity had not established any valid reasons for doing so. Moreover, he had not benefited from adequate procedural safeguards: he had not participated in the proceedings, he had not been heard at them or even notified of them, he had not been adequately represented, he could not appeal and the decision had been based only on one opinion of an expert who had not examined him.

98. The Government maintained that the proceedings on legal capacity as a whole, in connection with the compensation proceedings, had resulted in the due protection of the applicant's rights against arbitrary interference and remedy of grievances caused to him. In the end, the proceedings had resulted in an explicit rejection of the application for removal of legal capacity and acceptance of the relevant arguments of the applicant. Any interference with the applicant's rights by the decisions of the first-instance court had been very limited, as for most of the time the applicant had not even been aware that he had been deprived of legal capacity.

99. They added that the applicant was a person with a serious mental illness, and the removal of his legal capacity had also protected his own interests, such as protecting him from entering into disadvantageous or fraudulent legal contracts, or from neglecting contact with social welfare authorities or health care. Moreover, because of his often unknown official and actual place of residence, delivery of documents and contact with him had been objectively very difficult for the authorities. The applicant himself had sometimes refused to give the authorities a usable delivery address. The applicant had generally distrusted and often refused to cooperate with the authorities and especially with the expert in the period before the second judgment of the Municipal Court, which had resulted in elaboration of the expert testimony without direct examination of the applicant.

2. The Court's assessment

100. The Court notes that the applicant in the present case was initially deprived of legal capacity on 15 November 2000, on the request of the City of Brno, as he had not collected his pension for four years. The applicant, represented by a court employee who had never met him, was not summoned or present, although he was aware of the proceedings. The decision was quashed on 27 August 2001, and a fresh decision was taken on 24 November 2004. The new decision was taken on the basis of a fresh report, although the applicant had refused to be examined. The applicant, still nominally represented by a court employee, was not present and did not receive a copy of the judgment. The applicant, now represented by the MDAC, appealed on 4 July 2006, and on 25 October 2006 the first instance decision was quashed as the applicant had not been examined. In September 2007, the court decided not to deprive the applicant of his legal capacity. The applicant was thus deprived of his legal capacity for a total of two years and six months (see § 14 above).

101. The Court considers that the removal of the applicant's legal capacity for two and a half years over a period of six years constituted an interference with his private life within the meaning of Article 8 of the Convention, and notes that indeed there is no dispute between the parties on this point. It recalls that any interference with an individual's right to respect for his private life will constitute a breach of Article 8 unless it was "in accordance with the law", pursued a legitimate aim or aims under paragraph 2, and was "necessary in a democratic society" in the sense that it was proportionate to the aims sought.

102. In such a complex matter as determining somebody's mental capacity the authorities should enjoy a wide margin of appreciation. This is mostly explained by the fact that the national authorities have the benefit of direct contact with those concerned, and are therefore particularly well placed to determine such issues. However, whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-

making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8. The extent of the State's margin of appreciation thus depends on the quality of the decision-making process. If the procedure was seriously deficient in some respect, the conclusions of the domestic authorities are more open to criticism (see *Shtukaturov*, cited above, § 87-89). Regarding the procedural guarantees, the Court considers that there is a close affinity between the principles established under Articles 5 § 1 (e), 5 § 4, 6, and 8 of the Convention (see *Shtukaturov*, cited above, §§ 66 and 91).

103. Any deprivation or limitation of legal capacity must be based on sufficiently reliable and conclusive evidence. An expert medical report should explain what kind of actions the applicant is unable to understand or control and what the consequences of his illness are for his social life, health, pecuniary interests, and so on. The degree of the applicant's incapacity should be addressed in sufficient detail by the medical reports (see *Shtukaturov*, cited above, §§ 93-94).

104. The Court takes note of the applicant's contention that the measure applied to him had not been lawful and did not pursue any legitimate aim. However, in its opinion, it is not necessary to examine these aspects of the case, since the decision to remove legal capacity from the applicant was in any event disproportionate to the legitimate aim invoked by the Government for the reasons set out below (see *Shtukaturov,* cited above, § 86). In taking this approach, the Court notes also the fact that the Civil Code on the basis of which the applicant was deprived of his legal capacity will be superseded by a new Civil Code which takes effect on 1 January 2014. Consequently, the effect of any pronouncement by the Court on the current domestic provisions concerning deprivation of legal capacity would be limited.

105. The Court first considers, unlike the Government, that, even though only temporary, the removal of the applicant's legal capacity had serious consequences for him. In particular, once the authorities realised that he was subject to guardianship, he no longer benefitted from the guarantees available in domestic law to persons who were detained under the Public Health Care Act as in domestic law consent had been granted by the guardian without any reference being made to the applicant (see above, § 68).

106. The Court next notes that although the domestic courts ultimately decided not to deprive the applicant of his legal capacity (in the decision of 19 September 2007), the applicant was nevertheless substantially affected by the deprivation of capacity. In the second period, which lasted from 24 November 2004 until 25 October 2006, the applicant was detained, ultimately on the sole ground that the guardian had consented. The Court thus considers, unlike the Constitutional Court (see paragraph 20 above), that the first-instance decisions taken in this respect did seriously interfere with the applicant's rights (see *Berková v. Slovakia*, no. 67149/01, § 175,

24 March 2009 and *Shtukaturov*, cited above, § 90). Furthermore, the applicant was not compensated for the alleged violations of his rights in the subsequent civil proceedings against the State for damages (see paragraph 94 above).

107. The Court observes that the Municipal Court did not hear the applicant, either in the first round or the second round of proceedings, and indeed he was not even notified formally that the proceedings had been instituted (see *Shtukaturov*, cited above, §§ 69-73 and 91). The Court does not accept the Government's argument that the applicant's place of residence was unknown to the authorities and therefore it was difficult to deliver official mail to him. Nowhere in the case file is there anything to indicate that the Municipal Court made an attempt to inform the applicant of the proceedings and summon him to the hearings. In such circumstances it cannot be said that the judge had "had the benefit of direct contact with those concerned", which would normally call for judicial restraint on the part of this Court. The judge had no personal contact with the applicant (see *X and Y v. Croatia*, no. 5193/09, § 84, 3 November 2011).

108. As to the way in which the applicant was represented in the legal capacity proceedings, the Court is of the opinion that given what was at stake for him proper legal representation, including contact between the representative and the applicant, was necessary or even crucial in order to ensure that the proceedings would be really adversarial and the applicant's legitimate interests protected (see *D.D. v. Lithuania*, cited above, § 122; *Salontaji-Drobnjak v. Serbia*, no. 36500/05, §§ 127 and 144, 13 October 2009; and *Beiere v. Latvia*, no. 30954/05, § 52, 29 November 2011). In the present case, however, the representative never met the applicant, did not make any submissions on his behalf and did not even participate at the hearings. She effectively took no part in the proceedings.

109. Moreover, the judgments were not served on the applicant (see *X and Y v. Croatia*, cited above, § 89). The judgments expressly stated that they would not be delivered to the applicant, with a simple reference to the opinion of the court-appointed expert, even though in her second report the expert in fact stated that a judgment could be sent to the applicant. Even at the hearing she did not give any warnings about adverse effects if the applicant received the judgment, but merely recommended not sending it because he would not understand it.

110. The Court, however, considers that being aware of a judgment depriving oneself of legal capacity is essential for effective access to remedies against such a serious interference with private life. Whilst there may be circumstances in which it is appropriate not to serve a judgment on the person whose capacity is being limited or removed, no such reasons were given in the present case and, indeed, in the present case, when the applicant was aware of the judgment and was able to appeal, his appeal was successful. Therefore, had the Municipal Court respected the applicant's

right to receive the judgments, the interference would not have happened at all as the judgments would not have become final.

111. Finally, the Court observes that the 2004 decision was based only on the opinion of an expert who last examined the applicant in 1998 (see paragraph 9 above). In this context the Court cannot lose sight of the fact that development takes place in mental illness, as is also evidenced in the present case by the expert report on the applicant drawn up in 2007, on the basis of which the request to deprive the applicant of legal capacity was refused. Consequently, relying to a considerable extent on the medical examination of the applicant conducted six years earlier cannot form sufficiently reliable and conclusive evidence justifying such a serious interference with the applicant's rights (see, *mutatis mutandis*, *Stanev*, cited above, § 156). The Court notes that the expert attempted to examine the applicant between 2002 and 2004, but he refused to cooperate. Nevertheless, in the absence of strong countervailing considerations, this fact alone is not enough to dispense with a recent medical report involving direct contact with the person concerned.

112. Overall, the Court considers that the procedure on the basis of which the Municipal Court deprived the applicant of legal capacity suffered from serious deficiencies, and that the evidence on which the decision was based was not sufficiently reliable and conclusive.

113. In the light of these considerations, the Court finds that the interference with the applicant's private life was disproportionate to the legitimate aim pursued and there has been a violation of Article 8 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

114. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

115. The applicant claimed EUR 25,000 in respect of non-pecuniary damage.

116. The Government considered the claim excessive.

117. The Court is of the view that as a result of the circumstances of the case the applicant must have experienced considerable anguish and distress which cannot be made good by a mere finding of a violation of the Convention. Having regard to the circumstances of the case seen as a whole and deciding on an equitable basis, the Court awards the applicant EUR 20,000 for non-pecuniary damage.

118. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning Article 5 and 8 as far as it concerns the deprivation of applicant's legal capacity admissible, and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

4. *Holds* that there has been a violation of Article 8 of the Convention;

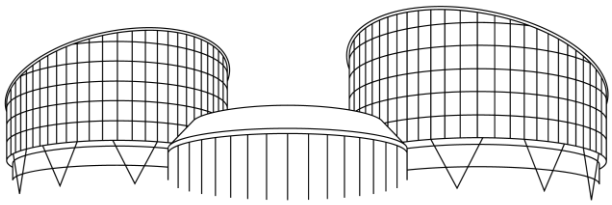
5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Czech korunas at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 November 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Deputy Registrar

Dean Spielmann
President



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF BUREŠ v. THE CZECH REPUBLIC

(Application no. 37679/08)

JUDGMENT

STRASBOURG

18 October 2012

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Bureš v. the Czech Republic,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Dean Spielmann, *President*,
Karel Jungwiert,
Boštjan M. Zupančič,
Ann Power-Forde,
Angelika Nußberger,
André Potocki,
Paul Lemmens, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 25 September 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 37679/08) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Czech national, Mr Lukáš Bureš ("the applicant"), on 1 August 2008.

2. The applicant was represented by Ms B. Bukovská, Mr J. Fiala, Ms J. Marečková and Mr M. Matiaško, lawyers from the Mental Disability Advocacy Centre in Brno. The Czech Government ("the Government") were represented by their Agent, Mr V.A. Schorm, of the Ministry of Justice.

3. The applicant alleged that he was ill-treated in a sobering-up centre in violation of Article 3 of the Convention and detained in a psychiatric hospital in violation of Article 5 of the Convention.

4. On 16 June 2010 the application was communicated to the Government.

5. The applicant and the Government each filed observations on the merits. In addition, third-party comments were received from the Harvard Law School Project on Disability, which had been granted leave by the President of the Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1985 and lives in Brno. He is a violoncello player and has been diagnosed as having a psycho-social disability. At the material time he weighed 64 kg and was 176 cm tall. In the past, he has been treated in Italian psychiatric hospitals as a voluntary patient. At the time of the events at issue, he was using Akineton, a calming psychiatric medication prescribed to him by his psychiatrist.

7. On 9 February 2007 the applicant inadvertently overdosed on Akineton. In the evening, he left his flat and went to buy some food. Being under the influence of the medication, he did not notice that he was wearing only a sweater, but no trousers or underwear. On the way he was stopped by a police patrol that assumed that he was a drug addict and called an ambulance, which took him to Brno-Černovice Psychiatric Hospital. The record drawn up by the ambulance staff states that the applicant was receiving psychiatric treatment and that he was calm during transport.

8. At the hospital he was examined by Dr V., who did not find any injuries on the applicant's body and sent him to the sobering-up centre in the same hospital at about 8 p.m. The applicant was calm during the medical examination. In the sobering-up centre he was again examined by Dr H., who confirmed that there were no injuries on the applicant's body when he was admitted to the centre.

9. On 10 February 2007 at 7:24 a.m. the applicant was transferred to the Intensive Psychiatric Care Unit where, according to the admission record, he had visible abrasions on the front of his neck, both wrists and both ankles, caused probably by friction against textile, and abrasions of an unspecified different type on his knees. He complained about his treatment in the sobering-up centre to the hospital authorities, but they did not take any action.

10. On 15 February 2007 the applicant was examined by a neurologist, who stated that as a result of the use of straps the applicant suffered severe paresis of the left arm and medium to severe paresis of the right arm. He began a course of intensive treatment at the Rehabilitation Unit.

11. The applicant remained in the hospital involuntarily until released on 13 April 2007.

12. However, because of his two-month hospitalisation, he was confused and was not able to fully take care of himself. He voluntarily returned to the hospital on 14 April 2007 and remained there until 1 July 2007.

A. The applicant's treatment in the sobering-up centre

13. The following facts are disputed by the parties.

14. According to the applicant, at 8.10 p.m. on 9 February 2007 he was strapped to a bed with leather straps around his wrists, knees and ankles by two male nurses, Mr M. and Mr H. While strapping him, they kneeled on his chest and verbally abused him. He remained strapped for the whole night, until 6.30 a.m. The staff did not check up on him during that time. As the straps were too tight, he struggled to breathe and as a result of insufficient blood circulation the nerves in his arms were damaged.

15. According to the Government the applicant was strapped to a bed for three intervals, namely, from 8.10 p.m. to 10 p.m., 4.30 a.m. to 5 a.m. and 6.30 a.m. to 7.15 a.m.

16. They submitted a record from the sobering-up centre containing the following information. When brought to the centre the applicant was intoxicated and was put to bed. He was unstrapped at 10 p.m. At 4.30 a.m. he attacked a nurse and was strapped again. Checks were carried out. The applicant was restless. At 6.30 a.m. he was checked on and again strapped. The record noted that he showed destructive behaviour. He was released at 7.15 a.m. and sent to the psychiatric hospital.

17. The version of the record submitted by the applicant and obtained from his medical files contains less information. The information about the release of the applicant at 10 p.m. is illegible. According to the Government, the version submitted by the applicant was an incomplete version sent to the psychiatric hospital as an accompanying document.

B. Review of the lawfulness of the applicant's involuntary admission to the psychiatric hospital

18. On 12 February 2007 the hospital informed the Brno Municipal Court (*městský soud*) that the applicant had been detained because he showed signs of a mental illness and was a danger to himself and his surroundings. He was described as –"restless, aggressive and suspected of intoxication by psycho-stimulants".

19. On 16 February 2007 the court began reviewing the lawfulness of the applicant's involuntary admission under Article 191b of the Code of Civil Procedure. At the same time, it appointed an attorney, Ms P., to represent the applicant in the proceedings. On the same day a court employee visited the hospital and questioned the applicant's treating doctor, Dr V., in the absence of the applicant and his representative. Dr V. testified that the applicant had been admitted to the hospital due to his confusion, restlessness and inappropriate behaviour and that he had been intoxicated when admitted. He further stated that the applicant was only partly able to understand the proceedings. The court employee did not question or even see the applicant because Dr V. told her that contact with him "would not be entirely beneficial".

20. On the same day and without any further evidence the court ruled that the applicant's involuntary admission had been lawful because he suffered from an illness that made him dangerous to himself and his surroundings. The decision was served on the applicant's representative only. The latter did not take part in the proceedings, not being aware of them as the decision on her appointment was sent to her together with the decision on the merits. The applicant never saw her during his detention.

21. After his release in July 2007, the applicant contacted a local office of the Mental Disability Advocacy Center ("the MDAC"). On 10 July 2007 an MDAC lawyer lodged an appeal on his behalf, applying at the same time for a waiver of the deadline for lodging the appeal.

22. On 20 August 2007 the Municipal Court granted the waiver. However, on 31 October 2007, the Brno Regional Court (*krajský soud*), terminated the appeal proceedings without deciding on the merits. It stated that the applicant had been released on 13 April 2007, that on 30 May 2007 the Municipal Court had stayed the proceedings on the applicant's continuing detention and that, therefore, the court did not have the authority to deal with the case.

23. In the meantime, on 23 July 2007, the applicant lodged an action for nullity (*žaloba pro zmatečnost*) under Article 229 § 1 c) of the Code of Civil Procedure seeking to have the Municipal Court's decision of 16 February 2007 quashed on the ground that he had been denied the right to participate in the proceedings and had not been properly represented. On 22 May 2008 the Municipal Court dismissed the applicant's action, finding, *inter alia*, that Ms P. had not been wholly inactive, referring to a letter of 26 February 2007 by which she had allegedly tried to establish contact with the applicant, but which, according to the applicant, had never been delivered to him. On 25 February 2009 the Regional Court upheld the decision.

24. On 5 February 2008 the applicant lodged a constitutional appeal challenging the decision of 31 October 2007 and alleging a violation of his rights to liberty, a fair trial and an effective remedy because the Regional Court had failed to rule on the merits of his appeal and thus the legality of his detention in the psychiatric hospital.

25. On 18 March 2008 the Constitutional Court (*Ústavní soud*) dismissed his appeal on the grounds that he had not exhausted all available remedies. It held that the applicant should have lodged a plea of nullity under Article 229 § 4 of the Code of Civil Procedure against the 31 October 2007 decision of the Regional Court.

C. Review of the lawfulness of the applicant's continuing detention

26. After ruling on the lawfulness of the applicant's involuntary admission to the hospital, the Municipal Court continued proceedings under Article 191d of the Code of Civil Procedure to review the lawfulness of the

applicant's continuing detention. On 6 March 2007 a forensic psychiatric expert was appointed for these purposes. On 30 May 2007 the court terminated the proceedings without deciding on the merits, the applicant having been released in the meantime.

D. Proceedings regarding the applicant's alleged inhuman and degrading treatment

27. On 7 June 2007 the applicant filed a criminal complaint concerning the measure of restraint applied to him and alleged ill-treatment on the night from 9 to 10 February 2007 in the sobering-up centre of the psychiatric hospital.

28. He was questioned by the police on 29 June 2007 and gave a full account of the events. The police then questioned numerous other persons.

29. The male nurses on duty, Mr M. and Mr H., did not recall the applicant at all and were not able to provide any specific information about him. Mr. M noted that during the winter of 2007 checks had been always carried out in accordance with the instructions of the psychiatric hospital management.

30. The third nurse on duty that night, Ms K., stated that the applicant had been strapped to the bed because he had been restless and intoxicated by an unknown substance and had refused to undergo a blood test to identify the substance. She admitted that it was possible that regular checks every twenty minutes might not have been performed due to the high number of patients at the centre that night. She also alleged that the applicant had attacked a male nurse at 4.30 a.m. but she could not remember who exactly.

31. Dr H., who had been on duty at the sobering-up centre that night, confirmed that the applicant had had no injuries when he had been admitted. He noted that the applicant had been strapped to the bed due to his restlessness but that he and other staff had duly checked on him.

32. Nurse P. recalled that while she was taking over patients from Ms K. at around 6 a.m. in the morning of 10 February, the applicant's arms and legs had been strapped. They had tried releasing the straps one by one but because he defended himself each time a limb was released he was strapped again.

33. In his report of 10 December 2007 commissioned by the police, a forensic expert, Dr V., stated that the applicant had suffered bilateral severe paresis of the elbow nerves as a result of compression of the nerves and blood vessels. He confirmed that these injuries corresponded to the cause as described by the applicant. According to him, the injury on the applicant's left arm limited his ability to play the violoncello. He concluded that the injury would have a long-lasting effect which was unlikely to be permanent.

34. On 11 December 2007 the Brno-Komárov Municipal Police Directorate (*městské ředitelství policie*) terminated the criminal proceedings, finding that no criminal offence had been committed regarding the applicant's strapping on the night of 9 to 10 February 2007. It held that the applicant had suffered the injuries partly as a result of the staff's failure to check on him regularly but that the extent of the guilt of individual suspects could not be determined. It also held that the injuries had almost healed and that the applicant was partly responsible for them.

35. The applicant appealed, disputing the conclusions of the police, and requested that the doctors and nurses give evidence again.

36. On 12 February 2008 the Brno Municipal Prosecutors' Office (*městské státní zastupitelství*) dismissed the applicant's appeal. Without examining any additional evidence it stated that the strapping of the applicant on account of his aggressive behaviour at the time of his admission to the sobering-up centre had been in compliance with the law and the hospital's internal rules and he had been checked on every twenty minutes. The applicant had been strapped from 8.10 p.m. to 10 p.m., from 4.30 a.m. to 5 a.m. and from 6.30 a.m.

37. The applicant lodged a constitutional appeal claiming a violation of Articles 3, 6 § 1 and 13 of the Convention. He alleged that the investigation had not been effective because, *inter alia*, he had not been allowed to be present during the questioning of witnesses and put questions to them.

38. On 30 October 2008 the Constitutional Court dismissed his constitutional appeal as manifestly ill-founded. It held that there was no right to have a third person prosecuted so the applicant could claim his rights only in civil proceedings for damages and protection of his personality rights (*ochrana osobnosti*). It further found no violation of procedural obligations as developed by the Court under Article 3 of the Convention. It noted that the police had conducted a number of interviews and examined other evidence and that the investigation had also been independent and prompt. Lastly, it held that it had no jurisdiction to rule on the ill-treatment in the hospital because that was an instantaneous act, whereas it could only rule on interference with rights that was ongoing and that could be remedied by a decision on its part.

E. Proceedings for protection of his personal rights

39. On 8 December 2008 the applicant instituted proceedings for protection of his personality rights against Brno-Černovice Psychiatric Hospital, claiming a violation of his right to liberty, inhuman treatment and interference with his health and physical integrity.

40. On 19 January 2012 the Brno Regional Court rejected his claim, holding that the applicant's internment in the sobering-up centre and the use

of restraints had been necessary for his own protection and that of his surroundings.

41. The applicant appealed and the proceedings are pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Code of Civil Procedure (Act no. 99/1963)

42. Under Article 191a a health-care facility that admits a patient against his or her will must inform the competent court within twenty-four hours.

43. Under Article 191b § 1 a court has to review the lawfulness of an involuntary admission to a health-care facility within seven days. Article 191b § 2 provides that the patient has a right to be represented by counsel of his or her own choosing. If he or she does not have counsel, the court shall appoint him or her an attorney. In accordance with Article 191b § 3, the court shall assess evidence, hear the detained person, his or her treating doctor and other persons at the detained person's request unless it considers it unnecessary.

44. Under Article 191c an appeal can be lodged against a decision taken under Article 191b, but does not have a suspensive effect. The health-care facility can release the patient even if a court has declared that the involuntary admission was lawful.

45. Article 191d § 1 provides that if the court finds that the admission was lawful, it shall continue to review the lawfulness of the continued confinement. Pursuant to paragraph 2, the court shall appoint an expert to assess the necessity of the confinement. That expert must not be working in the health-care facility where the person is detained. In accordance with paragraph 3 the court shall hold a hearing and summon the patient and his or her counsel (provided that according to the treating doctor or written expert opinion the patient is able to follow and understand the meaning of the proceedings). At the hearing, the court shall hear the expert, the treating doctor if needed and the patient and assess any other relevant evidence. Its decision must be issued no later than three months from the decision by which the admission to the health care facility was approved.

46. Under Article 191f the patient, his or her counsel, guardian and other persons close to him may, before the expiration of the time for which his or her admission to the health-care facility was approved, request a new medical examination and release, if there is a reasoned presumption that continued confinement is not necessary.

47. Under Article 229 § 1 c) a final court decision may be challenged by an action for nullity on the ground that a party to the proceedings lacked legal capacity to act or could not attend the court and was not properly represented. Paragraph 4 provides that an action for nullity may also be

lodged against a final decision of an appellate court by which an appeal was dismissed or the appellate proceedings were terminated.

B. The Public Health Care Act (Act no. 20/1996)

48. Under section 23(4)(b) a person can be involuntarily hospitalised if he shows signs of a mental illness and is a danger to himself or his surroundings.

C. Act no. 379/2005, on measures for the protection against damage caused by tobacco products, alcohol and other drugs

49. Section 17(1) defines an alcohol and drug sobering-up centre as a health-care facility established by a regional self-governing unit.

50. Section 17(2) stipulates that should a health-care facility find that a person's life is not endangered by failure of basic vital functions but that he or she is under the influence of alcohol or another drug and cannot control his or her behaviour, thereby directly endangering him or herself or other persons, public order or property, or is causing public annoyance, that person shall undergo treatment and stay at the sobering-up centre for however long is necessary for the acute intoxication to subside.

D. Guideline no. 1/2005 of the Journal of the Ministry of Health, on the use of measures of restraint on patients in psychiatric facilities in the Czech Republic

51. This guideline stipulates, *inter alia*, the following:

> "The use of measures of restraint must be considered as a last resort in cases when it is necessary for the protection of the patient, other patients, the patient's surroundings and staff of psychiatric facilities. They may be used only after all other possibilities have been exhausted. Any decision to restrain the patient must be sufficiently grounded. Restraint cannot be used to facilitate treatment or to deal with a restless patient. Potential causes of problematic behaviour, for example, pain, discomfort, side effects of medicinal products, stress, interpersonal problems between the caregivers and the patient, or other illnesses must always be identified. The use of measures of restraint is justified only if a removable cause of the patient's behaviour cannot be found or in situations when the risk arising from the patient's behaviour is unacceptably high. The benefit of the use of restraining means must outweigh the risks ...
>
> 2. Measures of restraint can be used only exceptionally and only when the patient behaves in a way which endangers himself and his surroundings, and not on an educational or corrective basis. In the case of each individual patient it is necessary to use the most gentle and appropriate means of restraint ...
>
> 5. A patient restrained by these means shall be checked on on a regular basis, intervals between the checks shall be specified, provisions shall be put in place to

prevent the patient hurting himself or suffering from dehydration, malnutrition, hypothermia and pressure ulcers, and to allow for personal hygiene. Measures of restraint should be used for the shortest time possible, and during checks the need for the measures and the possibility of using less restraint should be reassessed ...

6. The doctor shall decide on the use of measures of restraint, and make a record that shall always include: the name of the person who ordered the measure of restraint, the type of restraint used, the reason for using it, the time when restraint was employed and the time when it ended, the frequency of checks by the medical staff and the doctor, a description of the person's physical and mental condition ... A member of the medical staff shall inform the doctor of any change in the patient's symptoms. The record on the use of restraint shall be subsequently signed by the head doctor during the ward round."

E. Psychiatrie, Guidelines for psychiatric treatment issued by the Czech Psychiatric Society, December 2006

52. In its section on the use of restraints the Guidelines contain similar principles as the above-mentioned Guideline no. 1/2005 of the Journal of the Ministry of Health. In particular they state that mechanical restraints should be used only as a matter of last resort. Strapping to a bed should be applied only in cases of serious manifestations of distress endangering surroundings, auto-aggressive manifestations with immediate risk of self-harm or suicide or conditions that will with the highest probability result in these manifestations.

They also state that all circumstances connected with the use of restraints must be transparently and clearly documented. Every use of restraints must be recorded in a concrete way, including, *inter alia*, the time when the restraints were applied and removed and checks on the patient.

F. Opinion of the Civil Law and Commercial Division of the Supreme Court, no. Cpjn 29/2006, as regards proceedings to determine the lawfulness of admission to and detention in a health-care facility

53. On 14 January 2009 the Supreme Court adopted an opinion on this matter, because the courts had not been dealing with cases concerning proceedings to decide on the lawfulness of admission to a health-care facility (Article 191b of the Code of Civil Procedure) and continuing confinement therein (Article 191d of the Code of Civil Procedure) in a uniform manner.

It held, *inter alia*, that if the detained person is released there are no more reasons for continuing the proceedings either under Article 191b or 191d and both should be discontinued.

III. RELEVANT INTERNATIONAL STANDARDS

A. Articles on State Responsibility (noted by the UN General Assembly resolution no. 56/83 of 12 December 2001)

54. The Articles, drawn up by the International Law Commission of the United Nations, are largely considered to contain rules of customary international law. They stipulate, *inter alia*, the following possibilities of attribution of a conduct to a State:

Article 4. Conduct of organs of a State

"1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

Article 5. Conduct of persons or entities exercising elements of governmental authority

"The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

In its commentary to Article 5, the International Law Commission explained that the rule dealt with situations when entities which were not considered organs of a State exercised functions of a public character normally exercised by State organs, and the conduct of the entity was related to the exercise of the governmental authority concerned. It gave the power of detention as an example of such a public function.

B. Recommendation Rec(2004)10 of the Committee of Ministers of the Council of Europe to member states concerning the protection of the human rights and dignity of persons with mental disorders, 22 September 2004

55. Article 27, entitled "Seclusion and restraint" stipulates:

"1. Seclusion or restraint should only be used in appropriate facilities, and in compliance with the principle of least restriction, to prevent imminent harm to the person concerned or others, and in proportion to the risks entailed.

2. Such measures should only be used under medical supervision, and should be appropriately documented.

3. In addition:

i. the person subject to seclusion or restraint should be regularly monitored;

ii. the reasons for, and duration of, such measures should be recorded in the person's medical records and in a register.

4. This Article does not apply to momentary restraint."

C. The CPT Standards (the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment) concerning using restraints in psychiatric establishments (CPT/Inf/E (2002) 1- Rev. 2010)

56. The CPT standards contain the following rules on restraining patients in psychiatric establishments:

"Involuntary placement in psychiatric establishments Extract from the 8th General Report [CPT/Inf (98) 12]

47. In any psychiatric establishment, the restraint of agitated and/or violent patients may on occasion be necessary. This is an area of particular concern to the CPT, given the potential for abuse and ill-treatment.

The restraint of patients should be the subject of a clearly-defined policy. That policy should make clear that initial attempts to restrain agitated or violent patients should, as far as possible, be non-physical (e.g. verbal instruction) and that where physical restraint is necessary, it should in principle be limited to manual control.

Staff in psychiatric establishments should receive training in both non-physical and manual control techniques vis-à-vis agitated or violent patients. The possession of such skills will enable staff to choose the most appropriate response when confronted by difficult situations, thereby significantly reducing the risk of injuries to patients and staff.

48. Resort to instruments of physical restraint (straps, strait-jackets, etc.) shall only very rarely be justified and must always be either expressly ordered by a doctor or immediately brought to the attention of a doctor with a view to seeking his approval. If, exceptionally, recourse is had to instruments of physical restraint, they should be removed at the earliest opportunity; they should never be applied, or their application prolonged, as a punishment ...

50. Every instance of the physical restraint of a patient (manual control, use of instruments of physical restraint, seclusion) should be recorded in a specific register established for this purpose (as well as in the patient's file). The entry should include the times at which the measure began and ended, the circumstances of the case, the reasons for resorting to the measure, the name of the doctor who ordered or approved it, and an account of any injuries sustained by patients or staff.

This will greatly facilitate both the management of such incidents and the oversight of the extent of their occurrence."

"Means of restraint in psychiatric establishments for adults Extract from the 16th General Report [CPT/Inf (2006) 35]

43. As a general rule, a patient should only be restrained as a measure of last resort; an extreme action applied in order to prevent imminent injury or to reduce acute agitation and/or violence ...

52. Experience has shown that detailed and accurate recording of instances of restraint can provide hospital management with an oversight of the extent of their occurrence and enable measures to be taken, where appropriate, to reduce their incidence.

Preferably, a specific register should be established to record all instances of recourse to means of restraint. This would be in addition to the records contained within the patient's personal medical file. The entries in the register should include the time at which the measure began and ended; the circumstances of the case; the reasons for resorting to the measure; the name of the doctor who ordered or approved it; and an account of any injuries sustained by patients or staff. Patients should be entitled to attach comments to the register, and should be informed of this; at their request, they should receive a copy of the full entry."

D. Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 7 April 2006 and from 21 to 24 June 2006 (CPT/Inf (2007)32)

57. The CPT visited also Brno-Černovice Psychiatric Hospital and stated, *inter alia*, as follows:

"118. At Brno Psychiatric Hospital ... [t]he restraints would be applied either on the patient's own bed or in a separate room close to the nurses' office. A protocol on the use of immobilisation was in force, but the protocol does not mention the surveillance intervals; it appears that the hospital staff had adopted a practice to monitoring an immobilised patient every twenty minutes.

The delegation was pleased to note that registers recording the use of restraints had been introduced on the wards of Brno Psychiatric Hospital, thus meeting a long-standing CPT recommendation. However, the delegation found that the entries were not always meticulously kept; the release time and, on occasion, the moment of application of the immobilisation were not recorded.

As indicated above (cf. paragraph 114), in the CPT's view, patients who are immobilised should always be subject to continuous, direct personal supervision by a member of staff. However, the delegation was told that a pilot project on ward 12 to have patients accompanied by a member of staff for the full duration of the immobilisation had failed due to a lack of staff. Nevertheless the CPT considers that hospital management should ensure the permanent presence of a staff member whenever a patient is immobilised.

The CPT recommends that in Brno Psychiatric Hospital:

- the register on restraints clearly records the duration of the measure, as well as all other events that occur during the period of restraint;

- the protocol on restraints be amended in order to include a paragraph on supervision of an immobilised patient.

Further, the CPT recommends that all patients who are immobilised are always subject to continuous, direct personal supervision by a member of staff."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION IN ITS SUBSTANTIVE ASPECT

58. The applicant complained that he had been ill-treated in the sobering-up centre in violation of Article 3 of the Convention, which reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

59. The Government contested that argument.

A. Admissibility

60. The Government maintained that the applicant had failed to exhaust domestic remedies in that the civil proceedings against the hospital were pending and they constituted a sufficient remedy for the alleged wrongs. They referred to a number of cases of medical malpractice where the Court had required exhaustion of civil remedies.

61. The applicant disagreed, maintaining that he had been wilfully restrained in detention and that in those circumstances a civil claim for compensation was not an adequate remedy.

62. The Court considers that the issue of effectiveness of a civil remedy is closely linked to the substance of the present complaint and should be joined to the merits.

63. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

64. The applicant complained that his strapping down for ten hours, with no medical justification and no regular checks, had caused him severe mental and physical suffering with long-lasting effects and had constituted inhuman treatment. Moreover, the use of restraints was not adequately and comprehensively recorded.

65. He maintained that under the applicable international and national legal and medical standards physical restraints could be used only as a matter of last resort and must be fully justified. Yet, as stated in the official reports, he had been calm when he had been transferred to the psychiatric hospital and had no history of aggressiveness. He had not needed to be strapped upon his arrival at the sobering-up centre. Moreover, his alleged restlessness could not justify such treatment, the purpose of which had rather been to ease the hospital staff's workload due to a staff shortage.

66. According to the applicant, the treatment had reached the minimum level of severity required for Article 3 of the Convention to come into play. The straps had been applied to his wrists, knees and ankles and had been so tight that he could not move, resulting in great pain and suffering. At times he had even thought that he would suffocate. The treatment had had a long-term negative effect on his health and he had been unable to finish his studies and pursue his career as a violoncello player.

67. The Government maintained that the acts of the medical staff in the sobering-up centre, who were not state agents, could not be attributed to the State. In any event, according to them, the restraining of the applicant had not reached the minimum threshold of severity required for application of Article 3 of the Convention. They considered that it was more appropriate to examine the complaint under Article 8 of the Convention. Actually, the strapping of the applicant had been necessary for the protection of his own health, it not having been possible to use a less severe measure, such as tranquilisation with medicines, because the applicant had refused to give a blood sample in order for the doctors to be able to identify the substance the influence of which he had been under.

2. The Court's assessment

(a) The relevant facts

68. Before examining the case, the Court will address the factual dispute between the parties concerning the duration of the applicant's strapping.

69. It observes that the police did not ascertain the actual duration of the strapping, referring to the applicant's version of the facts (see paragraph 34 above). However, the Brno Municipal Prosecutor established that the applicant was restrained from 8.10 p.m. to 10 p.m. on 9 February 2007, then on 10 February 2007 from 4.30 a.m. to 5 a.m. and again from 6.30 a.m. until his release from the sobering up-centre. Yet the prosecutor did not mention on what she had based her conclusions or give any reasons why the applicant's version of facts was not credible (see paragraph 36 above).

70. The Court observes that the applicant supported his description of events mainly by the sobering-up centre's record, which does not say that he was released at 10 p.m. but includes two illegible letters instead. Nevertheless, the Court considers plausible the Government's explanation

that this was a typing mistake which was remedied in the later edition of the document. The Court further observes that the document submitted by the applicant does not fully support his version of the facts either, as it states that restraints were applied at 4.30 a.m. In fact, if he had been restrained for the whole night it would not have been necessary to apply the restraints again at 4.30 a.m.

71. The Court notes, on the other hand, that the Government's version of facts is also open to doubt, being considerably undermined by the testimony of nurse P., who remembered that while taking over duty from Ms K. at 6 a.m. on 10 February, the applicant had been strapped to the bed by his arms and legs. This is precisely the time when, according to the Government, the applicant was not restrained.

72. Accordingly, even though the Court has some doubts about the exact duration of the applicant's strapping, and given that his version of the facts was not fully supported by any evidence, it will proceed to the examination of the case on the basis of the Government's description of the duration of the applicant's strapping.

(b) Negative or positive obligations

73. The Court must next consider the objection of the Government that the actions of the medical staff could not be attributed to the State.

74. The events complained of occurred during the applicant's detention in a sobering-up centre, which amounts to a "deprivation of liberty" within the meaning of Article 5 § 1 of the Convention, which is not disputed by the parties (see *Witold Litwa v. Poland*, no. 26629/95, § 46, ECHR 2000-III). A person in a sobering-up centre is within the complete control of its staff.

75. The Court has considered the treatment of persons, including the application of restraints to detainees in sobering-up centres, from the point of view of the negative obligations of the State (see *Wiktorko v. Poland*, no. 14612/02, 31 March 2009, and *Mojsiejew v. Poland*, no. 11818/02, 24 March 2009).

76. Under Czech law, sobering-up centres are public bodies established by regional self-governing units that are entitled by law to hold persons under the influence of alcohol or another drug who cannot control their behaviour, thereby directly endangering themselves or other persons, public order or property, or whose condition causes a public disturbance.

77. Even accepting the Government's contention that the medical staff in the sobering up-centre are not State agents, they nevertheless perform governmental authority of detention (compare § 54 above). The State is responsible for the well-being of detainees (*Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI, and *Moisejevs v. Latvia*, no. 64846/01, § 78, 15 June 2006) and cannot evade its responsibility by delegating its power to other entities.

78. The Court further considers crucial in the present case that what is at stake is not the applicant's injury as an unintended negative consequence of medical treatment, as submitted by the Government, but the use of the restraints itself. The applicant's injury was only incidental to the intentional treatment, which is the issue from the point of view of Article 3 of the Convention. The present case significantly differs from cases where voluntary medical treatment had negative consequences on the health of patients. The Court thus does not consider the string of case-law concerning medical negligence referred to by the Government relevant to the present case. More pertinent to the present case are cases concerning the use of restraints on persons in detention, which the Court has always considered from the point of view of negative obligations (see, for example, *Herczegfalvy*, cited above, § 83; *Istratii and Others v. Moldova*, nos. 8721/05, 8705/05 and 8742/05, 27 March 2007, § 57; and *Kashavelov v. Bulgaria*, no. 891/05, § 40, 20 January 2011).

79. Consequently, the Court considers that the State must be held directly responsible for the use of restraints on the applicant in the sobering-up centre and the Court will consider that treatment in the light of the negative obligations of the State.

80. It further follows from the above that the cases of medical malpractice referred to by the Government are neither relevant to the present case in the context of exhaustion of civil remedies. The application of restraints was not medical treatment that the detainee could refuse. The issue is thus not that the applicant objected to his medical treatment, but that restraints and force were applied to him that would only be allowed by Article 3 of the Convention if made strictly necessary by his own conduct (see *Ribitsch v. Austria*, 4 December 1995, § 38, Series A no. 336).

81. The Court reiterates that in cases where an individual has an arguable claim under Article 3 of the Convention, the notion of an effective remedy entails, on the part of the State, a thorough and effective investigation capable of leading to the identification and punishment of those responsible (see *Selmouni v. France* [GC], no. 25803/94, § 79, ECHR 1999-V, and in the context of a treatment in a psychiatric hospital including application of restraints, *Filip v. Romania* (dec.), no. 41124/02, 8 December 2005). Wilful ill-treatment of persons who are within the control of agents of the State cannot be remedied exclusively through an award of compensation to the victim (see *Krastanov v. Bulgaria*, no. 50222/99, § 60, 30 September 2004, and *Kopylov v. Russia*, no. 3933/04, § 130, 29 July 2010).

82. Accordingly, a criminal complaint was an adequate remedy in the present case for the applicant's complaint that he had been ill-treated in detention (see, *mutatis mutandis*, *Mojsiejew v. Poland*, no. 11818/02, § 41, 24 March 2009, where the Court reached the same conclusion regarding death in a sobering-up centre). Once the criminal proceedings had been

terminated, the applicant was not required under Article 35 § 1 of the Convention to pursue and await the outcome of the civil proceedings instituted by him. The Government's objection of non-exhaustion of domestic remedies must therefore be rejected.

(c) General principles

83. The Court reiterates that Article 3 of the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances or the victim's behaviour (see, for example, *Labita v. Italy* [GC], no 26772/95, § 119, ECHR 2000-IV). Where allegations are made under Article 3 of the Convention, like in the present case, the Court must apply a particularly thorough scrutiny (see *Wiktorko*, cited above, § 48).

84. To fall under Article 3 of the Convention, ill-treatment must attain a minimum level of severity. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the gender, age and state of health of the victim. Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it, as well as its context, such as an atmosphere of heightened tension and emotions (see *Gäfgen v. Germany* [GC], no. 22978/05, § 88, ECHR 2010).

85. The Court has recognised the special vulnerability of mentally ill persons in its case-law and the assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 has, in particular, to take into consideration this vulnerability (see *Keenan v. the United Kingdom*, no. 27229/95, § 111, ECHR 2001-III, *Rohde v. Denmark*, no. 69332/01, § 99, 21 July 2005 and *Renolde v. France*, no. 5608/05, § 120, ECHR 2008 (extracts)).

86. In respect of persons deprived of their liberty, recourse to physical force which has not been made strictly necessary by their own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention (see *Krastanov v. Bulgaria*, no. 50222/99, § 53, 30 September 2004). In the context of detention in a sobering-up centre, it is up to the Government to justify the use of restraints on a detained person. Regarding the use of restraining belts, the Court accepted that aggressive behaviour on the part of an intoxicated individual may require recourse to the use of restraining belts, provided of course that checks are periodically carried out on the welfare of the immobilised individual. The application of such restraints must, however, be necessary under the circumstances and its length must not be excessive (see *Wiktorko*, cited above, § 55).

87. The position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with. Nevertheless, it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible. The established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist (see *Herczegfalvy v. Austria*, 24 September 1992, § 82, Series A no. 244).

(d) Application in the present case of the above-mentioned principles

(i) The severity of the treatment

88. The Court notes that the applicant was a young man of a fragile build, suffering from a mental illness. He was brought to the sobering-up centre in a state of intoxication, as a result of overdosing on medicine that was part of his treatment. He was thus in a particularly vulnerable position. Even though the applicant was calm during transport and admission to the hospital, he was immediately attached by restraining belts to his bed in the sobering-up centre due to his alleged restlessness. He was left in restraints for almost two hours. He was again restrained in the same way for half an hour at night on account of an alleged attack on a male nurse, and lastly for forty-five minutes the next morning for allegedly being destructive to his surroundings.

89. The Court must also take into account the serious consequences the treatment had on the applicant in evaluating whether it reached the minimum level of severity required for application of Article 3 of the Convention. It notes that an expert report commissioned by the police ten months after the treatment concluded that the applicant had suffered very severe bilateral paresis of the elbow nerves caused by the compression of nerves and blood vessels, that this injury still limited his ability to play the violoncello and that it would have a long-lasting effect which was unlikely to be permanent.

90. Accordingly, the Court considers that the strapping of the applicant must have caused him great distress and physical suffering and that Article 3 of the Convention is in principle applicable to the present case (see also the practice of the CPT, which considers the use of physical restraints an area of particular concern given the potential for abuse and ill-treatment).

(ii) The justification of the treatment

91. The Court will turn now to the examination of whether such treatment was justified in the present case and whether periodic checks were carried out.

92. According to the Government, the applicant's restriction was necessary for the protection of his own health although they did not indicate in what way the applicant's health was endangered. The Court notes that the record from the sobering up centre and the testimonies of the medical staff do not specify the extent or indeed existence of the danger the applicant posed to himself. They show that the reason for the applicant's restriction for two hours in the evening of 9 February 2007 was his restlessness. His restraint at night and in the morning was justified by his allegedly aggressive behaviour towards the medical staff.

93. The Court must determine whether the mere restlessness of a patient justifies his or her being restrained by straps to a bed for almost two hours, taking into account the current legal and medical standards on the issue (see *Herczegfalvy*, cited above, § 83).

94. The applicant was detained in a sobering-up centre, a health care facility that was part of a psychiatric hospital, the purpose of which is to treat persons under the influence of drugs. The fact that the applicant was a person suffering from a mental illness was or should have been known to the staff of the centre, as it was already stated in the record drawn up by the ambulance staff who had brought the applicant to the psychiatric hospital. Therefore the Court considers that the rules and standards on using restraints on patients with mental disabilities in psychiatric hospitals are relevant for the interpretation and application of Article 3 of the Convention to the facts of the present case.

95. The Court notes that both the European and national standards (see "Relevant domestic law" and "Relevant international standards" above) are unanimous in declaring that physical restraints can be used only exceptionally, as a matter of last resort and when their application is the only means available to prevent immediate or imminent harm to the patient or others. The Czech Guideline expressly states that restraints cannot be used when the patient is merely restless (see paragraph 51 above).

96. In line with these standards, the Court considers that using restraints is a serious measure which must always be justified by preventing imminent harm to the patient or the surroundings and must be proportionate to such an aim. Mere restlessness cannot therefore justify strapping a person to a bed for almost two hours.

97. The Court further observes that even though restraints should be used as a matter of last resort, no alternatives were tried in the applicant's case. He was restrained immediately on arrival at the sobering-up centre on account of his alleged restlessness, without any methods of calming him

down having been tried. Strapping was applied as a matter of routine. It thus cannot even be said that the domestic guideline was complied with.

98. Regarding the use of restraints as a result of the applicant's alleged aggressiveness at night and in the morning the Court agrees that attacking medical staff can be a sufficient reason for applying restraints. Nevertheless, it is not satisfied that it was conclusively established that the use of restraints was to prevent further attacks and that other means of trying to calm the applicant down, or less restrictive restraints, had been unsuccessfully tried. In this context the Court considers that it is unacceptable to use restraints as a punishment.

99. The Court observes that the two male nurses did not mention the alleged attack by the applicant at 4.30 a.m. to the police and there are no details about the nature of the attack anywhere in the case file. Ms K. only told the police that she did not remember which nurse had been attacked. The only details about any physical force used by the applicant were submitted by nurse P., who went on duty at 6 a.m. on 10 February and who reported that when any of the applicant's limbs had been unstrapped he had immediately started to defend himself and resist being strapped again. The Court, however, considers that using restraints can be hardly justified by the fact that a person resists their application.

100. The Court thus concludes that even though it is up to the Government to justify the use of restraints on a detained person (see *Wiktorko*, cited above, § 55) it has failed to show that the use of restraints on the applicant was necessary and proportionate in the circumstances.

101. In addition to this finding, the Court notes that the CPT recommended to Brno-Černovice Psychiatric Hospital that "patients who are immobilised should always be subject to continuous, direct personal supervision by a member of staff" after it found in its visit in 2005 that this was not the case (see paragraph 57 above).

102. The Court also notes that the domestic police investigation found that checks were not performed at regular intervals. The Court reiterates that restrained patients must be under close supervision. This obviously was not the case, which must have been one of the reasons for the damage to the applicant's health with long-lasting effect. The domestic authorities thus failed in their obligation to protect the health of persons deprived of their liberty (see *Keenan v. the United Kingdom*, no. 27229/95, § 111, ECHR 2001-III, and *Jasinskis v. Latvia*, no. 45744/08, § 60, 21 December 2010).

103. The Court further takes into account the European and national standards requiring proper recording of every use of restraints, which, among other things, facilitates any subsequent review of whether their use was justified. The Court has stressed the need for keeping proper medical notes in its case-law as well (see *Keenan*, cited above, § 114).

104. In the present case the Court finds the record kept about the use of restraints against the applicant very rudimentary. It does not contain any

information on when the restraints were first applied, merely stating that the applicant was released at 10 p.m., and that the restraints were again applied at 4.30 a.m., but not when they were removed. The record only states that the restraints were lastly applied at 6.30 a.m. and finished at 7.15 a.m. The record contains no explicit reasons for applying the restraints, save for the alleged attack on a male nurse at 4.30 a.m., yet even that is not clear from the record. Otherwise, there are only general notes about the applicant being restless, and at 6.30 a.m. as being aggressive towards his surroundings. There is no information about when checks were carried out.

105. In these circumstances the Court cannot but conclude that the records were far from satisfactory and it is evident that they undermined the proper establishment of the facts and hampered the domestic criminal investigation in the case.

106. Having regard to all the circumstances of the present case, the Court is of the view that the applicant has been subjected to inhuman and degrading treatment contrary to Article 3. There has accordingly been a substantive violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION IN ITS PROCEDURAL ASPECT

107. The applicant maintained that his complaints about his ill-treatment in the sobering-up centre had not been effectively investigated in violation of Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

108. The Government contested that argument.

A. Admissibility

109. The Government maintained that the applicant had failed to exhaust domestic remedies regarding some of his complaints concerning the alleged procedural violation of Article 3 of the Convention. In particular, in his complaint against the police authority's decision on the termination of the investigation, he had failed to mention that the proceedings had failed to satisfy the requirement of promptness and independence and had not been public because he was not allowed to be present during the questioning of witnesses and put questions to them (see paragraph 35 above).

110. The applicant disagreed.

111. The Court notes that the applicant challenged the effectiveness of the investigation before the prosecutor and the Constitutional Court (see paragraphs 35 and 37 above). It further notes that the alleged lack of independence lies not only in the conduct of the police but of the

prosecuting authorities as a whole. Therefore the applicant could not have complained of it in his appeal to the prosecutor; that is, before the alleged deficiency had materialised.

112. Regarding the complaint of lack of promptness, the Court in turn, does not consider that mentioning it in the appeal to the prosecutor could have had any effect. The police had already terminated the investigation and thus the prosecutor could not have remedied any alleged delays in the conduct of the investigation by the police.

113. Lastly, regarding the complaint that the proceedings were not public, the Court notes that in his appeal the applicant requested that the medical staff be questioned again. It also notes that he complained of the lack of their public nature in his subsequent constitutional appeal.

114. Consequently, the Government's plea of non-exhaustion of domestic remedies must be rejected.

115. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

116. The applicant complained that the investigation had not been initiated on the authorities' own motion. He had complained to the hospital authorities but they had not forwarded his complaint to the prosecuting authorities. Furthermore, it had not been effective either in law or in practice as the prosecuting authorities had not made a serious attempt to find out what happened and base their decision on established facts. The investigation had concerned only the crime of causing bodily harm and not inhuman treatment, and the investigating authorities had failed to establish the person responsible for his injuries even though the police had found out that the restraints had been used unlawfully. He had been unable to be present when the witnesses had been questioned or to suggest gathering additional evidence. The investigation had not been independent or speedy, as the investigating authorities had heavily relied on the explanations of the hospital staff, the police had taken twenty-two days to question the applicant and it had commissioned a forensic report only three months and nineteen days after the receipt of the criminal complaint.

117. The Government maintained that the investigation had been effective in that the factual circumstances of the case had been clarified to the maximum extent possible and all possible investigative steps had been taken. It was only logical that the complaint had been investigated as the criminal offence of causing bodily harm and not inhuman treatment because

there had been no intentional offence and the offender, if any, could only have been someone from the medical staff and not a State authority, local self-governing authority or a court.

118. They noted that the investigation had been instituted immediately after the police had received the criminal complaint and had proceeded with promptness.

119. In the Government's opinion the observance of the principle of the public nature and transparency of the investigation had been sufficiently secured by the fact that the applicant was able to request to be allowed to inspect the investigation file and lodge a complaint against the police authority's decision on the setting aside of the case. They also noted that in that complaint he had not challenged the content of the depositions of the medical staff at all, nor had he claimed that he should have been able to put questions to them. The Government believed that given the context, this opportunity to participate in the investigation had been sufficient to secure the applicant's rights and that transparency of the investigation and the applicant's legitimate interests had not required that the applicant be present at the questioning of the medical staff.

120. Lastly, they opined that there was no hierarchical, institutional or close working relationship between the medical staff and the police authority that could raise any doubt about the independence and impartiality of the investigation.

2. The Court's assessment

(a) General principles

121. The Court reiterates that Article 3 of the Convention requires States to put in place effective criminal-law provisions to deter the commission of offences against personal integrity, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. The domestic legal system, and in particular the criminal law applicable in the circumstances of the case, must provide practical and effective protection of the rights guaranteed by Article 3 (*Đurđević v. Croatia*, no. 52442/09, § 51, 19 July 2011).

122. Where an individual makes a credible assertion that he has suffered treatment infringing Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation (see *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV). Even though the scope of the State's positive obligations might differ between cases where treatment contrary to Article 3 has been inflicted through the involvement of State agents and cases where violence is inflicted by private individuals, the requirements as to an official

investigation are similar (see *Denis Vasilyev v. Russia*, no. 32704/04, § 100, 17 December 2009).

123. In its case-law the Court has established that for an investigation to be considered effective it must be thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions (see *Mikheyev v. Russia*, no. 77617/01, § 108, 26 January 2006). The investigation must be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard (*Denis Vasilyev v. Russia*, no. 32704/04, § 100, 17 December 2009). But the obligation on the States is not to elucidate all facts of the case but only those important for establishing the circumstances of the use of force and to determine whether official responsibility is engaged (see *Anusca v. Moldova*, no. 24034/07, § 40, 18 May 2010).

124. The investigation must further be independent, in that it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence (see *Đurđević*, cited above, § 85).

125. There must be also a sufficient element of public scrutiny of the investigation. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Isayeva and Others v. Russia*, nos. 57947/00, 57948/00 and 57949/00, § 212-213, 24 February 2005). However, that does not mean that the victim's right to access to investigation in all its stages arises from the Convention, because the interests of other persons or the risk of jeopardising the achievement of the aim of the investigation can prevail over his interest (see, for example, *McKerr v. the United Kingdom*, no. 28883/95, 4 May 2001, § 129).

126. The investigation must also start promptly once the matter has come to the attention of responsible authorities and conducted with reasonable expedition.

127. Lastly, the authorities must act of their own motion once the matter has come to their attention (see *Isayeva and Others*, cited above, § 209).

(b) Application in the present case of the above-mentioned principles

128. The Court firstly observes that the police started the investigation promptly after the applicant had lodged his criminal complaint and it did not suffer from any unnecessary delays. The applicant was interviewed about two weeks after the police had received his criminal complaint. The interviews of other persons, collection of documents and drawing up of an expert report were carried out in the following months. The police closed the investigation within six months. Such length is not unreasonable to an extent that it would make the investigation ineffective. The Court adds that for the purpose of fulfilling the requirement of promptness, the investigation could not have been started when the applicant complained to the hospital staff, because they are not a state authority that could have instituted a criminal investigation.

129. Regarding the alleged lack of independence the Court does not consider that the present case can be compared to the situation in *Ergi v. Turkey* (28 July 1998, § 83, *Reports* 1998-IV) as suggested by the applicant, where the Court criticised the heavy reliance of the prosecuting authorities on a report by the gendarmerie, given that the gendarmes themselves were suspected of shooting the applicant's sister. However, in the present case, the prosecuting authorities based their conclusions on several witness testimonies, documents and an independent expert report.

130. Regarding the level of public scrutiny of the investigation, the Court observes that the applicant had access to the investigation file and could have lodged an appeal against the decision of the police to terminate the investigation. In his appeal, or indeed at any time, he was free to dispute the veracity of any evidence collected by the police or to suggest the taking of further evidence. The Court therefore finds that the applicant was involved in the procedure to the extent necessary to safeguard his legitimate interests and that it was not indispensable that he be present when the police took statements from the witnesses.

131. The Court further reiterates that it is not its task to interpret the domestic law, including the Criminal Code. Therefore, it will not express a view on whether the applicant's ill-treatment should have been investigated as the crime of torture and other inhuman or cruel treatment. It must concentrate on the purpose of the obligation of effective investigation, which is to secure an effective implementation of the domestic laws which protect the right not to be tortured and, in those cases involving State agents or bodies, to ensure their accountability (see *Kelly and Others v. the United Kingdom*, no. 30054/96, § 94, 4 May 2001) and to enable the facts to become known to the public (see *Siemińska v. Poland* (dec.), no. 37602/97, 29 March 2001).

132. It appears from the decision of the police that the main reason for the termination of the investigation was that they considered that no crime had been committed. This is explicitly stated in the decision of the

prosecutor, who considered the treatment of the applicant to have been in compliance with the law. Such conclusions are, however, hardly reconcilable with the obligation of States that the domestic legal system must provide practical and effective protection of the rights guaranteed by Article 3. The Court must take into account that the application of restraining belts on the applicant was a wilful act constituting inhuman and degrading treatment, as it has found above.

133. The Court is further struck by the resolute conclusion of the prosecutor that the applicant was aggressive at the time of his admission to the sobering-up centre and therefore he was restrained. It is not clear on what this statement is based, especially given that there is no single piece of evidence in the case file that would support such a conclusion. The written evidence and the statements mention only that the applicant was restless at the time of his admission, but not that he was aggressive. Furthermore, the prosecutor's conclusion that the applicant was checked on every twenty minutes also lacks any reasoning, which is particularly striking given that the police, on the basis of the same evidence, reached a different conclusion. Both these conclusions were crucial for the legal assessment of the events and had a direct bearing on the effectiveness of the investigation. In consequence, it cannot be said that it was thorough.

134. In view of these considerations, the Court concludes that the investigation in the present case did not provide the applicant with practical and effective protection of his rights guaranteed by Article 3. Consequently, there has been a procedural violation of Article 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

135. The applicant complained that his involuntary admission and detention in Brno-Černovice Psychiatric Hospital violated his right to liberty. He relied on Article 5 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants ..."

136. The Government contested that argument. They argued that the applicant had failed to exhaust domestic remedies and that he had been detained for two unrelated reasons, which had to be considered separately.

137. First, he had been detained in the sobering-up centre overnight from 9 to 10 February 2007. Detention in sobering-up centres involved deprivation of liberty for several hours maximum, and therefore the law did

not envisage any approval by a court. The appropriate legal tool was a subsequent reparatory remedy, namely, an action for the protection of personality rights under the Civil Code against the health care facility concerned, which the applicant had failed to lodge.

138. Secondly, the applicant had been detained in a psychiatric hospital, in which case court proceedings under Article 191b of the Code of Civil Procedure had been automatically instituted. The applicant, however, had failed to lodge a constitutional appeal in compliance with the procedural requirements. They remarked that in the months prior to the lodging of the applicant's constitutional appeal all the chambers of the Constitutional Court had adopted the approach of requiring previous recourse to an action for nullity. That approach had been subsequently confirmed by a decision of the plenary session of the Constitutional Court of 16 December 2008, no. 79/2009.

139. The applicant disagreed. First, he contested the division of his detention into two phases, holding that since 9 February 2007 he had been detained in the same psychiatric hospital, and that he had not been released from the sobering-up centre but transferred to a different unit of the hospital.

140. He then maintained that an action for nullity was not an effective remedy within the meaning of Article 35 of the Convention. Actually, such an action could not remedy the deficiencies alleged by him under Article 5 § 1 of the Convention. Moreover, lodging it would have no chance of success in view of the Opinion of the Supreme Court no. Cpjn 29/2006 (see paragraph 53 above).

141. The Court reiterates that Article 35 § 1 of the Convention requires not merely the use of the requisite remedies but that the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic body, and in compliance with the formal requirements laid down in domestic law (see *Sabeh El Leil v. France* [GC], no. 34869/05, § 32, 29 June 2011).

142. The Court finds, and this is not in dispute between the parties, that a constitutional appeal as such was an effective remedy within the meaning of Article 35 § 1 of the Convention. It observes that the applicant's constitutional appeal was dismissed for non-exhaustion of remedies, namely, for failing to lodge an action for nullity, without a decision on its merits.

143. The Court reiterates that it is in the first place for the national authorities, and notably the courts, to interpret domestic law and that the Court will not substitute its own interpretation for theirs in the absence of arbitrariness. This applies in particular to the interpretation by domestic courts of rules of a procedural nature. Although procedural rules governing appeals must be adhered to as part of the concept of a fair procedure, in principle it is for the national courts to police the conduct of their own

proceedings (see *Tejedor García v. Spain*, 16 December 1997, § 31, *Reports* 1997-VIII, and *Matoušek v. the Czech Republic* (dec.), no. 32384/05, 7 September 2010).

144. On the other hand, the Court notes that on numerous occasions it has found a violation of Article 6 of the Convention because of lack of access to court, when a procedural rule was construed in a way that was unpredictable and in variance with the principle of legal certainty (see *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, §§ 53-54, ECHR 2002-IX), or the domestic court showed excessive formalism (see *Bulena v. the Czech Republic*, no. 57567/00, § 35, 20 April 2004). In these instances, it then dismissed the Government's objection to the admissibility of other complaints (see *Běleš and Others v. the Czech Republic* (dec.), no. 47273/99, 11 December 2001 and *Zvolský and Zvolská v. the Czech Republic* (dec.), no. 46129/99, 11 December 2001).

145. The Court, however, does not consider that such a situation arose in the present case. It notes that the Government extensively referred to the Constitutional Court's case-law, built up before the applicant lodged his constitutional appeal, where it had consistently required the lodging of an action for nullity before lodging a constitutional appeal. Therefore it cannot be said that its decision could not have been foreseen by the applicant (see, *a contrario*, *Faltejsek v. the Czech Republic*, no. 24021/03, § 32, 15 May 2008).

146. The Court also notes that the Opinion of the Supreme Court no. Cpjn 29/2006, relied on by the applicant, was adopted only on 14 January 2009 and thus could not have any relevance to the decision of the Constitutional Court given before.

147. In conclusion, the applicant failed to lodge a constitutional appeal in compliance with the procedural requirements, which were not applied arbitrarily, unforeseeably, or with excessive formalism.

148. Consequently, this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

149. The applicant complained that he did not have access to a proper judicial review of his detention. He relied on Article 5 § 4 of the Convention, which reads as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

150. The Government considered that the case-law on the applicability of Article 5 § 4 of the Convention was inconsistent and asked the Court to

clarify to which proceedings in the context of involuntary hospitalizations in the Czech Republic Article 5 § 4 applied. They maintained, however, that Article 5 § 4 ceased to apply once a person was released and this part of the application was therefore incompatible *ratione materiae* with the Convention.

151. The Government further raised the same inadmissibility plea on the grounds of non-exhaustion of domestic remedies, submitting the same arguments as in the context of Article 5 § 1 of the Convention.

152. The applicant disagreed and maintained that Article 5 § 4 continued to apply even after a detainee's release.

153. Regarding the objection of non-exhaustion of domestic remedies, the applicant referred to his submissions under Article 5 § 1.

154. The Court does not consider it appropriate in the context of the present case to examine the question of applicability of Article 5 § 4 to the appeal proceedings brought by the applicant after his release as the applicant's complaint about deficiencies in the judicial review of the lawfulness of his detention is in any event inadmissible for the following reason.

155. The Court held in *Knebl v. the Czech Republic* (no. 20157/05, § 77, 28 October 2010) that a constitutional appeal was an effective remedy that had to be exhausted for complaints that a procedure under Article 5 § 4 of the Convention did not provide guarantees appropriate to the kind of deprivation of liberty in question. The Court has no reason to hold otherwise in the present case.

156. In view of the conclusions above under Article 5 § 1 of the Convention, the Court concludes that the complaint under Article 5 § 4 must be also rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies since the applicant failed to lodge a constitutional appeal in compliance with the procedural requirements.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

157. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

158. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

159. The Government considered that amount excessive.

160. The Court is of the view that as a result of the circumstances of the case the applicant must have experienced considerable anguish and distress which cannot be made good by a mere finding of a violation of the Convention. Having regard to the circumstances of the case seen as a whole

and deciding on an equitable basis, the Court awards the applicant EUR 20,000 for non-pecuniary damage.

161. The applicant did not claim reimbursement of any costs and expenses. Accordingly, the Court considers that there is no call to award him any sum on that account.

162. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join to the merits the Government's objection as to the exhaustion of domestic remedies and rejects it;

2. *Declares* the complaints concerning Article 3 of the Convention admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 3 of the Convention under its substantive limb;

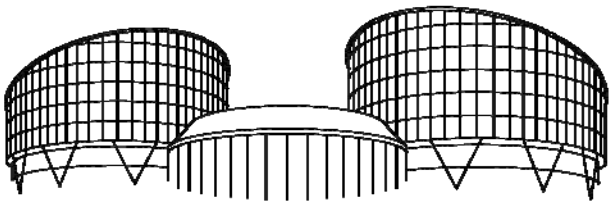
4. *Holds* that there has been a violation of Article 3 of the Convention under its procedural limb;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Czech korunas at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 18 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Dean Spielmann
Registrar	President



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF D.D. v. LITHUANIA

(Application no. 13469/06)

JUDGMENT

STRASBOURG

14 February 2012

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of D.D. v. Lithuania,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, *President,*
Danutė Jočienė,
Dragoljub Popović,
Işıl Karakaş,
Guido Raimondi,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 24 January 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 13469/06) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian national, Ms D.D. ("the applicant"), on 28 March 2006. The President of the Chamber acceded to the applicant's request not to have her name disclosed (Rule 47 § 3 of the Rules of Court, as in force at the material time).

2. On 8 January 2008 the applicant, who had been granted legal aid, signed a power of attorney in favour of Mr H. Mickevičius, a lawyer practising in Vilnius, giving him authority to represent her before the Court. The Lithuanian Government ("the Government") were represented by their Agent, Ms E. Baltutytė.

3. The applicant complained that her involuntary admission to a psychiatric institution was in breach of Article 5 §§ 1 and 4 of the Convention. She further alleged that she had been deprived of the right to a fair hearing, in breach of Article 6 § 1.

4. On 20 November 2007 the Court decided to give notice of the application to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. Written submissions were received from the European Group of National Human Rights Institutions and from the Harvard Project on Disability, which had been granted leave by the President to intervene as third parties (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court, as in force at the material time).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1963 and currently lives in the Kėdainiai Social Care Home (hereinafter "the Kėdainiai Home") for individuals with general learning disabilities.

A. The circumstances of the case

7. The facts of the case, as submitted by the parties, may be summarised as follows.

1. The applicant's psychiatric treatment, guardianship and care

8. The applicant has had a history of mental disorder since 1979, when she experienced shock having discovered that she was an adopted child. She is classed as Category 2 disabled.

9. In 1980, the applicant was diagnosed with schizophrenia simplex. In 1984 she was diagnosed with circular schizophrenia. In 1999, the applicant was diagnosed with paranoid schizophrenia with a predictable course. She has been treated in psychiatric hospitals more than twenty times. During her most recent hospitalisation at Kaunas Psychiatric Hospital in 2004, she was diagnosed with continuous paranoid schizophrenia (*paranoidinė šizofrenija*, *nepertraukiama eiga*). The diagnosis of the applicant remains unchanged.

10. In 2000 the applicant's adoptive father applied to the Kaunas City District Court to have the applicant declared legally incapacitated. The court ordered a forensic examination of the applicant's mental status.

11. In their report (no. 185/2000 of 19 July 2000), the forensic experts concluded that the applicant was suffering from "episodic paranoid schizophrenia with a predictable course" (*šizofrenija/paranoidinė forma, epizodinė liga su prognozuojančiu defektu*) and that she was not able "to understand the nature of her actions or to control them". The experts noted that the applicant knew of her adoptive father's application to the court for her incapacitation and wrote that she "did not oppose it". The experts also wrote that the applicant's participation in the court hearing for incapacitation was "unnecessary".

12. On 15 September 2000 the Kaunas City District Court granted the request by the applicant's adoptive father and declared the applicant legally incapacitated. In a one-page ruling, the court relied on medical expert report no. 185/2000. Neither the applicant nor her adoptive father was present at the hearing. The Social Services Department of the Kaunas City Council was represented before the court.

13. On 17 May 2001 the applicant's adoptive father requested her admission to the Kėdainiai Home for individuals with general learning disabilities. The applicant's name was put on a waiting list.

14. On 13 August 2002 the Kaunas City District Court appointed D.G., the applicant's psychiatrist at the Kaunas out-patient health centre (*Kauno Centro Poliklinika*), as her legal guardian. The applicant was present at the hearing. Her adoptive father submitted that "he himself did not agree with being appointed her guardian because he was in disagreement with his daughter (*jis pats nepageidauja būti globėju, nes su dukra nesutaria*)". Nonetheless, he promised to take care of her in future and to help her financially.

15. By a decision of 24 March 2003, the director of the health care centre dismissed D.G. from her work for a serious violation of her working duties. The decision was based on numerous reports submitted by D.G.'s colleagues and superiors.

16. On 16 July 2003 D.G. wrote to the Kaunas City District Court asking that she be relieved of her duties as the applicant's guardian. She mentioned that she had only agreed to become the applicant's guardian because she had observed a strained relationship between the applicant and her adoptive father. However, D.G. claimed that the applicant's adoptive father had asked her to hand over the applicant's pension to him, even though the applicant had been receiving her pension and had been using the money perfectly well on her own for many years. D.G. also contended that the applicant's adoptive father had attempted to unlawfully appropriate the applicant's property.

17. On 1 October 2003 the Kaunas City District Court relieved D.G. of her duties as the applicant's guardian at her own request. In court D.G. had argued that as she was litigating for unlawful dismissal she could not take proper care of the applicant.

18. By letter of 9 December 2003, the Kaunas City Social Services Department suggested to the district court that the applicant's adoptive father be appointed her guardian, although the Department noted that relations between the two of them were tense.

19. On 21 January 2004 the Kaunas City District Court appointed the applicant's adoptive father as her legal guardian. The court relied on the request by the Kaunas City Council Department of Health, which was represented at the hearing. The applicant's adoptive father did not object to the appointment. The applicant was not present at the hearing.

20. Upon the initiative and consent of the applicant's adoptive father, on 30 June 2004 the applicant was taken to the Kaunas Psychiatric Hospital for treatment. The applicant complained that she had been treated against her will. A letter by the hospital indicates that the applicant's adoptive father had asked the hospital staff to ensure that her contacts with D.G. were limited on the ground that the latter had had a negative influence on the

applicant. However, on 3 September 2004 the prosecutor for the Kaunas City District dismissed the applicant's allegations, finding that she had been hospitalised due to deterioration in her mental state upon the order of her psychiatrist. The applicant had also expressed her consent to being treated.

21. On 8 July 2004 a panel designated by Kaunas City Council to examine cases of admission to residential psychiatric care (*Kauno miesto savivaldybės asmenų su proto negalia siuntimo į stacionarias globos įstaigas komisija*) adopted a unanimous decision to admit the applicant to the Kėdainiai Home.

22. On 20 July 2004 a medical panel of the Kaunas Psychiatric Hospital concluded that the applicant was suffering from "continuous paranoid schizophrenia" (*paranoidinė šizofrenija nepertraukiama eiga*). The commission also stated that it would be appropriate for the applicant to "live in a social care institution for the mentally handicapped".

23. On 28 July 2004 a social worker examined the conditions in which the applicant lived in her apartment in Kaunas city. The report reads that "the applicant is not able to take care of herself, does not understand the value of money, does not clean her apartment, is not able to cook on her own and wanders in the city hungry. Sometimes the applicant gets angry at people and shouts at them without a reason; her behaviour is unpredictable. The applicant does not have bad habits and likes to be in other persons' company". The social worker recommended that the applicant be placed in a social care institution because her adoptive father could not "manage" her.

24. On 2 August 2004 an agreement was concluded between the Kėdainiai Home, the Guardianship Department of Kaunas City Council and the Social Services Department of the Kaunas Regional Administration. On the basis of that agreement, the applicant was transferred from the Kaunas Psychiatric Hospital to the Kėdainiai Home, where she continued her treatment.

25. On 6 October 2004 the applicant signed a document stating that she agreed to be examined by the doctors in the Kėdainiai Home and to be treated there.

26. On 10 August 2004 the applicant's adoptive father wrote to the director of the Kėdainiai Home with a request that during the applicant's settling into the Kėdainiai Home she should be temporarily restricted from receiving visits by other people. The director granted the request. Subsequently, the Kaunas District Administration upheld the director's decision on the ground that the latter was responsible for the safety of patients in the Kėdainiai Home and thus was in a better position to determine what steps were necessary.

27. On 18 August 2004, upon the decision of the Kėdainiai Home director, D.G. was not allowed to visit the applicant. The applicant's medical record, which a treating psychiatrist signed the following day, states that "[the applicant] is acclimatising at the institution with difficulties, as

her former guardian and former doctor [D.G.] keeps calling constantly and telling painful matters from the past (...) [the applicant] is crying and blaming herself for being not good, for not preserving her mother, for having lived improperly. Verbal correction is not effective".

28. According to a document signed by Margarita Buržinskienė on 23 February 2005, she had called the Kėdainiai Home to speak to the applicant but the employees had told her that, on the director's orders, the applicant was not allowed to answer the phone (*vykdant direktorės nurodymą Daivos prie telefono nekviečia*).

29. On 15 June 2006 the applicant's adoptive father removed her from institutional care and taken her to his flat. On 15 July 2006 the applicant left his home on her own. A police investigation was started following a report by the applicant's adoptive father of the allegedly unlawful deprivation of the applicant's liberty. She was eventually found and apprehended by the police on 31 October 2006, and was taken back to the Kėdainiai Home.

30. On 6 September 2007 the applicant left the Kėdainiai Home without informing its management. She was found by the police and taken back to the institution on 9 October 2007.

31. As can be seen from a copy of the record of the Kėdainiai Home's visitors submitted by the Government, between 2 August 2004 and 25 December 2006 the applicant received one or more visitors on forty-two separate occasions. In particular, her adoptive father saw her thirteen times, her friends and other relatives visited her twenty-six times and she was visited by D.G. on twelve occasions.

2. Proceedings regarding the change of the applicant's guardianship

32. On 15 July 2004 the applicant asked the Kaunas Psychiatric Hospital to initiate a change of guardianship from her adoptive father to D.G. The applicant wrote that her adoptive father had had her admitted to the psychiatric hospital by force and deception, thus depriving her of her liberty. The hospital refused her request as it did not have competence in guardianship matters.

33. The applicant states that a similar request was rejected by the Kėdainiai Home.

34. On 2 September 2005, assisted by her former guardian and then friend, D.G., the applicant brought an application before the courts, requesting that the guardianship proceedings be reopened and a new guardian appointed. She submitted that she had been unable to state her opinion as to her guardianship, because she had not been informed of and summoned to the court hearing during which her adoptive father had been appointed her guardian. The applicant relied on Article 507 § 3 of the Code of Civil Procedure and stated that her state of health in the previous year could not have been an obstacle to her expressing her opinion as to the appropriateness of the guardian proposed at the court hearing. She claimed

that in 2004 she had used to visit her friend in a village for a couple of weeks at a time. The applicant also noted that when she returned to Kaunas, her adoptive father had often threatened to have her committed to a mental asylum.

35. The applicant also argued that by appointing her adoptive father to be her guardian without informing her and without her being able to state her opinion as to his prospective appointment, in contravention of Article 3.242 of the Civil Code and Article 507 § 4 of the Code of Civil Procedure, the court had disregarded the strained relationship between the two of them. The applicant drew the court's attention to the ruling of the Kaunas City District Court of 13 August 2002, in which the applicant's adoptive father had himself stated that their relationship had been tense. The applicant drew the court's attention to Article 491 § 2 of the Code of Civil Procedure, stipulating that the court had to take all necessary measures to avoid a possible conflict between the incapacitated person and her potential guardian.

Lastly, she stated that she had only learned of her adoptive father's appointment in April 2004.

36. By a ruling of 29 September 2005 the Kaunas City District Court decided to accept the applicant's request for examination.

37. On 27 October 2005 the applicant wrote to the Chairman of the Kaunas City District Court. She complained of her incapacitation on her adoptive father's devious initiative without having being informed of the incapacitation proceedings. The applicant also pleaded that she had been unlawfully deprived of her liberty and involuntarily admitted to the Kėdainiai Home for an indefinite time and where she had been unable to obtain legal aid.

38. On 7 November 2005 judge R.A. of the Kaunas City District Court held a closed hearing in which the applicant, her guardian (her adoptive father) and his lawyer, and D.G. took part. The relevant State institutions were also represented at the hearing: the Kėdainiai Home, the Kaunas Psychiatric Hospital, the prosecutor and the Social Services Department of Kaunas City Council. The applicant's doctor did not take part in the hearing. The court noted that the doctor had been informed of it and had asked the court to proceed without him.

39. In her application form to the Court, the applicant alleged that at the beginning of the hearing the judge had ordered her to leave her place next to D.G. and to sit next to the judge. The judge had also ordered D.G. "to keep her eyes off the applicant". Given that this was not reflected in the transcript of the hearing, on 19 November 2005 D.G. had written to the court asking that the transcript be rectified accordingly.

40. According to the transcript of the hearing, at the beginning thereof D.G. requested that an audio recording be made. The judge refused the request. The applicant asked to be assisted by a lawyer. The judge refused

her request, deeming that her guardian was assisted by a lawyer before the court. Without the agreement of her guardian, a separate lawyer could not be appointed. The lawyer hired by the applicant's guardian was held to represent both the interests of the applicant and her guardian.

41. As the transcript of the hearing shows, the applicant went on to unequivocally state that she stood by her request that the guardianship proceedings be reopened. She argued that she had neither been informed of the proceedings as to her incapacitation, nor those pursuant to which her guardian had been appointed. The decisions had been taken while she had been in hospital. During the hearing, the applicant expressed her willingness to leave the Kėdainiai Home and stated that she was being kept and treated there by force. She submitted that she would prefer to live at her adoptive father's home and to attend a day centre (*lankys dienos užimtumo centrą*). The applicant also argued that D.G. had been forced to surrender her duties as her guardian and to allow the applicant's adoptive father to become her guardian because of pressure from him with the aim of transferring the applicant's flat to him. The applicant also noted that in the Kėdainiai Home she was cut off from society and had been deprived of the opportunity to make telephone calls. Her friends could not visit her and she was not allowed to go to the cinema. In the Kėdainiai Home "she was isolated and saw only a fence". The other parties to the proceedings opposed the applicant's wish that the guardianship proceedings be reopened.

42. In her application to the Court, the applicant alleged that during a break in the hearing she had been ordered to follow the judge to her private office. When the applicant had refused, she had been threatened with restraint by psychiatric personnel. In private, the judge had instructed her not to say anything negative about her adoptive father and that, should she not comply, her friend D.G. would also be declared legally incapacitated. As stated in D.G.'s letter seeking rectification of the transcript (paragraph 39 above), after the break was announced the applicant had wished to stay in the hearing room. However, she had been taken away and had returned very depressed (*prislėgta*). Responding to a question by the judge as to her guardianship, the applicant replied: "I agree that [my adoptive father] should be my guardian, because God asks that people be forgiving. I just wish that he [would] take me [away] from [the Kėdainiai Home] to Kaunas, to his place... and let me see D.G. and my friends".

43. It appears from the transcript of the hearing that after the break, when giving her submissions to the court, the applicant agreed to keep her adoptive father as guardian, but insisted on being released from institutional care in order to live with her adoptive father. The relevant State institutions – the Kėdainiai Home, the Kaunas Psychiatric Hospital, the prosecutor, the Social Services Department of Kaunas City Council – and the applicant's guardian's lawyer each argued that the applicant's request for reopening was clearly unfounded and should be dismissed.

44. On 17 November 2005 the Kaunas City District Court refused to reopen the guardianship proceedings on the basis of Article 366 § 1 (6) of the Code of Civil Procedure, ruling that there were no grounds to change the guardian (see Relevant domestic law part below). The court noted that before appointing the applicant's adoptive father as her guardian, the Kaunas City Council Department of Health had prepared a report on the proposed appointment of the applicant's guardian and had questioned the applicant, who had not been able to provide an objective opinion about that appointment. The court confirmed that the applicant had not been summoned to the hearing of 21 January 2004, when her guardian was appointed, as the court had taken into consideration the applicant's mental state and, on the basis of the findings of the relevant health care officials, had not considered her involvement in the hearing necessary. The court further noted that the findings had disclosed tense relations between the applicant and her adoptive father. Even so, the applicant's adoptive father had been duly performing his duties. The court also referred to statements of the representatives of the Kaunas Psychiatric Hospital and the director of the Kėdainiai Home to the effect that the applicant's contact with D.G. had had a negative influence on her mental health.

45. The Kaunas City District Court proceeded to fine D.G. 1,000 Lithuanian litai (LTL) (approximately 290 euros (EUR)) for abuse of process. It noted that D.G. had filed numerous complaints before various State institutions and the courts of alleged violations of the applicant's rights. Those complaints had prompted several inquiries which had revealed a lack of substantiation. The court noted:

> "... by such an abuse of rights, [D.G.] caused damage to the State, namely the waste of time and money of the court and the participants in the proceedings. The court concludes that [D.G.] has abused her rights ... and the vulnerability of the incapacitated person".

46. D.G. appealed against the above decision. She noted, *inter alia*, that the 21 January 2004 ruling to appoint the applicant's adoptive father as her guardian had been adopted by judge R.A. The same judge had dismissed the applicant's request that the court proceedings be reopened, although this was explicitly prohibited by Article 370 § 5 of the Code of Civil Procedure.

The applicant also submitted a brief in support of D.G.'s appeal, arguing that persons admitted to psychiatric institutions should have a right to know the reasons for their admission. Moreover, they should be able to contact a lawyer who is independent from the institution to which they have been admitted.

47. The appeal by D.G. was dismissed by the Kaunas Regional Court on 7 February 2006 in written proceedings. The court did not rule on the plea that the district court judge R.A. had been partial.

48. On 11 May 2006 the Supreme Court declared D.G.'s subsequent appeal on points of law inadmissible, as it had not been submitted by a lawyer and raised no important legal issues.

49. By a ruling of 7 February 2007 the Kaunas City District Court, following a public hearing attended by social services representatives and the applicant's legal guardian, granted the guardian's request to be relieved from the duties of guardian and property administrator. The applicant's adoptive father had argued that he was no longer fit to be her guardian because of his old age (seventy-seven years at that time) and state of health. The Kėdainiai Home was appointed temporary guardian and property administrator. The applicant was not present at the hearing.

50. On 25 April 2007, the Kaunas City District Court held a public hearing and appointed the Kėdainiai Home as the applicant's permanent guardian and administrator of her property rights. The applicant was not present at that hearing; the court did not give reasons for her absence.

3. Criminal inquiry

51. On 1 February 2006 a criminal inquiry was opened on the initiative of some of the applicant's acquaintances, who alleged that the applicant had been the victim of Soviet-style classification of illnesses which was designed to repress those who fall foul of the regime. The complainants submitted that, as a result of the persistent diagnoses of schizophrenia, the applicant had been unlawfully deprived of her liberty, had been ill-treated and had been overmedicated in the Kėdainiai Home, and that her property rights had been violated by her guardian.

52. On 31 July 2006 the investigation was discontinued, no evidence having been found of an abuse of the applicant's interests, either pecuniary or personal. It was established that the immovable property belonging to the applicant had been let to a third person, with the proceeds used to satisfy the applicant's needs. The applicant had had a bank account opened in her name on 6 October 2005, and the deposit made on that date had since been left untouched. Moreover, the applicant's guardian had transferred to her account the sum received from the sale of their common property. There was thus no indication that the applicant's adoptive father had abused his position as guardian.

53. As regards the deprivation of the applicant's liberty, the prosecutor noted that the applicant had been admitted to an institutional care facility in accordance with the applicable legislation. The prosecutor acknowledged that the freedom of the applicant "to choose her place of residence [was] restricted (*laisvė pasirinkti buvimo vietą yra ribojama*)", but further noted that she was:

> "... constrained to an extent no greater than necessary in order to take due care of her as a legally incapacitated person. The guardian of [the applicant] can change her place of residence without first obtaining a separate official decision; she is not unlawfully

hospitalised. Therefore, her placement in the Kėdainiai Home cannot be classified as an unlawful deprivation of liberty, punishable under Article 146 § 2 (3) of the Criminal Code".

54. The prosecutor had also conducted an inquiry into an incident which had occurred at the Kėdainiai Home on 25 January 2005. After questioning the personnel of the Home, it was established that on that day the applicant had been placed in the intensive supervision ward (*intensyvaus stebėjimo kambarys*), had been given an additional dose of tranquilisers (2 mg of Haloperidol) and had been tied down (*fiksuota*) for fifteen to thirty minutes by social care staff.

55. The prosecutor noted the explanation of the psychiatrist at the Home, who admitted that the applicant's restraint had been carried out in breach of the applicable rules, without the approval of medical personnel. However, after having read written reports on the incident produced by the social care personnel, he considered the tying down to have been undertaken in order to save the applicant's life and not in breach of her rights.

56. Questioned by the prosecution as witnesses, social workers at the Kėdainiai Home testified that 25 January 2005 had been the only occasion on which the applicant had been physically restrained and placed in isolation. The measures had only been taken because at that particular time the applicant had shown suicidal tendencies.

57. The prosecutor concluded that the submissions made by the complainants were insufficient to find that the applicant's right to liberty had been violated by unnecessary restraint or that she had suffered degrading treatment.

58. On 30 August 2006 the higher prosecutor upheld that decision.

4. Complaints to other authorities

59. With the assistance of D.G., the applicant addressed a number of complaints to various State authorities.

60. On 30 July 2004, in reply to a police inquiry into the applicant's complaint of unlawful detention in the Kėdainiai Home, the Kaunas City Council Social Services department wrote that "[in] the last couple of years, relations between the applicant and her adoptive father have been tense. Therefore, on the wish of both of them, until 21 January 2004 [the applicant's] legal guardian was D.G. and not her adoptive father".

61. The Ministry of Social Affairs also commissioned an inquiry, including conducting an examination of the applicant's living conditions at the Kėdainiai Home and interviews with the applicant and the management of the Home. The commission established that the applicant's living conditions were not exemplary (*nėra labai geros*), but it was promised that the inhabitants would soon move to new premises with better conditions. However, it was noted that the applicant received adequate care. The commission opined that it was advisable not to disturb the applicant, given

her vulnerability and instability. It was also emphasised that the State authorities were under an obligation to be diligent as regards supervision of how the guardians use their rights.

62. On 6 January 2005 D.G. filed a complaint with the police, alleging that the applicant had been unlawfully deprived of her liberty and of contact with people from outside the Kėdainiai Home. By letter of 28 February 2005, the police replied that no violation of the applicant's rights had been found. They explained that, in accordance with the internal rules of the Kėdainiai Home, residents could be visited by their relatives and guardians, but other people required the approval of the management. At the request of the applicant's guardian, the management had prohibited other people from visiting her.

63. On 17 May 2005 upon the inspection performed by food safety authorities out-of-date frozen meat (best before 12 May 2005) was found in the Kėdainiai Home. However, there was no indication that that meat would have been used for cooking. On 20 February 2006 the Kaunas City Governor's office inspected the applicant's living conditions in Kėdainiai and found no evidence that she could have been receiving food of bad quality.

64. On 28 April 2006 the applicant complained to the Ministry of Health about her admission to long-term care. By letter of 12 May 2006, the Ministry noted that no court decision to hospitalise the applicant had been issued, and that she had been admitted to the Kėdainiai Home after her adoptive father had entrusted that institution with her care.

65. On 6 October 2006, the Ministry of Health and Social Services, in response to the applicant's complaints of alleged violations of her rights, wrote to the applicant stating that it was not possible to investigate her complaints because she had left the Kėdainiai Home and her place of living was unknown. Prosecutors were in the middle of a pre-trial investigation into the circumstances of the applicant's disappearance from where she had previously been living.

66. By a decision of 18 December 2006, the Kaunas City District prosecutor discontinued a pre-trial investigation into alleged unlawful deprivation of the applicant's liberty.

II. RELEVANT DOMESTIC LAW AND PRACTICE

67. Article 21 of the Lithuanian Constitution prohibits torture or degrading treatment of persons. Article 22 thereof states that private life is inviolable.

68. The Law on Mental Heath Care provides:

Article 1

"1. Main Definitions

...

5. "Mental health facility" means a health care institution (public or private), which is accredited for mental health care. If only a certain part (a "unit") of a health care institution has been accredited to engage in mental health care, the term shall only apply to the unit. In this Law, the term is also applicable to psychoneurological facilities..."

Article 13

"The parameters of a patient's health care shall be determined by a psychiatrist, seeking to ensure that the terms of their treatment and nursing offer the least restrictive environment possible.

The actions of a mentally ill person may be subject to restrictions only provided that the circumstances specified in section 27 of this Law are manifest. A note to that effect must be promptly made in the [patient's] clinical record."

Article 19

"In emergency cases, in seeking to save a person's life when the person himself is unable to express his will and his life is seriously endangered, necessary medical care may be taken without the patient's consent.

Where instead of a patient's consent, the consent of his representative is required, the necessary medical care may be provided without the consent of such person provided that there is insufficient time to obtain it in cases where immediate action is needed to save the life of the patient.

In those cases when urgent action must be taken in order to save a patient's life, and the consent of the patient's representative must be obtained in lieu of the patient's consent, immediate medical aid may be provided without the said consent, if there is not enough time to obtain it."

69. Article 24 of the Law on Mental Health Care stipulated that if a patient applied with a request to be hospitalised, he or she could be hospitalised only provided that: 1) at least one psychiatrist, upon examining the patient, recommended that he or she had to be treated as an inpatient at a mental health facility; 2) he or she had been informed about his or her rights at a mental health facility, the purpose of hospitalisation, the right to leave the psychiatric facility and restrictions on the right, as specified in Article 27 of the law. The latter provision read that a person who was ill with a severe mental illness and refused hospitalisation could be admitted involuntarily to the custody of the hospital only if there was real danger that

by his or her actions he or she was likely to commit serious harm to his or her health or life or to the health or life of others. When the circumstances specified in Article 27 of that law did exist, the patient could be involuntarily hospitalised and given treatment in a mental health facility for a period not exceeding 48 hours without court authorisation. If the court did not grant the authorisation within 48 hours, involuntary hospitalisation and involuntary treatment had to be terminated (Article 28).

70. As concerns legal incapacity and guardianship, the Civil Code provides:

Article 2.10. Declaration of incapacity of a natural person

"1. A natural person who, as a result of mental illness or imbecility, is not able to understand the meaning of his actions or control them may be declared incapacitated. The incapacitated person shall be placed under guardianship.

2. Contracts on behalf and in the name of a person declared incapacitated shall be concluded by his guardian...

3. Where a person who was declared incapacitated gets over his illness or the state of his health improves considerably, the court shall reinstate his capacity. After the court judgement becomes *res judicta,* guardianship of the said person shall be revoked.

4. The spouse of the person, parents, adult children, a care institution or a public prosecutor shall have the right to request the declaration of a person's incapacity by filing a declaration to the given effect. They shall also have the right to apply to the courts requesting the declaration of a person's capacity."

Article 3.238. Guardianship

"1. Guardianship shall be established with the aim of exercising, protecting and defending the rights and interests of a legally incapacitated person.

2. Guardianship of a person subsumes guardianship of the person's property, but if necessary, an administrator may be designated to manage the person's property."

Article 3.240. Legal position of a guardian or curator

"1. Guardians and curators shall represent their wards under law and shall defend the rights and interests of legally incapacitated persons or persons of limited active capacity without any special authorisation.

2. The guardian shall be entitled to enter into all necessary transactions in the interests and on behalf of the represented legally incapacitated ward..."

Article 3.241. Guardianship and curatorship authorities

"1. Guardianship and curatorship authorities are the municipal or regional [government] departments concerned with the supervision and control of the actions of guardians and curators.

2. The functions of guardianship and curatorship in respect of the residents of a medical or educational institution or [an institution run by a] guardianship (curator) authority who have been declared legally incapacitated or of limited active capacity by a court shall be performed by the respective medical or educational establishment or guardianship (curator) authority until a permanent guardian or curator is appointed..."

Article 3.242. Appointment of a guardian or a curator

"1. Having declared a person legally incapacitated or of limited active capacity, the court shall appoint the person's guardian or curator without delay.

...

3. Only a natural person with legal capacity may be appointed a guardian or a curator, [and] provided he or she gives written consent to that effect. When appointing a guardian or curator, account must be taken of the person's moral and other qualities, his or her capability of performing the functions of a guardian or curator, relations with the ward, the guardian's or curator's preferences and other relevant circumstances..."

Article 3.243. Performance of the duties of a guardian or a curator

"...

6. After the circumstances responsible for the declaration of the ward's legal incapacity or limited active capacity [are no longer in existence], the guardian or curator shall apply to the courts for the cancellation of guardianship or curatorship. Guardianship and curatorship authorities, as well as prosecutors, shall also have a right to apply to the courts for the cancellation of guardianship or curatorship."

Article 3.277. Placing under guardianship or curatorship

"1. An adult person declared legally incapacitated by the courts shall be placed under guardianship by a court judgment."

Article 3.278. Monitoring of the guardian's or the curator's activities

"1. Guardianship and curatorship authorities shall be obliged to monitor whether the guardian/curator is fulfilling his or her duties properly."

71. The Code of Civil Procedure stipulates that rights and interests of [disqualified] natural persons protected by law shall be defended in court by their representatives (parents, foster-parents, guardians) (Article 38 § 2). A

prosecutor has the right to submit a claim to protect the public interest (Article 49).

72. Article 366 § 1 (6) of the Code of Civil Procedure provides that proceedings may be reopened if one of the parties to them was incapacitated and did not have a representative.

Article 370 § 5 stipulates that when deciding upon a request that proceedings be reopened, the judge who took the decision against which the request has been lodged may not participate.

73. An application to declare a person legally incapacitated may be submitted by a spouse of that person, his or her parents or full-age children, a guardianship/care authority or a public prosecutor (Article 463). The parties to the proceedings for incapacitation consist, besides the applicant, of the person whose legal capacity is at issue, as well as the guardianship (care) authority. If it is impossible, due to the state of health, confirmed by an expert opinion, of the natural person whom it has been requested to declare incapacitated, to call and question him or her in court or to serve him or her with court documents, the court shall hear the case in the absence of the person concerned (Article 464 §§ 1 and 2).

74. Article 491 § 2 of the Code of Civil procedure stipulates that the courts are obliged to take all measures necessary to ensure that the rights and interests of persons who need guardianship are protected.

75. Pursuant to Article 507 § 3 of the Code of Civil Procedure, a case concerning the establishment of guardianship and the appointment of a guardian shall be heard by means of oral proceedings. The guardianship authority, the person declared incapacitated, the person recommended to be appointed as guardian and any parties interested in the outcome of the case must be notified of the hearing.

The case is to be heard with the attendance of a representative of the guardianship authority, who is to submit the authority's opinion to the court. The person to be appointed the guardian must also attend.

The person declared incapacitated is entitled to give his or her opinion at the hearing, if his or her health allows, as regards the prospective appointment of the guardian. The court may hold that it is necessary that the person declared incapacitated attend the hearing.

Article 507 § 4 provides that in appointing a guardian his moral and other qualities, his capability to perform the functions of a guardian, his relationship with the person who requires guardianship, and, if possible, the wishes of the person who requires guardianship or care shall be taken into consideration.

76. The Law on Prosecutor's Office provides that prosecutors have the right to protect the public interest, either on their own initiative or if the matter has been brought to their attention by a third party. In so doing, prosecutors may institute civil or criminal proceedings.

77. In a ruling of 9 June 2003 the Supreme Court stated that a public prosecutor could submit an application for reopening of proceedings, if the court's decision had been unlawful and had infringed the rights of a legally incapacitated person having limited opportunity to defend his or her rights or lawful interests.

78. The Law on Social Services provides that the basic goal of social services is to satisfy the vital needs of an individual and, when an individual himself is incapable of establishing such conditions, to create living conditions for him that do not debase his dignity (Article 2 (2)).

79. The Requirements for residential social care institutions and the Procedure for admission of persons thereto, approved by Order No. 97 of the Minister of Social Security and Labour on 9 July 2002 and published in State Gazette (*Valstybės žinios*) on 31 July 2002, regulate the methods of admission to a social care institution. The rules provide that an individual is considered to be eligible for admission to such an institution, *inter alia*, if he or she suffers from mental health problems and therefore is not able to live on his or her own. The need for care is decided by the municipal council of the place of his or her residence in cooperation with the founder of the residential care institution (the county governor). Individuals are admitted to care institutions in the event that the provision of social services at their home or at a non-statutory care establishment is not possible. A guardian who wishes to have a person admitted to a residential care institution must submit a request in writing to the social services department of the relevant municipal council. The reasons for and motives behind admission must be indicated. An administrative panel of the municipal council, comprising at least three persons, is empowered to decide on the proposed admission. Representatives of the institution to which the person is to be admitted as well as the founder (the governor) must participate.

80. The Government submitted to the Court an application by the Kėdainiai Home of 6 October 2009 to the Kaunas City District Court for the restoration of capacity (*dėl neveiksnumo panaikinimo*) of an individual, G.P. The Kėdainiai Home had been G.P.'s guardian. The director of the Kėdainiai Home had noted that after G.P.'s condition had become better and he had become more independent, it had accordingly become necessary for the court to order a fresh psychiatric examination and make an order restoring G.P.'s legal capacity.

81. The Bylaws of the Kėdainiai Home (*Kėdainių pensionato gyventojų vidaus tvarkos taisyklės*), as approved by an order of the director dated 17 March 2003, provide that the institution shall admit adults who suffer from mental health problems and are in need of care and medical treatment. A patient may leave the institution for up to ninety days per year, but only to visit his or her court-appointed guardian. The duration and conditions of such leave must be confirmed in writing. The rules also stipulate that a patient is not allowed to leave the grounds of the facility without informing

a social worker. If a patient decides to leave the Kėdainiai Home on his or her own, the management must immediately inform the police and facilitate finding him or her. A patient may be visited by relatives and guardians. Other visitors are allowed only upon the management's approval. The patients may have personal mobile phones. They may follow a religion, attend church services and receive magazines.

82. In a ruling of 11 September 2007 in civil case No. 3K-3-328/2007, the Supreme Court noted that the person whom it is asked to declare incapacitated is also a party to the proceedings (Article 464 § 1 of the Code of Civil Procedure). As a result, he or she enjoys the rights of an interested party, including the right to be duly informed of the place and time of any hearing. The fact that the case had been heard in the absence of D.L. – the person whom the court had been asked to declare incapacitated – was assessed by the Supreme Court as a violation of her right to be duly informed of the place and time of court hearings, as well as of other substantive procedural rights safeguarding her right to a fair trial. The Supreme Court also found that by failing to hear the person concerned and without making sure that she had been aware of the proceedings, the first-instance court had breached the principle of equality of arms, as well as D.L.'s right to appeal against the decision to declare her incapacitated, because the decision had not been delivered to her. The Supreme Court also referred to Principle no. 13 of Recommendation No. R (99) 4 by the Committee of Ministers of the Council of Europe (see paragraph 85 below), stating that the person concerned should have the right to be heard in any proceedings which could affect his or her legal capacity. This procedural guarantee should be applicable to the fullest extent possible, at the same time bearing in mind the requirements of Article 6 of the European Convention on Human Rights. In this regard, the Supreme Court also referred to the Court's case-law to the effect that a mental illness could result in appropriate restrictions of a person's right to a fair hearing. However, such measures should not affect the very essence of that right (*Golder*, *Winterwerp*, both cited below, and *Lacárcel Menéndez v. Spain*, no. 41745/02, 15 June 2006).

83. In the same ruling, the Supreme Court also emphasised that determining whether the person can understand his or her actions was not only a scientific conclusion, namely that of forensic psychiatry. It was also a question of fact which should be established by the court upon assessing all other evidence and, if necessary, upon hearing expert evidence. Taking into consideration the fact that the declaration of a person's incapacity is a very serious interference into his or her right to private life, one can only be declared incapacitated in exceptional cases.

III. RELEVANT INTERNATIONAL DOCUMENTS

A. Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly on 13 December 2006 (Resolution A/RES/61/106)

84. This Convention entered into force on 3 May 2008. It was signed by Lithuania on 30 March 2007 and ratified on 18 August 2010. The relevant parts of the Convention provide:

Article 12
Equal recognition before the law

"1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property."

Article 14
Liberty and security of person

"1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(*a*) Enjoy the right to liberty and security of person;

(*b*) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation."

B. Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults (adopted on 23 February 1999)

85. The relevant parts of this Recommendation read as follows:

Principle 2 – Flexibility in legal response

"1. The measures of protection and other legal arrangements available for the protection of the personal and economic interests of incapable adults should be sufficient, in scope or flexibility, to enable suitable legal response to be made to different degrees of incapacity and various situations.

...

4. The range of measures of protection should include, in appropriate cases, those which do not restrict the legal capacity of the person concerned."

Principle 3 – Maximum reservation of capacity

"1. The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.

2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so. ..."

Principle 6 – Proportionality

"1. Where a measure of protection is necessary it should be proportional to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned.

2. The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention. ..."

Principle 13 – Right to be heard in person

"The person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity."

Principle 14 – Duration review and appeal

"1. Measures of protection should, whenever possible and appropriate, be of limited duration. Consideration should be given to the institution of periodical reviews.

...

3. There should be adequate rights of appeal."

C. The 25 June 2009 report on visit to Lithuania by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), visit from 28 to 30 April 2008

86. This report outlines the situation of persons placed by the public authorities in social care homes for people with mental disorders or mental deficiency. Part C of the report (paragraphs 120, 125-132) analyses situation in the Skemai Residential Care Home.

87. The CPT noted that Lithuanian legislation does not provide for an involuntary placement procedure in social welfare establishments. At Skemai Residential Care Home, residents were admitted on their own application or that of their guardian through the competent district authority (Panevėžys District Administration). The decision on the placement was taken by the social affairs unit of Panevėžys District Administration on the basis of a report drawn up by a social worker and a medical certificate issued by a psychiatrist stating that the applicant's mental health permitted his/her placement in a social welfare institution of this type. An agreement was then signed between the applicant and the authorised representative of the local government for an indefinite period.

That said, it appeared that even legally competent residents admitted on the basis of their own application were not always allowed to leave the home when they so wished. The delegation was informed that their discharge could only take place by decision of the social affairs unit of the Panevėžys District Administration. This was apparently due to the need to ascertain that discharged residents had a place and means for them to live in the community; nevertheless, this meant that such residents were *de facto* deprived of their liberty (on occasion for a prolonged period).

88. Specific reference was made to the situation of residents deprived of their legal capacity. Such persons could be admitted to the Skemai Home solely on the basis of the application of their guardian. However, they were

considered to be voluntary residents, even when they opposed such a placement. In the CPT's view, placing incapacitated persons in a social welfare establishment which they cannot leave at will, based solely on the consent of the guardian, entailed a risk that such persons will be deprived of essential safeguards.

89. It was also a matter of concern that all 69 residents who were deprived of their legal capacity were placed under the guardianship of the Home. In this connection, the delegation was surprised to learn that in the majority of these cases, the existing guardianship arrangements had been terminated by a court decision upon admission to the establishment and guardianship of the person concerned entrusted to the Home.

The CPT stressed that one aspect of the role of a guardian is to defend the rights of incapacitated persons *vis-à-vis* the hosting social welfare institution. Obviously, granting guardianship to the very same institution could easily lead to a conflict of interest and compromise the independence and impartiality of the guardian. The CPT reiterated its recommendation that the Lithuanian authorities strive to find alternative solutions which would better guarantee the independence and impartiality of guardians.

90. In the context of discharge from psychiatric institution procedures, the CPT recommended that the Lithuanian authorities took steps to ensure that forensic patients were heard in person by the judge in the context of judicial review procedures. For that purpose, consideration may be given to the holding of hearings at psychiatric institutions

91. Lastly, the CPT found that at the establishment visited the existing arrangements for contact with the outside world were generally satisfactory. Patients/residents were able to send and receive correspondence, have access to a telephone, and receive visits.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. The parties' submissions

92. The Government argued, first, that the present application had been entirely based on knowingly untrue facts and therefore should be declared inadmissible for "abuse of the right of individual petition", pursuant to Article 35 § 3 of the Convention. For the Government, the content of the present application was contrary to the purpose of the right of individual application, as the information provided therein was untrue or insidious. An

appropriate and carefully selected form of social care for the applicant had been portrayed as detention. Appropriate medical care and striving to save her life had been presented as her torture. The facts concerning the reopening of the guardianship proceedings were also untrue, as well as those related to the applicant's complaints of the alleged refusal of the Kėdainiai Home's management to allow the applicant to have personal visits and of the censorship of her communications.

93. Alternatively, the Government submitted that the application had been prepared in its entirety and lodged by D.G. and not by the applicant. They held highly critical views of D.G., claiming that she had been "not only deceiving the Court but also harming a vulnerable, mentally-ill person". The Government contended in the present case that the term "applicant" referred to D.D. only in a formal sense, as in reality the person whose will the application reflected had been D.G., and, moreover, that will had clearly contradicted the interests of D.D., who had been misled and manipulated by D.G. It followed that the application as a whole was incompatible *ratione personae* with the provisions of the Convention.

94. The applicant's lawyer considered that the Government's allegation of factual inaccuracy was best understood by reference to the fact that the parties to this application held diametrically opposed perspectives in relation to the facts presented. Both the applicant and the Government saw the same facts in a totally different light and held incompatible views on the way in which the rights of persons with psychosocial disabilities should be respected under the Convention.

95. As to the Government's second argument, the applicant's lawyer submitted that the application had been lodged with D.D.'s fully-informed consent. D.D. had been keenly aware of the proceedings and had spoken of them frequently. Attention had to be drawn to the vulnerability and isolation of persons in the applicant's position, as well as the fact that domestic legislation had denied her legal standing to initiate any legal proceedings whatsoever. Consequently, it was ironic that the Government had not recognised D.D.'s ability to represent herself in domestic proceedings, requiring by law that she did so via another person, but that before the Court the Government seemed to insist that the applicant should act alone.

Lastly, the applicant's lawyer pointed out that D.G. was the applicant's closest friend, former psychotherapist and her first guardian. Moreover, since 8 January 2008 the applicant had been represented before the Court by a legal team.

B. The Court's assessment

96. The Court first turns to the Government's objection as to the applicant's victim status, and, in particular, their allegation that the application does not express the true will of D.D. In this connection, it

recalls that the existence of a victim of a violation, that is to say, an individual who is personally affected by an alleged violation of a Convention right, is indispensable for putting the protection mechanism of the Convention into motion, although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings (see *Poznanski and Others v. Germany*, (dec.), no. 25101/05, 3 July 2007).

97. Having regard to the documents presented, the Court notes that the original application form bears D.D.'s signature, without any indication that that signature could be forged (see, by converse implication, *Poznanski*, cited above). In paragraph 13 of the application, D.D. wrote that back in 2000, on her adoptive father's initiative, she had been unlawfully declared incapacitated and in 2004 admitted to the Kėdainiai Home "for an indefinite duration". She asked that, for the purposes of the proceedings before this Court, her adoptive father not be considered her legal representative, requesting that D.G. take on that role. After the application was communicated to the Government, the applicant was reminded that, in accordance with paragraph 4 (a) of Rule 36 of the Rules of Court, she had to designate a legal representative, which she did by appointing a lawyer, Mr H. Mickevičius. In his observations in reply to those of the Government, the applicant's lawyer followed the initial complaints as presented by D.D. In the light of the above, the Court holds that D.D. has validly lodged an application in her own name and thus has the status of "victim" in respect of the complaints listed in her application. The Government's objection as to incompatibility *ratione personae* should therefore be dismissed.

98. The Court further considers that the Government's objection as to the applicant's alleged abuse of the right to petition, on account of allegedly incorrect information provided in her application form, is closely linked to the merits of her complaints under Articles 3, 5, 6, 8 and 9 of the Convention. The Court thus prefers to join the Government's objection to the merits of the case and to examine them together.

99. Lastly, the Court observes that the applicant submitted several complaints under different Convention provisions. Those complaints relate to the proceedings concerning her involuntary admission to a psychiatric institution, the appointment of her guardian, her inability to receive personal visits, interference with her correspondence, involuntary medical treatment, and so forth. Whilst noting that the complaint as to the initial appointment of a guardian has been raised outside the six months time-limit (see paragraph 19 above), the Court sees fit to start with the complaint related to the court proceedings for a change of her legal guardian and then to examine the applicant's admission to the Kėdainiai Home and the complaints stemming from it.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE PROCEEDINGS FOR A CHANGE OF LEGAL GUARDIAN

100. The applicant complained that she had not been afforded a fair hearing in respect of her application for reopening of her guardianship proceedings and had not been able to have her legal guardian changed. In support of her complaints, the applicant cited Articles 6 § 1 and 8 of the Convention. In addition, relying upon Article 13 of the Convention, the applicant argued that she had not been afforded an effective remedy to complain of the alleged violations.

The Court considers that the applicant's complaints fall to be examined under of Article 6 § 1 of the Convention, which, in so far as relevant, provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

A. Submissions by the parties

1. The applicant

101. The applicant submitted that the blanket ban on her right of access to court went to the heart of her right to a fair hearing and had been in breach of Article 6 § 1 of the Convention. She pointed out that on 15 September 2000 she had been declared incapacitated during proceedings that had been initiated by her adoptive father. Solely on the basis of the medical report of 19 July 2000, the Kaunas City District Court had deemed that the applicant was not to be summoned. As a result she had not taken part in those proceedings. The local authority, whose presence had been obligatory, had not made a significant contribution during the hearing and had endorsed the conclusions of the medical report. The Kaunas District Court had not provided any reasons for its decision, other than reiterating the conclusions of the forensic experts. The district court had chosen not to assess other evidence which could have potentially shed light on the applicant's circumstances, such as that which could have arisen by summoning the applicant or other witnesses, or by questioning the authors of the psychiatric report in person. The judge had not found it necessary to examine whether any ulterior reasons had underlain the incapacitation request.

102. The applicant argued, further, that she had not been given the opportunity to participate in any of the guardianship proceedings. She had never been notified of or summoned to any of the four sets of proceedings concerning the appointment or discharge of her guardian/property

administrator. For the applicant, there had been no medical or other reasons relating to her health that would have precluded her from participating. Nonetheless, the courts had invariably based their decisions on the views of the local authority without examining the personal circumstances of the applicant. The proceedings had been very summary in nature, the hearings had been brief and the rationale underpinning judgments had been almost non-existent. On 15 September 2000 the Kaunas City District Court had appointed her adoptive father as her guardian without any involvement on her part. As a result, not only had she been unable to object to his appointment, but she had also been barred from appealing against that decision.

103. The applicant emphasised that the review proceedings in 2005 initiated by her with the assistance of D.G. had been the only opportunity that she had ever had to put her point of view across before a court of law. On this occasion, she had personally addressed the Kaunas City District Court on a number of issues of the utmost importance to her, such as her incapacitation, the identity of her guardian and her admission to an institution. However, the district court had chosen to dismiss her action on narrow procedural grounds.

104. The applicant's main objection with regard to the review proceedings lay in the district court's decision to turn down her express request to be provided with independent legal aid. The explanation that the applicant was already represented by her guardian's lawyer had misunderstood the competing interests of the two parties. The effect had been to severely prejudice the ability of the applicant to engage with the procedural aspects of the hearing on which the district court's decision had turned.

105. Lastly, the applicant argued that she had been financially able to afford to employ a lawyer to represent her at that or any other of the hearings. However, she had been denied access to her own money, and at many of the hearings her interests and those of the person with control over her funds had been divergent. She concluded that in view of her vulnerable position, the procedural complexity of the proceedings and the high stakes thereof, Article 6 § 1 of the Convention had required that she be provided with free legal aid.

2. The Government

106. As to the applicant's complaint that she had not been afforded a fair hearing in relation to her request that the proceedings by which her guardian was appointed be reopened, the Government referred to the Court's case-law to the effect that the right of access to court is not absolute and that the States have a certain margin of appreciation in assessing what might be the best policy in this field (*Golder v. the United Kingdom*, 21 February 1975, § 38, Series A no. 18). That was especially true as regards persons of

unsound mind, and the Convention organs had acknowledged that such restrictions were not in principle contrary to Article 6 § 1 of the Convention, where the aim pursued was legitimate and the means employed to achieve that aim were proportionate (*G.M. v. the United Kingdom*, no. 12040/86, Commission decision of 4 May 1987, Decisions and Reports (DR) 52, p. 269).

107. Turning to the particular situation of the applicant, the Government noted that domestic law did not allow a legally incapacitated person to lodge a petition seeking that his or her guardianship be changed. As the applicant had deemed that her adoptive father was not a suitable person to be her guardian, the authorities responsible for oversight of guardians (the Social Services Department of Kaunas City Council) or a public prosecutor could have submitted an application for reopening of the proceedings. Nevertheless, the Kaunas City District Court had accepted the applicant's request for reopening for examination and on 7 November 2005 had reviewed her case with a high degree of care.

108. The hearing of 7 November 2005 at the Kaunas City District Court had taken place in the presence of the applicant, her guardian (her adoptive father) and his lawyer, and D.G., as well as in the presence of the representatives of the relevant State authorities. Whilst admitting that at that hearing the applicant had asked to be assisted by a separate lawyer, the Government submitted that the court had not been able to grant the applicant's request because of the decision of 15 September 2000 declaring her legally incapacitated. Even so, the applicant's interests had been defended by the representative of the Kėdainiai Home, the representative of the Social Services Department and the public prosecutor.

109. The Government contended that during the hearing of 7 November 2005 the applicant had not sustained her request that D.G. be appointed as her new guardian. Contrary to what the applicant had stated to the European Court, in her submissions at the hearing at issue she had agreed to keep her adoptive father as her guardian, saying that she loved him, but had expressed her wish to be released from the Kėdainiai Home. For the Government, it appeared from the transcript of the hearing that this statement had been made by the applicant before the break, but not after, contrary to her allegation of being "threatened with restraint" for disobedience.

110. The Government pointed out that, pursuant to Article 507 § 3 of the Code of Civil Procedure, the appointment of a guardian required to be heard in the presence of a representative of the authority overseeing guardians, who was required to submit the authority's conclusions to the court, and the person to be appointed as guardian. Given that both of these persons had taken part in the hearing of 21 January 2004, the Kaunas City District Court in its decision of 17 November 2005 had reasonably found that the applicant had been properly represented at the hearing of 21 January 2004, and thus

the provision on which the applicant had based her request to reopen the proceedings had not been breached.

111. Lastly, in their observations of 15 September 2008 the Government noted that as regards incapacitation proceedings the ministries had prepared legislative amendments to the Civil Code and the Code of Civil Procedure, which would be submitted to Parliament. The proposed amendments provide for compulsory representation of a person facing incapacitation proceedings before a court by a lawyer.

In the light of the preceding arguments, the Government considered that the applicant's complaint was manifestly ill-founded.

3. The intervening parties

112. The representatives of Harvard Law School submitted that in all cases a court or other judicial authority must ensure that a representative acts solely in the interests of the incapacitated person. In any case in which it is objectively apparent that the person being represented does not accept or assent to the steps taken by a representative, those matters must be explored by the judicial authorities. The judicial authorities must exercise thorough, additional supervision in all cases in which there is a filter between a person and a court, such as when a person is represented by another individual. This remains true even where the representative was appointed by a court.

113. The European Group of National Human Rights Institutions noted that the European Convention on Human Rights guaranteed rights and freedoms that must be protected regardless of an individual's level of capacity. They also saw it important to mention the Court's judgment in *Winterwerp v. the Netherlands* (24 October 1979, Series A no. 33), where the Court concluded that although mental illness may render legitimate certain limitations upon the exercise of the "right to access to court", it could not warrant the total absence of that right as embodied in Article 6 § 1.

B. The Court's assessment

1. Admisibility

114. The parties did not dispute the applicability of Article 6, under its "civil" head, to the proceedings at issue, and the Court does not see any reason to hold otherwise (see *Winterwerp*, cited above, § 73, and *Matter v. Slovakia*, no. 31534/96, § 51, 5 July 1999).

115. The Court notes that the applicant's complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It

further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

2. Merits

(a) General principles

116. In most of the previous cases before the Court involving "persons of unsound mind", the domestic proceedings concerned their detention and were thus examined under Article 5 of the Convention. However, the Court has consistently held that the "procedural" guarantees under Article 5 §§ 1 and 4 are broadly similar to those under Article 6 § 1 of the Convention (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 232, 17 January 2012 and the case-law cited therein). Therefore, in deciding whether the proceedings in the present case for the reopening of the guardianship appointment were "fair", the Court will have regard, *mutatis mutandis*, to its case-law under Article 5 § 1 (e) and Article 5 § 4 of the Convention.

117. In the context of Article 6 § 1 of the Convention, the Court accepts that in cases involving a mentally-ill person the domestic courts should also enjoy a certain margin of appreciation. Thus, for example, they can make appropriate procedural arrangements in order to secure the good administration of justice, protection of the health of the person concerned, and so forth (see *Shtukaturov v. Russia*, no. 44009/05, § 68, ECHR 2008).

118. The Court accepts that there may be situations where a person deprived of legal capacity is entirely unable to express a coherent view or give proper instructions to a lawyer. It considers, however, that in many cases the fact that an individual has to be placed under guardianship because he lacks the ability to administer his affairs does not mean that he is incapable of expressing a view on his situation and thus of coming into conflict with the guardian. In such cases, when the conflict potential has a major impact on the person's legal situation, such as when there is a proposed change of guardian, it is essential that the person concerned should have access to court and the opportunity to be heard either in person or, where necessary, through some form of representation. Mental illness may entail restricting or modifying the manner of exercise of such a right, but it cannot justify impairing the very essence of the right, except in very exceptional circumstances such as those mentioned above. Indeed, special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental health issues, are not fully capable of acting for themselves (see, *mutatis mutandis*, *Winterwerp*, cited above, § 60).

119. The Court reiterates that the key principle governing the application of Article 6 is fairness. Even in cases where an applicant appears in court notwithstanding lack of assistance by a lawyer and manages to conduct his or her case in the face of all consequent difficulties, the question may

nonetheless arise as to whether this procedure was fair (see, *mutatis mutandis*, *McVicar v. the United Kingdom*, no. 46311/99, §§ 50-51, ECHR 2002-III). The Court also recalls that there is the importance of ensuring the appearance of the fair administration of justice and a party to civil proceedings must be able to participate effectively, *inter alia*, by being able to put forward the matters in support of his or her claims. Here, as with other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures (see *P., C. and S. v. the United Kingdom*, no. 56547/00, § 91, ECHR 2002-VI).

(b) Application to the present case

120. Turning to the circumstances of the instant case, the Court again notes that it cannot examine the applicant's initial placement under guardianship (see paragraph 99 above). Even so, the Court cannot overlook the fact that back in 2000 the applicant did not participate in the court proceedings for her incapacitation. In particular, nothing suggests that the court notified the applicant of its own accord of the hearing at which her personal autonomy in almost all areas of life was at issue, including the eventual limitation of her liberty (see paragraph 12 above). Furthermore, as transpires from the decision of the Kaunas City District Court of 15 September 2000, it ruled exclusively on the basis of the medical panel's report, without having summoned the medical experts who authored the report for questioning. Neither did the court call to testify any other witnesses who could have shed some light as to the personality of the applicant. Accordingly, the applicant was unable to participate in the proceedings before the Kaunas City District Court in any form. Given that the potential finding of the applicant being of unsound mind was, by its very nature, largely based on the applicant's personality, her statements would have been an important part of the applicant's presentation of her case, and virtually the only way to ensure adversarial proceedings (see, *mutatis mutandis*, *Kovalev v. Russia*, no. 78145/01, §§ 35-37, 10 May 2007; also see Principle 13 of the Recommendation No. R (99) 4 by the Council of Europe).

121. The Court also notes that on 21 January 2004 the Kaunas City District Court appointed the applicant's adoptive father as her legal guardian. The applicant was again not summoned because the court apparently considered her attendance to be unnecessary.

122. Next, the Court turns to the proceedings regarding the change of the applicant's guardianship in 2005. The Court notes that there is no indication that at that moment in time the applicant was suffering from an incapacity of such a degree that her personal participation in the proceedings would have been meaningless. Although health care officials had considered that her involvement in the proceedings relating to her initial placement under

guardianship in 2000 was unnecessary, as she had apparently been unable to provide them with an objective opinion (see paragraph 11 above), she did in fact participate in the hearing relating to the change of guardian on 7 November 2005. Indeed, she not only stated unequivocally that she maintained her request that the guardianship proceedings be reopened and asked to be assisted by a lawyer but also made a number of other submissions about the proceedings and expressed a clear view on various matters. In particular, the applicant emphasised that she had not been summoned to the hearing during which her adoptive father had been appointed her guardian. She also expressed her desire to leave the Kėdainiai Home. Taking into account the fact that the applicant was an individual with a history of psychiatric troubles, and the complexity of the legal issues at stake, the Court considers that it was necessary to provide the applicant with a lawyer.

123. The Government argued that the Kaunas City District Court's finding that the applicant, who lacked legal capacity, had been properly represented by her adoptive father's lawyer had been correct and in compliance with domestic law. However, the crux of the complaint is not the legality of the decision under domestic law but the "fairness" of the proceedings from the standpoint of the Convention and the Court's case-law.

124. As emerges from the materials before the Court, the relationship between the applicant and her adoptive father has not always been positive. Quite the contrary, on numerous occasions the applicant had contacted State authorities claiming that there was a dispute between the two of them, which culminated in her being deprived of legal capacity and her liberty (see paragraphs 32, 33 and 60 above). What is more, the social services had also noted disagreement between the applicant and her adoptive father (see paragraph 18 above). Lastly, on at least one occasion the applicant's adoptive father had himself acknowledged their strained relationship (see paragraph 14 above). Accordingly, the Court finds merit in the applicant's argument that, because of the conflicting interests of her and her legal guardian, her guardian's lawyer could in no way have represented her interests properly. In the view of the Court, the interests of a fair hearing required that the applicant be granted her own lawyer.

125. The Government suggested that a representative of the social services and the district prosecutor attended the hearing on the merits, thus protecting the applicant's interests. However, in the Court's opinion, their presence did not make the proceedings truly adversarial. As the transcript of the hearing of 7 November 2005 shows, the representatives of the social services, the prosecutor, the doctors from the Kėdainiai Home and the Kaunas Psychiatric Hospital clearly supported the position of the applicant's adoptive father – that he should remain D.D.'s legal guardian.

126. Finally, the Court recalls that it must always assess the proceedings as a whole (see *C.G. v. the United Kingdom*, no. 43373/98, § 35, 19 December 2001). In particular, and turning to the spirit in which the hearing of 7 November 2005 was held, the Court notes that the judge refused a request by D.G. that an audio recording be made. Be that as it may, the Court is not able to overlook the applicant's complaint, although denied by the Government, that the judge did not allow her to sit near D.G., the only person whom the applicant trusted. Neither can the Court ignore the allegation that during the break the applicant was forced to leave the hearing room and to go to the judge's office, after which measure the applicant declared herself content (see paragraphs 41 and 42 above). Against this background, the Court considers that the general spirit of the hearing further compounded the applicant's feelings of isolation and inferiority, taking a significantly greater emotional toll on her than would have been the case if she would have had her own legal representation.

127. In the light of the above considerations and taking into account the events that preceded the examination of the applicant's request for reopening of her guardianship proceedings, the Court concludes that the proceedings before the Kaunas City District Court on 7 November 2005 were not fair. Accordingly, the Government's preliminary objection of abuse of application must be dismissed. The Court holds that there has been a violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

128. Under Article 5 § 1 of the Convention the applicant complained that her involuntary admission to the Kėdainiai Home had been unlawful. Article 5, in so far as relevant, provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (e) the lawful detention of persons ... of unsound mind..."

A. Submissions by the parties

1. The applicant

129. The applicant maintained her claims. She alleged that her involuntary admission to the Kėdainiai Home after 2 August 2004 had

amounted to a "deprivation of liberty" within the meaning of Article 5 § 1 of the Convention.

130. With regard to the objective element of her complaint, the applicant argued that her liberty had been restricted on account of her complete confinement and the extreme degree of control over her daily life. The applicant, like other residents, had not been able to leave the grounds of the Kėdainiai Home. If a resident left without permission, the director was bound to inform the police immediately. The applicant had tried to abscond twice, in 2006 and 2007, only to be brought back by the police. Furthermore, the applicant had been entirely under the control of staff at the institution, who had been able to medicate her by force or coercion, place her in isolation or tie her down, as exemplified by the incident of 25 January 2005. According to the findings of the Prosecutor's Office, on that day the applicant had been tied down to a bed in the isolation room and forcibly medicated, in contravention of the internal rules of the institution. It would be plain upon visiting the Kėdainiai Home that the vast majority of residents are heavily medicated.

131. Further, the applicant complained that all aspects of her life are controlled by the staff. Although in theory she is allowed to receive visits from people outside the institution, this right is subject to approval from the director. Upon her admission to the Kėdainiai Home in 2004, all visits other than those from her guardian had been restricted for a lengthy period of time.

The applicant submitted that she cannot decide whether or when to stay in bed, there is a limited range of activities for her to take part in, she is not free to make routine choices like other adults – for example, about her diet, daily activities and social contacts. She is subject to constant supervision.

132. With respect to the subjective element of her complaint, the applicant noted that her case was diametrically opposite to that of *H.M. v. Switzerland* (no. 39187/98, § 47, ECHR 2002-II), where the applicant had agreed to her admission to a nursing home. In the present case, the applicant's views had not been sought, either at the time of her admission or during her continued involuntary placement in the Kėdainiai Home. However, under Lithuanian law it had, in fact, been irrelevant whether she had consented or not to her detention, because an individual lacking legal capacity and placed under guardianship becomes a non-entity under the law and loses the capacity to take any decisions. Even so, whilst she had been incapable *de jure*, she had still, in fact, been capable of expressing her consent. She had expressed strong objections about her continued involuntary admission to the institution, most emphatically by running away twice, in her arguments before the domestic court, in her correspondence with various State authorities and, finally, by submitting a complaint to the Court.

133. In sum, the applicant's involuntary admission to and continued residence in the Kėdainiai Home after 2 August 2004 constituted a "deprivation of liberty" within the meaning of Article 5 § 1 of the Convention.

134. Lastly, the applicant submitted that her admission to the Kėdainiai institution was not lawful. The authorities involved in placing her in a psychiatric institution or those supervising the guardian's activities failed to consider whether other less restrictive community-based arrangements would have been more suitable to address the applicant's mental health problems. Instead they simply acquiesced in the guardian's request to have the applicant placed in an institution. Most importantly, the applicant was excluded from this decision-making process altogether. Consequently, the applicant saw her detention as arbitrary, in contradiction with Article 5 § 1 (e) of the Convention.

2. The Government

135. The Government argued, first, that Article 5 of the Convention was not applicable to the instant case. They submitted that the Kėdainiai Home was an institution for providing social services and not forced treatment under a regime corresponding to that of a psychiatric institution. Whilst admitting that certain medical services continued to be provided in the Kėdainiai Home, the institution at issue was not primarily used for the purposes of hospitalisation or medical treatment. Having regard to the fact that the Kėdainiai Home had to take care of adults suffering from mental health problems, it followed that the limited restrictions on the applicant had corresponded to the nature of the facility and had been no more than normal requirements (*Nielsen v. Denmark*, 28 November 1988, § 72, Series A no. 144).

136. Turning to the particular situation of the applicant, the Government submitted that until September 2007 the applicant had lived in a part of the Kėdainiai Home called "Apytalaukis", which had been an open facility. Although its grounds had been fenced, the gates had not been locked and residents had been able to leave the territory as they wished. The doors of the building had stayed unlocked. The same conditions had remained after the applicant's resettlement, except that the grounds had not even been fenced. According to the personnel of the Kėdainiai Home, the applicant had not always adhered to the internal rules of the institution and had failed to inform the staff before leaving the grounds and going for a walk. Even so, this had neither been considered as absconding, nor had the applicant been sanctioned in any way. Also, similarly to the facts in *H.M. v. Switzerland* (cited above), and with the exception of the incident of 25 January 2005, the applicant had never been placed in a secure ward. Moreover, she had been free to maintain personal contacts, to write and receive letters, to practise her religion and to make phone calls.

137. As to the medical treatment the applicant had received in the Kėdainiai Home, the Government submitted that, except for the incident of 25 January 2005, she had not been forcefully medicated. Each time she had been required to take medicine a psychiatrist had talked to her and had explained the need for treatment. There had been periods when the applicant had refused to take medicine; those periods had always been followed by the deterioration of her mental health. However, after some time the applicant had usually accepted the doctors' arguments and had agreed to continue treatment. The social and medical care she had received in the Kėdainiai Home had had a positive effect on the applicant, because her mental state had stabilised. Since her admission to the Kėdainiai Home she had never been hospitalised, whereas prior to that she had used to be hospitalised at least once a year.

In sum, the limited restrictions to which the applicant had been subjected in the Kėdainiai Home had all been necessary due to the severity of her mental illness, had been in her interests and had been no more than the normal requirements associated with the responsibilities of a social care institution taking care of inhabitants suffering from mental health problems.

138. The Government also noted that the admission of the applicant to the Kėdainiai Home had stemmed from her guardian's decision and not from a decision of the State or the municipal authorities. The applicant's adoptive father, as her guardian, had been empowered to act on her behalf and with the aim of exercising and protecting her rights and interests. In addition, the involvement of the municipal and State authorities in examining the applicant's situation and state of mind had played an important role in verifying the best interests of the applicant and had provided necessary safeguards against any arbitrariness in the guardian's decisions.

139. Turning to the subjective element of the applicant's case, the Government submitted that the applicant was legally incapacitated and had thus lacked the decision-making capacity to consent or object to her admission. Her guardian and not the authorities had been able to decide on her place of residence.

140. In the light of the above considerations, the Government argued that this part of the application was incompatible *ratione materiae* with Article 5 § 1 of the Convention.

141. Alternatively, should the Court find that Article 5 § 1 was applicable to the applicant's complaints, the Government contended that they were not founded. The applicant's admission to the Kėdainiai Home had been lawful, given that it had been carried out in accordance with the procedure established by domestic law. Under the law, a person can be admitted to an institution at the request of the guardian, provided that the person is suffering from a mental disorder. The applicant was admitted to the hospital at the request of her official guardian in relation to a worsening

of her mental condition. Furthermore, in the view of the Government, the involvement of the authorities in the procedure for the applicant's admission had provided safeguards against any possible abuses.

142. In the further alternative, the Government submitted that even if the restrictions on the applicant's movement could be considered as falling within Article 2 of Protocol No. 4 to the Convention, those restrictions had been lawful and necessary.

B. The Court's assessment

1. Admissibility

143. The Government argued that the conditions in which the applicant is institutionalised in the Kėdainiai Home are not so restrictive as to fall within the meaning of "deprivation of liberty" as established by Article 5 of the Convention. However, the Court cannot subscribe to this thesis.

144. It reiterates that in order to determine whether there has been a deprivation of liberty, the starting point must be the concrete situation of the individual concerned. Account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question (see *Guzzardi v. Italy*, 6 November 1980, § 92, Series A no. 39; and *Ashingdane v. the United Kingdom*, 28 May 1985, § 41, Series A no. 93).

145. The Court further recalls that the notion of deprivation of liberty within the meaning of Article 5 § 1 does not only comprise the objective element of a person's confinement in a particular restricted space for a not negligible length of time. A person can only be considered to have been deprived of his liberty if, as an additional subjective element, he has not validly consented to the confinement in question (see, *mutatis mutandis*, *H.M. v. Switzerland*, cited above, § 46).

146. In the instant case the Court observes that the applicant's factual situation in the Kėdainiai Home is disputed. Be that as it may, the fact whether she is physically locked in the Kėdainiai facility is not determinative of the issue. In this regard, the Court notes its case-law to the effect that a person could be considered to have been "detained" for the purposes of Article 5 § 1 even during a period when he or she was in an open ward with regular unescorted access to unsecured hospital grounds and the possibility of unescorted leave outside the hospital (see *H.L. v. the United Kingdom*, no. 45508/99, § 92, ECHR 2004-IX). As concerns the circumstances of the present case, the Court considers that the key factor in determining whether Article 5 § 1 applies to the applicant's situation is that the Kėdainiai Home's management has exercised complete and effective control by medication and supervision over her assessment, treatment, care, residence and movement from 2 August 2004, when she was admitted to

that institution, to this day (ibid., § 91). As transpires from the rules of the Kėdainiai Home, a patient therein is not free to leave the institution without the management's permission. In particular, and as the Government have themselves admitted in their observations on the admissibility and merits, on at least one occasion the applicant left the institution without informing its management, only to be brought back by the police (see paragraph 29 above). Moreover, the director of the Kėdainiai Home has full control over whom the applicant may see and from whom she may receive telephone calls (see paragraph 81 above). Accordingly, the specific situation in the present case is that the applicant is under continuous supervision and control and is not free to leave (see *Storck v. Germany*, no. 61603/00, § 73, ECHR 2005-V). Any suggestion to the contrary would be stretching credulity to breaking point.

147. Considerable reliance was placed by the Government on the Court's judgment in *H.M.* (cited above), in which it was held that the placing of an elderly applicant in a foster home in order to ensure necessary medical care as well as satisfactory living conditions and hygiene did not amount to a deprivation of liberty within the meaning of Article 5 of the Convention. However, each case has to be decided on its own particular "range of factors" and, while there may be similarities between the present case and *H.M.*, there are also distinguishing features. In particular, it was not established that H.M. was legally incapable of expressing a view on her position. She had often stated that she was willing to enter the nursing home and, within weeks of being there, she had agreed to stay, in plain contrast to the applicant in the instant case. Further, a number of safeguards – including judicial scrutiny – were in place in order to ensure that the placement in the nursing home was justified under domestic and international law. This led to the conclusion that the facts in *H.M.* were not of a "degree" or "intensity" sufficiently serious to justify a finding that H.M. was detained (see *Guzzardi*, cited above, § 93). By contrast, in the present case the applicant was admitted to the institution upon the request of her guardian without any involvement of the courts.

148. As to the facts in *Nielsen*, the other case relied on by the Government, the applicant in that case was a child, hospitalised for a strictly limited period of time of only five and a half months, on his mother's request and for therapeutic purposes. The applicant in the present case is a functional adult who has already spent more than seven years in the Kėdainiai Home, with negligible prospects of leaving it. Furthermore, in contrast to this case, the therapy in *Nielsen* consisted of regular talks and environmental therapy and did not involve medication. Lastly, as the Court found in *Nielsen*, the assistance rendered by the authorities when deciding to hospitalise the applicant was "of a limited and subsidiary nature" (§ 63), whereas in the instant case the authorities contributed substantially to the applicant's admission to and continued residence in the Kėdainiai Home.

149. Assessing further, the Court draws attention to the incident of 25 January 2005, when the applicant was restrained by the Kėdainiai Home staff. Although the applicant was placed in a secure ward, given drugs and tied down for a period of only fifteen to thirty minutes, the Court notes the particularly serious nature of the measure of restraint and observes that where the facts indicate a deprivation of liberty within the meaning of Article 5 § 1, the relatively short duration of the detention does not affect this conclusion (see *X v. Germany*, no. 8819/79, Commission decision of 19 March 1981, DR 24, pp. 158, 161; and *Novotka v. Slovakia* (dec.), no. 47244/99, 4 November 2003).

150. The Court next turns to the "subjective" element, which was also disputed between the parties. The Government argued that the applicant lacked *de jure* legal capacity to decide matters for herself. However, this does not necessarily mean that the applicant was *de facto* unable to understand her situation (see *Shtukaturov v. Russia*, no. 44009/05, § 108, ECHR 2008). Whilst accepting that in certain circumstances, due to severity of his or her incapacity, an individual may be wholly incapable of expressing consent or objection to being confined in an institution for the mentally handicapped or other secure environment, the Court finds that that was not the applicant's case. As transpires from the documents presented to the Court, the applicant subjectively perceived her compulsory admission to the Kėdainiai Home as a deprivation of liberty. Contrary to what the Government suggested, she has never regarded her admission to the facility as consensual and has unequivocally objected to it throughout the entire duration of her stay in the institution. On a number of occasions the applicant requested her discharge from the Kėdainiai Home by submitting numerous pleas to State authorities and, once she was given the only possibility to address a judicial institution, to the Kaunas City District Court (see paragraphs 34 and 37 above). She even twice attempted to escape from the Kėdainiai facility (see, *a fortiori*, *Storck*, cited above, § 73). In sum, even though the applicant had been deprived of her legal capacity, she was still able to express an opinion on her situation, and in the present circumstances the Court finds that the applicant had never agreed to her continued residence at the Kėdainiai Home.

151. Lastly, the Court notes that although the applicant's admission was requested by the applicant's guardian, a private individual, it was implemented by a State-run institution – the Kėdainiai Home. Therefore, the responsibility of the authorities for the situation complained of was engaged (see *Shtukaturov*, cited above, § 110).

152. In the light of the foregoing the Court concludes that the applicant was "deprived of her liberty" within the meaning of Article 5 § 1 of the Convention from 2 August 2004 and remains so to this day.

153. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

154. The Government argued that the applicant had been admitted to the Kėdainiai Home lawfully. The Court accepts that the applicant's involuntary admission was "lawful", if this term is construed narrowly, in the sense of the formal compatibility of the applicant's involuntary admission with the procedural and material requirements of domestic law (see paragraph 79 above). It appears that the only condition necessary for the applicant's admission was the consent of her official guardian, her adoptive father, who was also the person who had initially sought the applicant's admission to the Kėdainiai Home.

155. However, the Court reiterates that the notion of "lawfulness" in the context of Article 5 § 1 (e) has also a broader meaning. The notion underlying the term "procedure prescribed by law" is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary (see *Winterwerp*, cited above, § 45).

156. The Court also recalls that in *Winterwerp* (paragraph 39) it set out three minimum conditions which have to be satisfied in order for there to be "the lawful detention of a person of unsound mind" within the meaning of Article 5 § 1 (e): except in emergency cases, the individual concerned must be reliably shown to be of unsound mind, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder.

157. Turning to the present case, the Court notes that just a few weeks before her placement in the Kėdainiai Home on 2 August 2004, the applicant had been admitted to and examined at the Kaunas Psychiatric Hospital (see, by converse implication, *Stanev*, cited above, § 156). A medical panel of that hospital concluded that at that time the applicant suffered from "continuous paranoid schizophrenia". The doctors' commission deemed it appropriate for the applicant to live in a "social care institution for the mentally handicapped". The Court further observes that soon thereafter a social worker concluded that the applicant was not able to live on her own, as she could not take care of herself, did not understand the value of money, did not clean her apartment and wandered in the city hungry. The Court also notes the social worker's testimony as to the unpredictability of the applicant's behaviour, given that sometimes she would get angry at people and shout at them without a reason (see

paragraphs 22 and 23 above). That being so and recalling the fact that the applicant had a history of serious mental health problems since 1979, the Court is ready to find that the applicant has been reliably shown to have been suffering from a mental disorder of a kind and degree warranting compulsory confinement and the conditions as defined in *Wintertwerp* had thus been met in her case. Furthermore, the Court also considers that no other measures were available in the circumstances. As noted by the social worker, the applicant's adoptive father, who was her legal guardian, could not "manage" her (see paragraph 23 above). On this point the Court also takes notice of the fact that even being removed from institutional care and taken to her adoptive father's apartment, the applicant escaped and was found by the police only three months later (see paragraph 29 above). In these circumstances the Court concludes that the applicant's compulsory confinement was necessary (see *Stanev*, cited above, § 143) and no alternative measures had been appropriate in the circumstances of the case. The Court lastly observes, and it has not been disputed by the applicant, that in situations such as hers the domestic law did not provide that placement in a social care institution would be decided by a court (see, by converse implication, *Gorobet v. Moldova*, no. 30951/10, § 40, 11 October 2011).

158. In the light of the above, the Court cannot but conclude that the applicant's confinement to the Kėdainiai Home on 2 August 2004 was "lawful" within the meaning of Article 5 § 1 (e) of the Convention. Accordingly, there has been no violation of Article 5 § 1.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

159. The applicant complained that she is unable to obtain her release from the Kėdainiai Home. Article 5 § 4, relied on by the applicant, provides as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Submissions by the parties

160. The applicant submitted that she had been admitted to the Kėdainiai Home upon her guardian's request and with the authorisation of an administrative panel. The lawfulness of her involuntary hospitalisation had not been reviewed by a court, either upon her admission or at any other subsequent time. Being deprived of her legal capacity, the applicant submitted that she is prevented from independently pursuing any judicial legal remedy to challenge her continued involuntary hospitalisation. In

relation to the possibility supposedly at the applicant's disposal of asking for a prosecutorial inquiry, this remedy could not be regarded *per se* as judicial review satisfying the requirements of Article 5 § 4. As for the possibilities identified by the Government, namely to ask social services or a prosecutor to initiate a review of the applicant's medical condition, these procedures were discretionary. In any event, the applicant had filed a number of complaints with the prosecutor's office and other authorities, which had unanimously concluded that her hospitalisation in the Kėdainiai Home had been carried out in accordance with the domestic law, thus being disinclined to take any action to override the will of her adoptive father, acting as her legal guardian. Once the Kėdainiai Home had become her guardian, it had been clear that that facility clearly had an interest in stifling any of the applicant's complaints and in keeping her in the institution. The applicant therefore submitted that her rights under Article 5 § 4 of the Convention had been breached.

161. The Government maintained that the applicant had had an effective remedy to challenge her hospitalisation at the Kėdainiai facility. Thus, she had been able to apply for release or complain about the actions of the medical staff through her guardians, who had represented her in dealings with third parties, including the courts. Further, the applicant had been able to ask the social services authorities or a prosecutor to initiate a review of her situation. For the Government, the applicant's complaint was unfounded.

B. The Court's assessment

1. Admissibility

162. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

163. Among the principles emerging from the Court's case-law on Article 5 § 4 concerning "persons of unsound mind" are the following:

(a) a person of unsound mind who is compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings "at reasonable intervals" before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his detention;

(b) Article 5 § 4 requires that the procedure followed have a judicial character and give to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place;

(c) the judicial proceedings referred to in Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. Special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves (see *Megyeri v. Germany*, 12 May 1992, § 22, Series A no. 237-A; also see *Stanev*, cited above, § 171).

164. This is so in cases where the original detention was initially authorised by a judicial authority (see *X v. the United Kingdom*, 5 November 1981, § 52, Series A no. 46), and it is all the more true in the circumstances of the present case, where the applicant's placement in the Kėdainiai Home was initiated by a private individual, namely the applicant's guardian, and decided upon by the municipal and social care authorities without any involvement on the part of the courts.

165. The Court accepts that the forms of judicial review may vary from one domain to another and may depend on the type of the deprivation of liberty at issue. It is not within the province of the Court to inquire into what would be the best or most appropriate system of judicial review in this sphere. However, in the present case the courts were not involved in deciding on the applicant's placement in the Kėdainiai Home at any moment or in any form. It appears that, in situations such as the applicant's, Lithuanian law does not provide for automatic judicial review of the lawfulness of admitting a person to and keeping him in an institution like the Kėdainiai Home. In addition, a review cannot be initiated by the person concerned if that person has been deprived of his legal capacity. In sum, the applicant was prevented from independently pursuing any legal remedy of a judicial character to challenge her continued involuntary institutionalisation.

166. The Government claimed that the applicant could have initiated legal proceedings through her guardians. However, that remedy was not directly accessible to her: the applicant fully depended on her legal guardian, her adoptive father, who had requested her placement in the Kėdainiai Home in the first place. The Court also observes that the applicant's current legal guardian is the Kėdainiai Home – the same social care institution which is responsible for her treatment and, furthermore, the same institution which the applicant had complained against on many occasions, including in court proceedings. In this context the Court considers that where a person capable of expressing a view, despite having

been deprived of legal capacity, is deprived of his liberty at the request of his guardian, he must be accorded an opportunity of contesting that confinement before a court, with separate legal representation. Lastly, as to the prospect of an inquiry carried out by the prosecuting authorities, the Court shares the applicant's observation that a prosecutorial inquiry cannot as such be regarded as judicial review satisfying the requirements of Article 5 § 4 of the Convention (see *Shtukaturov*, cited above, § 124).

167. In the light of the above, the Court dismisses the Government's preliminary objection of abuse of application and holds that there has also been a violation of Article 5 § 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLES 3 AND 8 OF THE CONVENTION

168. Relying on Articles 3 and 8 of the Convention, the applicant complained of having been physically restrained on 25 January 2005, when she had been tied to a bed in an isolation room, and of the overall standard of medical treatment in the Kėdainiai Home. She also argued that she had been given poor quality food.

The Court considers that in the particular circumstances of the present case these complaints fall to be examined under Article 3 of the Convention, which reads, in so far as relevant as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

169. The applicant submitted that she had been forced to take medication provided by the Kėdainiai Home with little or no information about its use. On occasions she had refused medication, but had generally acquiesced to its administration because of persistent pressure from the staff. The incident of 25 January 2005 had exemplified that pressure at its worst, though the coercion is generally less dramatic and persistent.

170. The applicant also complained that at the Kėdainiai institution she had been given out-of-date products to eat.

171. The Government argued that the measures used in respect of the applicant had been therapeutic and necessary. Turning to the events of 25 January 2005, they submitted that the social workers had decided on their own to tie down the applicant as they had been afraid for her life. Although the exact length of time that the applicant had been tied up for was not clear, it could have lasted for only fifteen to thirty minutes and had not continued any longer than necessary. During the incident the applicant had been forcibly injected with 10 mg of Haloperidol, whilst the average

therapeutic dosage of the said medication is 12 mg. Haloperidol is a common antipsychotic medicament prescribed for individuals suffering from schizophrenia in order to eliminate the symptoms of psychosis. According to the generally accepted principles of psychiatry, medical necessity had fully justified the treatment in issue. The Government also drew the Court's attention to the prosecutor's decision of 31 July 2006 to discontinue the pre-trial investigation in connection with the applicant's forced restraint. They also noted the absence of any other similar incidents at the Kėdainiai Home in respect of the applicant. The Government summed up that even if the treatment of the applicant on 25 January 2005 had had unpleasant effects, it had not reached the minimum level of severity required under Article 3 of the Convention.

172. As to the applicant's complaint that she had been provided poor quality food, the Government submitted that although the authorities had found out-of-date meat in the Kėdainiai Home, the meat had been frozen and had never been used for cooking. A follow-up report of 20 February 2006 did not contain any evidence that the applicant had complained of failure to provide any medical assistance to her in respect of alleged food poisoning. For the Government, the applicant's accusations towards the care institution were unsubstantiated and hence manifestly ill-founded.

B. The Court's assessment

173. Referring to its settled case-law the Court reiterates that the position of inferiority and powerlessness which is typical of patients admitted on an involuntary basis to psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with. While it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3, whose requirements permit of derogation.

The established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist (see *Herczegfalvy v. Austria*, 24 September 1992, § 82, Series A no. 244).

174. In this case it is above all the applicant's restraint on 25 January 2005 which appears worrying. However, the evidence before the Court is not sufficient to disprove the Government's suggestion that, according to the psychiatric principles generally accepted at the time, medical necessity justified the treatment in issue. Moreover, the applicant's allegations that the

use of restraint measures had been unlawful were dismissed by the prosecutors and the Court sees no valid reason to dispute their findings (see paragraphs 54-58 above). The Court also notes the Government's affirmation that there were no more similar incidents in the Kėdainiai Home in which physical restraint and supplementary medication had been used in respect of the applicant.

175. Turning to the applicant's submission of allegedly poor quality food and food poisoning, the Court notes with concern that out-of-date meat was found at the Kėdainiai Home (see paragraph 63 above). However, that fact alone is not sufficient to substantiate the applicant's accusations of inhuman or degrading treatment, as directed towards the Kėdainiai institution, to such an extent that an issue under Article 3 of the Convention would arise.

176. The Court accordingly finds that the above complaints must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

A. Censorship of correspondence

177. The applicant alleged that the Kėdainiai Home had censored her correspondence, in breach of Article 8 of the Convention, which reads insofar as relevant as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. The parties' submissions

178. The applicant argued that her correspondence, including that with the Court, and her telephone conversations, as illustrated by the incident of 18 January 2005, had been censored by the Kėdainiai Home. She also submitted that she had been denied books and newspapers.

179. The Government disputed the applicant's submissions and argued that the residents of the Kėdainiai Home were guaranteed the right to receive periodicals and personal correspondence. There were no requirements that the residents should send or receive their correspondence through the personnel of the facility.

180. As to the particular situation of the applicant, the Government underlined that there had been neither stopping nor censorship of any of her communications, such as telephone conversations or letters, including those with the Court. Such allegations were totally unsubstantiated and there was no proof that any acts of interception of communications had occurred. As regards the only specified incident involving the telephone call from Ms M. Buržinskienė on 18 January 2005, which the applicant had not been invited to answer, the Government noted that in the context of a more intensified deterioration of the applicant's health, the Kėdainiai Home personnel might have decided not to have the applicant temporarily disturbed. Nonetheless, since 2005 the applicant had possessed several of her own mobile phones and had used them at her own convenience and without hindrance. Furthermore, the applicant had not indicated either the addressees of her supposedly intercepted correspondence, or, at least, the approximate dates of such letters. Lastly, the Government submitted that the Kėdainiai Home had a room with newspapers, periodicals and books, to which all the residents, including the applicant, had unrestricted access.

Relying on the above considerations, the Government argued that the applicant's complaint was manifestly ill-founded.

2. The Court's assessment

181. The Court recalls its case-law to the effect that telephone calls made from business premises, as well as from the home, may be covered by the notions of "private life" and "correspondence" within the meaning of Article 8 § 1 (see *Halford v. the United Kingdom*, 25 June 1997, § 44, *Reports of Judgments and Decisions* 1997-III). Turning to the applicant's situation, it observes that on 18 January 2005 the applicant was indeed prevented from receiving a telephone call from Ms Buržinskienė. However, taking into account the applicant's medical diagnosis and the explanations provided by the Government, the Court is not ready to hold that on that occasion the applicant's rights under Article 8 were limited more than was strictly necessary. The Court also notes that this part of the complaint has been raised out of time, as required by Article 35 § 1 of the Convention.

182. Furthermore, having examined the materials submitted by the parties, the Court finds the applicant's other complaints in this part of the application not sufficiently substantiated and therefore rejects them as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

B. Visits

1. The parties' submissions

183. The applicant further argued that her ability to build and sustain relationships had also been limited due to restrictions placed on her capacity to receive visitors and telephone calls. The applicant has had very little contact with members of the community outside the facility. Outsiders' visits are generally limited and most visitors may not be received in private. The director of the Kėdainiai Home had in the past restricted visits from outsiders after the applicant's institutionalisation, upon a request from her guardian. The list of visitors maintained by the Kėdainiai Home showed that between 2 August 2004 and 25 December 2006 only the applicant's adoptive father had visited her, with few exceptions. Before the applicant got her own mobile phone, she had had to use the facilities provided by the institution. At that time, she had only been able to receive calls through the Kėdainiai Home's switchboard. She relied upon the right to respect for private and family life under the above-cited Article 8 of the Convention.

184. The Government pointed out that the applicant, as with the other residents of the Kėdainiai Home, was entitled to unrestricted visits by her relatives and her court-appointed guardians. As to other visitors, such individuals could visit residents upon having obtained the management's permission, which was required in order to protect the interests and the safety of the residents of the institution.

185. The Government submitted that the applicant's adoptive father, as her guardian, had requested that the Kėdainiai Home prevent D.G.'s negative influence over the applicant and restrict her visits in order to avoid the applicant's destabilisation. Only once on 18 August 2004, in accordance with that request and also having the oral consent of the in-house psychiatrist, had D.G.'s permission to visit been denied. In that connection, the Government also referred to a doctor's report concerning the negative influence of D.G. over the applicant. Relying on the record of visitors to the Kėdainiai Home, the Government asserted that, contrary to what had been said by the applicant, she had received visitors. In contrast to what had been suggested by the applicant, it had not been her relatives, but rather her friends who had most often visited her.

186. In the light of the above, the Government submitted that the applicant's complaint was manifestly ill-founded.

2. The Court's assessment

187. The Court reiterates that Article 8 of the Convention is intended to protect individuals from arbitrary interference by the State in their private and family life, home and correspondence. The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of

"private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to entirely exclude therefrom the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings (see *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B).

188. Turning to the applicant's case, the Court notes that, except for one occasion on which D.G. was not allowed to see her on 18 August 2004, the applicant has not substantiated her pleas of social isolation and restrictions on having people visit her. Even assuming that these matters have been raised in time, the Court is not ready to disagree with the Government's suggestion that that single restriction was aimed at the protection of the applicant's mental health and was thus in compliance with the requirements of Article 8 of the Convention.

189. The applicant complained that by her admission to the Kėdainiai Home she had been segregated from society and cut off from social networks. Whilst acknowledging that because of her involuntary stay in the institution the applicant indeed could have faced certain restrictions in contacting others, the Court nonetheless observes that between 2 August 2004 and 25 December 2006 the applicant received one or more visitors on forty-two separate occasions. Of those visits, her friends, relatives and D.G. saw the applicant thirty-eight times (see paragraph 31 above). Lastly, the applicant had herself admitted that at one point she had got a mobile phone, which helped her to maintain contact with the outside world.

190. In the light of the foregoing, the Court considers that this part of the applicant's complaint is manifestly ill-founded within the meaning of Article 35 § 3 and therefore inadmissible in accordance with Article 35 § 4 of the Convention.

VII. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

191. The applicant complained that she had been prevented from practising her religion whilst resident in the Kėdainiai Home, in breach of Article 9 of the Convention.

192. The Government submitted that the applicant's complaint was purely abstract in nature. It was not indicated in the applicant's complaint when in particular she had been barred or impeded from practising her religion. Pursuant to the Bylaws of the Kėdainiai facility, the residents thereof had the right to practise their chosen religion and to attend a place of worship.

193. The Court has examined the above complaint as submitted by the applicant. However, having regard to all the material in its possession, it finds the complaint wholly unsubstantiated and therefore rejects it as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

VIII. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

194. Relying upon Article 13 of the Convention, the applicant also complained that she had had no effective domestic remedies at her disposal to seek redress for the alleged violations of which she had complained to the Court. Article 13 of the Convention provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The parties' submissions

1. The applicant

195. The applicant submitted at the outset that she is a very vulnerable individual. She is legally incapacitated with a history of mental health problems and has been admitted to a psychiatric institution against her will for an indeterminate period. The applicant's guardian, who has the power to take decisions on all her aspects of life, is the care institution itself. In the applicant's view, on account of her vulnerability, Article 13 of the Convention required that the State take supplementary measures to make sure that she could have benefited from effective remedies for the violations of her rights.

196. The applicant pointed out that she does not have independent standing to initiate any civil proceedings. Only once had she been successful in initiating court proceedings, namely those before the Kaunas District Court in 2005 concerning the change of guardianship. However, even then it had been not possible to pursue that remedy in full, given that the Kaunas District Court had decided to refuse the applicant's request for legal assistance on the grounds that she had been represented by her legal guardian, who already had a lawyer.

197. The applicant further submitted that neither could she exercise her right to an effective domestic remedy through other persons. As concerns her guardian, who was her legal representative in accordance with the law, this remedy had been purely discretionary. More importantly, it was difficult to conceive how this remedy could have worked with regard to complaints challenging decisions taken by the guardian him, her or itself on the applicant's behalf, such as the decision to hospitalise the applicant in the

institution, or the decision by the Kėdainiai Home to restrict visitors' access to the applicant.

198. The applicant also argued that she could not effectively act through the Social Services Department or the public prosecutor either. As concerns the first body, she emphasised the purely discretionary powers of the social services department and doubted the impartiality of an institution which had to a large degree been responsible for the appointment of her guardians and for her hospitalisation in the institution. As concerns the prosecutor, in the applicant's view, his decisions were not binding and, as practice had showed, the prosecutor had invariably rejected the applicant's complaints, mostly deferring to the decisions taken by the guardians or the social service authorities.

199. Lastly, the applicant submitted that decisions to remove incapacitation, although theoretically possible, were exceptional. Most importantly, the ability to bring an action to restore legal capacity did not belong to incapacitated persons themselves, but rather to their guardian. For most people, incapacitation is for life.

2. The Government

200. The Government contested the applicant's arguments. Whilst acknowledging that the applicant had no independent standing in the domestic proceedings, the Government contended that she had been able to effectively act through her guardian, who had been her legal representative. They also pointed to the Kaunas City District Court's decision of 7 November 2007 to accept the applicant's application for change of her guardian for examination. For the Government, it could be presumed that the district court had reviewed the applicant's request to reopen the proceedings with a high degree of care because of the essence of the applicant's request – appointment of a guardian. Even though the court had refused the applicant's request to have separate legal assistance, that refusal had been based on domestic law, pursuant to which a guardian is the legal representative of an incapacitated person. Furthermore, the actions of the applicant's guardian had been supervised by the social services authorities, thus protecting the interests of the applicant.

201. The Government next argued that the protection of the rights and interests of the applicant fell within the notion of public interest. Thus the applicant had been able to apply to the prosecutor, who, in turn, had been entitled to file a civil claim or an administrative complaint. In this context the Government referred to the decisions of 3 September 2004 and 31 July 2006, by which the prosecutors had discontinued the official investigation into the complaints about alleged deprivation of liberty of the applicant. However, having considered the complaints to be unfounded, the prosecutors saw no reason to apply to the domestic courts in order to protect the public interest.

202. As to an effective remedy for the applicant to complain of the alleged violations of Articles 8 and 9 of the Convention regarding her living conditions, the Government contended that, pursuant to the Law on Social Services, the applicant could have complained to social care officials, and, in the event that they dismissed her complaint, to the courts. Various complaints made by the applicant regarding her allegedly inadequate living conditions and ill-treatment in the Kėdainiai Home had been investigated by a number of municipal officials and interdepartmental panels, which had found no violations of the applicant's rights. Moreover, neither a prosecutor nor the applicant's guardian had ever applied to the courts with a claim for damages for any alleged violations of the applicant's rights.

In sum, the applicant had had domestic remedies which were effective, available in theory and in practice, and capable of providing redress in respect of the applicant's complaints and which had offered reasonable prospects of success.

203. Lastly, the Government submitted that declaration of the recovery of a person's legal capacity upon the amelioration of his or her mental health was quite common practice in Lithuania. Such requests could be submitted by a social care institution, acting as a guardian, on its own motion. Moreover, a request to annul an incapacitation decision could also be lodged by a prosecutor in the public interest. Nonetheless, as regards the applicant, the circumstances warranting her incapacitation have never disappeared as no amelioration of her mental state has ever been established that would give her guardian, be it her adoptive father or the Kėdainiai Home, or the prosecutor grounds to apply to a court for the reinstatement of her legal capacity.

B. The Court's assessment

204. The Court finds that this complaint is linked to the complaints submitted under Articles 5 and 6 of the Convention, and it should therefore be declared admissible.

205. The Court recalls its case-law to the effect that Article 5 § 4 provides a *lex specialis* in relation to the more general requirements of Article 13 (see *Chahal v. the United Kingdom*, 15 November 1996, § 126, *Reports of Judgments and Decisions* 1996-V). It also reiterates that the requirements of Article 13 are less strict than, and are here absorbed by, those of Article 6 (see, among many authorities, *Kamasinski v. Austria*, 19 December 1989, § 110, Series A no. 168). The Court further notes that, in analysing the fairness of the civil proceedings concerning the applicant's guardianship and the lawfulness of the applicant's involuntary placement in the Kėdainiai Home, it has already taken account of the fact that the applicant is deprived of legal capacity and thus is not able to initiate any legal proceedings before the domestic courts. When analysing the above

complaints, the Court has also noted that the other remedies suggested by the Government, be it a possibility to act through her guardians or a request by the applicant to complain to a prosecutor or her complaints to the social care authorities, have not been proved to be feasible in the applicant's case. This being so, having regard to its conclusions under Articles 5 § 4 and 6 of the Convention, the Court does not consider it necessary to re-examine these aspects of the case separately through the prism of the "effective remedies" requirement of Article 13.

IX. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

206. Relying upon Article 2 of the Convention, the applicant also complained that, due to overmedication, her life is at risk. Relying on Article 10 of the Convention, the applicant alleged that one of the reasons for her involuntary psychiatric hospitalisation had been her bold poetic expression. Finally, without citing any Article of the Convention or its Protocols, the applicant complained of a violation of her property rights by her State-appointed guardian.

207. Having examined the materials submitted by the parties, the Court finds that the applicant has not provided sufficient evidence to substantiate her claims. It notes that, according to the Government, the applicant had received and had had access to newspapers and reading materials (see paragraph 180 above). It further observes that the applicant's complaints as to alleged breach of her property rights were dismissed by the prosecutors (see paragraph 52 above). The Court therefore rejects this part of the application as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

208. Relying upon Article 3 of the Convention, the applicant complained of her involuntary hospitalisation and treatment in the Kaunas Psychiatric Hospital from 30 June 2004 to 2 August 2004. The Court notes, however, that the applicant submitted this complaint on 28 March 2006. Accordingly, this part of the application has not been lodged within six months of the final effective measure or decision, as required by Article 35 § 1 of the Convention. It must therefore be rejected pursuant to Article 35 § 4.

X. APPLICATION OF ARTICLE 41 OF THE CONVENTION

209. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

210. The applicant claimed 300,000 euros (EUR) in respect of non-pecuniary damage.

211. The Government submitted that the above claim was wholly unsubstantiated.

212. The Court notes that it has found a violation of Article 5 § 4 as well as a violation of Article 6 § 1 in the present case. As regards the non-pecuniary damage already sustained, the Court finds that the violation of the Convention has indisputably caused the applicant substantial damage. In these circumstances, it considers that the applicant has experienced suffering and frustration, for which the mere finding of a violation cannot compensate. Making its assessment on an equitable basis, the Court awards the applicant EUR 8,000 in respect of non-pecuniary damage.

B. Costs and expenses

213. The applicant claimed the sum of EUR 16,609.85 for costs and expenses before the Court, broken down as follows: EUR 62 for secretarial costs; EUR 3,500 in relation to legal fees for preparation of the submissions made by the applicant's lawyer; and EUR 13,047.85 for fees for legal advice from *Interrights*.

214. The Government submitted that the sum was excessive.

215. The Court notes that the applicant was granted legal aid under the Court's legal aid scheme, under which the sum of EUR 850 has been paid to the applicant's lawyer to cover the submission of the applicant's observations and additional expenses.

216. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Ruling on an equitable basis and taking into account the sums already paid to the applicant by the Council of Europe in legal aid, the Court awards the applicant EUR 5,000.

C. Default interest

217. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's objection concerning the applicant's victim status;

2. *Joins to the merits* the Government's preliminary objection of abuse of application and *dismisses* it;

3. *Declares* the complaints under Article 5 § 1 and 4 (concerning involuntary placement in the Kėdainiai Home and the applicant's inability to obtain judicial review of her continuous placement), Article 6 § 1 (concerning the proceedings for change of guardianship), and Article 13 (concerning the absence of effective remedies) admissible, and the remainder of the application inadmissible;

4. *Holds* that there has been no violation of Article 5 § 1 of the Convention as regards the lawfulness of the applicant's involuntary placement in the Kėdainiai Home;

5. *Holds* that there has been a violation of Article 5 § 4 of the Convention as regards the applicant's inability to obtain her release from the Kėdainiai Home;

6. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account the unfairness of the guardianship proceedings;

7. *Holds* that there is no need to examine the applicant's complaint under Article 13 of the Convention;

8. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 8,000 (eight thousand euros) in respect of non-pecuniary damage;

(ii) EUR 5,000 (five thousand euros) in respect of costs and expenses;

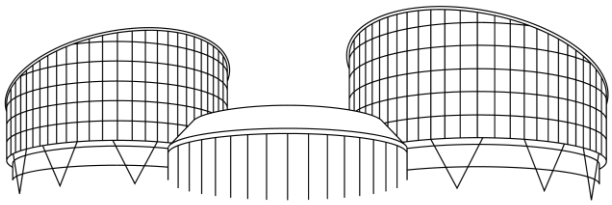
(iii) any tax that may be chargeable on the above amounts;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 14 February 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Registrar	Françoise Tulkens President



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF STANEV v. BULGARIA

(Application no. 36760/06)

JUDGMENT

STRASBOURG

17 January 2012

This judgment is final but may be subject to editorial revision.

In the case of Stanev v. Bulgaria,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President*,
Jean-Paul Costa,
Françoise Tulkens,
Josep Casadevall,
Nina Vajić,
Dean Spielmann,
Lech Garlicki,
Khanlar Hajiyev,
Egbert Myjer,
Isabelle Berro-Lefèvre,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska,
Vincent A. de Gaetano,
Angelika Nußberger,
Julia Laffranque, *judges*,

and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 9 February and 7 December 2011,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 36760/06) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bulgarian national, Mr Rusi Kosev Stanev ("the applicant"), on 8 September 2006.

2. The applicant, who had been granted legal aid, was represented by Ms A. Genova, a lawyer practising in Sofia, and Ms V. Lee and Ms L. Nelson, lawyers from the Mental Disability Advocacy Center, a non-governmental organisation based in Budapest. The Bulgarian Government ("the Government") were represented by their Agents, Ms N. Nikolova and Ms R. Nikolova, of the Ministry of Justice.

3. The applicant complained about his placement in a social care home for people with mental disorders and his inability to obtain permission to leave the home (Article 5 §§ 1, 4 and 5 of the Convention). Relying on Article 3, taken alone and in conjunction with Article 13, he further

complained about the living conditions in the home. He also submitted that he had no access to a court to seek release from partial guardianship (Article 6 of the Convention). Lastly, he alleged that the restrictions resulting from the guardianship regime, including his placement in the home, infringed his right to respect for his private life within the meaning of Article 8, taken alone and in conjunction with Article 13 of the Convention.

4. The application was allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 29 June 2010, after a hearing on admissibility and the merits had been held on 10 November 2009 (Rule 54 § 3), it was declared admissible by a Chamber of that Section composed of Peer Lorenzen, President, Renate Jaeger, Karel Jungwiert, Rait Maruste, Isabelle Berro-Lefèvre, Mirjana Lazarova Trajkovska and Zdravka Kalaydjieva, judges, and also of Claudia Westerdiek, Section Registrar. On 14 September 2010 a Chamber of the same Section, composed of Peer Lorenzen, President, Renate Jaeger, Rait Maruste, Mark Villiger, Isabelle Berro-Lefèvre, Mirjana Lazarova Trajkovska and Zdravka Kalaydjieva, judges, and also of Claudia Westerdiek, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

6. The applicant and the Government each filed written observations on the merits.

7. In addition, third-party comments were received from the non-governmental organisation Interights, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 9 February 2011 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms N. NIKOLOVA, Ministry of Justice,
Ms R. NIKOLOVA, Ministry of Justice, *Co-Agents*;

(b) *for the applicant*
Ms A. GENOVA, *Counsel*,
Ms V. LEE,
Ms L. NELSON, *Advisers*.

The Court heard addresses by them. The applicant was also present.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1956 in Ruse, where he lived until December 2002 and where his half-sister and his father's second wife, his only close relatives, also live. On 20 December 1990 a panel of occupational physicians declared him unfit to work. The panel found that as a result of having been diagnosed with schizophrenia in 1975, the applicant had a 90% degree of disablement but did not require assistance. He is in receipt of an invalidity pension on that account.

A. The applicant's placement under partial guardianship and placement in a social care home for people with mental disorders

10. On an unspecified date in 2000, at the request of the applicant's two relatives, the Ruse regional prosecutor applied to the Ruse Regional Court (*Окръжен съд*) for a declaration of total legal incapacity in respect of the applicant. In a judgment of 20 November 2000 the court declared the applicant to be partially incapacitated on the ground that he had been suffering from simple schizophrenia since 1975 and his ability to manage his own affairs and interests and to realise the consequences of his own acts had been impaired. The court found that the applicant's condition was not so serious as to warrant a declaration of total incapacity. It observed, in particular, that during the period from 1975 to 2000 he had been admitted to a psychiatric hospital on several occasions. The court took into account an expert medical report produced in the course of the proceedings and interviewed the applicant. Furthermore, according to certain other people it interviewed, the applicant had sold all his possessions, begged for a living, spent all his money on alcohol and became aggressive whenever he drank.

11. That judgment was upheld in a judgment of 12 April 2001 by the Veliko Tarnovo Court of Appeal (*Апелативен съд*) on an appeal by the applicant, and was subsequently transmitted to the Ruse Municipal Council on 7 June 2001 for the appointment of a guardian.

12. Since the applicant's family members had refused to take on any guardianship responsibilities, on 23 May 2002 the Municipal Council appointed Ms R.P., a council officer, as the applicant's guardian until 31 December 2002.

13. On 29 May 2002 R.P. asked the Ruse social services to place the applicant in a social care home for people with mental disorders. She appended to the application form a series of documents including a psychiatric diagnosis. The social services drew up a welfare report on the applicant, noting on 23 July 2002 that he was suffering from schizophrenia, that he lived alone in a small, run-down annexe to his half-sister's house

and that his half-sister and his father's second wife had stated that they did not wish to act as his guardian. The requirements for placement in a social care home were therefore deemed to be fulfilled.

14. On 10 December 2002 a welfare placement agreement was signed between R.P. and the social care home for adults with mental disorders near the village of Pastra in the municipality of Rila ("the Pastra social care home"), an institution under the responsibility of the Ministry of Labour and Social Policy. The applicant was not informed of the agreement.

15. Later that day, the applicant was taken by ambulance to the Pastra social care home, some 400 km from Ruse. Before the Court, he stated that he had not been told why he was being placed in the home or for how long; the Government did not dispute this.

16. On 14 December 2002, at the request of the director of the Pastra social care home, the applicant was registered as having his home address in the municipality of Rila. The residence certificate stated that his address had been changed for the purpose of his "permanent supervision". According to the most recent evidence submitted in February 2011, the applicant was still living in the home at that time.

17. On 9 September 2005 the applicant's lawyer requested the Rila Municipal Council to appoint a guardian for her client. In a letter dated 16 September 2005 she was informed that the Municipal Council had decided on 2 February 2005 to appoint the director of the Pastra social care home as the applicant's guardian.

B. The applicant's stay in the Pastra social care home

1. Provisions of the placement agreement

18. The agreement signed between the guardian R.P. and the Pastra social care home on 10 December 2002 (see paragraph 14 above) did not mention the applicant's name. It stated that the home was to provide food, clothing, medical services, heating and, obviously, accommodation, in return for payment of an amount determined by law. It appears that the applicant's entire invalidity pension was transferred to the home to cover that amount. The agreement stipulated that 80% of the sum was to be used as payment for the services provided and the remaining 20% put aside for personal expenses. According to the information in the case file, the applicant's invalidity pension, as updated in 2008, amounted to 130 Bulgarian levs (BGN – approximately 65 euros (EUR)). The agreement did not specify the duration of the provision of the services in question.

2. Description of the site

19. The Pastra social care home is located in an isolated area of the Rila mountains in south-western Bulgaria. It is accessible via a dirt track from the village of Pastra, the nearest locality 8 km away.

20. The home, built in the 1920s, comprises three buildings, where its residents, all male, are housed according to the state of their mental health. According to a report produced by the Social Assistance Agency in April 2009, there were seventy-three people living in the home, one was in hospital and two had absconded. Among the residents, twenty-three were entirely lacking legal capacity, two were partially lacking capacity and the others enjoyed full legal capacity. Each building has a yard surrounded by a high metal fence. The applicant was placed in block 3 of the home, reserved for residents with the least serious health problems, who were able to move around the premises and go alone to the nearest village with prior permission.

21. According to the applicant, the home was decaying, dirty and rarely heated in winter, and as a result, he and the other residents were obliged to sleep in their coats during winter. The applicant shared a room measuring 16 square metres with four other residents and the beds were practically side by side. He had only a bedside table in which to store his clothes, but he preferred to keep them in his bed at night for fear that they might be stolen and replaced with old clothes. The home's residents did not have their own items of clothing because clothes were not returned to the same people after being washed.

3. Diet and hygiene and sanitary conditions

22. The applicant asserted that the food provided at the home was insufficient and of poor quality. He had no say in the choice of meals and was not allowed to help prepare them.

23. Access to the bathroom, which was unhealthy and decrepit, was permitted once a week. The toilets in the courtyard, which were unhygienic and in a very poor state of repair, consisted of holes in the ground covered by dilapidated shelters. Each toilet was shared by at least eight people. Toiletries were available only sporadically.

4. Recent developments

24. In their memorial before the Grand Chamber the Government stated that renovation work had been carried out in late 2009 in the part of the home where the applicant lived, including the sanitary facilities. The home now had central heating. The diet was varied and regularly included fruit and vegetables as well as meat. Residents had access to television, books and games. The State provided them all with clothes. The applicant did not dispute these assertions.

5. Journeys undertaken by the applicant

25. The home's management kept hold of the applicant's identity papers, allowing him to leave the home only with special permission from the director. He regularly went to the village of Pastra. It appears that during the visits he mainly provided domestic help to villagers or carried out tasks at the village restaurant.

26. Between 2002 and 2006 the applicant returned to Ruse three times on leave of absence. Each trip was authorised for a period of about ten days. The journey cost BGN 60 (approximately EUR 30), which was paid to the applicant by the home's management.

27. Following his first two visits to Ruse, the applicant returned to Pastra before the end of his authorised period of leave. According to a statement made by the director of the home to the public prosecutor's office on an unspecified date, the applicant came back early because he was unable to manage his finances and had no accommodation.

28. The third period of leave was authorised from 15 to 25 September 2006. After the applicant failed to return on the scheduled date, the director of the home wrote to the Ruse municipal police on 13 October 2006, asking them to search for the applicant and transfer him to Sofia, where employees of the home would be able to collect him and take him back to Pastra. On 19 October 2006 the Ruse police informed the director that the applicant's whereabouts had been discovered but that the police could not transfer him because he was not the subject of a wanted notice. He was driven back to the social care home on 31 October 2006, apparently by staff of the home.

6. Opportunities for cultural and recreational activities

29. The applicant had access to a television set, several books and a chessboard in a common room at the home until 3 p.m., after which the room was kept locked. The room was not heated in winter and the residents kept their coats, hats and gloves on when inside. No other social, cultural or sports activities were available.

7. Correspondence

30. The applicant submitted that the staff at the social care home had refused to supply him with envelopes for his correspondence and that as he did not have access to his own money, he could not buy any either. The staff would ask him to give them any sheets of paper he wished to post so that they could put them in envelopes and send them off for him.

8. Medical treatment

31. It appears from a medical certificate of 15 June 2005 (see paragraph 37 below) that following his placement in the home in 2002, the

applicant was given anti-psychotic medication (carbamazepine (600mg)), under the monthly supervision of a psychiatrist.

32. In addition, at the Grand Chamber hearing the applicant's representatives stated that their client had been in stable remission since 2006 and had not undergone any psychiatric treatment in recent years.

C. Assessment of the applicant's social skills during his stay in Pastra and conclusions of the psychiatric report drawn up at his lawyer's request

33. Once a year, the director of the social care home and the home's social worker drew up evaluation reports on the applicant's behaviour and social skills. The reports indicated that the applicant was uncommunicative, preferred to stay on his own rather than join in group activities, refused to take his medication and had no close relatives to visit while on leave of absence. He was not on good terms with his half-sister and nobody was sure whether he had anywhere to live outside the social care home. The reports concluded that it was impossible for the applicant to reintegrate into society, and set the objective of ensuring that he acquired the necessary skills and knowledge for social resettlement and, in the long term, reintegration into his family. It appears that he was never offered any therapy to that end.

34. The case file indicates that in 2005 the applicant's guardian asked the Municipal Council to grant a social allowance to facilitate his reintegration into the community. Further to that request, on 30 December 2005 the municipal social assistance department carried out a "social assessment" (*социална оценка*) of the applicant, which concluded that he was incapable of working, even in a sheltered environment, and had no need for training or retraining, and that in those circumstances, he was entitled to a social allowance to cover the costs of his transport, subsistence and medication. On 7 February 2007 the municipal social assistance department granted the applicant a monthly allowance of BGN 16.50 (approximately EUR 8). On 3 February 2009 the allowance was increased to BGN 19.50 (approximately EUR 10).

35. In addition, at his lawyer's request, the applicant was examined on 31 August 2006 by Dr V.S., a different psychiatrist from the one who regularly visited the social care home, and by a psychologist, Ms I.A. The report drawn up on that occasion concluded that the diagnosis of schizophrenia given on 15 June 2005 (see paragraph 37 below) was inaccurate in that the patient did not display all the symptoms of that condition. It stated that, although the applicant had suffered from the condition in the past, he had not shown any signs of aggression at the time of the examination, but rather a suspicious attitude and a slight tendency towards "verbal aggression", that he had not undergone any treatment for the condition between 2002 and 2006 and that his health had visibly

stabilised. The report noted that no risk of deterioration of his mental health had been observed and stated that, in the opinion of the home's director, the applicant was capable of reintegrating into society.

36. According to the report, the applicant's stay in the Pastra social care home was very damaging to his health and it was desirable that he should leave the home; otherwise, he was at risk of developing "institutionalisation syndrome" the longer he stayed there. The report added that it would be more beneficial to his mental health and social development to allow him to integrate into community life with as few restrictions as possible, and that the only aspect to monitor was his tendency towards alcohol abuse, which had been apparent prior to 2002. In the view of the experts who had examined the applicant, the behaviour of an alcohol-dependent person could have similar characteristics to that of a person with schizophrenia; accordingly, vigilance was required in the applicant's case and care should be taken not to confuse the two conditions.

D. The applicant's attempts to obtain release from partial guardianship

37. On 25 November 2004 the applicant, through his lawyer, asked the public prosecutor's office to apply to the Regional Court to have his legal capacity restored. On 2 March 2005 the public prosecutor requested the Pastra social care home to send him a doctor's opinion and other medical certificates concerning the applicant's disorders in preparation for a possible application to the courts for restoration of his legal capacity. Further to that request, the applicant was admitted to a psychiatric hospital from 31 May to 15 June 2005 for a medical assessment. In a certificate issued on the latter date, the doctors attested that the applicant showed symptoms of schizophrenia. As his health had not deteriorated since he had been placed in the home in 2002, the regime to which he was subject there had remained unchanged. He had been on maintenance medication since 2002 under the monthly supervision of a psychiatrist. A psychological examination had revealed that he was agitated, tense and suspicious. His communication skills were poor and he was unaware of his illness. He had said that he wanted to leave the home at all costs. The doctors did not express an opinion either on his capacity for resettlement or on the need to keep him in the Pastra social care home.

38. On 10 August 2005 the regional prosecutor refused to bring an action for restoration of the applicant's legal capacity on the grounds that, in the opinion of the doctors, the director of the Pastra social care home and the home's social worker, the applicant was unable to cope on his own, and that the home, where he could undergo medical treatment, was the most suitable place for him to live. The applicant's lawyer challenged the refusal to bring the action, arguing that her client should have the opportunity to

assess by himself whether or not, having regard to the living conditions at the home, it was in his interests to remain there. She pointed out that the enforced continuation of his stay in the home, on the pretext of providing him with treatment in his own interests, amounted in practice to a deprivation of liberty, a situation that was unacceptable. A person could not be placed in an institution without his or her consent. In accordance with the legislation in force, anyone under partial guardianship was free to choose his or her place of residence, with the guardian's agreement. The choice of residence was therefore not a matter within the competence of the prosecution service. Despite those objections, the regional prosecutor's refusal was upheld on 11 October 2005 by the appellate prosecutor, and subsequently on 29 November 2005 by the chief public prosecutor's office at the Supreme Court of Cassation.

39. On 9 September 2005 the applicant, through his lawyer, asked the mayor of Rila to bring a court action for his release from partial guardianship. In a letter of 16 September 2005 the mayor of Rila refused his request, stating that there was no basis for such an action in view of the medical certificate of 15 June 2005, the opinions of the director and the social worker and the conclusions reached by the public prosecutor's office. On 28 September 2005 the applicant's lawyer applied to the Dupnitsa District Court for judicial review of the mayor's decision, under Article 115 of the Family Code (see paragraph 49 below). In a letter of 7 October 2005 the District Court stated that since the applicant was partially lacking legal capacity, he was required to submit a valid form of authority certifying that his lawyer was representing him, and that it should be specified whether his guardian had intervened in the procedure. On an unspecified date the applicant's lawyer submitted a copy of the form of authority signed by the applicant. She also requested that the guardian join the proceedings as an interested party or that an *ad hoc* representative be appointed. On 18 January 2006 the court held a hearing at which the representative of the mayor of Rila objected that the form of authority was invalid as it had not been countersigned by the guardian. The guardian, who was present at the hearing, stated that he was not opposed to the applicant's application, but that the latter's old-age pension was insufficient to meet his needs and that, accordingly, the Pastra social care home was the best place for him to live.

40. The Dupnitsa District Court gave judgment on 10 March 2006. As to the admissibility of the application for judicial review, it held that although the applicant had instructed his lawyer to represent him, she was not entitled to act on his behalf since the guardian had not signed the form of authority. However, it held that the guardian's endorsement of the application at the public hearing had validated all the procedural steps taken by the lawyer, and that the application was therefore admissible. As to the merits, the court dismissed the application, finding that the guardian had no legitimate interest in contesting the mayor's refusal, given that he could apply

independently and directly for the applicant to be released from partial guardianship. Since the judgment was not subject to appeal, it became final.

41. Lastly, the applicant asserted that he had made several oral requests to his guardian to apply for his release from partial guardianship and to allow him to leave the home. However, his requests had always been refused.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Legal status of persons placed under partial guardianship and their representation before the courts

42. Section 5 of the Persons and Family Act of 9 August 1949 provides that persons who are unable to look after their own interests on account of mental illness or mental deficiency must be entirely deprived of legal capacity and declared legally incapable. Adults with milder forms of such disorders are to be partially incapacitated. Persons who are entirely deprived of legal capacity are placed under full guardianship (*настойничество*), whereas those who are partially incapacitated are placed under partial guardianship (*попечителство* – literally "trusteeship"). In accordance with sections 4 and 5 of the Act, persons under partial guardianship may not perform legal transactions without their guardian's consent. They may, however, carry out ordinary acts forming part of everyday life and have access to the resources obtained in consideration for their work. Accordingly, the guardian of a partially incapacitated person cannot independently perform legal transactions that are binding on that person. This means that contracts signed only by the guardian, without the consent of the person partially lacking legal capacity, are invalid.

43. Under Article 16, paragraph 2, of the Code of Civil Procedure ("the CCP"), persons under full guardianship are represented before the courts by their guardian. Persons under partial guardianship, however, are entitled to take part in court proceedings, but require their guardian's consent. Accordingly, the guardian of a partially incapacitated person does not perform the role of a legal representative. The guardian cannot act on behalf of the person under partial guardianship, but may express agreement or disagreement with the person's individual transactions (Сталев, Ж., *Българско гражданско процесуално право*, София, 2006 г., стр. 171). In particular, a person under partial guardianship may instruct a lawyer provided that the form of authority is signed by the guardian (ibid., стр. 173).

B. Procedure for placement under partial guardianship

44. There are two stages to the procedure for placing a person under partial guardianship: the declaration of partial incapacity and the appointment of a guardian.

1. Declaration of partial incapacity by the courts

45. The first stage involves a judicial procedure which at the material time was governed by Articles 275-277 of the 1952 CCP, which have been reproduced unchanged in Articles 336-340 of the new 2007 CCP. A declaration of partial incapacity may be sought by the person's spouse or close relatives, by the public prosecutor or by any other interested party. The court reaches its decision after examining the person concerned at a public hearing – or, failing that, after forming a first-hand impression of the person's condition – and interviewing the person's close relatives. If the statements thus obtained are insufficient, the court may have recourse to other evidence, such as an expert medical assessment. According to domestic case-law, an assessment must be ordered where the court is unable to conclude from any other information in the file that the request for deprivation of legal capacity is unfounded (Решение на ВС № 1538 от 21.VIII.1961 г. по гр. д. № 5408/61 г.; Решение на ВС № 593 от 4.III.1967 г. по гр. д. № 3218/1966 г.).

2. Appointment of a guardian by the administrative authorities

46. The second stage involves an administrative procedure for the appointment of a guardian, which at the material time was governed by Chapter X (Articles 109-128) of the 1985 Family Code ("the FC"); these provisions have been reproduced, with only minor amendments, in Articles 153-174 of the new 2009 FC. The administrative stage is conducted by an authority referred to as "the guardianship authority", namely the mayor or any other municipal council officer designated by him or her.

47. The guardian should preferably be appointed from among the relatives of the person concerned who are best able to defend his or her interests.

C. Review of measures taken by the guardian and possibility of replacement

48. Measures taken by the guardian are subject to review by the guardianship authority. At the authority's request, the guardian must report on his or her activities. If any irregularities are observed, the authority may request that they be rectified or may order the suspension of the measures in question (see Article 126, paragraph 2, and Article 125 of the 1985 FC, and

Article 170 and Article 171, paragraphs 2 and 3, of the 2009 FC). It is unclear from domestic law whether persons under partial guardianship may apply to the mayor individually or through another party to suspend measures taken by the guardian.

49. Decisions by the mayor, as the guardianship authority, and any refusal by the mayor to appoint a guardian or to take other steps provided for in the FC are, for their part, amenable to judicial review. They may be challenged by interested parties or the public prosecutor before the district court, which gives a final decision on the merits (Article 115 of the 1985 FC). This procedure allows close relatives to request a change of guardian in the event of a conflict of interests (Решение на ВС № 1249 от 23.XII.1993 г. по гр. д. № 897/93 г.). According to domestic case-law, fully incapacitated persons are not among the "interested parties" entitled to initiate such proceedings (Определение № 5771 от 11.06.2003 г. на ВАС по адм. д. № 9248/2002). There is no domestic case-law showing that a partially incapacitated person is authorised to do so.

50. Furthermore, the guardianship authority may at any time replace a guardian who fails to discharge his or her duties (Article 113 of the 1985 FC). By Article 116 of the 1985 FC, a person cannot be appointed as a guardian where there is a conflict of interests between that person and the person under partial guardianship. Article 123 of the 1985 FC provides that a deputy guardian is to be appointed where the guardian is unable to discharge his or her duties or where there is a conflict of interests. In both cases, the guardianship authority may also appoint an *ad hoc* representative.

D. Procedure for restoration of legal capacity

51. By virtue of Article 277 of the 1952 CCP, this procedure is similar to the partial guardianship procedure. It is open to anyone entitled to apply for a person to be placed under partial guardianship, and also to the guardianship authority and the guardian. The above-mentioned provision has been reproduced in Article 340 of the 2007 CCP. On 13 February 1980 the Plenary Supreme Court delivered a decision (no. 5/79) aimed at clarifying certain questions concerning the procedure for deprivation of legal capacity. Paragraph 10 of the decision refers to the procedure for restoration of legal capacity and reads as follows:

> "The rules applicable in the procedure for restoration of legal capacity are the same as those governing the procedure for deprivation of capacity (Article 277 and Article 275, paragraphs 1 and 2, of the CCP). The persons who requested the measure or the close relatives are treated as respondent parties in the procedure. There is nothing to prevent the party that applied for a person to be deprived of legal capacity from requesting the termination of the measure if circumstances have changed.
>
> Persons under partial guardianship may request, either individually or with the consent of their guardian, that the measure be lifted. They may also ask the

guardianship authority or the guardianship council to bring an action under Article 277 of the CCP in the regional court which deprived them of legal capacity. In such cases, they must show that the application is in their interests by producing a medical certificate. In the context of such an action, they will be treated as the claimant. Where the guardian of a partially incapacitated person, the guardianship authority or the guardianship council (in the case of a fully incapacitated person) refuses to bring an action for restoration of legal capacity, the incapacitated person may ask the public prosecutor to do so (Постановление № 5/79 от 13.II.1980 г., Пленум на ВС)."

52. In addition, the Government cited a case in which proceedings for the review of the legal status of a person entirely deprived of legal capacity had been instituted at the guardian's request and the person had been released from guardianship (Решение № 1301 от 12.11.2008 г. на ВКС по гр. Д. № 5560/2007 г., V г.о.).

E. Validity of contracts signed by representatives of incapacitated persons

53. Section 26(2) of the Obligations and Contracts Act 1950 provides that contracts that are in breach of the law or have been entered into in the absence of consent are deemed null and void.

54. In accordance with section 27 of the same Act, contracts entered into by representatives of persons deprived of legal capacity in breach of the applicable rules are deemed voidable. A ground of incurable nullity may be raised on any occasion, whereas a ground of voidability may be raised only by means of a court action. The right to raise a ground of voidability becomes time-barred after a period of three years from the date of release from partial guardianship if a guardian is not appointed. In other cases, the period in question begins to run from the date on which a guardian is appointed (section 32(2), in conjunction with section 115(1)(e), of the above-mentioned Act; see also Решение на ВС № 668 от 14.III.1963 г. по гр. д. № 250/63 г., I г. о., Решение на Окръжен съд – Стара Загора от 2.2.2010 г. по т. д. № 381/2009 г. на I състав, Решение на Районен съд Стара Загора № 459 от 19.5.2009 г. по гр. д. № 1087/2008).

F. Place of residence of legally incapacitated persons

55. By virtue of Article 120 and Article 122, paragraph 3, of the 1985 FC, persons deprived of legal capacity are deemed to reside at the home address of their guardian, unless "exceptional reasons" require them to live elsewhere. Where the place of residence is changed without the guardian's consent, the guardian may request the district court to order the person's return to the official address. By Article 163, paragraphs 2 and 3, of the 2009 FC, before reaching a decision in such cases, the court is required to interview the person under guardianship. If it finds that there are

"exceptional reasons", it must refuse to order the person's return and must immediately inform the municipal social assistance department so that protective measures can be taken.

56. The district court's order may be appealed against to the president of the regional court, although its execution cannot be stayed.

G. Placement of legally incapacitated persons in social care homes for adults with mental disorders

57. Under the Social Assistance Act 1998, social assistance is available to people who, for medical and social reasons, are incapable of meeting their basic needs on their own through work, through their own assets or with the help of persons required by law to care for them (section 2 of the Act). Social assistance consists of the provision of various financial benefits, benefits in kind and social services, including placement in specialised institutions. Such benefits are granted on the basis of an individual assessment of the needs of the persons concerned and in accordance with their wishes and personal choices (section 16(2)).

58. By virtue of the implementing regulations for the Social Assistance Act 1998 (*Правилник за прилагане на Закона за социално подпомагане*), three categories of institutions are defined as "specialised institutions" for the provision of social services: (1) children's homes (homes for children deprived of parental care, homes for children with physical disabilities, homes for children with a mental deficiency); (2) homes for adults with disabilities (homes for adults with a mental deficiency, homes for adults with mental disorders, homes for adults with physical disabilities, homes for adults with sensory disorders, homes for adults with dementia), and (3) old people's homes (regulation 36(3)). Social services are provided in specialised institutions where it is no longer possible to receive them in the community (regulation 36(4)). Under domestic law, placement of a legally incapacitated person in a social care home is not regarded as a form of deprivation of liberty.

59. Similarly, in accordance with Decree no. 4 of 16 March 1999 on the conditions for obtaining social services, adopted on 16 March 1999 (*Наредба № 4 за условията и реда за извършване на социални услуги*), adults with mental deficiencies are placed in specialised social care homes if it is impossible to provide them with the necessary medical care in a family environment (section 12, point (4), and section 27 of the Decree). Section 33(1), point (3), of the Decree provides that when a person is placed in a social care home, a medical certificate concerning the person's state of health must be produced. By section 37(1) of the Decree, a placement agreement for the provision of social services is signed between the specialised institution and the person concerned or his or her legal representative, on the basis of a model approved by the Ministry of Labour

and Social Policy. The person may be transferred to another home or may leave the institution in which he or she has been placed: (1) at his or her request or at the request of his or her legal representative, submitted in writing to the director of the institution; (2) if there is a change in the state of his or her mental and/or physical health such that it no longer corresponds to the profile of the home; (3) in the event of failure to pay the monthly social-welfare contribution for more than one month; (4) in the event of systematic breaches of the institution's internal rules; or (5) in the event of a confirmed addiction to narcotic substances.

60. Furthermore, the system governing admission to a psychiatric hospital for compulsory medical treatment is set out in the Health Act 2005, which replaced the Public Health Act 1973.

H. Appointment of an *ad hoc* representative in the event of a conflict of interests

61. Article 16, paragraph 6, of the CCP provides that, in the event of a conflict of interests between a person being represented and the representative, the court is to appoint an *ad hoc* representative. The Bulgarian courts have applied this provision in certain situations involving a conflict of interests between minors and their legal representative. Thus, the failure to appoint an *ad hoc* representative has been found to amount to a substantial breach of the rules governing paternity proceedings (Решение на ВС № 297 от 15.04.1987 г. по гр. д. № 168/87 г., II г. о.), disputes between adoptive and biological parents (Решение на ВС № 1381 от 10.05.1982 г. по гр. д. № 954/82 г., II г. о.) or property disputes (Решение № 643 от 27.07.2000 г. на ВКС по гр. д. № 27/2000 г., II г. о.; Определение на ОС – Велико Търново от 5.11.2008 г. по в. ч. гр. д. № 963/2008).

I. State liability

62. The State and Municipalities Responsibility for Damage Act 1988 (*Закон за отговорността на държавата и общините за вреди* – title amended in 2006) provides in section 2(1) that the State is liable for damage caused to private individuals as a result of a judicial decision ordering certain types of detention where the decision has been set aside as having no legal basis.

63. Section 1(1) of the same Act provides that the State and municipalities are liable for damage caused to private individuals and other legal entities as a result of unlawful decisions, acts or omissions by their own authorities or officials while discharging their administrative duties.

64. In a number of decisions, various domestic courts have found this provision to be applicable to the damage suffered by prisoners as a result of

poor conditions or inadequate medical treatment in prison and have, where appropriate, partly or fully upheld claims for compensation brought by the persons concerned (реш. от 26.01.2004 г. по гр. д. № 959/2003, ВКС, IV г. о. and реш. № 330 от 7.08.2007 г. по гр. д. № 92/2006, ВКС, IV г. о.).

65. There are no court decisions in which the above position has been found to apply to allegations of poor living conditions in social care homes.

66. Moreover, it appears from the domestic courts' case-law that under section 1(1) of the Act in question, anyone whose health has deteriorated because bodies under the authority of the Ministry of Health have failed in their duty to provide a regular supply of medication may hold the administrative authorities liable and receive compensation (реш. № 211 от 27.05.2008 г. по гр. д. № 6087/2007, ВКС, V г. о.).

67. Lastly, the State and its authorities are subject to the ordinary rules on tortious liability for other forms of damage resulting, for example, from the death of a person under guardianship while absconding from a social care home for adults with a mental deficiency, on the ground that the staff of the home had failed to discharge their duty of permanent supervision (реш. № 693 от 26.06.2009 г. по гр. д. № 8/2009, ВКС, III г. о.).

J. Arrest by the police under the Ministry of the Interior Act 2006

68. Under this Act, the police are, *inter alia*, authorised to arrest anyone who, on account of severe mental disturbance and through his or her conduct, poses a threat to public order or puts his or her own life in manifest danger (section 63(1)-(3)). The person concerned may challenge the lawfulness of the arrest before a court, which must give an immediate ruling (section 63(4)).

69. Furthermore, the police's responsibilities include searching for missing persons (section 139(3)).

K. Information submitted by the applicant about searches for persons who have absconded from social care homes for adults with mental disorders

70. The Bulgarian Helsinki Committee conducted a survey of police stations regarding searches for people who had absconded from social care homes of this type. It appears from the survey that there is no uniform practice. Some police officers said that when they were asked by employees of a home to search for a missing person, they carried out the search and took the person to the police station, before informing the home. Other officers explained that they searched for the person but, not being empowered to perform an arrest, simply notified the staff of the home, who took the person back themselves.

L. Statistics submitted by the applicant on judicial proceedings concerning deprivation of legal capacity

71. The Bulgarian Helsinki Committee obtained statistics from eight regional courts on the outcome of proceedings for restoration of legal capacity between January 2002 and September 2009. During this period 677 persons were deprived of legal capacity. Proceedings to restore capacity were instituted in thirty-six cases: ten of them ended with the lifting of the measure; total incapacitation was changed to partial incapacitation in eight cases; the applications were rejected in four cases; the courts discontinued the proceedings in seven cases; and the other cases are still pending.

III. RELEVANT INTERNATIONAL INSTRUMENTS

A. Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly on 13 December 2006 (Resolution A/RES/61/106)

72. This Convention entered into force on 3 May 2008. It was signed by Bulgaria on 27 September 2007 but has yet to be ratified. The relevant parts of the Convention provide:

Article 12
Equal recognition before the law

"1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property."

Article 14
Liberty and security of person

"1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(*a*) Enjoy the right to liberty and security of person;

(*b*) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation."

B. Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults (adopted on 23 February 1999)

73. The relevant parts of this Recommendation read as follows:

Principle 2 – Flexibility in legal response

"1. The measures of protection and other legal arrangements available for the protection of the personal and economic interests of incapable adults should be sufficient, in scope or flexibility, to enable suitable legal response to be made to different degrees of incapacity and various situations.

...

4. The range of measures of protection should include, in appropriate cases, those which do not restrict the legal capacity of the person concerned."

Principle 3 – Maximum reservation of capacity

"1. The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.

2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so. ..."

Principle 6 – Proportionality

"1. Where a measure of protection is necessary it should be proportional to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned.

2. The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention. ...”

Principle 13 – Right to be heard in person

“The person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity.”

Principle 14 – Duration, review and appeal

“1. Measures of protection should, whenever possible and appropriate, be of limited duration. Consideration should be given to the institution of periodical reviews.

...

3. There should be adequate rights of appeal.”

C. Reports on visits to Bulgaria by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

1. The CPT’s report on its visit from 16 to 22 December 2003, published on 24 June 2004

74. This report outlines the situation of persons placed by the public authorities in social care homes for people with mental disorders or mental deficiency, which are under the authority of the Ministry of Labour and Social Policy. Part II.4 of the report is devoted to the Pastra social care home.

75. The CPT noted that the home’s official capacity was 105; it had 92 registered male residents, of whom eighty-six were present at the time of the visit. Two residents had absconded and the others were on home leave. Some 90% of the residents were suffering from schizophrenia and the remainder had a mental deficiency. The majority had spent many years in the institution, discharges being quite uncommon.

76. According to the CPT’s findings, the premises of the Pastra social care home were in a deplorable state of repair and hygiene and the home was inadequately heated.

77. In particular, the buildings did not have running water. The residents washed in cold water in the yard and were often unshaven and dirty. The bathroom, to which they had access once a week, was rudimentary and dilapidated.

78. The toilets, likewise located in the yard, consisted of decrepit shelters with holes dug in the ground. They were in an execrable state and access to them was dangerous. Furthermore, basic toiletries were rarely available.

79. The report notes that the provision of food was inadequate. Residents received three meals a day, including 750 g of bread. Milk and

eggs were never on offer, and fresh fruit and vegetables were rarely available. No provision was made for special diets.

80. The only form of treatment at the home consisted of the provision of medicines. The residents, who were treated as chronic psychiatric patients in need of maintenance therapy, were registered as outpatients with a psychiatrist in Dupnitsa. The psychiatrist visited the home once every two to three months, and also on request. In addition, residents could be taken to the psychiatrist – who held weekly surgeries in the nearby town of Rila – if changes in their mental condition were observed. All residents underwent a psychiatric examination twice a year, which was an occasion for them to have their medication reviewed and, if necessary, adjusted. Nearly all residents received psychiatric medication, which was recorded on a special card and administered by the nurses.

81. Apart from the administration of medication, no therapeutic activities were organised for residents, who led passive, monotonous lives.

82. The CPT concluded that these conditions had created a situation which could be said to amount to inhuman and degrading treatment. It requested the Bulgarian authorities to replace the Pastra social care home as a matter of urgency. In their response of 13 February 2004 the Bulgarian authorities acknowledged that the home was not in conformity with European care standards. They stated that it would be closed as a priority and that the residents would be transferred to other institutions.

83. The CPT further observed, in part II.7 of its report, that in most cases, placement of people with mental disabilities in a specialised institution led to a *de facto* deprivation of liberty. The placement procedure should therefore be surrounded by appropriate safeguards, among them an objective medical, and in particular psychiatric, assessment. It was also essential that these persons should have the right to bring proceedings by which the lawfulness of their placement could be decided speedily by a court. The CPT recommended that such a right be guaranteed in Bulgaria (see paragraph 52 of the report).

2. The CPT's report on its visit from 10 to 21 September 2006, published on 28 February 2008

84. In this report the CPT again recommended that provision be made for the introduction of judicial review of the lawfulness of placement in a social care home (see paragraphs 176-177 of the report).

85. It also recommended that efforts be made to ensure that the placement of residents in homes for people with mental disorders and/or deficiency conformed fully to the letter and spirit of the law. Contracts for the provision of social services should specify the legal rights of residents, including the possibilities for lodging complaints with an outside authority. Furthermore, residents who were incapable of understanding the contracts should receive appropriate assistance (see paragraph 178 of the report).

86. Lastly, the CPT urged the Bulgarian authorities to take the necessary steps to avoid conflicts of interests arising from the appointment of an employee of a social care home as the guardian of a resident of the same institution (see paragraph 179 of the report).

87. The CPT made a further visit to the Pastra social care home during its periodic visit to Bulgaria in October 2010.

IV. COMPARATIVE LAW

A. Access to a court for restoration of legal capacity

88. A comparative study of the domestic law of twenty Council of Europe member States indicates that in the vast majority of cases (Croatia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Luxembourg, Monaco, Poland, Portugal, Romania, Slovakia, Sweden, Switzerland and Turkey) the law entitles anyone who has been deprived of legal capacity to apply directly to the courts for discontinuation of the measure.

89. In Ukraine, people who have been partially deprived of legal capacity may themselves apply for the measure to be lifted; this does not apply to those who have been declared fully incapable, who may nevertheless challenge before a court any measures taken by their guardian.

90. Judicial proceedings for the discontinuation of an order depriving a person of legal capacity cannot be instituted directly by the person concerned in Latvia (where an application may be made by the public prosecutor or the guardianship council) or Ireland.

B. Placement of legally incapacitated persons in a specialised institution

91. A comparative-law study of the legislation of twenty States Parties to the Convention shows that there is no uniform approach in Europe to the question of placement of legally incapacitated persons in specialised institutions, particularly as regards the authority competent to order the placement and the guarantees afforded to the person concerned. It may nevertheless be observed that in some countries (Austria, Estonia, Finland, France, Germany, Greece, Poland, Portugal and Turkey) the decision to place a person in a home on a long-term basis against his or her will is taken directly or approved by a judge.

92. Other legal systems (Belgium, Denmark, Hungary, Ireland, Latvia, Luxembourg, Monaco and the United Kingdom) authorise the guardian, close relatives or the administrative authorities to decide on placement in a specialised institution without a judge’s approval being necessary. It also

appears that in all the above-mentioned countries, the placement is subject to a number of substantive requirements, relating in particular to the person's health, the existence of a danger or risk and/or the production of medical certificates. In addition, the obligation to interview or consult the person concerned on the subject of the placement, the setting of a time-limit by law or by the courts for the termination or review of the placement, and the possibility of legal assistance are among the safeguards provided in several national legal systems.

93. In certain countries (Denmark, Estonia, Germany, Greece, Hungary, Ireland, Latvia, Poland, Slovakia, Switzerland and Turkey) the possibility of challenging the initial placement order before a judicial body is available to the person concerned without requiring the guardian's consent.

94. Lastly, several States (Denmark, Estonia, Finland, Germany, Greece, Ireland, Latvia, Poland, Switzerland and Turkey) directly empower the person concerned to apply periodically for judicial review of the lawfulness of the continued placement.

95. It should also be noted that many countries' laws on legal capacity or placement in specialised institutions have recently been amended (Austria: 2007; Denmark: 2007; Estonia: 2005; Finland: 1999; France: 2007; Germany: 1992; Greece: 1992; Hungary: 2004; Latvia: 2006; Poland: 2007; Ukraine: 2000; United Kingdom: 2005) or are in the process of amendment (Ireland). These legislative reforms are designed to increase the legal protection of persons lacking legal capacity by affording them either the right of direct access to court for a review of their status or additional safeguards when they are placed in specialised institutions against their will.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

96. The applicant submitted that his placement in the Pastra social care home was in breach of Article 5 § 1 of the Convention.

Article 5 § 1 provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having

committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

A. Preliminary remarks

97. The Grand Chamber observes that the Government maintained before it the objection they raised before the Chamber alleging failure to exhaust domestic remedies in respect of the complaint under Article 5 § 1.

98. The objection was based on the following arguments. Firstly, the applicant could at any time have applied personally to a court for restoration of his legal capacity, under Article 277 of the CCP, and release from guardianship would have allowed him to leave the home of his own accord. Secondly, his close relatives had not availed themselves of the possibility open to some of them, under Articles 113 and 115 of the FC, of asking the guardianship authority to replace his guardian. According to the Government, in the event of a refusal the applicants' relatives could have applied to a court, which would have considered the merits of the request and, if appropriate, appointed a new guardian, who would then have been able to terminate the placement agreement. The Government also submitted in substance that the applicant's close relatives could have challenged the contract signed between the guardian R.P. and the Pastra social care home. Lastly, they indicated that the applicant himself could have requested the guardianship authority to appoint an *ad hoc* representative on account of his alleged conflict of interests with his guardian, with a view to requesting to leave the institution and establish his home elsewhere (Article 123, paragraph 1, of the FC).

99. The Grand Chamber observes that in its admissibility decision of 29 June 2010 the Chamber found that this objection raised questions that were closely linked to those arising in relation to the applicant's complaint under Article 5 § 4 and therefore joined the objection to its examination of the merits under that provision.

100. In addition, finding that the question whether there had been a "deprivation of liberty" within the meaning of Article 5 § 1 in the present case was closely linked to the merits of the complaint under that provision, the Chamber likewise joined that issue to its examination of the merits. The

Grand Chamber sees no reason to call into question the Chamber's findings on these issues.

B. Whether the applicant was deprived of his liberty within the meaning of Article 5 § 1

1. The parties' submissions

(a) The applicant

101. The applicant contended that although under domestic law, placement of people with mental disorders in a social care institution was regarded as "voluntary", his transfer to the Pastra social care home constituted a deprivation of liberty. He maintained that, as in the case of *Storck v. Germany* (no. 61603/00, ECHR 2005-V), the objective and subjective elements of detention were present in his case.

102. With regard to the nature of the measure, the applicant submitted that living in a social care home in a remote mountain location amounted to physical isolation from society. He could not have chosen to leave on his own initiative since, having no identity papers or money, he would soon have faced the risk of being stopped by the police for a routine check, a widespread practice in Bulgaria.

103. Absences from the social care home were subject to permission. The distance of approximately 420 km between the institution and his home town and the fact that he had no access to his invalidity pension had made it impossible for him to travel to Ruse any more than three times. The applicant further submitted that he had been denied permission to travel on many other occasions by the home's management. He added that, in accordance with a practice with no legal basis, residents who left the premises for longer than the authorised period were treated as fugitives and were searched for by the police. He stated in that connection that on one occasion the police had arrested him in Ruse and that, although they had not taken him back to the home, the fact that the director had asked for him to be located and transferred back had amounted to a decisive restriction on his right to personal liberty. He stated that he had been arrested and detained by the police pending the arrival of staff from the home to collect him, without having been informed of the grounds for depriving him of his liberty. Since he had been transferred back under duress, it was immaterial that those involved had been employees of the home.

104. The applicant further noted that his placement in the home had already lasted more than eight years and that his hopes of leaving one day were futile, as the decision had to be approved by his guardian.

105. As to the consequences of his placement, the applicant highlighted the severity of the regime to which he was subject. His occupational activities, treatment and movements had been subject to thorough and

practical supervision by the home's employees. He had been required to follow a strict daily routine, getting up, going to bed and eating at set times. He had had no free choice as to his clothing, the preparation of his meals, participation in cultural events or the development of relations with other people, including intimate relationships as the home's residents were all men. He had been allowed to watch television in the morning only. Accordingly, his stay in the home had caused a perceptible deterioration in his well-being and the onset of institutionalisation syndrome, in other words the inability to reintegrate into the community and lead a normal life.

106. With regard to the subjective element, the applicant submitted that his situation differed from that examined in *H.M. v. Switzerland* (no. 39187/98, ECHR 2002-II), in which the applicant had consented to her placement in a nursing home. He himself had never given such consent. His guardian at the time, Ms R.P. (see paragraph 12 above), had not consulted him on the placement and, moreover, he did not even know her; nor had he been informed of the existence of the placement agreement of 10 December 2002 (see paragraph 14 above), which he had never signed. Those circumstances reflected a widespread practice in Bulgaria whereby once people were deprived of legal capacity, even partially, they were deemed incapable of expressing their wishes. In addition, it was clear from the medical documents that the applicant's desire to leave the home had been interpreted not as a freely expressed wish, but rather as a symptom of his mental illness.

107. Lastly, in the case of *H.M. v. Switzerland* (cited above) the authorities had based their decision to place the applicant in a nursing home on a thorough examination showing that the living conditions in her own home had severely deteriorated as a result of her lack of cooperation with a social welfare authority. By contrast, the applicant in the present case had never been offered and had never refused alternative social care at home.

(b) The Government

108. In their written observations before the Chamber, the Government accepted that the circumstances of the case amounted to a "deprivation of liberty" within the meaning of Article 5 § 1 of the Convention. However, at the hearing and in the proceedings before the Grand Chamber, they contended that Article 5 was not applicable. They observed in that connection that the applicant had not been compulsorily admitted to a psychiatric institution by the public authorities under the Public Health Act, but had been housed in a social care home at his guardian's request, on the basis of a civil-law agreement and in accordance with the rules on social assistance. Thus, persons in need of assistance, including those with mental disorders, could request various social and medical services, either directly or through their representatives, under the Social Assistance Act 1998 (see paragraphs 57-60 above). Homes for adults with mental disorders offered a

wide range of services of this kind and placement in such institutions could not be seen as a deprivation of liberty.

109. As to the particular circumstances of the case, the Government emphasised that the applicant had never expressly and consciously objected to his placement in the home, and it could not therefore be concluded that the measure had been involuntary. Furthermore, he had been free to leave the home at any time.

110. In addition, the applicant had been encouraged to work in the village restaurant to the best of his abilities and had been granted leave of absence on three occasions. The reason why he had twice returned from Ruse before the end of his authorised period of leave (see paragraph 27 above) was his lack of accommodation. The Government further submitted that the applicant had never been brought back to the home by the police. They acknowledged that in September 2006 the director had been obliged to ask the police to search for him because he had not come back (see paragraph 28 above). However, it was clear from the case of *Dodov v. Bulgaria* (no. 59548/00, 17 January 2008) that the State had a positive obligation to take care of people housed in social care homes. In the Government's submission, the steps taken by the director had formed part of this duty of protection.

111. The Government further observed that the applicant had lacked legal capacity and had not had the benefit of a supportive family environment, accommodation or sufficient resources to lead an independent life. Referring in that connection to the judgments in *H.M. v. Switzerland* (cited above) and *Nielsen v. Denmark* (28 November 1988, Series A no. 144), they submitted that the applicant's placement in the home was simply a protective measure taken in his interests alone and constituted an appropriate response to a social and medical emergency; such a response could not be viewed as involuntary.

(c) The third party

112. Interights made the following general observations. It stated that it had carried out a survey of practices regarding placement of people with mental disorders in specialised institutions in central and east European countries. According to the conclusions of the survey, in most cases placement in such institutions could be regarded as amounting to a *de facto* deprivation of liberty.

113. Social care homes were often located in rural or mountainous areas which were not easily accessible. Where they were situated near urban areas, they were surrounded by high walls or fences and the gates were kept locked. As a rule, residents were able to leave the premises only with the express permission of the director of the home, and for a limited period. In cases of unauthorised leave, the police had the power to search for and return the persons concerned. The same restrictive regime applied to all

residents, without any distinction according to legal status – whether they had full, partial or no legal capacity – and in the view of Interights, this was a decisive factor. No consideration at all was given to whether the placement was voluntary or involuntary.

114. Regarding the analysis of the subjective aspect of the placement, Interights submitted that the consent of the persons concerned was a matter requiring careful attention. Thorough efforts should be made to ascertain their true wishes, notwithstanding any declaration of legal incapacity that might have been made in their case. Interights contended that in reality, when faced with a choice between a precarious, homeless existence and the relative security offered by a social care home, incapable persons in central and east European countries might opt for the latter solution, simply because no alternative services were offered by the State's social welfare system. That did not mean, however, that the persons concerned could be said to have freely consented to the placement.

2. The Court's assessment

(a) General principles

115. The Court reiterates that the difference between deprivation of liberty and restrictions on liberty of movement, the latter being governed by Article 2 of Protocol No. 4, is merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends (see *Guzzardi v. Italy*, 6 November 1980, §§ 92-93, Series A no. 39). In order to determine whether someone has been deprived of his liberty, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see *Storck*, cited above, § 71, and *Guzzardi*, cited above, § 92).

116. In the context of deprivation of liberty on mental-health grounds, the Court has held that a person could be regarded as having been "detained" even during a period when he was in an open hospital ward with regular unescorted access to the unsecured hospital grounds and the possibility of unescorted leave outside the hospital (see *Ashingdane v. the United Kingdom*, 28 May 1985, § 42, Series A no. 93).

117. Furthermore, in relation to the placement of mentally disordered persons in an institution, the Court has held that the notion of deprivation of liberty does not only comprise the objective element of a person's confinement in a particular restricted space for a not negligible length of time. A person can only be considered to have been deprived of his liberty

if, as an additional subjective element, he has not validly consented to the confinement in question (see *Storck*, cited above, § 74).

118. The Court has found that there was a deprivation of liberty in circumstances such as the following: (a) where the applicant, who had been declared legally incapable and admitted to a psychiatric hospital at his legal representative's request, had unsuccessfully attempted to leave the hospital (see *Shtukaturov v. Russia*, no. 44009/05, § 108, 27 March 2008); (b) where the applicant had initially consented to her admission to a clinic but had subsequently attempted to escape (see *Storck*, cited above, § 76); and (c) where the applicant was an adult incapable of giving his consent to admission to a psychiatric institution which, nonetheless, he had never attempted to leave (see *H.L. v. the United Kingdom*, no. 45508/99, §§ 89-94, ECHR 2004-IX).

119. The Court has also held that the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention (see *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, §§ 64-65, Series A no. 12), especially when it is not disputed that that person is legally incapable of consenting to, or disagreeing with, the proposed action (see *H.L. v. the United Kingdom*, cited above, § 90).

120. In addition, the Court has had occasion to observe that the first sentence of Article 5 § 1 must be construed as laying down a positive obligation on the State to protect the liberty of those within its jurisdiction. Otherwise, there would be a sizeable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society. The State is therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge (see *Storck*, cited above, § 102). Thus, having regard to the particular circumstances of the cases before it, the Court has held that the national authorities' responsibility was engaged as a result of detention in a psychiatric hospital at the request of the applicant's guardian (see *Shtukaturov*, cited above) and detention in a private clinic (see *Storck*, cited above).

(b) Application of these principles in the present case

121. The Court observes at the outset that it is unnecessary in the present case to determine whether, in general terms, any placement of a legally incapacitated person in a social care institution constitutes a "deprivation of liberty" within the meaning of Article 5 § 1. In some cases, the placement is initiated by families who are also involved in the guardianship arrangements and is based on civil-law agreements signed with an appropriate social care institution. Accordingly, any restrictions on liberty in such cases are the result of actions by private individuals and the authorities' role is limited to

supervision. The Court is not called upon in the present case to rule on the obligations that may arise under the Convention for the authorities in such situations.

122. It observes that there are special circumstances in the present case. No members of the applicant's family were involved in his guardianship arrangements, and the duties of guardian were assigned to a State official (Ms R.P.), who negotiated and signed the placement agreement with the Pastra social care home without any contact with the applicant, whom she had in fact never met. The placement agreement was implemented in a State-run institution by the social services, which likewise did not interview the applicant (see paragraphs 12-15 above). The applicant was never consulted about his guardian's choices, even though he could have expressed a valid opinion and his consent was necessary in accordance with the Persons and Family Act 1949 (see paragraph 42 above). That being so, he was not transferred to the Pastra social care home at his request or on the basis of a voluntary private-law agreement on admission to an institution to receive social assistance and protection. The Court considers that the restrictions complained of by the applicant are the result of various steps taken by public authorities and institutions through their officials, from the initial request for his placement in an institution and throughout the implementation of the relevant measure, and not of acts or initiatives by private individuals. Although there is no indication that the applicant's guardian acted in bad faith, the above considerations set the present case apart from *Nielsen* (cited above), in which the applicant's mother committed her son, a minor, to a psychiatric institution in good faith, which prompted the Court to find that the measure in question entailed the exercise of exclusive custodial rights over a child who was not capable of expressing a valid opinion.

123. The applicant's placement in the social care home can therefore be said to have been attributable to the national authorities. It remains to be determined whether the restrictions resulting from that measure amounted to a "deprivation of liberty" within the meaning of Article 5.

124. With regard to the objective aspect, the Court observes that the applicant was housed in a block which he was able to leave, but emphasises that the question whether the building was locked is not decisive (see *Ashingdane*, cited above, § 42). While it is true that the applicant was able to go to the nearest village, he needed express permission to do so (see paragraph 25 above). Moreover, the time he spent away from the home and the places where he could go were always subject to controls and restrictions.

125. The Court further notes that between 2002 and 2009 the applicant was granted leave of absence for three short visits (of about ten days) to Ruse (see paragraphs 26-28 above). It cannot speculate as to whether he could have made more frequent visits had he asked to do so. Nevertheless, it

observes that such leave of absence was entirely at the discretion of the home's management, who kept the applicant's identity papers and administered his finances, including transport costs (see paragraphs 25-26 above). Furthermore, it would appear to the Court that the home's location in a mountain region far away from Ruse (some 400 km) made any journey difficult and expensive for the applicant in view of his income and his ability to make his own travel arrangements.

126. The Court considers that this system of leave of absence and the fact that the management kept the applicant's identity papers placed significant restrictions on his personal liberty.

127. Moreover, it is not disputed that when the applicant did not return from leave of absence in 2006, the home's management asked the Ruse police to search for and return him (see paragraph 28 above). The Court can accept that such steps form part of the responsibilities assumed by the management of a home for people with mental disorders towards its residents. It further notes that the police did not escort the applicant back and that he has not proved that he was arrested pending the arrival of staff from the home. Nevertheless, since his authorised period of leave had expired, the staff returned him to the home without regard for his wishes.

128. Accordingly, although the applicant was able to undertake certain journeys, the factors outlined above lead the Court to consider that, contrary to what the Government maintained, he was under constant supervision and was not free to leave the home without permission whenever he wished. With reference to the *Dodov* case (cited above), the Government maintained that the restrictions in issue had been necessary in view of the authorities' positive obligations to protect the applicant's life and health. The Court notes that in the above-mentioned case, the applicant's mother suffered from Alzheimer's disease and that, as a result, her memory and other mental capacities had progressively deteriorated, to the extent that the nursing home staff had been instructed not to leave her unattended. In the present case, however, the Government have not shown that the applicant's state of health was such as to put him at immediate risk, or to require the imposition of any special restrictions to protect his life and limb.

129. As regards the duration of the measure, the Court observes that it was not specified and was thus indefinite since the applicant was listed in the municipal registers as having his permanent address at the home, where he still remains (having lived there for more than eight years). This period is sufficiently lengthy for him to have felt the full adverse effects of the restrictions imposed on him.

130. As to the subjective aspect of the measure, it should be noted that, contrary to the requirements of domestic law (see paragraph 42 above), the applicant was not asked to give his opinion on his placement in the home and never explicitly consented to it. Instead, he was taken to Pastra by ambulance and placed in the home without being informed of the reasons

for or duration of that measure, which had been taken by his officially assigned guardian. The Court observes in this connection that there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned. However, the Court has already held that the fact that a person lacks legal capacity does not necessarily mean that he is unable to comprehend his situation (see *Shtukaturov*, cited above, § 108). In the present case, domestic law attached a certain weight to the applicant's wishes and it appears that he was well aware of his situation. The Court notes that, at least from 2004, the applicant explicitly expressed his desire to leave the Pastra social care home, both to psychiatrists and through his applications to the authorities to have his legal capacity restored and to be released from guardianship (see paragraphs 37-41 above).

131. These factors set the present case apart from *H.M. v. Switzerland* (cited above), in which the Court found that there had been no deprivation of liberty as the applicant had been placed in a nursing home purely in her own interests and, after her arrival there, had agreed to stay. In that connection the Government have not shown that in the present case, on arrival at the Pastra social care home or at any later date, the applicant agreed to stay there. That being so, the Court is not convinced that the applicant consented to the placement or accepted it tacitly at a later stage and throughout his stay.

132. Having regard to the particular circumstances of the present case, especially the involvement of the authorities in the decision to place the applicant in the home and its implementation, the rules on leave of absence, the duration of the placement and the applicant's lack of consent, the Court concludes that the situation under examination amounts to a deprivation of liberty within the meaning of Article 5 § 1 of the Convention. Accordingly, that provision is applicable.

C. Whether the applicant's placement in the Pastra social care home was compatible with Article 5 § 1

1. The parties' submissions

(a) The applicant

133. The applicant submitted that, since he had not consented to his placement in the Pastra social care home and had not signed the agreement drawn up between his guardian and the home, the agreement was in breach of the Persons and Family Act. He added that he had not been informed of the agreement's existence at the time of his placement and that he had remained unaware of it for a long time afterwards. Nor had he had any

opportunity to challenge this step taken by his guardian. Although the guardian had been required by Article 126 of the Family Code to report on her activities to the guardianship authority (the mayor), the latter was not empowered to take any action against her. Furthermore, no report had ever been drawn up in respect of the applicant, and his guardians had never been called to account for that shortcoming.

134. The applicant further argued that his placement in a home for people with mental disorders did not fall within any of the grounds on which deprivation of liberty could be justified for the purposes of Article 5. The measure in question had not been justified by the need to ensure public safety or by the inability of the person concerned to cope outside the institution. In support of that contention, the applicant argued that the director of the home had deemed him capable of integrating into the community and that attempts had been made to bring him closer to his family, albeit to no avail. Accordingly, the authorities had based their decision to place him in the home on the simple fact that his family were not prepared to take care of him and he needed social assistance. They had not examined whether the necessary assistance could be provided through alternative measures that were less restrictive of his personal liberty. Such measures were, moreover, quite conceivable since Bulgarian legislation made provision for a wide range of social services, such as personal assistance, social rehabilitation centres and special allowances and pensions. The authorities had thus failed to strike a fair balance between the applicant's social needs and his right to liberty. It would be arbitrary, and contrary to the purpose of Article 5, for detention to be based on purely social considerations.

135. Should the Court take the view that the placement fell within the scope of Article 5 § 1 (e), by which persons of unsound mind could be deprived of their liberty, the applicant submitted that the national authorities had not satisfied the requirements of that provision. In the absence of a recent psychiatric assessment, it was clear that his placement in the home had not pursued the aim of providing him with medical treatment and had been based solely on medical documents produced in the context of the proceedings for his legal incapacitation. The documents had been issued approximately a year and a half beforehand and had not strictly concerned his placement in an institution for people with mental disorders. Relying on *Varbanov v. Bulgaria* (no. 31365/96, § 47, ECHR 2000-X), the applicant stated that he had been placed in the Pastra social care home without having undergone any assessment of his mental health at that time.

(b) The Government

136. The Government submitted that the applicant's placement in the home complied with domestic law as the guardian had signed an agreement whereby the applicant was to receive social services in his own interests.

She had therefore acted in accordance with her responsibilities and had discharged her duty to protect the person under partial guardianship.

137. Bearing in mind that the sole purpose of the placement had been to provide the applicant with social services under the Social Assistance Act and not to administer compulsory medical treatment, the Government submitted that this measure was not governed by Article 5 § 1 (e) of the Convention. In that connection, the authorities had taken into account his financial and family situation, that is to say, his lack of resources and the absence of close relatives able to assist him on a day-to-day basis.

138. The Government noted at the same time that the applicant could in any event be regarded as a "person of unsound mind" within the meaning of Article 5 § 1 (e). The medical assessment carried out during the proceedings for his legal incapacitation in 2000 showed clearly that he was suffering from mental disorders and that it was therefore legitimate for the authorities to place him in an institution for people with similar problems. Lastly, relying on the *Ashingdane* judgment (cited above, § 44), the Government submitted that there was an adequate link between the reason given for the placement, namely the applicant's state of health, and the institution in which he had been placed. Accordingly, they contended that the measure in issue had not been in breach of Article 5 § 1 (e).

(c) The third party

139. On the basis of the study referred to in paragraphs 112-114 above, Interights submitted that in central and east European countries, the placement of mentally disordered persons in a social care home was viewed solely in terms of social protection and was governed by contractual law. Since such placements were not regarded as a form of deprivation of liberty under domestic law, the procedural safeguards available in relation to involuntary psychiatric confinement were not applicable.

140. Interights contended that situations of this nature were comparable to that examined in the case of *H.L. v. the United Kingdom* (cited above), in which criticism had been levelled at the system prior to 2007 in the United Kingdom, whereby the common-law doctrine of necessity had permitted the "informal" detention of compliant incapacitated persons with mental disorders. The Court had held that the lack of any fixed procedural rules on the admission and detention of such persons was striking. In its view, the contrast between this dearth of regulation and the extensive network of safeguards applicable to formal psychiatric committals covered by mental-health legislation was significant. In the absence of a formalised admission procedure, indicating who could propose admission, for what reasons and on what basis, and given the lack of indication as to the length of the detention or the nature of treatment or care, the hospital's health-care professionals had assumed full control of the liberty and treatment of a vulnerable incapacitated person solely on the basis of their own clinical

assessments completed as and when they saw fit. While not doubting that those professionals had acted in good faith and in the applicant's best interests, the Court had observed that the very purpose of procedural safeguards was to protect individuals against any misjudgments and professional lapses (*H.L. v. the United Kingdom*, cited above, §§ 120-121).

141. Interights urged the Court to remain consistent with that approach and to find that in the present case the informal nature of admission to and continued detention in a social care home was at odds with the guarantees against arbitrariness under Article 5. The courts had not been involved at any stage of the proceedings and no other independent body had been assigned the task of monitoring the institutions in question. The lack of regulation coupled with the vulnerability of mentally disordered persons facilitated abuses of fundamental rights in a context of extremely limited supervision.

142. The third party further submitted that in most cases of this kind, placements were automatic as there were few possibilities of alternative social assistance. It contended that the authorities should be under a practical obligation to provide for appropriate measures that were less restrictive of personal liberty but were nonetheless capable of ensuring medical care and social services for mentally disordered persons. This would be a means of applying the principle that the rights guaranteed by the Convention should not be theoretical or illusory but practical and effective.

2. The Court's assessment

(a) General principles

143. The Court reiterates that in order to comply with Article 5 § 1, the detention in issue must first of all be "lawful", including the observance of a procedure prescribed by law; in this respect the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. It requires in addition, however, that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness (see *Herczegfalvy v. Austria*, 24 September 1992, § 63, Series A no. 244). Furthermore, the detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law; it must also be necessary in the circumstances (see *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000-III).

144. In addition, sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds of deprivation of liberty; such a measure will not be lawful unless it falls within one of those grounds (ibid.,

§ 49; see also, in particular, *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, 29 January 2008, and *Jendrowiak v. Germany*, no. 30060/04, § 31, 14 April 2011).

145. As regards the deprivation of liberty of mentally disordered persons, an individual cannot be deprived of his liberty as being of "unsound mind" unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33; *Shtukaturov*, cited above, § 114; and *Varbanov*, cited above, § 45).

146. As to the second of the above conditions, the detention of a mentally disordered person may be necessary not only where the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him, for example, causing harm to himself or other persons (see *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 52, ECHR 2003-IV).

147. The Court further reiterates that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the "detention" of a person as a mental-health patient will be "lawful" for the purposes of Article 5 § 1 (e) only if effected in a hospital, clinic or other appropriate institution authorised for that purpose (see *Ashingdane*, cited above, § 44, and *Pankiewicz v. Poland*, no. 34151/04, §§ 42-45, 12 February 2008). However, subject to the foregoing, Article 5 § 1 (e) is not in principle concerned with suitable treatment or conditions (see *Ashingdane*, cited above, § 44, and *Hutchison Reid*, cited above, § 49).

(b) Application of these principles in the present case

148. In examining whether the applicant's placement in the Pastra social care home was lawful for the purposes of Article 5 § 1, the Court must ascertain whether the measure in question complied with domestic law, whether it fell within the scope of one of the exceptions provided for in sub-paragraphs (a) to (f) of Article 5 § 1 to the rule of personal liberty, and, lastly, whether it was justified on the basis of one of those exceptions.

149. On the basis of the relevant domestic instruments (see paragraphs 57-59 above), the Court notes that Bulgarian law envisages placement in a social care institution as a protective measure taken at the request of the person concerned and not a coercive one ordered on one of the grounds listed in sub-paragraphs (a) to (f) of Article 5 § 1. However, in the particular circumstances of the instant case, the measure in question entailed significant restrictions on personal freedom giving rise to a deprivation of

liberty with no regard for the applicant's will or wishes (see paragraphs 121-132 above).

150. As to whether a procedure prescribed by law was followed, the Court notes firstly that under domestic law, the guardian of a person partially lacking legal capacity is not empowered to take legal steps on that person's behalf. Any contracts drawn up in such cases are valid only when signed together by the guardian and the person under partial guardianship (see paragraph 42 above). The Court therefore concludes that the decision by the applicant's guardian R.P. to place him in a social care home for people with mental disorders without having obtained his prior consent was invalid under Bulgarian law. This conclusion is in itself sufficient for the Court to establish that the applicant's deprivation of liberty was contrary to Article 5.

151. In any event, the Court considers that that measure was not lawful within the meaning of Article 5 § 1 of the Convention since it was not justified on the basis of any of sub-paragraphs (a) to (f).

152. The applicant accepted that the authorities had acted mainly on the basis of the arrangements governing social assistance (see paragraph 134 above). However, he argued that the restrictions imposed amounted to a deprivation of liberty which had not been warranted by any of the exceptions provided for in sub-paragraphs (a) to (f) of Article 5 § 1 to the rule of personal liberty. The Government contended that the applicant's placement in the home had been intended solely to protect his interest in receiving social care (see paragraphs 136-137 above). However, they stated that should the Court decide that Article 5 § 1 was applicable, the measure in question should be held to comply with sub-paragraph (e) in view of the applicant's mental disorder (see paragraph 138 above).

153. The Court notes that the applicant was eligible for social assistance as he had no accommodation and was unable to work as a result of his illness. It takes the view that, in certain circumstances, the welfare of a person with mental disorders might be a further factor to take into account, in addition to medical evidence, in assessing whether it is necessary to place the person in an institution. However, the objective need for accommodation and social assistance must not automatically lead to the imposition of measures involving deprivation of liberty. The Court considers that any protective measure should reflect as far as possible the wishes of persons capable of expressing their will. Failure to seek their opinion could give rise to situations of abuse and hamper the exercise of the rights of vulnerable persons. Therefore, any measure taken without prior consultation of the interested person will as a rule require careful scrutiny.

154. The Court is prepared to accept that the applicant's placement in the home was the direct consequence of the state of his mental health, the declaration of his partial incapacity and his placement under partial guardianship. Some six days after being appointed as the applicant's

guardian, Ms R.P., without knowing him or meeting him, decided on the strength of the file to ask the social services to place him in a home for people with mental disorders. The social services, for their part, likewise referred to the applicant's mental health in finding that the request should be granted. It seems clear to the Court that if the applicant had not been deprived of legal capacity on account of his mental disorder, he would not have been deprived of his liberty. Therefore, the present case should be examined under sub-paragraph (e) of Article 5 § 1.

155. It remains to be determined whether the applicant's placement in the home satisfied the requirements laid down in the Court's case-law concerning the detention of mentally disordered persons (see the principles outlined in paragraph 145 above). In this connection, the Court reiterates that in deciding whether an individual should be detained as a "person of unsound mind", the national authorities are to be recognised as having a certain discretion since it is in the first place for them to evaluate the evidence adduced before them in a particular case; the Court's task is to review under the Convention the decisions of those authorities (see *Winterwerp*, cited above, § 40, and *Luberti v. Italy*, 23 February 1984, § 27, Series A no. 75).

156. In the instant case it is true that the expert medical report produced in the course of the proceedings for the applicant's legal incapacitation referred to the disorders from which he was suffering. However, the relevant examination took place before November 2000, whereas the applicant was placed in the Pastra social care home on 10 December 2002 (see paragraphs 10 and 14 above). More than two years thus elapsed between the expert psychiatric assessment relied on by the authorities and the applicant's placement in the home, during which time his guardian did not check whether there had been any change in his condition and did not meet or consult him. Unlike the Government (see paragraph 138 above), the Court considers that this period is excessive and that a medical opinion issued in 2000 cannot be regarded as a reliable reflection of the state of the applicant's mental health at the time of his placement. It should also be noted that the national authorities were not under any legal obligation to order a psychiatric report at the time of the placement. The Government explained in that connection that the applicable provisions were those of the Social Assistance Act and not those of the Health Act (see paragraphs 57-60 and 137 above). Nevertheless, in the Court's view, the lack of a recent medical assessment would be sufficient to conclude that the applicant's placement in the home was not lawful for the purposes of Article 5 § 1 (e).

157. As a subsidiary consideration, the Court observes that the other requirements of Article 5 § 1 (e) were not satisfied in the present case either. As regards the need to justify the placement by the severity of the disorder, it notes that the purpose of the 2000 medical report was not to examine whether the applicant's state of health required his placement in a home for

people with mental disorders, but solely to determine the issue of his legal protection. While it is true that Article 5 § 1 (e) authorises the confinement of a person suffering from a mental disorder even where no medical treatment is necessarily envisaged (see *Hutchison Reid*, cited above, § 52), such a measure must be properly justified by the seriousness of the person's condition in the interests of ensuring his or her own protection or that of others. In the present case, however, it has not been established that the applicant posed a danger to himself or to others, for example because of his psychiatric condition; the simple assertion by certain witnesses that he became aggressive when he drank (see paragraph 10 above) cannot suffice for this purpose. Nor have the authorities reported any acts of violence on the applicant's part during his time in the Pastra social care home.

158. The Court also notes deficiencies in the assessment of whether the disorders warranting the applicant's confinement still persisted. Although he was under the supervision of a psychiatrist (see paragraph 31 above), the aim of such supervision was not to provide an assessment at regular intervals of whether he still needed to be kept in the Pastra social care home for the purposes of Article 5 § 1 (e). Indeed, no provision was made for such an assessment under the relevant legislation.

159. Having regard to the foregoing, the Court observes that the applicant's placement in the home was not ordered "in accordance with a procedure prescribed by law" and that his deprivation of liberty was not justified by sub-paragraph (e) of Article 5 § 1. Furthermore, the Government have not indicated any of the other grounds listed in sub-paragraphs (a) to (f) which might have justified the deprivation of liberty in issue in the present case.

160. There has therefore been a violation of Article 5 § 1.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

161. The applicant complained that he had been unable to have the lawfulness of his placement in the Pastra social care home reviewed by a court.

He relied on Article 5 § 4 of the Convention, which provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. The parties' submissions

1. The applicant

162. The applicant submitted that domestic law did not provide for any specific remedies in respect of his situation, such as a periodic judicial

review of the lawfulness of his placement in a home for people with mental disorders. He added that, since he was deemed incapable of taking legal action on his own, domestic law did not afford him the possibility of applying to a court for permission to leave the Pastra social care home. He stated that he had likewise been unable to seek to have the placement agreement terminated, in view of the conflict of interests with his guardian, who at the same time was the director of the home.

163. The applicant further noted that he had not been allowed to apply to the courts to initiate the procedure provided for in Article 277 of the CCP (see paragraph 51 above) and that, moreover, such action would not have led to a review of the lawfulness of his deprivation of liberty but solely to a review of the conditions justifying partial guardianship in his case.

164. He further submitted that the procedure provided for in Articles 113 and 115 of the FC (see paragraphs 49-50 above) in theory afforded his close relatives the right to ask the mayor to replace the guardian or to compel the mayor to terminate the placement agreement. However, this had been an indirect remedy not accessible to him, since his half-sister and his father's second wife had not been willing to initiate such a procedure.

2. The Government

165. The Government submitted that, since the purpose of the applicant's placement in the home had been to provide social services, he could at any time have asked for the placement agreement to be terminated without the courts needing to be involved. In their submission, in so far as the applicant alleged a conflict of interests with his guardian, he could have relied on Article 123, paragraph 1, of the FC (see paragraph 50 above) and requested the guardianship authority to appoint an *ad hoc* representative, who could then have consented to a change of permanent residence.

166. The Government further contended that the applicant's close relatives had not availed themselves of the possibility open to some of them under Articles 113 and 115 of the FC of requesting the guardianship authority to replace his guardian or of challenging steps taken by the latter. They added that in the event of a refusal, his relatives could have appealed to a court, which would have considered the merits of the case and, if appropriate, appointed a new guardian, who could then have terminated the placement agreement. This, in the Government's submission, would have enabled them to challenge in substance the agreement signed between Ms R.P. and the Pastra social care home.

167. Lastly, the Government submitted that an action for restoration of legal capacity (under Article 277 of the CCP – see paragraph 51 above) constituted a remedy for the purposes of Article 5 § 4 since, if a sufficient improvement in the applicant's health had been observed and he had been released from guardianship, he would have been free to leave the home.

B. The Court's assessment

1. General principles

168. The Court reiterates that Article 5 § 4 entitles detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions which are essential for the "lawfulness", in Convention terms, of their deprivation of liberty. The notion of "lawfulness" under paragraph 4 of Article 5 has the same meaning as in paragraph 1, so that a detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. Article 5 § 4 does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 § 1 (see *E. v. Norway*, 29 August 1990, § 50, Series A no. 181-A). The reviewing "court" must not have merely advisory functions but must have the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful (see *Ireland v. the United Kingdom*, 18 January 1978, § 200, Series A no. 25; *Weeks v. the United Kingdom*, 2 March 1987, § 61, Series A no. 114; *Chahal v. the United Kingdom*, 15 November 1996, § 130, *Reports of Judgments and Decisions* 1996-V; and *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 202, 19 February 2009).

169. The forms of judicial review satisfying the requirements of Article 5 § 4 may vary from one domain to another, and will depend on the type of deprivation of liberty in issue. It is not the Court's task to inquire into what would be the most appropriate system in the sphere under examination (see *Shtukaturov*, cited above, § 123).

170. Nevertheless, Article 5 § 4 guarantees a remedy that must be accessible to the person concerned and must afford the possibility of reviewing compliance with the conditions to be satisfied if the detention of a person of unsound mind is to be regarded as "lawful" for the purposes of Article 5 § 1 (e) (see *Ashingdane*, cited above, § 52). The Convention requirement for an act of deprivation of liberty to be amenable to independent judicial scrutiny is of fundamental importance in the context of the underlying purpose of Article 5 of the Convention to provide safeguards against arbitrariness. What is at stake is both the protection of the physical liberty of individuals and their personal security (see *Varbanov*, cited above, § 58). In the case of detention on the ground of mental illness, special procedural safeguards may be called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of

acting for themselves (see, among other authorities, *Winterwerp*, cited above, § 60).

171. Among the principles emerging from the Court's case-law under Article 5 § 4 concerning "persons of unsound mind" are the following:

(a) a person detained for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings "at reasonable intervals" before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his detention;

(b) Article 5 § 4 requires the procedure followed to have a judicial character and to afford the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether proceedings provide adequate guarantees, regard must be had to the particular nature of the circumstances in which they take place;

(c) the judicial proceedings referred to in Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation (see *Megyeri v. Germany*, 12 May 1992, § 22, Series A no. 237-A).

2. Application of these principles in the present case

172. The Court observes that the Government have not indicated any domestic remedy capable of affording the applicant the direct opportunity to challenge the lawfulness of his placement in the Pastra social care home and the continued implementation of that measure. It also notes that the Bulgarian courts were not involved at any time or in any way in the placement and that the domestic legislation does not provide for automatic periodic judicial review of placement in a home for people with mental disorders. Furthermore, since the applicant's placement in the home is not recognised as a deprivation of liberty in Bulgarian law (see paragraph 58 above), there is no provision for any domestic legal remedies by which to challenge its lawfulness in terms of a deprivation of liberty. In addition, the Court notes that, according to the domestic courts' practice, the validity of the placement agreement could have been challenged on the ground of lack of consent only on the guardian's initiative (see paragraph 54 above).

173. In so far as the Government referred to the procedure for restoration of legal capacity under Article 277 of the CCP (see paragraph 167 above), the Court notes that the purpose of this procedure would not have been to examine the lawfulness of the applicant's placement *per se*, but solely to review his legal status (see paragraphs 233-246 below). The Government also referred to the procedures for reviewing steps taken by the guardian (see paragraphs 165-166 above). The Court considers it necessary

to determine whether such remedies could have given rise to a judicial review of the lawfulness of the placement as required by Article 5 § 4.

174. In this connection, it notes that the 1985 FC entitled close relatives of a person under partial guardianship to challenge decisions by the guardianship authority, which in turn was required to review steps taken by the guardian – including the placement agreement – and to replace the latter in the event of failure to discharge his or her duties (see paragraphs 48-50 above). However, the Court notes that those remedies were not directly accessible to the applicant. Moreover, none of the persons theoretically entitled to make use of them displayed any intention of acting in Mr Stanev's interests, and he himself was unable to act on his own initiative without their approval.

175. It is uncertain whether the applicant could have requested the mayor to demand explanations from the guardian or to suspend the implementation of the placement agreement on the ground that it was invalid. In any event, it appears that since he had been partially deprived of legal capacity, the law did not entitle him to apply of his own motion to the courts to challenge steps taken by the mayor (see paragraph 49 above); this was not disputed by the Government.

176. The same conclusion applies as regards the possibility for the applicant to ask the mayor to replace his guardian temporarily with an *ad hoc* representative on the basis of an alleged conflict of interests and then to apply for the termination of the placement agreement. The Court observes in this connection that the mayor has discretion to determine whether there is a conflict of interests (see paragraph 50 above). Lastly, it does not appear that the applicant could have applied of his own motion to the courts for a review on the merits in the event of the mayor's refusal to take such action.

177. The Court therefore concludes that the remedies referred to by the Government were either inaccessible to the applicant or were not judicial in nature. Furthermore, none of them can give rise to a direct review of the lawfulness of the applicant's placement in the Pastra social care home in terms of domestic law and the Convention.

178. Having regard to those considerations, the Court dismisses the Government's objection of failure to exhaust domestic remedies (see paragraphs 97-99 above) and finds that there has been a violation of Article 5 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

179. The applicant submitted that he had not been entitled to compensation for the alleged violations of his rights under Article 5 §§ 1 and 4 of the Convention.

He relied on Article 5 § 5, which provides:

"Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. The parties' submissions

180. The applicant submitted that the circumstances in which unlawful detention could give rise to compensation were exhaustively listed in the State Responsibility for Damage Act 1988 (see paragraphs 62-67 above) and that his own situation was not covered by any of them. He further complained that there were no legal remedies by which compensation could be claimed for a violation of Article 5 § 4.

181. The Government maintained that the compensation procedure under the 1988 Act could have been initiated if the applicant's placement in the home had been found to have no legal basis. Since the placement had been found to be consistent with domestic law and with his own interests, he had not been able to initiate the procedure in question.

B. The Court's assessment

182. The Court reiterates that Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 (see *Wassink v. the Netherlands*, 27 September 1990, § 38, Series A no. 185-A, and *Houtman and Meeus v. Belgium*, no. 22945/07, § 43, 17 March 2009). The right to compensation set forth in paragraph 5 therefore presupposes that a violation of one of the other paragraphs has been established, either by a domestic authority or by the Convention institutions. In this connection, the effective enjoyment of the right to compensation guaranteed by Article 5 § 5 must be ensured with a sufficient degree of certainty (see *Ciulla v. Italy*, 22 February 1989, § 44, Series A no. 148; *Sakık and Others v. Turkey*, 26 November 1997, § 60, *Reports* 1997-VII; and *N.C. v. Italy* [GC], no. 24952/94, § 49, ECHR 2002-X).

183. Turning to the present case, the Court observes that, regard being had to its finding of a violation of paragraphs 1 and 4 of Article 5, paragraph 5 is applicable. It must therefore ascertain whether, prior to the present judgment, the applicant had an enforceable right at domestic level to compensation for damage, or whether he will have such a right following the adoption of this judgment.

184. The Court reiterates in this connection that in order to find a violation of Article 5 § 5, it has to establish that the finding of a violation of one of the other paragraphs of Article 5 could not give rise, either before or after the Court's judgment, to an enforceable claim for compensation before the domestic courts (see *Brogan and Others v. the United Kingdom*, 29 November 1988, §§ 66-67, Series A no. 145-B).

185. Having regard to the case-law cited above, the Court considers that it must first be determined whether the violation of Article 5 §§ 1 and 4 found in the present case could have given rise, before the delivery of this judgment, to an entitlement to compensation before the domestic courts.

186. As regards the violation of Article 5 § 1, the Court observes that section 2(1) of the State Responsibility for Damage Act 1988 provides for compensation for damage resulting from a judicial decision ordering certain types of detention where the decision has been set aside as having no legal basis (see paragraph 62 above). However, that was not the case in this instance. It appears from the case file that the Bulgarian judicial authorities have not at any stage found the measure to have been unlawful or otherwise in breach of Article 5 of the Convention. Moreover, the Government's line of argument has been that the applicant's placement in the home was in accordance with domestic law. The Court therefore concludes that the applicant was unable to claim any compensation under the above-mentioned provision in the absence of an acknowledgment by the national authorities that the placement was unlawful.

187. As to the possibility under section 1 of the same Act of claiming compensation for damage resulting from unlawful acts by the authorities (see paragraph 63 above), the Court observes that the Government have not produced any domestic decisions indicating that that provision is applicable to cases involving the placement of people with mental disorders in social care homes on the basis of civil-law agreements.

188. Furthermore, since no judicial remedy by which to review the lawfulness of the placement was available under Bulgarian law, the applicant could not have invoked State liability as a basis for receiving compensation for the violation of Article 5 § 4.

189. The question then arises whether the judgment in the present case, in which violations of paragraphs 1 and 4 of Article 5 have been found, will entitle the applicant to claim compensation under Bulgarian law. The Court observes that it does not appear from the relevant legislation that any such remedy exists; nor, indeed, have the Government submitted any arguments to prove the contrary.

190. It has therefore not been shown the applicant was able to avail himself prior to the Court's judgment in the present case, or will be able to do so after its delivery, of a right to compensation for the violation of Article 5 §§ 1 and 4.

191. There has therefore been a violation of Article 5 § 5.

IV. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION, TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 13

192. The applicant complained that the living conditions in the Pastra social care home were poor and that no effective remedy was available

under Bulgarian law in respect of that complaint. He relied on Article 3, taken alone and in conjunction with Article 13 of the Convention. These provisions are worded as follows:

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Preliminary objection of failure to exhaust domestic remedies

193. In their memorial before the Grand Chamber the Government for the first time raised an objection of failure to exhaust domestic remedies in respect of the complaint under Article 3 of the Convention. They submitted that the applicant could have obtained compensation for the living conditions in the home by bringing an action under the State Responsibility for Damage Act 1988.

194. The Court reiterates that, in accordance with Rule 55 of the Rules of Court, any plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application (see *N.C. v. Italy*, cited above, § 44). Where an objection of failure to exhaust domestic remedies is raised out of time for the purposes of Rule 55, an estoppel arises and the objection must accordingly be dismissed (see *Velikova v. Bulgaria*, no. 41488/98, § 57, ECHR 2000-VI, and *Tanrıbilir v. Turkey*, no. 21422/93, § 59, 16 November 2000).

195. In the present case the Government have not cited any circumstances justifying their failure to raise the objection in question at the time of the Chamber's examination of the admissibility of the case.

196. That being so, the Court observes that the Government are estopped from raising this objection, which must accordingly be dismissed.

B. Merits of the complaint under Article 3 of the Convention

1. The parties' submissions

197. The applicant submitted that the poor living conditions in the Pastra social care home, in particular the inadequate food, the deplorable sanitary conditions, the lack of heating, the enforced medical treatment, the overcrowded bedrooms and the absence of therapeutic and cultural activities, amounted to treatment prohibited by Article 3.

198. He observed that the Government had already acknowledged in 2004 that such living conditions did not comply with the relevant European standards and had undertaken to make improvements (see paragraph 82 above). However, the conditions had remained unchanged, at least until late 2009.

199. In their observations before the Chamber, the Government acknowledged the deficiencies in the living conditions at the home. They explained that the inadequate financial resources set aside for institutions of this kind formed the main obstacle to ensuring the requisite minimum standard of living. They also stated that, following an inspection by the Social Assistance Agency, the authorities had resolved to close the Pastra social care home and to take steps to improve living conditions for its residents. In the Government's submission, since the living conditions were the same for all the home's residents and there had been no intention to inflict ill-treatment, the applicant had not been subjected to degrading treatment.

200. Before the Grand Chamber the Government stated that renovation work had been carried out in late 2009 in the part of the home where the applicant lived (see paragraph 24 above).

2. The Court's assessment

(a) General principles

201. Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 90, ECHR 2000-XI, and *Poltoratskiy v. Ukraine*, no. 38812/97, § 130, ECHR 2003-V).

202. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see *Kudła*, cited above, § 91, and *Poltoratskiy*, cited above, § 131).

203. Treatment has been held by the Court to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV). Treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance or driving them to act against their will or conscience (see *Jalloh v. Germany* [GC],

no. 54810/00, § 68, ECHR 2006-IX). In this connection, the question whether such treatment was intended to humiliate or debase the victim is a factor to be taken into account, although the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3 (see *Peers v. Greece*, no. 28524/95, §§ 67, 68 and 74, ECHR 2001-III, and *Kalashnikov v. Russia*, no. 47095/99, § 95, ECHR 2002-VI).

204. The suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. Yet it cannot be said that deprivation of liberty in itself raises an issue under Article 3 of the Convention. Nevertheless, under that Article the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance (see *Kudła*, cited above, §§ 92-94).

205. When assessing the conditions of a deprivation of liberty under Article 3 of the Convention, account has to be taken of their cumulative effects and the duration of the measure in question (see *Kalashnikov*, cited above, §§ 95 and 102; *Kehayov v. Bulgaria*, no. 41035/98, § 64, 18 January 2005; and *Iovchev v. Bulgaria*, no. 41211/98, § 127, 2 February 2006). In this connection, an important factor to take into account, besides the material conditions, is the detention regime. In assessing whether a restrictive regime may amount to treatment contrary to Article 3 in a given case, regard must be had to the particular conditions, the stringency of the regime, its duration, the objective pursued and its effects on the person concerned (see *Kehayov*, cited above, § 65).

(b) Application of these principles in the present case

206. In the present case the Court has found that the applicant's placement in the Pastra social care home – a situation for which the domestic authorities must be held responsible – amounts to a deprivation of liberty within the meaning of Article 5 of the Convention (see paragraph 132 above). It follows that Article 3 is applicable to the applicant's situation, seeing that it prohibits the inhuman and degrading treatment of anyone in the care of the authorities. The Court would emphasise that the prohibition of ill-treatment in Article 3 applies equally to all forms of deprivation of liberty, and in particular makes no distinction according to the purpose of the measure in issue; it is immaterial whether the measure entails detention ordered in the context of criminal proceedings or

admission to an institution with the aim of protecting the life or health of the person concerned.

207. The Court notes at the outset that, according to the Government, the building in which the applicant lives was renovated in late 2009, resulting in an improvement in his living conditions (see paragraph 200 above); the applicant did not dispute this. The Court therefore considers that the applicant's complaint should be taken to refer to the period between 2002 and 2009. The Government have not denied that during that period the applicant's living conditions corresponded to his description, and have also acknowledged that, for economic reasons, there were certain deficiencies in that regard (see paragraphs 198-199 above).

208. The Court observes that although the applicant shared a room measuring 16 square metres with four other residents, he enjoyed considerable freedom of movement both inside and outside the home, a fact likely to lessen the adverse effects of a limited sleeping area (see *Valašinas v. Lithuania*, no. 44558/98, § 103, ECHR 2001-VIII).

209. Nevertheless, other aspects of the applicant's physical living conditions are a considerable cause for concern. In particular, it appears that the food was insufficient and of poor quality. The building was inadequately heated and in winter the applicant had to sleep in his coat. He was able to have a shower once a week in an unhygienic and dilapidated bathroom. The toilets were in an execrable state and access to them was dangerous, according to the findings by the CPT (see paragraphs 21, 22, 23, 78 and 79 above). In addition, the home did not return clothes to the same people after they were washed (see paragraph 21 above), which was likely to arouse a feeling of inferiority in the residents.

210. The Court cannot overlook the fact that the applicant was exposed to all the above-mentioned conditions for a considerable period of approximately seven years. Nor can it ignore the findings of the CPT, which, after visiting the home, concluded that the living conditions there at the relevant time could be said to amount to inhuman and degrading treatment. Despite having been aware of those findings, during the period from 2002 to 2009 the Government did not act on their undertaking to close down the institution (see paragraph 82 above). The Court considers that the lack of financial resources cited by the Government is not a relevant argument to justify keeping the applicant in the living conditions described (see *Poltoratskiy*, cited above, § 148).

211. It would nevertheless emphasise that there is no suggestion that the national authorities deliberately intended to inflict degrading treatment. However, as noted above (see paragraph 203), the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3.

212. In conclusion, while noting the improvements apparently made to the Pastra social care home since late 2009, the Court considers that, taken

as a whole, the living conditions to which the applicant was exposed during a period of approximately seven years amounted to degrading treatment.

213. There has therefore been a violation of Article 3 of the Convention.

C. Merits of the complaint under Article 13 in conjunction with Article 3

1. The parties' submissions

214. The applicant submitted that no domestic remedies, including the claim for compensation envisaged in the State Responsibility for Damage Act 1988, had been accessible to him without his guardian's consent. He pointed out in that connection that he had not had a guardian for a period of more than two years, between the end of Ms R.P.'s designated term on 31 December 2002 (see paragraph 12 above) and the appointment of a new guardian on 2 February 2005 (see paragraph 17 above). Moreover, his new guardian was also the director of the social care home. There would therefore have been a conflict of interests between the applicant and his guardian in the event of any dispute concerning the living conditions at the home and the applicant could not have expected the guardian to support his allegations.

215. In the Government's submission, an action for restoration of legal capacity (see paragraphs 51-52 above) constituted a remedy by which the applicant could have secured a review of his status, and in the event of being released from partial guardianship, he could have left the social care home and ceased to endure the living conditions of which he complained.

216. The Government added that the applicant could have complained directly about the living conditions at the Pastra social care home by bringing an action under section 1 of the State Responsibility for Damage Act 1988 (see paragraphs 62-67 above).

2. The Court's assessment

217. The Court refers to its settled case-law to the effect that Article 13 guarantees the existence of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law (see *McGlinchey and Others v. the United Kingdom*, no. 50390/99, § 62, ECHR 2003-V).

218. Where, as in the present case, the Court has found a breach of Article 3, compensation for the non-pecuniary damage flowing from the

breach should in principle be part of the range of available remedies (ibid., § 63; and *Iovchev*, cited above, § 143).

219. In the instant case the Court observes that section 1(1) of the State Responsibility for Damage Act 1988 has indeed been interpreted by the domestic courts as being applicable to damage suffered by prisoners as a result of poor detention conditions (see paragraphs 63-64 above). However, according to the Government's submissions, the applicant's placement in the Pastra social care home is not regarded as detention under domestic law (see paragraphs 108-111 above). Therefore, he would not have been entitled to compensation for the poor living conditions in the home. Moreover, there are no judicial precedents in which this provision has been found to apply to allegations of poor conditions in social care homes (see paragraph 65 above), and the Government have not adduced any arguments to prove the contrary. Having regard to those considerations, the Court concludes that the remedies in question were not effective within the meaning of Article 13.

220. As to the Government's reference to the procedure for restoration of legal capacity (see paragraph 215 above), the Court considers that, even assuming that, as a result of that remedy, the applicant had been able to have his legal capacity restored and to leave the home, he would not have been awarded any compensation for his treatment during his placement there. Accordingly, the remedy in question did not afford appropriate redress.

221. There has therefore been a violation of Article 13 of the Convention, taken in conjunction with Article 3.

V. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

222. The applicant alleged that Bulgarian law had not afforded him the possibility of applying to a court for restoration of his legal capacity. He relied on Article 6 § 1 of the Convention, the relevant parts of which read:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Preliminary remarks

223. The Grand Chamber observes that the Government have maintained before it the objection they raised before the Chamber alleging failure to exhaust domestic remedies. The objection was based on Article 277 of the CCP, which, according to the Government, entitled the applicant to apply personally to the courts for restoration of his legal capacity.

224. The Grand Chamber notes that in its admissibility decision of 29 June 2010 the Chamber observed that the applicant disputed the accessibility of the remedy which, according to the Government, would

have enabled him to obtain a review of his legal status and that that argument underpinned his complaint under Article 6 § 1. The Chamber thus joined the Government's objection to its examination of the merits of the complaint in question. The Grand Chamber sees no reason to depart from the Chamber's conclusion.

B. Merits

1. The parties' submissions

225. The applicant maintained that he had been unable personally to institute proceedings for restoration of his legal capacity under Article 277 of the CCP and that this was borne out by the Supreme Court's decision no. 5/79 (see paragraph 51 above). In support of that argument, he submitted that the Dupnitsa District Court had declined to examine his application for judicial review of the mayor's refusal to bring such proceedings, on the ground that the guardian had not countersigned the form of authority (see paragraphs 39-40 above).

226. In addition, although an action for restoration of legal capacity had not been accessible to him, the applicant had attempted to bring such an action through the public prosecutor's office, the mayor and his guardian (the director of the home). However, since no application to that end had been lodged with the courts, all his attempts had failed. Accordingly, the applicant had never had the opportunity to have his case heard by a court.

227. The Government submitted that Article 277 of the CCP had offered the applicant direct access to a court at any time to have his legal status reviewed. They pointed out that, contrary to what the applicant alleged, the Supreme Court's decision no. 5/79 had interpreted Article 277 of the CCP as meaning that persons partially deprived of legal capacity could apply directly to the courts to be released from guardianship. The only condition for making such an application was the production of evidence of an improvement in their condition. However, as was indicated by the medical assessment carried out at the public prosecutor's request (see paragraph 37 above), which had concluded that the applicant's condition still persisted and that he was incapable of looking after his own interests, it was clear that the applicant had not had any such evidence available. The Government thus concluded that the applicant had not attempted to apply to the court on his own because he had been unable to substantiate his application.

228. The Government further observed that the courts regularly considered applications for restoration of legal capacity submitted, for example, by a guardian (see paragraph 52 above).

2. The Court's assessment

(a) General principles

229. The Court reiterates that Article 6 § 1 secures to everyone the right to have any claim relating to his or her civil rights and obligations brought before a court or tribunal (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18). This "right to a court", of which the right of access is an aspect, may be relied on by anyone who considers on arguable grounds that an interference with the exercise of his or her civil rights is unlawful and complains that no possibility was afforded to submit that claim to a court meeting the requirements of Article 6 § 1 (see, *inter alia*, *Roche v. the United Kingdom* [GC], no. 32555/96, § 117, ECHR 2005-X, and *Salontaji-Drobnjak v. Serbia*, no. 36500/05, § 132, 13 October 2009).

230. The right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals" (see *Ashingdane*, cited above, § 57). In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field. Nonetheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (ibid.; see also, among many other authorities, *Cordova v. Italy (no. 1)*, no. 40877/98, § 54, ECHR 2003-I, and the recapitulation of the relevant principles in *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B).

231. Furthermore, the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly true for the guarantees enshrined in Article 6, in view of the prominent place held in a democratic society by the right to a fair trial with all the guarantees under that Article (see *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 45, ECHR 2001-VIII).

232. Lastly, the Court observes that in most of the cases before it involving "persons of unsound mind", the domestic proceedings have concerned their detention and were thus examined under Article 5 of the Convention. However, it has consistently held that the "procedural" guarantees under Article 5 §§ 1 and 4 of the Convention are broadly similar to those under Article 6 § 1 (see, for instance, *Winterwerp*, cited above,

§ 60; *Sanchez-Reisse v. Switzerland*, 21 October 1986, §§ 51 and 55, Series A no. 107; *Kampanis v. Greece*, 13 July 1995, § 47, Series A no. 318-B; and *Ilijkov v. Bulgaria*, no. 33977/96, § 103, 26 July 2001). In the *Shtukaturov* case (cited above, § 66), in determining whether or not the incapacitation proceedings had been fair, the Court had regard, *mutatis mutandis*, to its case-law under Article 5 §§ 1 (e) and 4 of the Convention.

(b) Application of these principles in the present case

233. The Court observes at the outset that in the present case, none of the parties disputed the applicability of Article 6 to proceedings for restoration of legal capacity. The applicant, who has been partially deprived of legal capacity, complained that Bulgarian law did not afford him direct access to a court to apply to have his capacity restored. The Court has had occasion to clarify that proceedings for restoration of legal capacity are directly decisive for the determination of "civil rights and obligations" (see *Matter v. Slovakia*, no. 31534/96, § 51, 5 July 1999). Article 6 § 1 of the Convention is therefore applicable in the instant case.

234. It remains to be determined whether the applicant's access to court was restricted and, if so, whether the restriction pursued a legitimate aim and was proportionate to it.

235. The Court notes firstly that the parties differed as to whether a legally incapacitated person had *locus standi* to apply directly to the Bulgarian courts for restoration of legal capacity; the Government argued that this was the case, whereas the applicant maintained the contrary.

236. The Court accepts the applicant's argument that, in order to make an application to a Bulgarian court, a person under partial guardianship is required to seek the support of the persons referred to in Article 277 of the 1952 CCP (which has become Article 340 of the 2007 CCP). The list of persons entitled to apply to the courts under Bulgarian law does not explicitly include the person under partial guardianship (see paragraphs 45 and 51 above).

237. With regard to the Supreme Court's 1980 decision (see paragraph 51 above), the Court observes that although the fourth sentence of paragraph 10 of the decision, read in isolation, might give the impression that a person under partial guardianship has direct access to a court, the Supreme Court explains further on that where the guardian of a partially incapacitated person and the guardianship authority refuse to institute proceedings for restoration of legal capacity, the person concerned may request the public prosecutor to do so. In the Court's view, the need to seek the intervention of the public prosecutor is scarcely reconcilable with direct access to court for persons under partial guardianship in so far as the decision to intervene is left to the prosecutor's discretion. It follows that the Supreme Court's 1980 decision cannot be said to have clearly affirmed the existence of such access in Bulgarian law.

238. The Court further notes that the Government have not produced any court decisions showing that persons under partial guardianship have been able to apply of their own motion to a court to have the measure lifted; however, they have shown that at least one application for restoration of legal capacity has been successfully brought by the guardian of a fully incapacitated person (see paragraph 52 above).

239. The Court thus considers it established that the applicant was unable to apply for restoration of his legal capacity other than through his guardian or one of the persons listed in Article 277 of the CCP.

240. The Court would also emphasise that, as far as access to court is concerned, domestic law makes no distinction between those who are entirely deprived of legal capacity and those who, like the applicant, are only partially incapacitated. Moreover, domestic legislation does not provide for any possibility of automatic periodic review of whether the grounds for placing a person under guardianship remain valid. Lastly, in the applicant's case the measure in question was not limited in time.

241. Admittedly, the right of access to the courts is not absolute and requires by its very nature that the State should enjoy a certain margin of appreciation in regulating the sphere under examination (see *Ashingdane*, cited above, § 57). In addition, the Court acknowledges that restrictions on a person's procedural rights, even where the person has been only partially deprived of legal capacity, may be justified for the person's own protection, the protection of the interests of others and the proper administration of justice. However, the importance of exercising these rights will vary according to the purpose of the action which the person concerned intends to bring before the courts. In particular, the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned since such a procedure, once initiated, will be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity, not least in relation to any restrictions that may be placed on the person's liberty (see also *Shtukaturov*, cited above, § 71). The Court therefore considers that this right is one of the fundamental procedural rights for the protection of those who have been partially deprived of legal capacity. It follows that such persons should in principle enjoy direct access to the courts in this sphere.

242. However, the State remains free to determine the procedure by which such direct access is to be realised. At the same time, the Court considers that it would not be incompatible with Article 6 for national legislation to provide for certain restrictions on access to court in this sphere, with the sole aim of ensuring that the courts are not overburdened with excessive and manifestly ill-founded applications. Nevertheless, it seems clear that this problem may be solved by other, less restrictive means than automatic denial of direct access, for example by limiting the

frequency with which applications may be made or introducing a system for prior examination of their admissibility on the basis of the file.

243. The Court further observes that eighteen of the twenty national legal systems studied in this context provide for direct access to the courts for any partially incapacitated persons wishing to have their status reviewed. In seventeen States such access is open even to those declared fully incapable (see paragraphs 88-90 above). This indicates that there is now a trend at European level towards granting legally incapacitated persons direct access to the courts to seek restoration of their capacity.

244. The Court is also obliged to note the growing importance which international instruments for the protection of people with mental disorders are now attaching to granting them as much legal autonomy as possible. It refers in this connection to the United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities and to Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults, which recommend that adequate procedural safeguards be put in place to protect legally incapacitated persons to the greatest extent possible, to ensure periodic reviews of their status and to make appropriate remedies available (see paragraphs 72-73 above).

245. In the light of the foregoing, in particular the trends emerging in national legislation and the relevant international instruments, the Court considers that Article 6 § 1 of the Convention must be interpreted as guaranteeing in principle that anyone who has been declared partially incapable, as is the applicant's case, has direct access to a court to seek restoration of his or her legal capacity.

246. In the instant case the Court has observed that direct access of this kind is not guaranteed with a sufficient degree of certainty by the relevant Bulgarian legislation. That finding is sufficient for it to conclude that there has been a violation of Article 6 § 1 of the Convention in respect of the applicant.

247. The above conclusion dispenses the Court from examining whether the indirect legal remedies referred to by the Government provided the applicant with sufficient guarantees that his case would be brought before a court.

248. The Court therefore dismisses the Government's objection of failure to exhaust domestic remedies (see paragraph 223 above) and concludes that there has been a violation of Article 6 § 1 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION, TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 13

249. The applicant alleged that the restrictive guardianship regime, including his placement in the Pastra social care home and the physical

living conditions there, had amounted to unjustified interference with his right to respect for his private life and home. He submitted that Bulgarian law had not afforded him a sufficient and accessible remedy in that respect. He relied on Article 8 of the Convention, taken alone and in conjunction with Article 13.

Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

250. The applicant maintained in particular that the guardianship regime had not been geared to his individual case but had entailed restrictions automatically imposed on anyone who had been declared incapable by a judge. He added that the fact of having to live in the Pastra social care home had effectively barred him from taking part in community life and from developing relations with persons of his choosing. The authorities had not attempted to find alternative therapeutic solutions in the community or to take measures that were less restrictive of his personal liberty, with the result that he had developed "institutionalisation syndrome", that is, the loss of social skills and individual personality traits.

251. The Government contested those allegations.

252. Having regard to its conclusions under Articles 3, 5, 6 and 13 of the Convention, the Court considers that no separate issue arises under Article 8 of the Convention, taken alone and/or in conjunction with Article 13. It is therefore unnecessary to examine this complaint.

VII. ARTICLES 46 AND 41 OF THE CONVENTION

A. Article 46 of the Convention

253. The relevant parts of Article 46 of the Convention read as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. ..."

254. The Court reiterates that by Article 46 of the Convention the Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes

on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects (see *Menteş and Others v. Turkey* (Article 50), 24 July 1998, § 24, *Reports* 1998-IV; *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; and *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I). The Court further notes that it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order to discharge its obligation under Article 46 of the Convention (see *Scozzari and Giunta*, cited above; *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I; and *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV).

255. However, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation it has found to exist (see *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V, and *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 148, ECHR 2009-...).

256. In the instant case the Court considers that it is necessary, in view of its finding of a violation of Article 5, to indicate individual measures for the execution of this judgment. It observes that it has found a violation of that Article on account of the failure to comply with the requirement that any deprivation of liberty must be "in accordance with a procedure prescribed by law" and the lack of justification for the applicant's deprivation of liberty under sub-paragraph (e) or any of the other sub-paragraphs of Article 5 § 1. It has also noted deficiencies in the assessment of the presence and persistence of any disorders warranting placement in a social care home (see paragraphs 148-160 above).

257. The Court considers that in order to redress the effects of the breach of the applicant's rights, the authorities should ascertain whether he wishes to remain in the home in question. Nothing in this judgment should be seen as an obstacle to his continued placement in the Pastra social care home or any other home for people with mental disorders if it is established that he consents to the placement. However, should the applicant object to such placement, the authorities should re-examine his situation without delay in the light of the findings of this judgment.

258. The Court notes that it has also found a violation of Article 6 § 1 on account of the lack of direct access to a court for a person who has been partially deprived of legal capacity with a view to seeking its restoration (see paragraphs 233-248 above). Having regard to that finding, the Court

recommends that the respondent State envisage the necessary general measures to ensure the effective possibility of such access.

B. Article 41 of the Convention

259. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

1. Damage

260. The applicant did not submit any claims in respect of pecuniary damage but sought EUR 64,000 for non-pecuniary damage.

261. He asserted in particular that he had endured poor living conditions in the social care home and claimed a sum of EUR 14,000 on that account. In respect of his placement in the Pastra social care home, he stated that he had experienced feelings of anxiety, distress and frustration ever since that measure had begun to be implemented in December 2002. His enforced placement in the home had also had a significant impact on his life as he had been removed from his social environment and subjected to a very restrictive regime, making it harder for him to reintegrate into the community. He submitted that although there was no comparable case-law concerning unlawful detention in a social care home for people with mental disorders, regard should be had to the just satisfaction awarded by the Court in cases involving unlawful detention in psychiatric institutions. He referred, for example, to the judgments in *Gajcsi v. Hungary* (no. 34503/03, §§ 28-30, 3 October 2006) and *Kayadjieva v. Bulgaria* (no. 56272/00, § 57, 28 September 2006), while noting that he had been deprived of his liberty for a considerably longer period than the applicants in the above-mentioned cases. He submitted that a sum of EUR 30,000 would constitute an equitable award on that account. Lastly, he added that his lack of access to the courts to seek a review of his legal status had restricted the exercise of a number of freedoms in the sphere of his private life, causing additional non-pecuniary damage, for which an award of EUR 20,000 could provide redress.

262. The Government submitted that the applicant's claims were excessive and unfounded. They argued that if the Court were to make any award in respect of non-pecuniary damage, it should not exceed the amounts awarded in judgments against Bulgaria concerning compulsory psychiatric admission. The Government referred to the judgments in *Kayadjieva* (cited above, § 57), *Varbanov* (cited above, § 67), and *Kepenerov v. Bulgaria* (no. 39269/98, § 42, 31 July 2003).

263. The Court observes that it has found violations of several provisions of the Convention in the present case, namely Articles 3, 5 (paragraphs 1, 4 and 5), 6 and 13. It considers that the applicant must have endured suffering as a result of his placement in the home, which began in December 2002 and is still ongoing, his inability to secure a judicial review of that measure and his lack of access to a court to apply for release from partial guardianship. This suffering undoubtedly aroused in him a feeling of helplessness and anxiety. The Court further considers that the applicant sustained non-pecuniary damage on account of the degrading living conditions he had to endure for more than seven years.

264. Ruling on an equitable basis, as required by Article 41 of the Convention, the Court considers that the applicant should be awarded an aggregate sum of EUR 15,000 in respect of non-pecuniary damage.

2. Costs and expenses

265. The applicant did not submit any claims in respect of costs and expenses.

3. Default interest

266. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Dismisses*, unanimously, the Government's preliminary objections of failure to exhaust domestic remedies;

2. *Holds*, unanimously, that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds*, unanimously, that there has been a violation of Article 5 § 4 of the Convention;

4. *Holds*, unanimously, that there has been a violation of Article 5 § 5 of the Convention;

5. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention, taken alone and in conjunction with Article 13;

6. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention;

7. *Holds*, by thirteen votes to four, that it is not necessary to examine whether there has been a violation of Article 8 of the Convention, taken alone and in conjunction with Article 13;

8. *Holds*, unanimously,
(a) that the respondent State is to pay the applicant, within three months, EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage, to be converted into Bulgarian levs at the rate applicable at the date of settlement, plus any tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 17 January 2012.

Vincent Berger	Nicolas Bratza
Jurisconsult	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) joint partly dissenting opinion of Judges Tulkens, Spielmann and Laffranque;
(b) partly dissenting opinion of Judge Kalaydjieva.

N.B.
V.B.

JOINT PARTLY DISSENTING OPINION OF JUDGES TULKENS, SPIELMANN AND LAFFRANQUE

(Translation)

We had no hesitation in voting in favour of finding a violation of Article 5 and of Article 3, taken alone and in conjunction with Article 13. We also voted in favour of finding a violation of Article 6 of the Convention, and we believe that the judgment is likely to strengthen considerably the protection of persons in a similarly vulnerable situation to the applicant. However, we do not agree with the majority's finding that no separate issue arises under Article 8 of the Convention, taken alone and/or in conjunction with Article 13, and that it is therefore unnecessary to examine this complaint (see paragraph 252 of the judgment and point 7 of the operative provisions).

We wish to point out that the applicant alleged that the restrictive guardianship regime, including his placement in the Pastra social care home and the physical living conditions there, amounted to unjustified interference with his right to respect for his private life and home (see paragraph 249 of the judgment). He submitted that Bulgarian law had not afforded him a sufficient and accessible remedy in that respect. He also maintained that the guardianship regime had not been geared to his individual case but had entailed restrictions automatically imposed on anyone who had been declared incapable by a judge. He added that the fact of having to live in the Pastra social care home had effectively barred him from taking part in community life and from developing relations with persons of his choosing. The authorities had not attempted to find alternative therapeutic solutions in the community or to take measures that were less restrictive of his personal liberty, with the result that he had developed "institutionalisation syndrome", that is, the loss of social skills and individual personality traits (see paragraph 250 of the judgment).

In our opinion, these are genuine issues that deserved to be examined separately. Admittedly, a large part of the allegations submitted under Article 8 are similar to those raised under Articles 3, 5 and 6. Nevertheless, they are not identical and the answers given in the judgment in relation to those provisions cannot entirely cover the complaints brought under Articles 8 and 13.

More specifically, an issue that would also have merited a separate examination concerns the scope of a periodic review of the applicant's situation. He submitted that domestic law did not provide for an automatic periodic assessment of the need to maintain a measure restricting legal capacity. It might have been helpful to consider whether States have a positive obligation to set up a review procedure of this kind, especially in situations where the persons concerned are unable to comprehend the

consequences of a regular review and cannot themselves initiate a procedure to that end.

PARTLY DISSENTING OPINION OF JUDGE KALAYDJIEVA

I had no hesitation in reaching the conclusions concerning Mr Stanev's complaints under Articles 5, 3 and 6 of the Convention. However, like Judges Tulkens, Spielmann and Laffranque, I regret the majority's conclusion that in view of these findings it was not necessary to examine separately his complaints under Article 8 concerning "the [partial guardianship] system, including the lack of regular reviews of the continued justification of such a measure, the appointment of the director of the Pastra social care home as his [guardian] and the alleged lack of scrutiny of the director's decisions, and also about the restrictions on his private life resulting from his admission to the home against his will, extending to the lack of contact with the outside world and the conditions attached to correspondence" (see paragraph 90 of the decision as to admissibility of 29 June 2010). In my view the applicant's complaints under Article 8 of the Convention remain the primary issue in the present case.

In its earlier case-law the Court has expressed the view that an individual's legal capacity is decisive for the exercise of all the rights and freedoms, not least in relation to any restrictions that may be placed on the person's liberty (see *Shtukaturov v.Russia*, no. 44009/05, § 71, 27 March 2008; *Salontaji-Drobniak v. Serbia*, no. 36500/05, §§ 140 et seq.; and the recent judgment in *X and Y v. Croatia*, no. 5193/09, §§ 102-104).

There is hardly any doubt that restrictions on legal capacity constitute interference with the right to private life, which will give rise to a breach of Article 8 of the Convention unless it can be shown that it was "in accordance with the law", pursued one or more legitimate aims and was "necessary" for their attainment.

Unlike the situation of the applicants in the cases mentioned above, Mr Stanev's capacity to perform ordinary acts relating to everyday life and his ability to validly enter into legal transactions with the consent of his guardian were recognised. The national law and the domestic courts' decisions entitled him to request and obtain social care in accordance with his needs and preferences if he so wished, or to refuse such care in view of the quality of the services offered and/or any restrictions involved which he was not prepared to accept. There was nothing in the domestic law or the applicant's personal circumstances to justify any further restrictions, or to warrant the substitution of his own will with his guardian's assessment of his best interests.

However, once declared partially incapacitated, he was divested of the possibility of acting in his own interests and there were insufficient guarantees to prevent his *de facto* treatment as a fully incapacitated individual. It has not been contested that he was not consulted as to whether he wished to avail himself of placement in a social care institution and that

he was not even entitled to decide independently how to spend his time or the remaining part of his pension, and whether and when to visit his friends or relatives or other places, to send and receive letters or to otherwise communicate with the outside world. No justification was offered for the fact that Mr Stanev was stripped of the ability to act in accordance with his preferences to the extent determined by the courts and the law and that, instead of due assistance from his officially appointed guardian, the pursuit of his best interests was made completely dependent on the good will or neglect shown by the guardian. In this regard the lack of respect for the applicant's recognised personal autonomy violated Mr Stanev's right to personal life and dignity as guaranteed by Article 8 and failed to meet contemporary standards for ensuring the necessary respect for the wishes and preferences he was capable of expressing.

The applicant's situation was further aggravated by his inability to trigger any remedy for the independent protection of his rights and interests. Any attempt to avail himself of such remedies depended on the initial approval of Mr Stanev's guardian, who also acted as the director and representative of the social care institution. In this regard the majority's preference not to consider separately the applicant's complaints under Article 8 resulted in a failure to subject to separate scrutiny the absence of safeguards for the exercise of these rights in the face of a potential or even evident conflict of interests, a factor which appears to be of central importance for the requisite protection of vulnerable individuals against possible abuse and is equally pertinent to the applicant's complaints under Article 8 and Article 6.

While both parties submitted information to the effect that proceedings for the restoration of capacity were not only possible in principle, but had also been successful in a reasonable percentage of cases, Mr Stanev rightly complained that the institution of such proceedings in his case depended on his guardian's approval. It appears that the guardian's discretion to block any attempt to take proceedings in court affected not only the applicant's right of access to court for the purposes of restoration of capacity, but also prevented the institution of any proceedings in pursuit of the applicant's interests and rights, including those protected under Article 5 of the Convention. As was also submitted by his representatives before the national authorities, Mr Stanev "should have had the opportunity to assess by himself whether or not, having regard to the living conditions at the home, it was in his interests to remain there" (see paragraph 38 of the judgment).

KOMMISSION DER EUROPÄISCHEN GEMEINSCHAFTEN

Brüssel, den 2.7.2008
KOM(2008) 426 endgültig

2008/0140 (CNS)

Vorschlag für eine

RICHTLINIE DES RATES

zur Anwendung des Grundsatzes der Gleichbehandlung ungeachtet der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung

{SEK(2008) 2180}
{SEK(2008) 2181}

(von der Kommission vorgelegt)

BEGRÜNDUNG

1. KONTEXT DES VORSCHLAGS

Gründe und Ziele des Vorschlags

Ziel dieses Vorschlags ist die Anwendung des Grundsatzes der Gleichbehandlung ungeachtet der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung außerhalb des Arbeitsmarktes. Es soll ein Rahmen für das Verbot der Diskriminierung aus diesen Gründen gesetzt und in der Europäischen Union ein einheitliches Mindestschutzniveau für Personen, die Opfer solcher Diskriminierung sind, festgelegt werden.

Dieser Vorschlag ergänzt den bestehenden gemeinschaftlichen Rechtsrahmen, in dem das Diskriminierungsverbot aufgrund der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung lediglich in Beschäftigung, Beruf und Berufsausbildung Anwendung findet[1].

Allgemeiner Kontext

Die Kommission kündigte in ihrem Legislativ- und Arbeitsprogramm vom 23. Oktober 2007[2] an, sie werde neue Initiativen zur Vervollständigung des EU-Antidiskriminierungsrechts vorschlagen.

Dieser Vorschlag ist Teil der Agenda „Eine erneuerte Sozialagenda: Chancen, Zugangsmöglichkeiten und Solidarität im Europa des 21. Jahrhunderts“[3] und wird mit der Mitteilung „Nichtdiskriminierung und Chancengleichheit: Erneuertes Engagement“[4] vorgelegt.

Das Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen wurde von den Mitgliedstaaten und der Europäischen Gemeinschaft unterzeichnet. Es basiert auf den Grundsätzen Diskriminierungsverbot, Teilhabe und Einbeziehung in die Gesellschaft, Chancengleichheit und Barrierefreiheit. Dem Rat wurde der Abschluss des Übereinkommens durch die Europäische Gemeinschaft vorgelegt[5].

Bestehende Rechtsvorschriften auf diesem Gebiet

Dieser Vorschlag basiert auf den Richtlinien 2000/43/EG, 2000/78/EG und 2004/113/EG[6], die die Diskriminierung aufgrund des Geschlechts, der Rasse oder ethnischen Herkunft, des Alters, einer Behinderung, der sexuellen Ausrichtung, der Religion oder der Weltanschauung

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1 Richtlinie 2000/43/EG vom 29. Juni 2000 zur Anwendung des Gleichbehandlungsgrundsatzes ohne Unterschied der Rasse oder der ethnischen Herkunft, ABl. L 180 vom 19.7.2000, S. 22, und Richtlinie 2000/78/EG vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf, ABl. L 303 vom 2.12.2000, S. 16.

2 KOM(2007) 640.

3 KOM(2008) 412.

4 KOM(2008) 420.

5 [KOM(2008) XXX.]

6 Richtlinie 2004/113/EG vom 13. Dezember 2004 zur Verwirklichung des Grundsatzes der Gleichbehandlung von Männern und Frauen beim Zugang zu und bei der Versorgung mit Gütern und Dienstleistungen, ABl. L 373 vom 21.12.2004, S. 37.

untersagen[7]. Ein Verbot der Diskriminierung aufgrund der Rasse oder der ethnischen Herkunft besteht in Beschäftigung, Beruf und Berufsausbildung sowie in Bereichen, die sich nicht auf Beschäftigung beziehen, wie Sozialschutz, Gesundheitswesen, allgemeine Bildung und Zugang zu Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen, einschließlich Wohnraum. Diskriminierung aufgrund des Geschlechts ist ebenfalls in diesen Bereichen untersagt, mit Ausnahme der allgemeinen Bildung, der Medien und der Werbung. Diskriminierung aus Gründen des Alters, der Religion oder Weltanschauung, der sexuellen Ausrichtung oder einer Behinderung ist hingegen lediglich in Beschäftigung, Beruf und Berufsausbildung verboten.

Die Frist für die Umsetzung der Richtlinien 2000/43/EG und 2000/78/EG in nationales Recht lief Jahr 2003 ab. Eine Ausnahme stellten hierbei die Bestimmungen zur Diskriminierung wegen des Alters oder einer Behinderung dar, für die weitere drei Jahre angesetzt wurden. Im Jahr 2006[8] nahm die Kommission einen Bericht zur Durchführung der Richtlinie 2000/43/EG an, am 19. Juni 2008[9] den zur Durchführung der Richtlinie 2000/78/EG. Mit einer Ausnahme haben alle Mitgliedstaaten diese Richtlinien umgesetzt. Die Frist für die Umsetzung der Richtlinie 2004/113/EG lief Ende 2007 ab.

Soweit möglich fußen die in diesem Vorschlag dargelegten Konzepte und Regelungen auf denen der bereits bestehenden Richtlinien nach Artikel 13 EG-Vertrag.

Übereinstimmung mit anderen Politikbereichen und Zielen der Union

Dieser Vorschlag fußt auf der seit dem Vertrag von Amsterdam entwickelten Strategie zur Bekämpfung der Diskriminierung. Er steht im Einklang mit den horizontalen Zielsetzungen der Europäischen Union, insbesondere mit der Lissabon-Strategie für Wachstum und Beschäftigung und den Zielen des EU-Prozesses im Bereich Sozialschutz und soziale Eingliederung. Damit wird dazu beigetragen, die Grundrechte der Bürger in Übereinstimmung mit der EU-Charta der Grundrechte zu fördern.

2. ANHÖRUNG VON INTERESSIERTEN KREISEN UND FOLGENABSCHÄTZUNG

Anhörung

Bei der Erarbeitung der Initiative wollte die Kommission alle potenziell interessierten Kreise einbinden. Ferner wurde sichergestellt, dass denjenigen, die eventuell Anmerkungen abgeben wollten, auch Gelegenheit und Zeit dafür gegeben wurde. Das Europäische Jahr der Chancengleichheit für alle bot eine einzigartige Möglichkeit, auf die Themen aufmerksam zu machen und zur Teilnahme an der Diskussion aufzurufen.

Genannt werden sollten vor allem die öffentliche Online-Konsultation[10], eine Befragung der Geschäftswelt[11], sowie die schriftliche Konsultation der Sozialpartner und europaweit auf

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7 Richtlinie 2000/43/EG vom 29. Juni 2000 zur Anwendung des Gleichbehandlungsgrundsatzes ohne Unterschied der Rasse oder der ethnischen Herkunft (ABl. L 180 vom 19.7.2000) und Richtlinie 2000/78/EG vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf (ABl. L 303 vom 2.12.2000).

8 KOM(2006) 643 endg.

9 KOM(2008) 225.

10 Einsehbar sind die vollständigen Ergebnisse der Konsultation auf: http://ec.europa.eu/employment_social/fundamental_rights/news/news_de.htm#rpc.

11 http://ec.europa.eu/yourvoice/ebtp/consultations/index_de.htm.

dem Gebiet der Nichtdiskriminierung tätiger nichtstaatlicher Organisationen[12], mit denen auch Zusammenkünfte stattfanden. Die öffentliche Anhörung und die Konsultation der nichtstaatlichen Organisationen ergaben eine Forderung nach Rechtsvorschriften auf EU-Ebene, um den Schutz vor Diskriminierung zu verstärken; einige sprachen sich auch für spezifische Richtlinien für die Bereiche Behinderung und Geschlecht aus. Die Befragung der Testgruppe europäischer Unternehmen hat gezeigt, dass nach Ansicht der Geschäftswelt ein EU-weit einheitliches Maß an Schutz vor Diskriminierung hilfreich wäre. Die Arbeitgeber sprachen sich grundsätzlich gegen neue Rechtsvorschriften aus, die ihrer Ansicht nach Bürokratie und Kosten steigern, die Gewerkschaften hingegen dafür.

Die Antworten auf die Befragung offenbarten Sorge darüber, wie in einer neuen Richtlinie mit einigen sensiblen Gebieten umgegangen würde, und zeigten Missverständnisse beim Umfang bzw. Ausmaß der Gemeinschaftskompetenz auf. Die vorgeschlagene Richtlinie berücksichtigt diese Bedenken und führt die Grenzen der Gemeinschaftskompetenz explizit auf. Innerhalb dieser Grenzen darf die Gemeinschaft handeln (Artikel 13 EG-Vertrag) und sind ihrer Ansicht nach Maßnahmen auf EU-Ebene am erfolgversprechendsten.

Die Antworten betonten auch den besonderen Charakter der Diskriminierung aufgrund einer Behinderung und der erforderlichen Gegenmaßnahmen. Auf diese wird in einem speziellen Artikel eingegangen.

Zwar wurden Bedenken geäußert, dass eine neue Richtlinie Kosten für die Unternehmen bedeuten würde, doch sollte betont werden, dass dieser Vorschlag größtenteils auf Konzepten beruht, die in den bestehenden, den Wirtschaftsakteuren bereits vertrauten Richtlinien angewandt werden. Hinsichtlich der Maßnahmen gegen die Diskriminierung aufgrund einer Behinderung kennen die Unternehmen den Begriff der angemessenen Vorkehrungen, seit er in der Richtlinie 2000/78/EG festgelegt wurde. Der Vorschlag der Kommission führt die Faktoren an, die bei der Bewertung dieser „Angemessenheit“ berücksichtigt werden sollen.

Es wurde darauf aufmerksam gemacht, dass – im Gegensatz zu den beiden anderen Richtlinien – nach der Richtlinie 2000/78/EG die Mitgliedstaaten nicht zur Einrichtung von Gleichstellungsstellen verpflichtet sind. Auch wurde darauf hingewiesen, dass gegen Mehrfachdiskriminierungen vorgegangen werden müsse, z. B. durch ihre Definition als Diskriminierung und durch wirksame Abhilfemaßnahmen. Diese Themen gehen zwar über den Geltungsbereich dieser Richtlinie hinaus, doch steht es den Mitgliedstaaten frei, auch in diesen Bereichen Schritte zu unternehmen.

Schließlich wurde darauf hingewiesen, dass der Umfang des Schutzes vor Diskriminierung aufgrund des Geschlechts in der Richtlinie 2004/113/EG geringer ist als in der Richtlinie 2000/43/EG, was mit neuen Rechtsvorschriften behoben werden sollte. Die Kommission nimmt diese Anregung zu diesem Zeitpunkt nicht auf, da die Frist für die Umsetzung der Richtlinie 2004/113/EG gerade erst abgelaufen ist. Sie wird jedoch im Jahr 2010 einen Bericht über die Durchführung der Richtlinie erstellen und gegebenenfalls Änderungen vorschlagen.

Einholung und Nutzung von Expertenwissen

Eine Studie[13] aus dem Jahr 2006 hat aufgezeigt, dass einerseits die Mehrheit der Länder in der einen oder anderen Form Rechtsschutz bietet, der in den meisten untersuchten Gebieten über

[12] http://ec.europa.eu/employment_social/fundamental_rights/org/imass_de.htm#ar.

[13] http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/mapstrand1_de.pdf.

die gegenwärtigen EU-Anforderungen hinausgeht, dass andererseits jedoch Umfang und Art des Schutzes je nach Land stark variieren. Auch wird deutlich, dass nur sehr wenige Länder Ex-ante-Folgenabschätzungen zu Antidiskriminierungsvorschriften durchführen. Eine weitere Studie[14] befasste sich mit der Art und dem Ausmaß der Diskriminierung in der EU außerhalb des Bereichs Beschäftigung und den möglichen (direkten wie indirekten) Kosten, die dies für Einzelne und die Gesellschaft nach sich ziehen kann.

Zusätzlich stützte sich die Kommission auf Berichte aus dem Europäischen Netzwerk unabhängiger Rechtsexperten für Antidiskriminierung, insbesondere den Überblick „Entwicklung des Antidiskriminierungsrechts in Europa“[15] und eine Studie mit dem Titel „Bekämpfung von Mehrfachdiskriminierung: Praktiken, Politikstrategien und Rechtsvorschriften“[16].

Ebenfalls relevant sind die Ergebnisse einer Spezial-Eurobarometerumfrage[17] sowie einer Flash-Eurobarometererhebung von Februar 2008[18].

Folgenabschätzung

Der Bericht über die Folgenabschätzung[19] befasste sich mit Hinweisen auf Diskriminierung außerhalb des Arbeitsmarktes. Es wurde festgestellt, dass das Diskriminierungsverbot als einer der Grundwerte in der EU anerkannt wird, dass aber der Grad an Rechtsschutz zur Gewährleistung dieser Werte je nach Mitgliedstaat und Diskriminierungsgrund in der Praxis unterschiedlich ist. Somit können diejenigen, die von Diskriminierung bedroht sind, oftmals weniger an der Gesellschaft und der Wirtschaft teilhaben, was sich negativ auf die Einzelnen wie auch auf die breitere Gesellschaft auswirkt.

In dem Bericht wurden für einschlägige Initiativen drei Ziele benannt:

- mehr Schutz vor Diskriminierung;
- Gewährleistung von Rechtssicherheit für Wirtschaftsakteure und potenzielle Opfer in allen Mitgliedstaaten;
- Verbesserung der sozialen Eingliederung und Förderung der vollständigen Teilhabe aller Gruppen an der Gesellschaft und der Wirtschaft.

Von den verschiedenen Schritten, die im Hinblick auf diese Ziele hilfreich wären, wurden sechs Optionen für eine weitere Analyse ausgewählt: keine neuen Maßnahmen auf EU-Ebene, Selbstkontrolle, Empfehlungen sowie eine oder mehrere Richtlinien zum Verbot von Diskriminierung außerhalb des Bereichs Beschäftigung.

Auf jeden Fall müssen die Mitgliedstaaten das Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen durchführen, in dem die Verweigerung angemessener Vorkehrungen als Diskriminierung definiert wird. Eine rechtlich bindende

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14 Demnächst abrufbar auf http://ec.europa.eu/employment_social/fundamental_rights/org/imass_de.htm.

15 http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_de.htm#leg.

16 http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/multdis_de.pdf.

17 Umfrage Spezial-Eurobarometer 296 zu Benachteiligung in der EU: http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_de.htm und http://ec.europa.eu/public_opinion/archives/eb_special_en.htm.

18 Flash-Eurobarometer 232: http://ec.europa.eu/public_opinion/flash/fl_232_en.pdf.

19 Demnächst abrufbar auf http://ec.europa.eu/employment_social/fundamental_rights/org/imass_de.htm.

Maßnahme zum Verbot von Diskriminierung wegen einer Behinderung ist zwar aufgrund der erforderlichen Anpassungen mit finanziellen Kosten verbunden, doch wirkt sich die bessere wirtschaftliche und soziale Eingliederung gegenwärtig benachteiligter Gruppen positiv aus.

In dem Bericht gelangt man zu dem Schluss, dass eine die Grundsätze der Subsidiarität und Verhältnismäßigkeit respektierende Richtlinie für mehrere Diskriminierungsgründe ein geeignetes Mittel wäre. In einigen wenigen Mitgliedstaaten besteht bereits ein recht vollständiger gesetzlicher Schutz, während es in den meisten zwar einen gewissen, aber weniger umfassenden Schutz gibt. Die Rechtsangleichung infolge der neuen EU-Regelungen würde somit unterschiedlich ausfallen.

Der Kommission ging eine Vielzahl an Beschwerden über Diskriminierung im Versicherungs- und Bankensektor zu. Berücksichtigen Versicherungsgesellschaften und Banken bei der Bewertung des Risikoprofils ihrer Kunden das Alter oder eine Behinderung, so muss dies nicht notwendigerweise eine Diskriminierung darstellen: dies hängt vom Produkt ab. Die Kommission wird mit der Versicherungs- und der Bankenbranche sowie weiteren relevanten Interessengruppen in Dialog treten, um eine Verständigung darüber zu erreichen, auf welchen Gebieten das Alter oder eine Behinderung relevant für die Ausgestaltung der Produkte und die Preisfestsetzung sind.

3. RECHTLICHE ASPEKTE

Rechtsgrundlage

Der Vorschlag stützt sich auf Artikel 13 Absatz 1 EG-Vertrag.

Subsidiarität und Verhältnismäßigkeit

Das Subsidiaritätsprinzip findet Anwendung, da der Vorschlag nicht in den ausschließlichen Zuständigkeitsbereich der Gemeinschaft fällt. Seine Ziele können von den Mitgliedstaaten nicht ausreichend erfüllt werden, wenn sie allein handeln – nur gemeinschaftsweite Maßnahmen können sicherstellen, dass ein Mindeststandard an Schutz vor Diskriminierung aufgrund der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung in allen Mitgliedstaaten gilt. Ein Rechtsakt der Gemeinschaft bietet Rechtssicherheit hinsichtlich der Rechte und Pflichten der Wirtschaftsakteure und Bürger, einschließlich derer, die sich von einem Mitgliedstaat in einen anderen begeben. Die Erfahrung mit Richtlinien nach Artikel 13 Absatz 1 EG-Vertrag zeigt, dass diese sich positiv auf die Verbesserung des Schutzes vor Diskriminierung auswirken. Die vorgeschlagene Richtlinie geht entsprechend dem Grundsatz der Verhältnismäßigkeit nicht über das für die gesetzten Ziele erforderliche Maß hinaus.

Ferner sind die nationalen Traditionen und Konzepte in Bereichen wie Gesundheitswesen, Sozialschutz und allgemeine Bildung tendenziell unterschiedlicher als auf dem Gebiet der Beschäftigung. Die genannten Bereiche sind durch legitime gesellschaftliche Entscheidungen zu Themen gekennzeichnet, die in die Zuständigkeit der Mitgliedstaaten fallen.

Die Vielfalt der europäischen Gesellschaften zählt zu den Stärken Europas und soll, in Einklang mit dem Subsidiaritätsprinzip, gewahrt werden. Themen wie die Organisation und die Inhalte der allgemeinen Bildung, die Anerkennung des Ehe- oder Familienstandes, Adoption, reproduktive Rechte u. Ä. werden am besten auf nationaler Ebene entschieden. Die Richtlinie verlangt somit von keinem Mitgliedstaat, seine gegenwärtigen Rechtsvorschriften und Verfahren auf diesen Gebieten zu ändern. Ebenso bleiben die nationalen Regelungen zu

den Aktivitäten der Kirchen und anderer religiöser Organisationen sowie zu deren Beziehung zum Staat unberührt. So obliegt es beispielsweise auch weiterhin allein den Mitgliedstaaten, zu entscheiden, ob eine selektive Zulassung zu Schulen erlaubt ist, ob das Tragen oder Zurschaustellen religiöser Symbole in Schulen verboten oder zulässig ist, ob gleichgeschlechtliche Ehen anerkannt werden und wie die Beziehung von organisierter Religion zum Staat gestaltet ist.

Wahl des Instruments

Mit einer Richtlinie kann ein kohärentes Mindestmaß an Schutz vor Diskriminierung in der EU am besten gewährleistet werden. Den einzelnen Mitgliedstaaten bleibt es dabei freigestellt, über diese Mindestvorgaben hinauszugehen. Auch haben sie so die Möglichkeit, die geeignetsten Durchsetzungsmaßnahmen und Sanktionen zu wählen. Die Vergangenheit hat gezeigt, dass im Hinblick auf das Diskriminierungsverbot eine Richtlinie das passendste Instrument darstellt.

Entsprechungstabelle

Die Mitgliedstaaten werden aufgefordert, der Kommission den Wortlaut der innerstaatlichen Rechtsvorschriften, mit denen sie die Richtlinie umgesetzt haben, sowie eine Entsprechungstabelle zu übermitteln.

Europäischer Wirtschaftsraum

Der vorliegende Rechtsakt ist für den Europäischen Wirtschaftsraum von Bedeutung. Nach entsprechendem Beschluss des Gemeinsamen EWR-Ausschusses wird die Richtlinie auf Drittstaaten Anwendung finden, die dem Europäischen Wirtschaftsraum angehören.

4. AUSWIRKUNGEN AUF DEN HAUSHALT

Der Vorschlag hat keine Auswirkungen auf den Gemeinschaftshaushalt.

5. DETAILLIERTE ERLÄUTERUNG DER EINZELNEN BESTIMMUNGEN

Artikel 1: Zweck

Hauptzweck der Richtlinie ist die Bekämpfung der Diskriminierung aus Gründen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung zur Verwirklichung des Gleichbehandlungsgrundsatzes außerhalb von Beschäftigung und Beruf. Eine unterschiedliche Behandlung aufgrund des Geschlechts gemäß den Artikeln 13 und 141 EG-Vertrag und den daraus abgeleiteten Rechtsvorschriften wird durch diese Richtlinie nicht untersagt.

Artikel 2: Der Begriff „Diskriminierung“

Die Definition des Gleichbehandlungsgrundsatzes basiert auf derjenigen in den bereits bestehenden Richtlinien nach Artikel 13 Absatz 1 EG-Vertrag [und auf dem einschlägigen Fallrecht des Europäischen Gerichtshofes].

Unmittelbare Diskriminierung besteht darin, dass eine Person einzig wegen ihres Alters, ihrer Behinderung, ihrer Religion oder Weltanschauung oder ihrer sexuellen Ausrichtung anders behandelt wird. Mittelbare Diskriminierung ist insofern komplexer, als dem Anschein nach

neutrale Vorschriften oder Verfahren tatsächlich jedoch besonders nachteilige Auswirkungen auf eine Person oder Personengruppe mit einem bestimmten Merkmal haben. Der Urheber der Vorschriften oder Verfahren mag keine Vorstellung von den praktischen Folgen haben, weshalb irrelevant ist, ob die Diskriminierung beabsichtigt ist. Wie in den Richtlinien 2000/43/EG, 2000/78/EG und 2002/73/EG[20] kann indirekte Diskriminierung gerechtfertigt werden (wenn „diese Vorschriften, Kriterien oder Verfahren … durch ein rechtmäßiges Ziel sachlich gerechtfertigt und die Mittel … zur Erreichung dieses Ziels angemessen und erforderlich“ sind).

Belästigung ist eine Form der Diskriminierung. Das unerwünschte Verhalten kann unterschiedliche Formen annehmen, die von mündlichen oder schriftlichen Kommentaren bis zu Gesten reichen, muss aber so schwerwiegend sein, dass ein von Einschüchterungen, Erniedrigungen oder Beleidigungen gekennzeichnetes Umfeld entsteht. Diese Definition entspricht derjenigen in den anderen Richtlinien nach Artikel 13.

Die Verweigerung angemessener Vorkehrungen gilt als Form der Diskriminierung. Dies steht im Einklang mit dem Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen und mit der Richtlinie 2000/78/EG. In bestimmten Fällen kann Ungleichbehandlung aufgrund des Alters rechtmäßig sein, sofern sie durch ein legitimes Ziel gerechtfertigt ist und die Mittel zur Erreichung dieses Ziels angemessen und erforderlich sind (Verhältnismäßigkeitsprüfung).

Die bisherigen Richtlinien nach Artikel 13 EG-Vertrag sahen Ausnahmen vom Verbot der unmittelbaren Diskriminierung vor, „wenn das betreffende Merkmal … eine wesentliche und entscheidende berufliche Anforderung darstellt“, ferner bei Ungleichbehandlung wegen des Alters und, im Kontext der Diskriminierung aufgrund des Geschlechts, bei der Bereitstellung von Gütern und Dienstleistungen. Auch wenn der vorliegende Vorschlag nicht für den Bereich Beschäftigung gilt, so gibt es doch auf den in Artikel 3 genannten Gebieten Ungleichbehandlungen, die zulässig sein sollten. Da aber die Ausnahmen vom allgemeinen Gleichbehandlungsgrundsatz eng begrenzt bleiben sollten, müssen sie dem doppelten Erfordernis eines legitimen Ziels und verhältnismäßiger (d. h. möglichst wenig diskriminierender) Mittel zur Erreichung dieses Ziels entsprechen.

[20] ABl. L 269 vom 5.10.2002.

Für Versicherungs- und Bankdienstleistungen ist zusätzlich eine besondere Bestimmung vorgesehen, da anzuerkennen ist, dass Alter und Behinderung bei bestimmten Produkten wesentliche Elemente der Risikobewertung und damit des Preises darstellen können. Wird Versicherern völlig untersagt, die Faktoren Alter und Behinderung zu berücksichtigen, müssten die zusätzlichen Kosten vollständig vom übrigen „Pool" der Versicherten getragen werden, was höhere Gesamtkosten und geringere Deckung der Verbraucher zur Folge hätte. Die Berücksichtigung des Alters und einer Behinderung bei der Risikobewertung muss auf exakten Daten und Statistiken basieren.

Die Richtlinie berührt nicht die einzelstaatlichen Maßnahmen zur Gewährleistung der öffentlichen Sicherheit und Ordnung, zur Verhütung von Straftaten, zum Schutz der Gesundheit und zum Schutz der Rechte und Freiheiten anderer.

Artikel 3: Geltungsbereich

Diskriminierung aus Gründen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung ist im öffentlichen und privaten Bereich verboten in Bezug auf

- den Sozialschutz einschließlich der sozialen Sicherheit und der Gesundheitsdienste;
- die sozialen Vergünstigungen;
- die Bildung;
- den Zugang zu und die Versorgung mit Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen, einschließlich Wohnraum.

Was den Zugang zu Gütern und Dienstleistungen angeht, sind nur berufliche oder gewerbliche Tätigkeiten betroffen. Anders ausgedrückt, Transaktionen zwischen Privatpersonen, die als solche handeln, fallen nicht unter die Richtlinie: die Vermietung eines Zimmers in einem Privathaus muss nicht auf die gleiche Weise behandelt werden wie die Vermietung von Hotelzimmern. Die verschiedenen Bereiche sind nur insoweit betroffen, als der Gegenstand in die Zuständigkeit der Gemeinschaft fällt. So sind beispielsweise die Gestaltung des Bildungssystems, die Aktivitäten und die Lehrinhalte einschließlich der Organisation der Bildung für Menschen mit Behinderungen Sache der Mitgliedstaaten, die eine Ungleichbehandlung beim Zugang zu kirchlichen Bildungseinrichtungen vorsehen können. Beispielsweise kann eine Schule besondere Veranstaltungen für Kinder eines bestimmten Alters anbieten, und konfessionelle Schulen können Schulausflüge zu religiösen Themen organisieren.

Im Rechtsakt wird auch deutlich gemacht, dass Angelegenheiten im Zusammenhang mit dem Ehe- oder Familienstand, wozu auch die Adoption gehört, nicht unter die Richtlinie fallen. Dies betrifft auch die reproduktiven Rechte. Es bleibt den Mitgliedstaaten überlassen, ob sie *gesetzlich* eingetragene Partnerschaften einführen und anerkennen oder nicht. Sobald aber im einzelstaatlichen Recht derartige Partnerschaften als der Ehe vergleichbar anerkannt werden, gilt auch hier der Gleichbehandlungsgrundsatz[21].

[21] Urteil des EuGH vom 1.4.2008 in der Rechtssache C-267/06 Tadao Maruko.

In Artikel 3 wird präzisiert, dass einzelstaatliche Rechtsvorschriften über den säkularen Charakter des Staates und seiner Einrichtungen sowie über den Status religiöser Organisationen von der Richtlinie unberührt bleiben. Die Mitgliedstaaten können also das Tragen religiöser Symbole in Schulen erlauben oder verbieten. Auch fällt Ungleichbehandlung aufgrund der Staatsangehörigkeit nicht unter die Richtlinie.

Artikel 4: Gleichbehandlung von Menschen mit Behinderungen

Der effektive Zugang von Menschen mit Behinderungen zu Sozialschutz, sozialen Vergünstigungen, Gesundheitsdiensten und Bildung sowie der Zugang zu und die Versorgung mit Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen, einschließlich Wohnraum, ist von vornherein zu gewährleisten. Diese Pflicht wird insofern begrenzt, als sie entfällt, sollte ihre Erfüllung eine unverhältnismäßige Belastung darstellen oder größere Veränderungen des Produkts oder der Dienstleistung erfordern.

In einigen Fällen können individuelle angemessene Vorkehrungen erforderlich sein, um den effektiven Zugang einer bestimmten Person mit Behinderung zu gewährleisten. Wie oben gilt dies nur, wenn es keine unverhältnismäßige Belastung darstellt. Der Artikel enthält eine nicht erschöpfende Liste von Faktoren, die bei der Bewertung der Frage, ob die Belastung unverhältnismäßig ist, berücksichtigt werden könnten, so dass es möglich ist, der konkreten Situation von kleinen und mittleren Unternehmen sowie von Mikrounternehmen Rechnung zu tragen.

Den Begriff der angemessenen Vorkehrungen gibt es bereits für den Bereich Beschäftigung in der Richtlinie 2000/78/EG, weshalb die Mitgliedstaaten und Unternehmen schon Erfahrungen mit seiner Anwendung gesammelt haben. Was für eine große Gesellschaft oder Behörde angemessen sein mag, ist dies möglicherweise für ein kleines oder mittleres Unternehmen nicht. Die Anforderung, für angemessene Vorkehrungen zu sorgen, beschränkt sich nicht nur auf physische Veränderungen, sondern kann auch alternative Wege für die Bereitstellung einer Dienstleistung umfassen.

Artikel 5: Positive Maßnahmen

Diese Bestimmung findet sich in allen Richtlinien nach Artikel 13. Selbstverständlich führt in vielen Fällen formale Gleichstellung nicht zu Gleichstellung in der Praxis. Es kann sich als erforderlich erweisen, durch spezifische Maßnahmen Ungleichheitssituationen zu verhindern oder auszugleichen. Die Mitgliedstaaten verfügen, was positive Maßnahmen betrifft, über unterschiedliche Traditionen und Gepflogenheiten, weshalb es dieser Artikel den Mitgliedstaaten überlässt, positive Maßnahmen zu treffen, und sie nicht zur Pflicht macht.

Artikel 6: Mindestanforderungen

Diese Bestimmung findet sich in allen Richtlinien nach Artikel 13. Danach haben die Mitgliedstaaten die Möglichkeiten, für ein höheres als das von der Richtlinie garantierte Schutzniveau zu sorgen, und es wird bekräftigt, dass es durch die Umsetzung der Richtlinie nicht zu einer Absenkung des von den Mitgliedstaaten bereits garantierten allgemeinen Niveaus des Schutzes vor Diskriminierung kommen darf.

Artikel 7: Rechtsschutz

Diese Bestimmung findet sich in allen Richtlinien nach Artikel 13. Betroffene sollten ihr Recht auf Nichtdiskriminierung durchsetzen können. Daher sieht dieser Artikel vor, dass Menschen, die glauben, Opfer von Diskriminierung zu sein, in der Lage sein sollten, ihr Recht

in Verwaltungs- oder Gerichtsverfahren geltend zu machen, selbst wenn das Verhältnis, während dessen die Diskriminierung vorgekommen sein soll, bereits beendet ist, wie der Europäische Gerichtshof in der Rechtssache Coote entschieden hat[22].

Das Recht auf wirksamen Rechtsschutz wird dadurch verstärkt, dass Organisationen, die ein legitimes Interesse an der Bekämpfung von Diskriminierung haben, berechtigt sind, Opfer von Diskriminierung in Gerichts- oder Verwaltungsverfahren zu unterstützen. Einzelstaatliche Regelungen über Fristen für die Rechtsverfolgung bleiben von dieser Bestimmung unberührt.

Artikel 8: Beweislast

Diese Bestimmung findet sich in allen Richtlinien nach Artikel 13. Für Gerichtsverfahren gilt im Allgemeinen die Regel, dass eine Person, die eine Behauptung aufstellt, diese beweisen muss. In Diskriminierungsfällen ist es aber häufig äußerst schwierig, die erforderlichen Beweise zu erbringen, da sie sich oft in den Händen des Beklagten befinden. Dieses Problem wurde vom Europäischen Gerichtshof[23] und vom Gemeinschaftsgesetzgeber in der Richtlinie 97/80/EG[24] anerkannt.

Die Umkehrung der Beweislast gilt in allen Fällen, in denen die Verletzung des Gleichbehandlungsgrundsatzes geltend gemacht wird, auch wenn gemäß Artikel 7 Absatz 2 Verbände und Organisationen beteiligt sind. Wie in den bisherigen Richtlinien gilt die Umkehrung der Beweislast nicht bei Strafverfahren im Zusammenhang mit angenommener Diskriminierung.

Artikel 9: Viktimisierung

Diese Bestimmung findet sich in allen Richtlinien nach Artikel 13. Ein wirksamer Rechtsschutz muss auch den Schutz vor Vergeltungsmaßnahmen umfassen. Diskriminierungsopfer könnten sich davon abhalten lassen, ihre Rechte geltend zu machen, weil sie Vergeltungsmaßnahmen befürchten; deshalb ist es notwendig, den Einzelnen vor Benachteiligungen zu schützen, die als Reaktion auf die Wahrnehmung der durch die Richtlinie garantierten Rechte erfolgen. Dieser Artikel ist der gleiche wie in den Richtlinien 2000/43/EG und 2000/78/EG.

Artikel 10: Unterrichtung

Diese Bestimmung findet sich in allen Richtlinien nach Artikel 13. Erfahrung und Umfragen zeigen, dass die einzelnen Bürger schlecht oder unzureichend über ihre Rechte informiert sind. Je effektiver die Mechanismen zur Unterrichtung der Öffentlichkeit und das Präventionssystem sind, desto geringer ist der Bedarf an Abhilfe im Einzelfall. Entsprechende Bestimmungen gibt es auch in den Richtlinien 2000/43/EG, 2000/78/EG und 2002/113/EG.

Artikel 11: Dialog mit einschlägigen Interessengruppen

Diese Bestimmung findet sich in allen Richtlinien nach Artikel 13. Durch sie soll der Dialog gefördert werden zwischen den einschlägigen Behörden und Interessengruppen, etwa nichtstaatlichen Organisationen, die ein legitimes Interesse daran haben, sich an der Bekämpfung von Diskriminierung aus Gründen der Religion oder der Weltanschauung, einer

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22 Rechtssache C-185/97 [1998] Slg. I-5199.

23 Danfoss, Rechtssache 109/88 [1989] Slg. 03199.

24 ABl. L 14 vom 20.1.1998.

Behinderung, des Alters oder der sexuellen Ausrichtung zu beteiligen. Eine ähnliche Bestimmung enthalten auch die bisherigen Antidiskriminierungsrichtlinien.

Artikel 12: Mit der Förderung der Gleichbehandlung befasste Stellen

Diese Bestimmung findet sich in zwei Richtlinien nach Artikel 13. Danach müssen die Mitgliedstaaten auf nationaler Ebene eine oder mehrere Stellen („Gleichstellungsstelle“) einrichten, deren Aufgabe darin besteht, die Gleichbehandlung aller Personen ohne Diskriminierung aus Gründen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung zu fördern.

Sie entspricht insofern den Bestimmungen der Richtlinie 2000/43/EG, als sich die Stellen mit dem Zugang zu und der Versorgung mit Gütern und Dienstleistungen befassen, und sie baut auf entsprechenden Bestimmungen in den Richtlinien 2002/73/EG[25] und 2004/113/EG auf. Festgelegt werden Mindestzuständigkeiten für diese nationalen Stellen, die unabhängig tätig werden sollten, um den Gleichbehandlungsgrundsatz zu fördern. Die Mitgliedstaaten können beschließen, dass diese Stellen die gleichen sind wie die bereits im Rahmen der bisherigen Richtlinien eingerichteten.

Für Einzelne ist es schwierig und teuer, eine Klage wegen einer angenommenen Diskriminierung anzustrengen. Eine zentrale Aufgabe der Gleichstellungsstellen besteht darin, Diskriminierungsopfer auf unabhängige Weise zu unterstützen. Sie müssen auch in der Lage sein, unabhängige Untersuchungen zum Thema Diskriminierung durchzuführen und Berichte und Empfehlungen zu diskriminierungsrelevanten Themen zu veröffentlichen.

Artikel 13: Einhaltung

Diese Bestimmung findet sich in allen Richtlinien nach Artikel 13. Zur Durchsetzung des Gleichbehandlungsgrundsatzes ist es erforderlich, dass Diskriminierung, die auf Rechts- und Verwaltungsvorschriften zurückgeht, eliminiert wird; daher werden die Mitgliedstaaten durch die Richtlinie verpflichtet, solche Vorschriften aufzuheben. Wie in früheren Rechtsakten, so wird auch in dieser Richtlinie festgelegt, dass Bestimmungen, die dem Gleichbehandlungsgrundsatz zuwiderlaufen, aufgehoben oder geändert werden bzw. aufgehoben oder geändert werden können, wenn gegen sie Einspruch erhoben wird.

Artikel 14: Sanktionen

Diese Bestimmung findet sich in allen Richtlinien nach Artikel 13. Im Einklang mit dem Fallrecht des Europäischen Gerichtshofs[26] wird festgelegt, dass es keine Obergrenze für die Schadenersatzleistung bei Verletzung des Gleichbehandlungsgrundsatzes geben sollte. Die Einführung strafrechtlicher Sanktionen wird nicht verlangt.

Artikel 15: Umsetzung

Diese Bestimmung findet sich in allen Richtlinien nach Artikel 13. Den Mitgliedstaaten wird für die Umsetzung der Richtlinie in einzelstaatliches Recht und die Unterrichtung der Kommission über die einzelstaatlichen Rechtsvorschriften eine Frist von zwei Jahren

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[25] Richtlinie 2002/73/EG zur Änderung der Richtlinie 76/207/EWG des Rates zur Verwirklichung des Grundsatzes der Gleichbehandlung von Männern und Frauen hinsichtlich des Zugangs zur Beschäftigung, zur Berufsbildung und zum beruflichen Aufstieg sowie in Bezug auf die Arbeitsbedingungen, ABl. L 269 vom 5.10.2002, S. 15.

[26] Rechtssachen C-180/95 Draehmpaehl, Slg. 1997, I-2195 und C-271/91 Marshall, Slg. 1993, I-4367.

eingeräumt. Die Mitgliedstaaten können festlegen, dass der Pflicht, effektiven Zugang für Personen mit Behinderungen zu gewährleisten, erst vier Jahre nach Annahme der Richtlinie nachzukommen ist.

Artikel 16: Bericht

Diese Bestimmung findet sich in allen Richtlinien nach Artikel 13. Danach muss die Kommission dem Europäischen Parlament und dem Rat auf der Grundlage der von den Mitgliedstaaten übermittelten Informationen über die Anwendung der Richtlinie berichten. In dem Bericht werden die Standpunkte der Sozialpartner und der einschlägigen nichtstaatlichen Organisationen sowie der Europäischen Agentur für Grundrechte berücksichtigt.

Artikel 17: Inkrafttreten

Diese Bestimmung findet sich in allen Richtlinien nach Artikel 13. Die Richtlinie tritt am Tag ihrer Veröffentlichung im Amtsblatt der Europäischen Union in Kraft.

Artikel 18: Adressaten

Diese Bestimmung findet sich in allen Richtlinien nach Artikel 13 und besagt, dass die Richtlinie an die Mitgliedstaaten gerichtet ist.

2008/0140 (CNS)

Vorschlag für eine

RICHTLINIE DES RATES

zur Anwendung des Grundsatzes der Gleichbehandlung ungeachtet der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung

DER RAT DER EUROPÄISCHEN UNION –

gestützt auf den Vertrag zur Gründung der Europäischen Gemeinschaft, insbesondere auf Artikel 13 Absatz 1,

auf Vorschlag der Kommission[27],

nach Stellungnahme des Europäischen Parlaments[28],

nach Stellungnahme des Europäischen Wirtschafts- und Sozialausschusses[29],

nach Stellungnahme des Ausschusses der Regionen[30],

in Erwägung nachstehender Gründe:

(1) Nach Artikel 6 des Vertrags über die Europäische Union beruht diese auf den Grundsätzen der Freiheit, der Demokratie, der Achtung der Menschenrechte und Grundfreiheiten sowie der Rechtsstaatlichkeit, Grundsätzen, denen sich sämtliche Mitgliedstaaten verschrieben haben, und sie achtet die Grundrechte, wie sie in der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten gewährleistet sind und wie sie sich aus den gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten als allgemeine Grundsätze des Gemeinschaftsrechts ergeben.

(2) Die Gleichheit aller Menschen vor dem Gesetz und der Schutz vor Diskriminierung ist ein allgemeines Menschenrecht und wurde in der Allgemeinen Erklärung der Menschenrechte, im Übereinkommen der Vereinten Nationen über die Beseitigung aller Formen der Diskriminierung von Frauen, im Internationalen Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung, im Internationalen Pakt der Vereinten Nationen über bürgerliche und politische Rechte, im Internationalen Pakt der Vereinten Nationen über wirtschaftliche, soziale und kulturelle Rechte, im Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen, in der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten und in der Europäischen Sozialcharta anerkannt, die von den [allen] Mitgliedstaaten unterzeichnet wurden. Insbesondere ist im Übereinkommen der

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27 ABl. C vom , S .
28 ABl. C vom , S .
29 ABl. C vom , S .
30 ABl. C vom , S .

Vereinten Nationen über die Rechte von Menschen mit Behinderungen die Verweigerung angemessener Vorkehrungen in der Definition von Diskriminierung enthalten.

(3) Die Richtlinie wahrt die Grundrechte und achtet die Grundsätze, die insbesondere in der Charta der Grundrechte der Europäischen Union verankert sind. In Artikel 10 der Charta wird die Gedanken-, Gewissens- und Religionsfreiheit anerkannt, in Artikel 21 werden Diskriminierungen unter anderem aus Gründen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung verboten und in Artikel 26 wird der Anspruch von Menschen mit Behinderung auf Maßnahmen zur Gewährleistung ihrer Eigenständigkeit anerkannt.

(4) Das Europäische Jahr der Menschen mit Behinderungen 2003, das Europäische Jahr der Chancengleichheit für alle 2007 und das Europäische Jahr des interkulturellen Dialogs 2008 haben das Weiterbestehen von Diskriminierung, aber auch die Vorzüge der Vielfalt deutlich gemacht.

(5) Der Europäische Rat hat am 14. Dezember 2007 in Brüssel die Mitgliedstaaten ersucht, ihre Bemühungen zur Verhütung und Bekämpfung der Diskriminierung innerhalb und außerhalb des Arbeitsmarkts zu verstärken.[31]

(6) Das Europäische Parlament hat zu einer Ausdehnung des Diskriminierungsschutzes im Gemeinschaftsrecht aufgerufen.[32]

(7) Die Europäische Kommission hat in ihrer Mitteilung „Eine erneuerte Sozialagenda: Chancen, Zugangsmöglichkeiten und Solidarität im Europa des 21. Jahrhunderts“[33] bekräftigt, dass in Gesellschaften, in denen alle Menschen als gleichwertig betrachtet werden, niemandem der Weg zur Nutzung der Chancen durch künstliche Hindernisse oder Diskriminierung verstellt werden sollte.

(8) Die Gemeinschaft hat auf der Grundlage des Artikels 13 Absatz 1 EG-Vertrag drei Rechtsinstrumente[34] erlassen, um Diskriminierung aus Gründen des Geschlechts, der Rasse, der ethnischen Herkunft, der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung zu verhindern und zu bekämpfen. Insbesondere wird mit der Richtlinie 2000/78/EG ein allgemeiner Rahmen gegen Ungleichbehandlung aus Gründen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung in Beschäftigung und Beruf festgelegt. Doch bestehen nach wie vor Unterschiede zwischen den Mitgliedstaaten, was Umfang und Art des Schutzes vor derartiger Diskriminierung außerhalb des Beschäftigungsbereichs betrifft.

(9) Daher sollte Diskriminierung aus Gründen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung in einer Reihe von Bereichen außerhalb des Arbeitsmarktes gesetzlich verboten werden, unter anderem in den Bereichen Sozialschutz, Bildung sowie Zugang zu und Versorgung mit Gütern

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31 Tagung des Europäischen Rates vom 14. Dezember 2007 in Brüssel, Schlussfolgerungen des Vorsitzes, Nummer 50.

32 Entschließung vom 20. Mai 2008, P6_TA-PROV(2008)0212.

33 KOM(2008) 412.

34 Richtlinie 2000/43/EG, Richtlinie 2000/78/EG und Richtlinie 2004/113/EG.

und Dienstleistungen, einschließlich Wohnraum. Gesetzlich vorgeschrieben werden sollten Maßnahmen zur Gewährleistung des gleichberechtigten Zugangs von Personen mit Behinderungen zu den erfassten Bereichen.

(10) Die Richtlinie 2000/78/EG untersagt Diskriminierung beim Zugang zur Berufsbildung; dieser Schutz muss durch Ausdehnung des Diskriminierungsverbots auf die nicht zur Berufsbildung zählende Bildung vervollständigt werden.

(11) Diese Richtlinie sollte die Zuständigkeiten der Mitgliedstaaten in den Bereichen Bildung, soziale Sicherheit und Gesundheitswesen unberührt lassen. Ebenso sollten die grundlegende Rolle und der breite Ermessensspielraum der Mitgliedstaaten bei Bereitstellung, Inauftraggabe und Organisation von Dienstleistungen von allgemeinem wirtschaftlichem Interesse unberührt bleiben.

(12) Unter Diskriminierung sind unmittelbare und mittelbare Diskriminierung, Belästigung, Anweisung zur Diskriminierung und Verweigerung angemessener Vorkehrungen zu verstehen.

(13) Bei der Verwirklichung des Grundsatzes der Gleichbehandlung ungeachtet der Religion oder Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung sollte die Gemeinschaft gemäß Artikel 3 Absatz 2 EG-Vertrag darauf hinwirken, Ungleichheiten zu beseitigen und die Gleichstellung von Männern und Frauen zu fördern, insbesondere auch, weil Frauen häufig Opfer von Mehrfachdiskriminierung sind.

(14) Die Beurteilung von Tatbeständen, die auf eine unmittelbare oder mittelbare Diskriminierung schließen lassen, sollte den einzelstaatlichen gerichtlichen Instanzen oder anderen zuständigen Stellen nach den einzelstaatlichen Rechtsvorschriften oder Gepflogenheiten obliegen. In diesen einzelstaatlichen Vorschriften kann insbesondere vorgesehen sein, dass mittelbare Diskriminierung mit allen Mitteln, einschließlich statistischer Beweise, festzustellen ist.

(15) Bei Versicherungs-, Bank- und anderen Finanzdienstleistungen werden behinderungs- und altersbezogene versicherungsmathematische Faktoren und Risikofaktoren angewandt. Sie sollten nicht als diskriminierend angesehen werden, wenn nachgewiesen wird, dass es sich um für die Risikobewertung zentrale Faktoren handelt.

(16) Für alle Personen gelten die Freiheit der Vertragsschließung und die freie Wahl des Vertragspartners für eine Transaktion. Die Richtlinie sollte nicht für Wirtschaftstransaktionen von Personen gelten, für die diese Transaktionen nicht ihre berufliche oder gewerbliche Tätigkeit darstellen.

(17) Durch das Diskriminierungsverbot dürfen andere Grundrechte und Grundfreiheiten nicht beeinträchtigt werden, einschließlich des Schutzes des Privat- und Familienlebens und der in diesem Kontext stattfindenden Transaktionen, der Religionsfreiheit und der Vereinigungsfreiheit. Einzelstaatliche Gesetze über den Ehe- oder Familienstand einschließlich der reproduktiven Rechte bleiben von dieser Richtlinie unberührt. Unberührt bleibt auch der säkulare Charakter des Staates und seiner Einrichtungen oder Gremien sowie der Bildung.

(18) Die Mitgliedstaaten sind für die Gestaltung und die Inhalte der Bildung zuständig. In der Mitteilung der Kommission zum Thema „Bessere Kompetenzen für das 21. Jahrhundert: eine Agenda für die europäische Zusammenarbeit im Schulwesen“ wird auf die Notwendigkeit hingewiesen, den benachteiligten Kindern und den Kindern mit besonderen Bedürfnissen besondere Aufmerksamkeit zu widmen. Insbesondere kann das einzelstaatliche Recht unterschiedliche Behandlung aufgrund der Religion oder Weltanschauung bei der Zulassung zu Bildungseinrichtungen vorsehen. Auch können die Mitgliedstaaten das Tragen oder Zurschaustellen religiöser Symbole in Schulen zulassen oder verbieten.

(19) Die Europäische Union hat in ihrer der Schlussakte des Vertrags von Amsterdam angefügten Erklärung Nr. 11 zum Status der Kirchen und weltanschaulichen Gemeinschaften ausdrücklich anerkannt, dass sie den Status, den Kirchen und religiöse Vereinigungen oder Gemeinschaften in den Mitgliedstaaten nach deren Rechtsvorschriften genießen, achtet und ihn nicht beeinträchtigt und dass sie den Status von weltanschaulichen oder nicht religiösen Gemeinschaften in gleicher Weise achtet. Maßnahmen, durch die Menschen mit Behinderungen ein effektiver diskriminierungsfreier Zugang zu den von der vorliegenden Richtlinie erfassten Bereichen ermöglicht werden soll, spielen für die Gewährleistung der vollen Gleichstellung in der Praxis eine wichtige Rolle. Außerdem können in Einzelfällen individuelle angemessene Vorkehrungen erforderlich sein, um diesen Zugang zu gewährleisten. In keinem Fall sind Maßnahmen erforderlich, die eine unverhältnismäßige Belastung bedeuten würden. Bei der Bewertung der Frage, ob die Belastung unverhältnismäßig ist, sollte eine Reihe von Faktoren berücksichtigt werden, etwa die Größe, die Ressourcen und die Art der Organisation. Das Prinzip der angemessenen Vorkehrungen ist in der Richtlinie 2000/78/EG und im Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen festgelegt.

(20) In einigen Bereichen wurden auf europäischer Ebene rechtliche Anforderungen[35] und Normen zur Zugänglichkeit festgelegt, während laut Artikel 16 der Verordnung (EG) Nr. 1083/2006 des Rates vom 11. Juli 2006 mit allgemeinen Bestimmungen über den Europäischen Fonds für regionale Entwicklung, den Europäischen Sozialfonds und den Kohäsionsfonds und zur Aufhebung der Verordnung (EG) Nr. 1260/1999[36] der Zugang für Behinderte eines der Kriterien ist, die bei der Festlegung der aus Mitteln der Fonds kofinanzierten Vorhaben zu beachten sind. Auch hat der Rat die Notwendigkeit von Maßnahmen zur Gewährleistung der Zugänglichkeit kultureller Einrichtungen und kultureller Aktivitäten für Menschen mit Behinderungen unterstrichen[37].

(21) Das Diskriminierungsverbot sollte nicht der Beibehaltung oder Einführung von Maßnahmen der Mitgliedstaaten entgegenstehen, die Nachteile für eine Gruppe von Personen einer bestimmten Religion oder Weltanschauung, mit einer Behinderung, einer bestimmten Altersgruppe oder einer bestimmten sexuellen Ausrichtung verhindern oder ausgleichen sollen. Durch solche Maßnahmen können Organisationen von Personen einer bestimmten Religion oder Weltanschauung, mit einer

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35 Verordnung (EG) Nr. 1107/2006 und Verordnung (EG) Nr. 1371/2007.

36 ABl. L 210 vom 31.7.2006, S. 25. Zuletzt geändert durch die Verordnung (EG) Nr. 1989/2006 (ABl. L 411 vom 30.12.2006, S .6).

37 ABl. C 134 vom 7.6.2003, S. 7.

Behinderung, einer bestimmten Altersgruppe oder einer bestimmten sexuellen Ausrichtung zugelassen werden, wenn ihr Hauptzweck die Förderung der besonderen Bedürfnisse dieser Personen ist.

(22) In dieser Richtlinie werden Mindestanforderungen festgelegt, weshalb es den Mitgliedstaaten freisteht, günstigere Vorschriften einzuführen oder beizubehalten. Die Umsetzung dieser Richtlinie sollte nicht als Rechtfertigung für eine Absenkung des in den Mitgliedstaaten bereits bestehenden Schutzniveaus benutzt werden.

(23) Opfer von Diskriminierung aufgrund ihrer Religion oder Weltanschauung, einer Behinderung, ihres Alters oder ihrer sexuellen Ausrichtung sollten über einen angemessenen Rechtsschutz verfügen. Um einen effektiveren Schutz zu gewährleisten, sollten sich Verbände, Organisationen und andere juristische Personen unbeschadet der nationalen Verfahrensregeln bezüglich der Vertretung und Verteidigung vor Gericht auch im Namen eines Opfers oder zu seiner Unterstützung an einem Verfahren beteiligen können.

(24) Die Regeln für die Beweislastverteilung sind anzupassen, wenn ein glaubhafter Anschein einer Diskriminierung besteht; zur wirksamen Anwendung des Gleichbehandlungsgrundsatzes muss eine Verlagerung der Beweislast auf die beklagte Partei erfolgen, wenn Nachweise für eine solche Diskriminierung erbracht werden. Es ist aber nicht Sache der beklagten Partei, nachzuweisen, dass die klagende Partei einer bestimmten Religion oder Weltanschauung angehört oder eine bestimmte Behinderung, ein bestimmtes Alter oder eine bestimmte sexuelle Ausrichtung hat.

(25) Voraussetzung für eine effektive Verwirklichung des Gleichbehandlungsgrundsatzes ist ein angemessener rechtlicher Schutz vor Viktimisierung.

(26) Der Rat hat in seiner Entschließung zu den Folgemaßnahmen zum Europäischen Jahr der Chancengleichheit für alle (2007) dazu aufgerufen, die Zivilgesellschaft, einschließlich Organisationen, die diskriminierungsgefährdete Personen vertreten, die Sozialpartner und andere interessierte Kreise in vollem Umfang in die Entwicklung von Strategien und Programmen zur Verhütung von Diskriminierung und zur Förderung der Gleichbehandlung und der Chancengleichheit sowohl auf europäischer als auch auf nationaler Ebene einzubinden.

(27) Die Erfahrung mit der Anwendung der Richtlinien 2000/43/EG und 2004/113/EG zeigt, dass der Schutz vor Diskriminierung aus den in der vorliegenden Richtlinie erfassten Gründen verstärkt würde, wenn es in jedem Mitgliedstaat eine oder mehrere unabhängige Stellen gäbe, die für die Analyse der mit Diskriminierung verbundenen Probleme, die Prüfung möglicher Lösungen und die Bereitstellung konkreter Hilfsangebote für die Opfer zuständig wäre.

(28) Bei der Wahrnehmung ihrer Befugnisse und Erfüllung ihrer Aufgaben gemäß dieser Richtlinie sollten sich diese Stellen an den Pariser Grundsätzen der Vereinten Nationen betreffend die Stellung und Tätigkeit nationaler Einrichtungen zur Förderung und zum Schutz der Menschenrechte orientieren.

(29) Die Mitgliedstaaten sollten wirksame, verhältnismäßige und abschreckende Sanktionen für Verstöße gegen die in dieser Richtlinie festgelegten Pflichten vorsehen.

(30) Das Ziel, ein einheitliches Niveau des Schutzes vor Diskriminierung in allen Mitgliedstaaten zu gewährleisten, kann, im Einklang mit den Grundsätzen der Subsidiarität und der Verhältnismäßigkeit nach Artikel 5 EG-Vertrag, von den Mitgliedstaaten nicht in ausreichendem Maße verwirklicht und wegen des Umfangs und der angestrebten Wirkung der vorgeschlagenen Maßnahmen besser auf Gemeinschaftsebene erreicht werden. Diese Richtlinie geht nicht über das für die Erreichung dieses Ziels erforderliche Maß hinaus.

(31) Gemäß Nummer 34 der interinstitutionellen Vereinbarung über bessere Rechtsetzung werden die Mitgliedstaaten aufgefordert, für ihre eigenen Zwecke und im Interesse der Gemeinschaft eigene Aufstellungen vorzunehmen, aus denen im Rahmen des Möglichen die Entsprechungen zwischen Richtlinie und Umsetzungsmaßnahmen zu entnehmen sind, und diese zu veröffentlichen.

HAT FOLGENDE RICHTLINIE ERLASSEN:

Kapitel 1
ALLGEMEINE BESTIMMUNGEN

Artikel 1
Zweck

Mit dieser Richtlinie wird ein allgemeiner Rahmen zur Bekämpfung der Diskriminierung aus Gründen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung zur Verwirklichung des Grundsatzes der Gleichbehandlung in den Mitgliedstaaten außerhalb von Beschäftigung und Beruf festgelegt.

Artikel 2
Der Begriff „Diskriminierung“

1. Im Sinne dieser Richtlinie bedeutet „Gleichbehandlungsgrundsatz“, dass es keine unmittelbare oder mittelbare Diskriminierung wegen eines der in Artikel 1 genannten Gründe geben darf.

2. Im Sinne des Absatzes 1

a) liegt eine unmittelbare Diskriminierung vor, wenn eine Person wegen eines der in Artikel 1 genannten Gründe in einer vergleichbaren Situation eine weniger günstige Behandlung erfährt, als eine andere Person erfährt, erfahren hat oder erfahren würde;

b) liegt eine mittelbare Diskriminierung vor, wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren Personen mit einer bestimmten Religion oder Weltanschauung, einer bestimmten Behinderung, einem bestimmten Alter oder einer bestimmten sexuellen Ausrichtung gegenüber anderen Personen in besonderer Weise benachteiligen können, es sei denn diese Vorschriften, Kriterien oder Verfahren sind durch ein rechtmäßiges Ziel sachlich gerechtfertigt und die Mittel sind zur Erreichung dieses Ziels angemessen und erforderlich.

3. Unerwünschte Verhaltensweisen, die mit einem der Gründe nach Artikel 1 in Zusammenhang stehen und bezwecken oder bewirken, dass die Würde der betreffenden Person verletzt und ein von Einschüchterungen, Anfeindungen, Erniedrigungen,

Entwürdigungen oder Beleidigungen gekennzeichnetes Umfeld geschaffen wird, sind Belästigungen, die als Diskriminierung im Sinne des Absatzes 1 gelten.

4. Die Anweisung zur Diskriminierung einer Person wegen eines der in Artikel 1 genannten Gründe gilt als Diskriminierung im Sinne des Absatzes 1.

5. Werden im konkreten Fall angemessene Vorkehrungen für Menschen mit Behinderungen gemäß Artikel 4 Absatz 1 Buchstabe b dieser Richtlinie verweigert, gilt dies als Diskriminierung im Sinne des Absatzes 1.

6. Ungeachtet des Absatzes 2 können die Mitgliedstaaten festlegen, dass Ungleichbehandlung aufgrund des Alters keine Diskriminierung darstellt, sofern sie im Rahmen des nationalen Rechts durch ein legitimes Ziel gerechtfertigt ist und die Mittel zur Erreichung dieses Ziels angemessen und erforderlich sind. Insbesondere wird durch diese Richtlinie die Festsetzung bestimmter Altersgrenzen für den Zugang zu sozialen Vergünstigungen, zur Bildung und zu bestimmten Gütern und Dienstleistungen nicht ausgeschlossen.

7. Ungeachtet des Absatzes 2 können die Mitgliedstaaten bei der Bereitstellung von Finanzdienstleistungen verhältnismäßige Ungleichbehandlungen zulassen, wenn für das fragliche Produkt die Berücksichtigung des Alters oder einer Behinderung ein zentraler Faktor bei der auf relevanten und exakten versicherungsmathematischen oder statistischen Daten beruhenden Risikobewertung ist.

8. Diese Richtlinie berührt nicht die im einzelstaatlichen Recht vorgesehenen allgemeinen Maßnahmen, die in einer demokratischen Gesellschaft für die Gewährleistung der öffentlichen Sicherheit, die Verteidigung der Ordnung und die Verhütung von Straftaten, zum Schutz der Gesundheit und zum Schutz der Rechte und Freiheiten anderer notwendig sind.

Artikel 3
Geltungsbereich

1. Im Rahmen der auf die Gemeinschaft übertragenen Zuständigkeiten gilt das Diskriminierungsverbot für alle Personen im öffentlichen und privaten Bereich, einschließlich öffentlicher Stellen, in Bezug auf

a) den Sozialschutz einschließlich der sozialen Sicherheit und der Gesundheitsdienste;

b) die sozialen Vergünstigungen;

c) die Bildung;

d) den Zugang zu und die Versorgung mit Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen, einschließlich Wohnraum.

Buchstabe d gilt für Einzelne nur insoweit, als sie ihre berufliche oder gewerbliche Tätigkeit ausüben.

2. Einzelstaatliche Gesetze über den Ehe- oder Familienstand einschließlich der reproduktiven Rechte bleiben von dieser Richtlinie unberührt.

3. Die Zuständigkeit der Mitgliedstaaten für die Lehrinhalte, die Aktivitäten und die Gestaltung ihres Bildungssystems einschließlich der Sonderpädagogik bleibt von dieser

Richtlinie unberührt. Die Mitgliedstaaten können eine Ungleichbehandlung aufgrund der Religion oder Weltanschauung beim Zugang zu Bildungseinrichtungen vorsehen.

4. Einzelstaatliche Rechtsvorschriften zur Gewährleistung des säkularen Charakters des Staates, der staatlichen Einrichtungen und Gremien sowie der Bildung oder zum Status und zu den Aktivitäten der Kirchen und anderer religiös oder weltanschaulich begründeter Organisationen bleiben von dieser Richtlinie unberührt. Das Gleiche gilt für einzelstaatliche Rechtsvorschriften zur Förderung der Gleichstellung von Männern und Frauen.

5. Diese Richtlinie betrifft nicht die unterschiedliche Behandlung aus Gründen der Staatsangehörigkeit und berührt nicht die Vorschriften und Bedingungen für die Einreise von Drittstaatsangehörigen oder staatenlosen Personen in das Hoheitsgebiet der Mitgliedstaaten oder ihren Aufenthalt in diesem Hoheitsgebiet sowie eine Behandlung, die sich aus der Rechtsstellung von Drittstaatsangehörigen oder staatenlosen Personen ergibt.

Artikel 4
Gleichbehandlung von Menschen mit Behinderungen

1. Um die Anwendung des Gleichbehandlungsgrundsatzes auf Menschen mit Behinderungen zu gewährleisten,

a) werden die Maßnahmen, die für Menschen mit Behinderungen einen effektiven diskriminierungsfreien Zugang zu Sozialschutz, sozialen Vergünstigungen, Gesundheitsdiensten und Bildung sowie den Zugang zu und die Versorgung mit Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen, einschließlich Wohnraum und Transport, gewährleisten, im Voraus vorgesehen, einschließlich angemessener Veränderungen oder Anpassungen. Diese Maßnahmen sollten keine unverhältnismäßige Belastung bedeuten und keine grundlegende Veränderung des Sozialschutzes, der sozialen Vergünstigungen, der Gesundheitsdienste, der Bildung oder der betreffenden Güter und Dienstleistungen zur Pflicht machen oder die Bereitstellung von entsprechenden Alternativen erfordern.

b) Unbeschadet der Pflicht, den effektiven diskriminierungsfreien Zugang zu gewährleisten, und wenn im konkreten Fall erforderlich, ist für angemessene Vorkehrungen zu sorgen, es sei denn, dies würde eine unverhältnismäßige Belastung bedeuten.

2. Bei der Bewertung der Frage, ob die zur Einhaltung der Bestimmungen in Absatz 1 erforderlichen Maßnahmen eine unverhältnismäßige Belastung bedeuten, werden insbesondere Größe und Ressourcen der Organisation, die Art der Organisation, die voraussichtlichen Kosten, der Lebenszyklus der Güter und Dienstleistungen und die möglichen Vorteile eines verbesserten Zugangs für Menschen mit Behinderungen berücksichtigt. Die Belastung ist nicht unverhältnismäßig, wenn sie durch Maßnahmen im Rahmen der Gleichbehandlungspolitik des betreffenden Mitgliedstaates in ausreichendem Maße ausgeglichen wird.

3. Gemeinschaftsrechtliche Bestimmungen oder nationale Vorschriften über den Zugang zu besonderen Gütern oder Dienstleistungen bleiben von dieser Richtlinie unberührt.

Artikel 5
Positive Maßnahmen

Der Gleichbehandlungsgrundsatz hindert die Mitgliedstaaten nicht daran, zur Gewährleistung der vollen Gleichstellung in der Praxis spezifische Maßnahmen beizubehalten oder

einzuführen, mit denen Benachteiligungen wegen der Religion oder Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung verhindert oder ausgeglichen werden.

Artikel 6
Mindestanforderungen

1. Die Mitgliedstaaten können Vorschriften einführen oder beibehalten, die im Hinblick auf die Wahrung des Gleichbehandlungsgrundsatzes günstiger als die in dieser Richtlinie vorgesehenen Vorschriften sind.

2. Die Umsetzung dieser Richtlinie darf keinesfalls als Rechtfertigung für eine Absenkung des von den Mitgliedstaaten bereits garantierten allgemeinen Niveaus des Schutzes vor Diskriminierung in den von der Richtlinie abgedeckten Bereichen benutzt werden.

KAPITEL II
RECHTSBEHELFE UND RECHTSDURCHSETZUNG

Artikel 7
Rechtsschutz

1. Die Mitgliedstaaten stellen sicher, dass alle Personen, die sich durch die Nichtanwendung des Gleichbehandlungsgrundsatzes in ihren Rechten für verletzt halten, ihre Ansprüche aus dieser Richtlinie auf dem Gerichts- und/oder Verwaltungsweg sowie, wenn die Mitgliedstaaten es für angezeigt halten, in Schlichtungsverfahren geltend machen können, selbst wenn das Verhältnis, während dessen die Diskriminierung vorgekommen sein soll, bereits beendet ist.

2. Die Mitgliedstaaten stellen sicher, dass Verbände, Organisationen oder andere juristische Personen, die ein legitimes Interesse daran haben, für die Einhaltung der Bestimmungen dieser Richtlinie zu sorgen, sich entweder im Namen des Beschwerdeführers oder zu deren Unterstützung und mit deren Einwilligung an den in dieser Richtlinie zur Durchsetzung der Ansprüche vorgesehenen Gerichts- und/oder Verwaltungsverfahren beteiligen können.

3. Die Absätze 1 und 2 lassen einzelstaatliche Regelungen über Fristen für die Rechtsverfolgung betreffend den Gleichbehandlungsgrundsatz unberührt.

Artikel 8
Beweislast

1. Die Mitgliedstaaten ergreifen im Einklang mit ihrem nationalen Gerichtswesen die erforderlichen Maßnahmen, um zu gewährleisten, dass immer dann, wenn Personen, die sich durch die Nichtanwendung des Gleichbehandlungsgrundsatzes für verletzt halten und bei einem Gericht oder einer anderen zuständigen Stelle Tatsachen glaubhaft machen, die das Vorliegen einer unmittelbaren oder mittelbaren Diskriminierung vermuten lassen, es der beklagten Partei obliegt zu beweisen, dass keine Verletzung des Gleichbehandlungsgrundsatzes vorgelegen hat.

2. Absatz 1 lässt das Recht der Mitgliedstaaten, eine für die klagende Partei günstigere Beweislastregelung vorzusehen, unberührt.

3. Absatz 1 gilt nicht für Strafverfahren.

4. Die Mitgliedstaaten können davon absehen, Absatz 1 auf Verfahren anzuwenden, in denen die Ermittlung des Sachverhalts dem Gericht oder der zuständigen Stelle obliegt.

5. Die Absätze 1, 2, 3 und 4 gelten auch für Verfahren gemäß Artikel 7 Absatz 2.

Artikel 9
Viktimisierung

Die Mitgliedstaaten treffen im Rahmen ihrer nationalen Rechtsordnung die erforderlichen Maßnahmen, um den Einzelnen vor Benachteiligungen zu schützen, die als Reaktion auf eine Beschwerde oder auf die Einleitung eines Verfahrens zur Durchsetzung des Gleichbehandlungsgrundsatzes erfolgen.

Artikel 10
Unterrichtung

Die Mitgliedstaaten stellen sicher, dass in ihrem Hoheitsgebiet die gemäß dieser Richtlinie getroffenen Maßnahmen sowie die bereits geltenden einschlägigen Vorschriften allen Betroffenen in geeigneter Form bekannt gemacht werden.

Artikel 11
Dialog mit einschlägigen Interessengruppen

Zur Förderung des Grundsatzes der Gleichbehandlung begünstigen die Mitgliedstaaten den Dialog mit den einschlägigen Interessengruppen, insbesondere nichtstaatlichen Organisationen, die gemäß den nationalen Rechtsvorschriften und Gepflogenheiten ein legitimes Interesse daran haben, sich an der Bekämpfung von Diskriminierung aus den Gründen und in den Bereichen, die unter diese Richtlinie fallen, zu beteiligen.

Artikel 12
Mit der Förderung der Gleichbehandlung befasste Stellen

1. Jeder Mitgliedstaat bezeichnet eine oder mehrere Stellen, deren Aufgabe darin besteht, die Verwirklichung des Grundsatzes der Gleichbehandlung ungeachtet der Religion oder Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung zu fördern. Diese Stellen können Teil einer Einrichtung sein, die auf nationaler Ebene für den Schutz der Menschenrechte oder der Rechte des Einzelnen zuständig ist, einschließlich der Rechte aus anderen Rechtsakten der Gemeinschaft, etwa den Richtlinien 2000/43/EG und 2004/113/EG.

2. Die Mitgliedstaaten stellen sicher, dass es zu den Zuständigkeiten dieser Stellen gehört,

– unbeschadet der Rechte der Opfer und der Verbände, der Organisationen oder anderer juristischer Personen nach Artikel 7 Absatz 2 die Opfer von Diskriminierung auf unabhängige Weise dabei zu unterstützen, ihrer Beschwerde wegen Diskriminierung nachzugehen;

– unabhängige Untersuchungen zum Thema Diskriminierung durchzuführen;

– unabhängige Berichte zu veröffentlichen und Empfehlungen zu allen Aspekten vorzulegen, die mit dieser Diskriminierung in Zusammenhang stehen.

KAPITEL III
SCHLUSSBESTIMMUNGEN

Artikel 13
Einhaltung

Die Mitgliedstaaten treffen die erforderlichen Maßnahmen, um sicherzustellen, dass der Gleichbehandlungsgrundsatz beachtet wird; insbesondere ist sicherzustellen, dass

a) Rechts- und Verwaltungsvorschriften, die dem Gleichbehandlungsgrundsatz zuwiderlaufen, aufgehoben werden;

b) vertragliche Bestimmungen, Betriebsordnungen, Statuten von Vereinigungen mit oder ohne Erwerbszweck, die dem Gleichbehandlungsgrundsatz zuwiderlaufen, für nichtig erklärt werden bzw. erklärt werden können oder geändert werden.

Artikel 14
Sanktionen

Die Mitgliedstaaten legen die Sanktionen fest, die bei einem Verstoß gegen die nationalen Vorschriften zur Umsetzung dieser Richtlinie zu verhängen sind, und treffen alle geeigneten Maßnahmen, um deren Durchsetzung zu gewährleisten. Die Sanktionen können auch Schadenersatzleistungen an die Opfer umfassen, die nicht durch eine im Voraus festgelegte Höchstgrenze limitiert werden dürfen, und müssen wirksam, verhältnismäßig und abschreckend sein.

Artikel 15
Umsetzung

1. Die Mitgliedstaaten setzen die Rechts- und Verwaltungsvorschriften in Kraft, die erforderlich sind, um dieser Richtlinie spätestens am … [binnen zwei Jahren nach ihrer Annahme] nachzukommen. Sie setzen die Kommission unverzüglich davon in Kenntnis und übermitteln ihr den Wortlaut dieser Bestimmungen sowie eine Entsprechungstabelle zwischen diesen Bestimmungen und dieser Richtlinie.

Wenn die Mitgliedstaaten diese Vorschriften erlassen, nehmen sie in den Vorschriften selbst oder durch einen Hinweis bei der amtlichen Veröffentlichung auf diese Richtlinie Bezug. Die Mitgliedstaaten regeln die Einzelheiten der Bezugnahme.

2. Zur Berücksichtigung besonderer Umstände können die Mitgliedstaaten erforderlichenfalls festlegen, dass der in Artikel 4 vorgesehenen Pflicht, effektiven Zugang zu gewährleisten, bis … [spätestens vier Jahre nach der Annahme] nachzukommen ist.

Die Mitgliedstaaten, die diese zusätzliche Frist in Anspruch nehmen wollen, setzen die Kommission bis spätestens zu dem in Absatz 1 genannten Datum unter Angabe von Gründen davon in Kenntnis.

Artikel 16
Bericht

1. Bis spätestens …. und in der Folge alle fünf Jahre übermitteln die Mitgliedstaaten und die nationalen Gleichbehandlungsstellen der Kommission sämtliche Informationen, die diese für

die Erstellung eines dem Europäischen Parlament und dem Rat vorzulegenden Berichts über die Anwendung dieser Richtlinie benötigt.

2. Die Kommission berücksichtigt in ihrem Bericht in angemessener Weise die Standpunkte der Sozialpartner und der einschlägigen nichtstaatlichen Organisationen sowie der Europäischen Agentur für Grundrechte. Im Einklang mit dem Grundsatz der systematischen Berücksichtigung geschlechterspezifischer Fragen wird ferner in dem Bericht die Auswirkung der Maßnahmen auf Frauen und Männer bewertet. Unter Berücksichtigung der übermittelten Informationen enthält der Bericht erforderlichenfalls auch Vorschläge für eine Änderung und Aktualisierung dieser Richtlinie.

Artikel 17
Inkrafttreten

Diese Richtlinie tritt am Tag ihrer Veröffentlichung im Amtsblatt der Europäischen Union in Kraft.

Artikel 18
Adressaten

Diese Richtlinie ist an die Mitgliedstaaten gerichtet.

Geschehen zu Brüssel am […]

Im Namen des Rates

Der Präsident

7.1.9.

CODE OF GOOD PRACTICE FOR THE EMPLOYMENT OF PEOPLE WITH DISABILITIES

BUREAU DECISION

OF 22 JUNE 2005

THE BUREAU of the European Parliament

Having regard to the Treaty establishing the European Community, and in particular Article 13 thereof,

Having regard to Article 1d of the Staff Regulations,

Having regard to the Council Directive establishing a general framework for equal treatment in employment and occupation[1],

Having regard to the existing Code of Good Practice for the Employment of People with Disabilities, adopted by the Bureau of the European Parliament in January 2000[2]

Having regard to the Commission Decision of 25 November 2003 on a Revised Code of Good Practice for the Employment of People with Disabilities,

Having regard to the opinion of the Legal Service,

Whereas:

(1) The Commission's *Consultative Document on Improving Working Arrangements and Career Perspectives for People with Disabilities*[3] provides that "a more pro-active approach should be adopted to the implementation, evaluation and monitoring of the Code of Good Practice, with greater involvement of disabled staff",

(2) The Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability,

(3) The Council Directive establishing a general framework for equal treatment in employment and occupation and the Employment Guidelines for 2000 do not apply to the Community Institutions, the Commission has stated in the Reform that it should "offer its staff at least the same opportunities and levels of protection in these areas as apply in Member States"

(4) The European Parliament's resolution of 9 March 2005 on budget guidelines 2006 and on the European Parliament's preliminary draft estimates[4], calls on the institutions to give an

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1 2000/78/EC
2 PE 282.903/BUR
3 SEC (2000) 2084/4
4 A6-0043/2005, paragraph 9

overview by 1 September 2005 of measures taken to overcome obstacles to equal treatment as defined in Article 13 of the EC Treaty, taking account of the possibilities offered by the new Staff Regulations,

ADOPTS THE FOLLOWING CODE OF GOOD PRACTICE:

Article 1 - Introduction

The European Institutions are committed to providing equality of access to employment in the European Public Service. A Public Service that reflects the diversity of the community it serves is better able to deliver quality services to the European citizens. Apart from the objective merits of equality, any organisation that claims to be progressive and forward-looking must seek to optimise the potential contribution of its entire recruitment base by ensuring equal access.

European statistics show that there are too few people with disabilities in employment by comparison with the number of people with disabilities of working age. It is the European Institutions' policy to promote a diverse and skilled workforce, to improve employment access and participation by people with disabilities, to eliminate discrimination in the workplace and to promote a workplace culture based on fair workplace practices and behaviour.

In pursuing this policy, due regard should be given to the Commission Communication "Towards a Barrier Free Europe for People with Disabilities"[5]. The "Design for All" principle must also be applied. "Design for All" is a relatively new approach that consists of designing, developing and marketing mainstream products, services, systems and environments that are accessible by as broad a range of users as possible. Failure to apply the design for all principle and to take peoples' needs into account in the planning, design and adaptation of environments can force people unnecessarily into a situation of dependency and social exclusion.

The purpose of this CODE OF GOOD PRACTICE is to provide a clear statement of the European Institutions' policy in relation to the employment of people with disabilities and ensure that all staff in the European Institutions comply with their legal and statutory obligations under anti-discrimination provisions and carry out their duties in a manner which is consistent with good equal opportunities practice. To this end, adequate resources will be re-allocated, wherever necessary, by all DGs and services in order to ensure the effective implementation of this Code of Good Practice.

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5 COM(2000) 284 final of 12.05.2000

POLICY STATEMENT[6]

The European Institutions are committed to promoting equal treatment, irrespective of gender, race, colour, ethnic or social origin, genetic features, language, religion, convictions, political opinions or any other opinions, membership of a national minority, wealth, birth, age, disability or sexual orientation, by adopting workplace rules, policies, practices and behaviour, where all workers are valued and respected and have opportunities to develop their full potential and pursue a career of their choice. They are entitled to a working environment free from discrimination and harassment and where barriers to participation are identified and removed. These principles help the European Institutions to attract and retain the best people to deliver a high-quality service to European citizens.

In pursuit of these standards, the following provisions relating to the employment of people with disabilities have been inserted into Article 1d (4) of the Staff Regulations[7]:

"… a person has a disability if he has a physical or mental impairment that is, or likely to be, permanent. The impairment shall be determined according to the procedure set out in Article 33.

A person with a disability meets the conditions laid down in Article 28(e) if he can perform the essential functions of the job when reasonable accommodation is made.

"Reasonable accommodation", in relation to the essential functions of the job, shall mean appropriate measures, where needed, to enable a person with a disability to have access to, to participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer."

Article 2 - Scope of the Code

People with disabilities are not only those whose disability is immediately apparent. While many disabilities are not obvious they may, nonetheless, require certain accommodation. It is also recognised that the same disability can vary in its severity and affect the individual to a different degree and at different times and that a disability may be temporary in nature.

This code covers those who have a disability during the recruitment process, those who have a disability at the time of initial appointment and those in whom the disability develops during employment. The European Institutions will seek to adjust to any new circumstances in a supportive and sensitive manner.

The scope of the code does not encompass topics such as the special medical allowance for people with disabilities or the special budget for officials' children who have disabilities and related school allowances.

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6 The 'discriminatory grounds' set out in this Policy Statement are those included in the current Staff Regulations, which entered into force on 1st May 2004.

7 Cf. article 1c of the Staff Regulations: "Any reference in these Staff Regulations to a person of the male sex shall be deemed also to constitute a reference to a person of the female sex, and vice-versa, unless the context clearly indicates otherwise." In consequence, while the Code is drafted in gender-neutral terms, extracts from the Staff Regulations are not.

Article 3 - Work-related accommodation

It is the European Institutions' policy to provide reasonable accommodation in employment in order to meet the needs of people with disabilities and of the Institutions. For the purposes of the present code, it shall be for the Institution to demonstrate that providing the necessary accommodation imposes an unreasonable burden.

It is recognised that the majority of people with disabilities do not require any form of special aid or adaptation to perform their work. However, people can do the same job in different ways to achieve the same result. Enabling a member of staff to perform well in a job by making a work-related accommodation is therefore entirely consistent with the merit principle. In order to ensure and facilitate the provision of accessible accommodation, the Institutions will have to anticipate some fundamental well-known needs following the "Design for All" principles, especially when new infrastructures are being developed.

Directive 2000/78/EC, establishing a general framework for Equal Treatment in Employment and Occupation, states that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This is also the basis of the European Institutions' policy on work-related accommodation.

Accommodation applies to all areas of employment, including:

- recruitment, selection and appointment,
- career development,
- training, and
- promotion, transfers or any other employment benefit
- social relationships within the Institutions.

Accommodation is a way of changing the workplace and may include:

- job redesign,
- purchasing or modifying equipment,
- flexible working arrangements.

The accommodation required is to be determined by the particular needs of the individual and will normally be provided. If providing accommodation would impose a disproportionate burden on them, the European Institutions may decline to offer employment to a person with a disability. Stringent standards, which have to be defined, are to be applied when assessing what is a disproportionate burden for the European Institutions. This is without prejudice to the right of administrative appeal.

Article 4 - Recruitment

The European Institutions have a policy of equality of opportunity and selection on merit by means of fair and open competitions. Recruitment and selection procedures are adapted to ensure that they do not disadvantage candidates with disabilities. People with disabilities are also encouraged to apply by a positive reference to the equal opportunities policy in advertisements for posts and by the dissemination of notices about forthcoming competitions to specialist publications and organisations such as the European Disability Forum, which is representative of NGO disability groups in the Member States and the European Agency for

the Development of Special Needs Education. Positive action shall also be taken in the field of administrative 'stagiaire' recruitment as well as at the level of interim or temporary contracts.

Accordingly, recruitment procedures will include the following:

- **Press publicity** for competitions will include a statement affirming the Institutions' commitment to equality of opportunity for all candidates.

- **The Guide for Candidates** appearing in the Official Journal with the Notice of Competition will contain a paragraph specifically aimed at candidates with disabilities, mentioning the CODE OF GOOD PRACTICE.

- **Application forms** will request candidates with disabilities to detail the accommodation they require to enable them to participate in the tests on an equal basis with other candidates and every effort will be made to satisfy all reasonable requests.

- When a person with a disability is attending for **competition or interview**, the Secretary of the Selection Board, under the authority of the Chairperson, is responsible for ensuring that appropriate arrangements are made for the reception of that person and for the provision of any assistance that may be required, e.g. access to buildings, special equipment, extra time during competitions, etc.

- **Training** given to members of Selection Boards will include a module on disability awareness and the contents of this CODE OF GOOD PRACTICE. .

- A **website** will be set up in accordance with the most up-to-date accessibility standards, to enable access by the widest possible audience.

Article 5 - Careers

Once candidates with disabilities are on a reserve list, they may avail themselves of specialist advice in securing a post. DG Personnel of the European Parliament and EPSO will conduct an ongoing audit of the number of candidates with disabilities in competitions, the number who pass and the number who are subsequently recruited.

Having been recruited, officials with disabilities have the right to fully develop their potential. Care is taken at all stages during the career of an official with disabilities to ensure the avoidance of job requirements that, whether intentionally or otherwise, are not job-related and therefore discriminate against people with disabilities.

- **Initial Appointment and Probation**: The Appointing Authority uses its best endeavours, in co-operation with the Medical Services and/or the Equal Opportunities Service of DG Personnel, to ensure that candidates with disabilities placed on a competition reserve list are offered appropriate posts. In accordance with Staff Regulations, all successful candidates in a competition have their capacity to carry out their duties confirmed by a medical assessment. When appointing a person with a disability or determining their capacity to continue duty, care is taken to avoid discrimination based on disability. The aim is to ensure that the person is qualified for employment and to verify that he/she can perform the essential functions of the job, without prejudice to the obligation of providing reasonable

accommodation and having regard to the kind of disability. If, during the probationary period, it is verified that the job assigned to a successful candidate is incompatible with his/her disability, mobility will be considered.

- **Career Guidance**: The Career Guidance and Counselling Service can play an important role in counselling staff with disabilities on their career development and they should receive the appropriate training. The best approach would be to recruit a counsellor specialised in vocational and rehabilitation counselling, who would link, as appropriate, with other relevant services.

- **Career development**: Every effort is made to ensure that staff with disabilities have the same opportunities as others to increase their experience and develop their career by means of mobility within the Institutions. Providing for career development may include adjusting other posts so that members of staff with a disability can act in different or higher positions to develop new skills.

- **Training**: Staff with disabilities have the same access to training as other staff. The acquisition of new skills and knowledge is an important prerequisite for the career development of all officials. Every effort is made to enable staff with disabilities to participate in training courses and programmes organised by the particular institution. Where in-house training is unavailable or inappropriate, reasonable measures may be taken to provide training externally.

- **Staff assessment and Promotion**: disability does not constitute a reason for assessors and promotion committees to depart from the normal objective criteria used to judge the merits of officials.

- **Retention of Staff**: If a staff member acquires a disability, or an existing disability becomes more severe, the European Institutions take steps to try to enable the staff member to remain in employment. In consultation with the person, accommodation to facilitate their retention is considered, including restructuring that person's job, providing retraining or redeployment to a suitable post. Where necessary, such arrangements can be reviewed. Medical retirement procedures are undertaken in full consultation with the staff member where it is decided that adjustments cannot be made to allow the employee to remain in his/her post and a suitable, alternative, post is not available.

Article 6 - Working environment

The Institutions ensure that all reasonable measures are taken to eliminate physical or technical environmental barriers that may face some staff with disabilities:

- **Buildings**: All new buildings to be occupied by employees of the Institutions have to comply with the relevant national local legislation in respect of the access and utilisation of public buildings by people with disabilities in order to ensure seamless mobility. Buildings without suitable access, or buildings falling below a reasonable level in this respect, are progressively improved, subject to the availability of budgetary provision, or abandoned. Pending the adoption by the Institutions of revised criteria governing the adaptation of their buildings, the principles contained in the latest edition of the Commission document "Immeuble-type" will apply. The Institutions are taking all reasonable measures to ensure that officials with disabilities are allocated office accommodation compatible with their particular

needs, including the provision of designated parking, where necessary. Emergency facilities must be appropriate to all officials with disabilities. The Unit for Prevention and Well-Being at Work will continue to regularly audit buildings to determine improvements that should be made.

- **Office environment**: Care must be taken to ensure that the office environment is suited to a person with specific needs. The European Parliament will designate a specialist who will make an ergonomic appraisal of the office environment prior to newly-recruited staff members with disabilities commencing their employment and whenever a staff member with disabilities moves office.

The specialist will periodically inspect the office of all staff members with disabilities, will recommend appropriate changes, as needed, and will regularly inform the Directorate-General for Personnel, as well as the Interservice Working Party on the Accessibility of People with Disabilities, of the relevant findings.

To ensure the provision of reasonable accommodation, specific technical measures need to be taken as a precondition to an accessible environment. It is essential that information technology tools, including Intranet, applications and databases are developed following "Design for All" principles and accessibility guidelines. Electronic information and data should be available in accessible formats. The purchase of the appropriate tools and the training of personnel is an essential precondition.

Officials with disabilities are consulted about special equipment or furniture that might enhance their efficiency and effectiveness in the performance of their duties. The Institutions accept all reasonable requests for such items.

- **Meetings, etc**.: Care is taken to ensure that people with disabilities can fully participate in meetings or other fora by avoiding the inappropriate use of presentation aids or other media and by ensuring the availability of relevant material in accessible formats.

- **Flexible work**: Where reasonable, flexible working arrangements are made to meet both the Institution's work requirements and the particular needs of an official with a disability. Examples are:

- *flexible starting and finishing times to accommodate the difficulties some people with a disability have getting to and from work using public transport,*

- *regular short breaks to assist people who require periodic medication or rest periods,*

- *part-time work; teleworking, with adequate technological supports provided by the employer.*

Article 7 - Information and Awareness Training

This CODE OF GOOD PRACTICE will be brought to the attention of all staff by the Equal Opportunities Service and by the human resources units of DGs. It is available in all EU languages on the EUROPA web site, on the Intranets of the Institutions and their Offices and Agencies and is distributed to all Human Resources Management staff and to senior and middle management staff. Wherever possible, the Institutions will seek to make information services and documentation accessible to different groups of people with disabilities, taking into account language and cultural needs.

Training courses which deal with the question of disabilities in depth will be targeted at those most particularly involved, e.g. staff with HR responsibilities, local career guidance staff, relevant Heads of Units, and members of Selection Boards.

Article 8 - Monitoring

An essential element in the implementation of this CODE OF GOOD PRACTICE is continuous monitoring of how it is performing, thus ensuring that improved procedures for its better application are introduced at all levels, including the recruitment process and throughout an official's career. In the event of complaints, it will be for DGs to show that they meet the requirements of people with disabilities. The Equal Opportunities Service and the Interservice Working Party on the Accessibility of People with Disabilities will discuss and fix targets to achieve barrier-free conditions.

A disability audit, under which directorates-general conduct a survey of their employees, who will declare if they believe that they have a disability, is conducted regularly and the results reported to DG Personnel. The purpose of collecting this information is to:

- ensure that appropriate consultation takes place with all relevant staff;

- eliminate discrimination and barriers to equal opportunities for staff with disabilities;

- identify what accommodation might need to be provided when interviewing or employing a person with a disability;

- develop the full potential of all staff and ensure equality of opportunity in career development.

The data are used to produce anonymous statistical reports to enable Institutions to assess if the non-discrimination policy and this Code are working effectively and to help frame new initiatives. Having due regard to the provisions of the Data Protection Regulation concerning the processing of personal data by the Community Institutions[8], the information gathered in

8 Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L8, 12.01.2001, p. 1)

the audit will not be used for any other purpose. Statistics regarding the number of staff with disabilities will be published.

The **Interservice Working Party on the Accessibility of People with Disabilities** is also forwarding the direct input received from staff with disabilities in the DGs on questions of working conditions, accessibility, recruitment and career development to DG Personnel.

Additionally, the Equal Opportunities service of DG Personnel may be approached on a confidential basis if matters of dissatisfaction arise in relation to the implementation of this Code in the European Parliament. The Service pursues the issues discreetly, with due regard to the level of confidentiality sought.

I

(Veröffentlichungsbedürftige Rechtsakte)

RICHTLINIE 2004/17/EG DES EUROPÄISCHEN PARLAMENTS UND DES RATES

vom 31. März 2004

zur Koordinierung der Zuschlagserteilung durch Auftraggeber im Bereich der Wasser-, Energie- und Verkehrsversorgung sowie der Postdienste

DAS EUROPÄISCHE PARLAMENT UND DER RAT DER EUROPÄISCHEN UNION —

gestützt auf den Vertrag zur Gründung der Europäischen Gemeinschaft, insbesondere auf Artikel 47 Absatz 2 und die Artikel 55 und 95,

auf Vorschlag der Kommission ([1]),

nach Stellungnahme des Europäischen Wirtschafts- und Sozialausschusses ([2]),

nach Stellungnahme des Ausschusses der Regionen ([3]),

nach dem Verfahren des Artikels 251 EG-Vertrag ([4]), aufgrund des vom Vermittlungsausschuss am 9. Dezember 2003 gebilligten gemeinsamen Entwurfs,

in Erwägung nachstehender Gründe:

(1) Anlässlich neuer Änderungen der Richtlinie 93/38/EWG des Rates vom 14. Juni 1993 zur Koordinierung der Zuschlagserteilung durch Auftraggeber im Bereich der Wasser-, Energie- und Verkehrsversorgung sowie im Telekommunikationssektor ([5]), die notwendig sind, um den Forderungen nach Vereinfachung und Modernisierung zu entsprechen, die sowohl von Auftraggebern als auch von Wirtschaftsteilnehmern in ihren Reaktionen auf das Grünbuch der Kommission vom 27. November 1996 geäußert wurden, sollte die Richtlinie im Interesse der Klarheit neu gefasst werden. Die vorliegende Richtlinie gründet sich auf die Rechtsprechung des Gerichtshofs, insbesondere auf die Urteile zu den Zuschlagskriterien, wodurch klargestellt wird, welche Möglichkeiten die Auftraggeber haben, auf Bedürfnisse der betroffenen Allgemeinheit, einschließlich im ökologischen oder sozialen Bereich, einzugehen, sofern derartige Kriterien im Zusammenhang mit dem Auftragsgegenstand stehen, dem öffentlichen Auftraggeber keine unbeschränkte Wahlfreiheit einräumen, ausdrücklich erwähnt sind und den in Erwägungsgrund 9 genannten grundlegenden Prinzipien entsprechen.

(2) Ein wichtiger Grund für die Einführung von Vorschriften zur Koordinierung der Vergabeverfahren in diesen Sektoren ist die Vielzahl von Möglichkeiten, über die einzelstaatliche Behörden verfügen, um das Verhalten der Auftraggeber zu beeinflussen, unter anderem durch die Beteiligung an deren Kapital und die Vertretung in deren Verwaltungs-, Geschäftsführungs- oder Aufsichtsorganen.

(3) Ein weiterer wichtiger Grund, der eine Koordinierung der Vergabeverfahren durch Auftraggeber in diesen Sektoren notwendig macht, ist die Abschottung der Märkte, in denen sie tätig sind, was darauf zurückzuführen ist, dass die Mitgliedstaaten für die Versorgung, die Bereitstellung oder das Betreiben von Netzen, mit denen die betreffenden Dienstleistungen erbracht werden, besondere oder ausschließliche Rechte gewähren.

(4) Die Gemeinschaftsvorschriften, insbesondere die Verordnungen (EWG) Nr. 3975/87 des Rates vom 14. Dezember 1987 über die Einzelheiten der Anwendung der Wettbewerbsregeln auf Luftfahrtunternehmen ([6]) und (EWG) Nr. 3976/87 des Rates vom 14. Dezember 1987 zur Anwendung von Artikel 85 Absatz 3 des Vertrages auf bestimmte Gruppen von Vereinbarungen und aufeinander abgestimmten Verhaltensweisen im Luftverkehr ([7]) zielen auf mehr Wettbewerb zwischen den Luftverkehrsgesellschaften ab. Es erscheint daher nicht angemessen, diese Auftraggeber in die vorliegende Richtlinie einzubeziehen. In Anbetracht des Wettbewerbs im Seeverkehr der Gemeinschaft wäre es ebenfalls nicht angemessen, die Aufträge, die in diesem Sektor vergeben werden, der vorliegenden Richtlinie zu unterwerfen.

([1]) ABl. C 29 E vom 30.1.2001, S. 112 und ABl. C 203 E vom 27.8.2002, S. 183.
([2]) ABl. C 193 vom 10.7.2001, S. 1.
([3]) ABl. C 144 vom 16.5.2001, S. 23.
([4]) Stellungnahme des Europäischen Parlaments vom 17. Januar 2002 (ABl. C 271 E vom 7.11.2002, S. 293). Gemeinsamer Standpunkt des Rates vom 20. März 2003 (ABl. C 147 E vom 24.6.2003, S. 1) und Standpunkt des Europäischen Parlaments vom 2. Juli 2003 (noch nicht im Amtsblatt veröffentlicht). Legislative Entschließung des Europäischen Parlaments vom 29. Januar 2004 (noch nicht im Amtsblatt veröffentlicht) und Beschluss des Rates vom 2. Februar 2004.
([5]) ABl. L 199 vom 9.8.1993, S. 84. Zuletzt geändert durch die Richtlinie 2001/78/EG der Kommission (ABl. L 285 vom 29.10.2001, S. 1).
([6]) ABl. L 374 vom 31.12.1987, S. 1. Zuletzt geändert durch die Verordnung (EG) Nr. 1/2003 (ABl. L 1 vom 4.1.2003, S. 1).
([7]) ABl. 374 vom 31.12.1987, S. 9. Zuletzt geändert durch die Verordnung (EG) Nr. 1/2003.

(5) Der Anwendungsbereich der Richtlinie 93/38/EWG umfasst gegenwärtig bestimmte Aufträge, die von Auftraggebern im Telekommunikationssektor vergeben werden. Zur Liberalisierung dieses Sektors wurde ein Rechtsrahmen geschaffen, der im Vierten Bericht über die Umsetzung des Reformpakets für den Telekommunikationssektor vom 25. November 1998 genannt wird. Eine Folge davon war, dass in diesem Sektor de facto und de jure echter Wettbewerb herrscht. Angesichts dieser Lage hat die Kommission zur Information eine Liste der Telekommunikationsdienstleistungen [1] veröffentlicht, die gemäß Artikel 8 der genannten Richtlinie bereits von deren Anwendungsbereich ausgenommen werden können. Im Siebten Bericht über die Umsetzung des Reformpakets für den Telekommunikationssektor vom 26. November 2001 wurden zusätzliche Fortschritte bestätigt. Es ist deshalb nicht länger notwendig, die Beschaffungstätigkeit von Auftraggebern dieses Sektors zu regeln.

(6) Es ist daher insbesondere nicht länger angebracht, den mit der Richtlinie 90/531/EWG des Rates vom 17. September 1990 betreffend die Zuschlagserteilung durch Auftraggeber im Bereich der Wasser-, Energie- und Verkehrsversorgung sowie im Telekommunikationssektor [2] eingerichteten Beratenden Ausschuss für Aufträge im Telekommunikationssektor beizubehalten.

(7) Dennoch sollte die Entwicklung im Telekommunikationssektor auch weiterhin beobachtet und die Situation überprüft werden, wenn festgestellt wird, dass in diesem Sektor kein wirksamer Wettbewerb mehr herrscht.

(8) Ausgeschlossen vom Anwendungsbereich der Richtlinie 93/38/EWG sind Beschaffungen von Sprachtelefon-, Telex-, Mobilfunk-, Funkruf- und Satellitenkommunikationsdiensten. Sie wurden ausgeschlossen, um der Tatsache Rechnung zu tragen, dass sie in einem bestimmten geografischen Gebiet oft nur von einem einzigen Anbieter bereitgestellt werden, weil dort kein wirksamer Wettbewerb herrscht oder weil besondere oder ausschließliche Rechte bestehen. Mit der Einführung eines wirksamen Wettbewerbs im Telekommunikationssektor verlieren diese Ausnahmeregelungen ihre Berechtigung. Es ist daher erforderlich, auch die Beschaffung dieser Telekommunikationsdienste in den Anwendungsbereich der vorliegenden Richtlinie einzubeziehen.

(9) Um zu gewährleisten, dass die Vergabe von Aufträgen durch Auftraggeber im Bereich der Wasser-, Energie- und Verkehrsversorgung sowie der Postdienste für den Wettbewerb geöffnet wird, ist es ratsam, Bestimmungen für eine Gemeinschaftskoordinierung von Aufträgen, die über einen bestimmten Wert hinausgehen, festzulegen. Diese Koordinierung gründet sich auf die Anforderungen der Artikel 14, 28 und 49 des Vertrags sowie des Artikels 97 Euratom-Vertrag, nämlich auf den Grundsatz der Gleichbehandlung bzw. der Nichtdiskriminierung, die davon nur eine besondere Ausprägung ist, den Grundsatz der gegenseitigen Anerkennung, den Grundsatz der Verhältnismäßigkeit und den Grundsatz der Transparenz. In Anbetracht der Art der von dieser Koordinierung betroffenen Sektoren sollte diese unter Wahrung der Anwendung der genannten Grundsätze einen Rahmen für faire Handelspraktiken schaffen und ein Höchstmaß an Flexibilität ermöglichen.

Für Aufträge, deren Wert unter dem Schwellenwert für die Anwendung der Bestimmungen über die Gemeinschaftskoordinierung liegt, sei auf die Rechtsprechung des Gerichtshofs verwiesen, der zufolge die genannten Vorschriften und Grundsätze der Verträge Anwendung finden.

(10) Um bei der Anwendung der Vergabevorschriften in den Bereichen der Wasser-, Energie- und Verkehrsversorgung sowie der Postdienste eine wirkliche Marktöffnung und ein angemessenes Gleichgewicht zu erreichen, dürfen die von der Richtlinie erfassten Auftraggeber nicht aufgrund ihrer Rechtsstellung definiert werden. Es sollte daher sichergestellt werden, dass die Gleichbehandlung von Auftraggebern im öffentlichen Sektor und Auftraggebern im privaten Sektor gewahrt bleibt. Es ist auch gemäß Artikel 295 des Vertrags dafür zu sorgen, dass die Eigentumsordnungen in den Mitgliedstaaten unberührt bleiben.

(11) Die Mitgliedstaaten sollten dafür sorgen, dass die Teilnahme einer Einrichtung des öffentlichen Rechts als Bieter in einem Verfahren zur Vergabe eines Auftrags keine Wettbewerbsverzerrungen gegenüber privatrechtlichen Bietern verursacht.

(12) Nach Artikel 6 des Vertrags sind die Erfordernisse des Umweltschutzes bei der Festlegung und Durchführung der in Artikel 3 des Vertrags genannten Gemeinschaftspolitiken und -maßnahmen insbesondere zur Förderung einer nachhaltigen Entwicklung einzubeziehen. Diese Richtlinie stellt daher klar, wie die Auftraggeber zum Umweltschutz und zur Förderung einer nachhaltigen Entwicklung beitragen können, und garantiert ihnen gleichzeitig, dass sie für ihre Aufträge ein optimales Preis-Leistungs-Verhältnis erzielen können.

(13) Keine Bestimmung dieser Richtlinie sollte dem Erlass oder der Durchsetzung von Maßnahmen entgegenstehen, die zum Schutz der öffentlichen Sittlichkeit, Ordnung und Sicherheit oder zum Schutz der Gesundheit und des Lebens von Menschen und Tieren oder der Gesundheit von Pflanzen, insbesondere im Hinblick auf eine nachhaltige Entwicklung, notwendig sind, sofern diese Maßnahmen mit dem Vertrag im Einklang stehen.

[1] ABl. C 156 vom 3.6.1999, S. 3.

[2] ABl. L 297 vom 29.10.1990, S. 1. Zuletzt geändert durch die Richtlinie 94/22/EG des Europäischen Parlaments und des Rates (ABl. L 164 vom 30.6.1994, S. 3).

(14) Mit dem Beschluss 94/800/EG des Rates vom 22. Dezember 1994 über den Abschluss der Übereinkünfte im Rahmen der multilateralen Verhandlungen der Uruguay-Runde (1986-1994) im Namen der Europäischen Gemeinschaft in Bezug auf die in ihre Zuständigkeiten fallenden Bereiche [1] wurde unter anderem das WTO-Übereinkommen über das öffentliche Beschaffungswesen, nachstehend „Übereinkommen", genehmigt, das zum Ziel hat, einen multilateralen Rahmen ausgewogener Rechte und Pflichten im öffentlichen Beschaffungswesen festzulegen, um den Welthandel zu liberalisieren und auszuweiten. Aufgrund der internationalen Rechte und Pflichten, die sich für die Gemeinschaft aus der Annahme des Übereinkommens ergeben, sind auf Bieter und Erzeugnisse aus Drittländern, die dieses Übereinkommen unterzeichnet haben, die darin enthaltenen Regeln anzuwenden. Das Übereinkommen hat keine unmittelbare Wirkung. Die unter das Übereinkommen fallenden Auftraggeber, die der vorliegenden Richtlinie nachkommen und diese auf Wirtschaftsteilnehmer aus Drittländern anwenden, die das Übereinkommen unterzeichnet haben, sollten sich damit im Einklang mit dem Übereinkommen befinden. Die vorliegende Richtlinie sollte den Wirtschaftsteilnehmern in der Gemeinschaft die gleichen günstigen Teilnahmebedingungen bei der Vergabe öffentlicher Aufträge garantieren, wie sie auch den Wirtschaftsteilnehmern aus Drittländern, die das Übereinkommen unterzeichnet haben, gewährt werden.

(15) Bevor ein Verfahren zur Vergabe eines Auftrags eingeleitet wird, können die Auftraggeber unter Rückgriff auf einen „technischen Dialog" eine Stellungnahme einholen bzw. entgegennehmen, die bei der Erstellung der Verdingungsunterlagen (*) verwendet werden kann; dies setzt jedoch voraus, dass diese Stellungnahme den Wettbewerb nicht ausschaltet.

(16) Angesichts der für die Bauaufträge kennzeichnenden Vielfalt der Aufgaben sollten die Auftraggeber sowohl die getrennte als auch die gemeinsame Vergabe von Aufträgen für die Planung und die Ausführung von Bauleistungen vorsehen können. Diese Richtlinie bezweckt nicht, eine gemeinsame oder eine getrennte Vergabe vorzuschreiben. Die Entscheidung über eine getrennte oder die gemeinsame Vergabe des Auftrags sollte sich an qualitativen und wirtschaftlichen Kriterien orientieren, die in den einzelstaatlichen Vorschriften festgelegt werden können.

Ein Auftrag kann nur dann als Bauauftrag gelten, wenn er die Ausführung der in Anhang XII genannten Tätigkeiten zum Gegenstand hat, und zwar auch dann, wenn er sich auf andere Leistungen erstreckt, die für die Ausführung dieser Tätigkeiten erforderlich sind. Öffentliche Dienstleistungsaufträge, insbesondere im Bereich der Grundstücksverwaltung, können unter bestimmten Umständen Bauleistungen umfassen. Sofern diese Bauleistungen jedoch nur Nebenarbeiten im Verhältnis zum Hauptgegenstand des Auftrags darstellen und eine mögliche Folge oder eine Ergänzung des letzteren sind, rechtfertigt die Tatsache, dass der Auftrag diese Bauleistungen umfasst, nicht eine Einstufung des Auftrags als Bauauftrag.

Als Grundlage für die Veranschlagung des Werts eines Bauauftrags sollten der Wert der eigentlichen Bauleistungen sowie gegebenenfalls der geschätzte Wert der Lieferungen und Dienstleistungen herangezogen werden, die die Auftraggeber den Unternehmern zur Verfügung stellen, sofern diese Dienstleistungen oder Lieferungen für die Ausführung der betreffenden Bauleistungen erforderlich sind. Für die Zwecke dieses Absatzes sollte davon ausgegangen werden, dass die betreffenden Dienstleistungen vom Auftraggeber mit seinem eigenen Personal erbracht werden. Andererseits unterliegt die Berechnung des Werts von Dienstleistungsaufträgen den auf Dienstleistungsaufträge anwendbaren Vorschriften, unabhängig davon, ob die betreffenden Dienstleistungen dem Unternehmer für die anschließende Ausführung von Bauarbeiten zur Verfügung gestellt werden oder nicht.

(17) Der Dienstleistungsbereich lässt sich für die Anwendung der Verfahrensregeln dieser Richtlinie und zur Beobachtung am besten durch eine Unterteilung in Kategorien in Anlehnung an bestimmte Positionen einer gemeinsamen Nomenklatur beschreiben und nach der für sie jeweils geltenden Regelung in zwei Anhängen, XVII Teil A und XVII Teil B, zusammenfassen. Für die in Anhang XVII Teil B genannten Dienstleistungen sollten die einschlägigen Bestimmungen dieser Richtlinie unbeschadet der Anwendung besonderer gemeinschaftsrechtlicher Bestimmungen für die jeweiligen Dienstleistungen gelten.

(18) Die volle Anwendung dieser Richtlinie auf Dienstleistungsaufträge sollte während eines Übergangszeitraums auf Aufträge beschränkt werden, bei denen ihre Vorschriften dazu beitragen, das volle Wachstumspotenzial grenzüberschreitenden Handels auszuschöpfen. Aufträge für andere Dienstleistungen sollten während dieses Übergangszeitraums beobachtet werden, bevor die vollständige Anwendung der Richtlinie beschlossen werden kann. Dazu ist ein entsprechendes Beobachtungsinstrument zu definieren. Dieses Instrument sollte gleichzeitig den interessierten Kreisen die einschlägigen Informationen zugänglich machen.

(19) Hemmnisse für den freien Dienstleistungsverkehr sollten vermieden werden. Dienstleistungserbringer können deshalb sowohl natürliche als auch juristische Personen sein. Diese Richtlinie lässt jedoch die Anwendung von nationalen Vorschriften über die Bedingungen für die Ausübung einer Tätigkeit oder eines Berufs unberührt, sofern diese Vorschriften mit dem Gemeinschaftsrecht vereinbar sind.

(20) Es werden fortlaufend bestimmte neue Techniken der Online-Beschaffung entwickelt. Diese Techniken ermöglichen es, den Wettbewerb auszuweiten und die Effizienz des öffentlichen Beschaffungswesens — insbesondere durch eine Verringerung des Zeitaufwands und die durch die Verwendung derartiger neuer Techniken erzielten Einsparungseffekte — zu verbessern. Die Auftraggeber können Online-Beschaffungstechniken einsetzen, solange bei ihrer Verwendung die Vorschriften dieser

[1] ABl. L 336 vom 23.12.1994, S. 1.

(*) In Österreich: Ausschreibungsunterlagen.

Richtlinie und die Grundsätze der Gleichbehandlung, der Nichtdiskriminierung und der Transparenz eingehalten werden. Insofern kann ein Bieter insbesondere im Falle einer Rahmenvereinbarung oder der Anwendung eines dynamischen Beschaffungssystems sein Angebot in Form eines elektronischen Katalogs übermitteln, wenn er das von dem Auftraggeber gemäß Artikel 48 gewählte Kommunikationsmittel gemäß Artikel 48 verwendet.

(21) In Anbetracht des Umstands, dass sich Online-Beschaffungssysteme rasch verbreiten, sollten schon jetzt geeignete Vorschriften erlassen werden, die es den Auftraggebern ermöglichen, die durch diese Systeme gebotenen Möglichkeiten umfassend zu nutzen. Deshalb sollte ein vollelektronisch arbeitendes dynamisches Beschaffungssystem für Beschaffungen marktüblicher Leistungen definiert und präzise Vorschriften für die Einrichtung und die Arbeitsweise eines solchen Systems festgelegt werden, um sicherzustellen, dass jeder Wirtschaftsteilnehmer, der sich daran beteiligen möchte, gerecht behandelt wird. Jeder Wirtschaftsteilnehmer sollte sich an einem solchen System beteiligen können, sofern er ein vorläufiges Angebot im Einklang mit den Verdingungsunterlagen einreicht und die Eignungskriterien (*) erfüllt. Dieses Beschaffungsverfahren ermöglicht es den Auftraggebern, durch die Einrichtung eines Verzeichnisses von bereits ausgewählten Bietern und die neuen Bietern eingeräumte Möglichkeit, sich daran zu beteiligen, dank der eingesetzten elektronischen Mittel über ein besonders breites Spektrum von Angeboten zu verfügen, und somit durch Ausweitung des Wettbewerbs eine optimale Verwendung der Mittel zu gewährleisten.

(22) Da sich der Einsatz der Technik elektronischer Auktionen noch stärker verbreiten wird, sollten diese Auktionen im Gemeinschaftsrecht definiert und speziellen Vorschriften unterworfen werden, um sicherzustellen, dass sie unter uneingeschränkter Wahrung der Grundsätze der Gleichbehandlung, der Nichtdiskriminierung und der Transparenz ablaufen. Dazu ist vorzusehen, dass diese elektronischen Auktionen nur Aufträge für Bauleistungen, Lieferungen oder Dienstleistungen betreffen, für die präzise Spezifikationen erstellt werden können. Dies kann insbesondere bei wiederkehrenden Liefer-, Bau- und Dienstleistungsaufträgen der Fall sein. Zu dem selben Zweck sollte es auch möglich sein, dass die jeweilige Rangfolge der Bieter zu jedem Zeitpunkt der elektronischen Auktion festgestellt werden kann. Der Rückgriff auf elektronische Auktionen bietet den Auftraggebern die Möglichkeit, die Bieter zur Vorlage neuer, nach unten korrigierter Preise aufzufordern, und — sofern das wirtschaftlich günstigste Angebot den Zuschlag erhalten soll — auch andere als die preisbezogenen Angebotskomponenten zu verbessern. Zur Wahrung des Grundsatzes der Transparenz dürfen allein diejenigen Komponenten Gegenstand elektronischer Auktionen werden, die auf elektronischem Wege — ohne Eingreifen des und/oder Beurteilung durch den Auftraggeber — automatisch bewertet werden können, d. h. nur die Komponenten, die quantifizierbar sind, so dass sie in Ziffern oder in Prozentangaben ausgedrückt werden können. Hingegen sollten diejenigen Aspekte der Angebote, bei denen nichtquantifizierbare Komponenten zu beurteilen sind, nicht Gegenstand von elektronischen Auktionen sein. Folglich sollten bestimmte Bau- und Dienstleistungsaufträge, bei denen geistige Leistungen zu erbringen sind — wie z. B. die Konzeption von Bauarbeiten — nicht Gegenstand von elektronischen Auktionen sein.

(23) In den Mitgliedstaaten haben sich verschiedene zentrale Beschaffungsverfahren entwickelt. Mehrere öffentliche Auftraggeber haben die Aufgabe, für Auftraggeber Ankäufe zu tätigen oder Aufträge zu vergeben/Rahmenvereinbarungen zu schließen. In Anbetracht der großen Mengen, die beschafft werden, tragen diese Verfahren zur Verbesserung des Wettbewerbs und zur Rationalisierung des öffentlichen Beschaffungswesens bei. Daher sollte der Begriff der für Auftraggeber tätigen zentralen Beschaffungsstellen im Gemeinschaftsrecht definiert werden. Außerdem sollte unter Einhaltung der Grundsätze der Nichtdiskriminierung und der Gleichbehandlung definiert werden, unter welchen Voraussetzungen davon ausgegangen werden kann, dass Auftraggeber, die Bauleistungen, Waren und/oder Dienstleistungen über eine zentrale Beschaffungsstelle beziehen, diese Richtlinie eingehalten haben.

(24) Zur Berücksichtigung der unterschiedlichen Gegebenheiten in den Mitgliedstaaten sollte es in das Ermessen derselben gestellt werden zu entscheiden, ob für die Auftraggeber die Möglichkeit vorgesehen werden soll, auf zentrale Beschaffungsstellen, dynamische Beschaffungssysteme oder elektronische Auktionen, wie sie in dieser Richtlinie vorgesehen und geregelt sind, zurückzugreifen.

(25) Eine angemessene Definition der besonderen und der ausschließlichen Rechte ist geboten. Diese Definition hat zur Folge, dass es für sich genommen noch kein besonderes und ausschließliches Recht im Sinne dieser Richtlinie darstellt, wenn ein Auftraggeber zum Bau eines Netzes oder der Einrichtung von Flughafen- bzw. Hafenanlagen Vorteil aus Enteignungsverfahren oder Nutzungsrechten ziehen kann oder Netzeinrichtungen auf, unter oder über dem öffentlichen Wegenetz anbringen darf. Auch die Tatsache, dass ein Auftraggeber ein Netz mit Trinkwasser, Elektrizität, Gas oder Wärme versorgt, das seinerseits von einem Auftraggeber betrieben wird, der von einer zuständigen Behörde des betreffenden Mitgliedstaats gewährte besondere oder ausschließliche Rechte genießt, stellt für sich betrachtet noch kein besonderes und ausschließliches Recht im Sinne der vorliegenden Richtlinie dar. Räumt ein Mitgliedstaat einer begrenzten Zahl von Unternehmen in beliebiger Form, auch über Konzessionen, Rechte auf der Grundlage objektiver, verhältnismäßiger und nicht diskriminierender Kriterien ein, die allen interessierten Kreisen, die sie erfüllen, die Möglichkeit zur Inanspruchnahme solcher Rechte bietet, so dürfen diese ebenso wenig als besondere oder ausschließliche Rechte betrachtet werden.

(*) in Österreich kann dieser Begriff auch Auswahlkriterien umfassen.

(26) Es ist zweckmäßig, dass die Auftraggeber bei ihren wasserwirtschaftlichen Tätigkeiten gemeinsame Vergabevorschriften anwenden und dass diese Vorschriften auch dann gelten, wenn die Auftraggeber im Sinne dieser Richtlinie Aufträge für Vorhaben in den Bereichen Wasserbau, Bewässerung, Entwässerung, Ableitung sowie Klärung von Abwässern vergeben. Die Vergabevorschriften der Art, die für die Lieferaufträge vorgeschlagen wird, sind allerdings für die Beschaffung von Wasser ungeeignet angesichts der Notwendigkeit, sich aus in der Nähe des Verwendungsorts gelegenen Quellen zu versorgen.

(27) Bestimmte Auftraggeber, die öffentliche Busverkehrsdienste betreiben, waren bereits von der Richtlinie 93/38/EWG ausgenommen. Solche Auftraggeber sollten auch vom Anwendungsbereich der vorliegenden Richtlinie ausgenommen sein. Um eine Vielzahl von besonderen Regelungen, die sich nur auf bestimmte Sektoren beziehen, zu vermeiden, sollte das allgemeine Verfahren zur Berücksichtigung der Folgen der Öffnung für den Wettbewerb auch für alle Busverkehrsdienste betreibenden Auftraggeber gelten, die nicht nach Artikel 2 Absatz 4 der Richtlinie 93/38/EWG aus deren Anwendungsbereich ausgenommen sind.

(28) Angesichts der fortschreitenden Liberalisierung der Postdienste in der Gemeinschaft und der Tatsache, dass diese Dienste über ein Netz von Auftraggebern, öffentlichen Unternehmen und anderen Unternehmen erbracht werden, empfiehlt es sich, auf Aufträge, die von Auftraggebern vergeben werden, die selbst Postdienste anbieten, die Bestimmungen der vorliegenden Richtlinie, einschließlich Artikel 30, anzuwenden, die unter Wahrung der in Erwägungsgrund 9 genannten Grundsätze einen Rahmen für faire Handelspraktiken schaffen und eine größere Flexibilität als die Richtlinie 2004/18/EG des Europäischen Parlaments und des Rates vom 31. März 2004 über die Koordinierung der Verfahren zur Vergabe öffentlicher Bauaufträge, Lieferaufträge und Dienstleistungsaufträge [1] gestatten. Bei der Definition der entsprechenden Tätigkeiten sollten die Begriffsbestimmungen der Richtlinie 97/67/EG des Europäischen Parlaments und des Rates vom 15. Dezember 1997 über gemeinsame Vorschriften für die Entwicklung des Binnenmarktes der Postdienste der Gemeinschaft und die Verbesserung der Dienstequalität [2] berücksichtigt werden.

Unabhängig von ihrer Rechtsstellung unterliegen Stellen, die Postdienste anbieten, derzeit nicht den Bestimmungen der Richtlinie 93/38/EWG. Die Anpassung der Zuschlagserteilungsverfahren an diese Richtlinie könnte für diese Auftraggeber daher mehr Zeit erfordern als für Auftraggeber, die den betreffenden Bestimmungen bereits unterliegen und ihre Verfahren lediglich an die durch diese Richtlinie bewirkten Änderungen anpassen müssen. Es sollte deshalb zulässig sein, die Anwendung dieser Richtlinie aufzuschieben, damit genügend zusätzliche Zeit für die Anpassung zur Verfügung steht. Angesichts der unterschiedlichen Verhältnisse bei den Auftraggebern sollte es den Mitgliedstaaten möglich sein, den im Bereich der Postdienste tätigen Auftraggebern einen Übergangszeitraum für die Anwendung dieser Richtlinie einzuräumen.

(29) Um die Erfordernisse in mehreren Tätigkeitsbereichen zu erfüllen, können Aufträge vergeben werden, die unterschiedlichen rechtlichen Regelungen unterworfen sein können. Es sollte klargestellt werden, dass für die rechtliche Regelung, die auf einen mehrere Tätigkeiten umfassenden Einzelauftrag anzuwenden ist, die Vorschriften gelten sollten, die auf die Tätigkeit anzuwenden sind, auf die der Auftrag in erster Linie abzielt. Die Ermittlung der Tätigkeit, auf die der Auftrag in erster Linie abzielt, könnte auf einer Analyse der Erfordernisse, zu deren Erfüllung der betreffende Auftrag vergeben werden soll, beruhen, welche vom Auftraggeber erstellt wird, um den Auftragswert zu veranschlagen und die Verdingungsunterlagen zu erstellen. In bestimmten Fällen, beispielsweise beim Ankauf eines einzelnen Geräts für die Fortsetzung von Tätigkeiten, für die keine Informationen verfügbar sind, die eine Veranschlagung des jeweiligen Auslastungsgrades ermöglichen, könnte es objektiv unmöglich sein, die Tätigkeit zu ermitteln, auf die der Auftrag in erster Linie abzielt. Es sollte festgelegt werden, welche Vorschriften in diesen Fällen anzuwenden sind.

(30) Unbeschadet der internationalen Verpflichtungen der Gemeinschaft sollte die Anwendung der vorliegenden Richtlinie vereinfacht werden, insbesondere durch Vereinfachung der Schwellenwerte und durch Anwendung der Bestimmungen über die Informationen über die im Vergabeverfahren getroffenen Entscheidungen und sich daraus ergebende Tatsachen, die den Teilnehmern mitzuteilen sind, auf alle Auftraggeber gleichermaßen, unabhängig davon, in welchem Bereich sie tätig sind. Darüber hinaus sollten in der Währungsunion diese Schwellenwerte in Euro festgelegt werden; so dass die Anwendung dieser Bestimmungen vereinfacht und gleichzeitig die Einhaltung der im Übereinkommen festgelegten und in Sonderziehungsrechten (SZR) ausgedrückten Schwellenwerte sichergestellt wird. In diesem Zusammenhang sollten die in Euro ausgedrückten Schwellenwerte regelmäßig überprüft werden, um sie gegebenenfalls an mögliche Kursschwankungen des Euro gegenüber dem SZR anzupassen. Zudem müssen die für Wettbewerbe geltenden Schwellenwerte mit den Schwellenwerten für Dienstleistungsaufträge identisch sein.

(31) Es sollte vorgesehen werden, dass in bestimmten Fällen von der Anwendung der Maßnahmen zur Koordinierung der Verfahren aus Gründen der Staatssicherheit oder der staatlichen Geheimhaltung abgesehen werden kann, oder wenn besondere Vergabeverfahren zur Anwendung kommen, die sich aus internationalen Übereinkünften ergeben, die die Stationierung von Truppen betreffen oder für internationale Organisationen gelten.

[1] Siehe Seite 114 dieses Amtsblatts.

[2] ABl. L 15 vom 21.1.1998, S. 14. Zuletzt geändert durch Verordnung (EG) Nr. 1882/2003 (ABl. L 284 vom 31.10.2003, S. 1).

(32) Eine Ausnahme sollte für bestimmte Dienstleistungs-, Liefer- und Bauaufträge gemacht werden, die an ein verbundenes Unternehmen vergeben werden, dessen Haupttätigkeit darin besteht, diese Dienstleistungen, Lieferungen und Arbeiten der Unternehmensgruppe bereitzustellen, der es angehört, und nicht darin, sie auf dem Markt anzubieten. Für bestimmte Dienstleistungs-, Liefer- und Bauaufträge, die von einem Auftraggeber an ein joint venture vergeben werden, an dem er beteiligt ist und das aus mehreren Auftraggebern gebildet wurde, um die von dieser Richtlinie erfassten Tätigkeiten auszuüben, sollte ebenfalls eine Ausnahme gemacht werden. Jedoch sollte sichergestellt werden, dass durch diese Ausnahmeregelung keine Wettbewerbsverzerrungen zugunsten von Unternehmen oder Joint Ventures entstehen, die mit dem Auftraggeber verbunden sind; es sollten geeignete Vorschriften erlassen werden, die insbesondere auf Folgendes abzielen: die Höchstgrenzen, bis zu denen die Unternehmen einen Teil ihres Umsatzes auf dem Markt erzielen können und bei deren Überschreiten sie nicht mehr die Möglichkeit haben, Aufträge ohne Ausschreibung zu erhalten, die Zusammensetzung von joint ventures sowie die Stabilität der Beziehungen zwischen diesen gemeinsamen Unternehmen und den Auftraggebern, aus denen sie sich zusammensetzen.

(33) Dienstleistungsaufträge über den Erwerb oder die Miete bzw. Pacht von unbeweglichem Vermögen oder Rechten daran weisen Merkmale auf, die die Anwendung von Vorschriften über die Vergabe von Aufträgen unangemessen erscheinen lassen.

(34) Schiedsgerichts- und Schlichtungsdienste werden im Allgemeinen von Organisationen oder Personen übernommen, deren Bestimmung oder Auswahl nicht durch Vergabevorschriften geregelt werden kann.

(35) Entsprechend dem Übereinkommen gehören Aufträge, die sich auf die Ausgabe, den Ankauf, den Verkauf oder die Übertragung von Wertpapieren oder anderen Finanzinstrumenten beziehen, nicht zu den finanziellen Dienstleistungen im Sinne der vorliegenden Richtlinie; dies gilt insbesondere für Geschäfte, die der Geld- oder Kapitalbeschaffung der Auftraggeber dienen.

(36) Diese Richtlinie sollte ausschließlich für die Erbringung auftragsgebundener Dienstleistungen gelten.

(37) Nach Artikel 163 des Vertrags trägt unter anderem die Unterstützung der Forschung und technologischen Entwicklung dazu bei, die wissenschaftlichen und technologischen Grundlagen der Industrie der Gemeinschaft zu stärken, und die Öffnung der Dienstleistungsaufträge hat einen Anteil an der Erreichung dieses Zieles. Die Mitfinanzierung von Forschungsprogrammen sollte nicht Gegenstand dieser Richtlinie sein: Nicht unter diese Richtlinie fallen deshalb Aufträge über Forschungs- und Entwicklungsdienstleistungen, deren Ergebnisse nicht ausschließlich Eigentum des Auftraggebers für die Nutzung bei der Ausübung seiner eigenen Tätigkeit sind, sofern die Dienstleistung vollständig durch den Auftraggeber vergütet wird.

(38) Um eine Ausweitung von besonderen Regelungen, die sich nur auf bestimmte Sektoren beziehen, zu vermeiden, sollte die gegenwärtig geltende Sonderregelung des Artikels 3 der Richtlinie 93/38/EWG und Artikel 12 der Richtlinie 94/22/EG des Europäischen Parlaments und des Rates vom 30. Mai 1994 über die Erteilung und Nutzung von Genehmigungen zur Prospektion, Exploration und Gewinnung von Kohlenwasserstoffen [1], für Auftraggeber, die ein geografisch abgegrenztes Gebiet nutzen, um dort nach Erdöl, Gas, Kohle oder anderen Festbrennstoffen zu suchen oder diese Stoffe zu fördern, durch das allgemeine Verfahren ersetzt werden, das es ermöglicht, unmittelbar dem Wettbewerb ausgesetzte Sektoren von der Richtlinie auszunehmen. Es ist jedoch sicherzustellen, dass folgende Rechtsakte davon unberührt bleiben: Die Entscheidung 93/676/EG der Kommission vom 10. Dezember 1993, wonach die Nutzung eines geografisch abgegrenzten Gebiets zum Zwecke der Suche nach oder der Förderung von Erdöl oder Gas in den Niederlanden keine Tätigkeit im Sinne von Artikel 2 Absatz 2 Buchstabe b) Ziffer i) der Richtlinie 90/531/EWG des Rates darstellt und die diese Tätigkeit ausübenden Auftraggeber in den Niederlanden keine besonderen oder ausschließlichen Rechte im Sinne von Artikel 2 Absatz 3 Buchstabe b) dieser Richtlinie besitzen [2], die Entscheidung 97/367/EG der Kommission vom 30. Mai 1997, wonach die Nutzung eines geografisch abgegrenzten Gebiets zum Zweck der Suche nach oder der Förderung von Erdöl oder Gas im Vereinigten Königreich nicht als Tätigkeit im Sinne von Artikel 2 Absatz 2 Buchstabe b) Ziffer i) der Richtlinie 93/38/EWG des Rates gilt und die eine solche Tätigkeit ausübenden Auftraggeber im Vereinigten Königreich nicht als im Besitz von besonderen oder ausschließlichen Rechten im Sinne von Artikel 2 Absatz 3 Buchstabe b) der genannten Richtlinie gelten [3], die Entscheidung 2002/205/EG der Kommission vom 4. März 2002 über einen Antrag Österreichs, das spezielle Regime in Artikel 3 der Richtlinie 93/38/EWG anzuwenden [4] und die Entscheidung 2004/74/EG der Kommission über einen Antrag Deutschlands, das spezielle Regime in Artikel 3 der Richtlinie 93/38/EWG anzuwenden [5].

(39) Beruf und Beschäftigung sind Schlüsselelemente zur Gewährleistung gleicher Chancen für alle und tragen zur Eingliederung in die Gesellschaft bei. In diesem Zusammenhang tragen geschützte Werkstätten und geschützte Beschäftigungsprogramme wirksam zur Eingliederung oder Wiedereingliederung von Menschen mit Behinderungen in den Arbeitsmarkt bei. Derartige Werkstätten sind jedoch möglicherweise nicht in der Lage, unter normalen Wettbewerbsbedingungen Aufträge zu erhalten. Es ist daher angemessen, vorzusehen, dass Mitgliedstaaten das Recht, an Verfahren zur Vergabe von Aufträgen teilzunehmen, derartigen Werkstätten, oder die Ausführung eines Auftrags geschützten Beschäftigungsprogrammen vorbehalten können.

[1] ABl. L 164 vom 30.6.1994, S. 3.
[2] ABl. L 316 vom 17.12.1993, S. 41.
[3] ABl. L 156 vom 13.6.1997, S. 55.
[4] ABl. L 68 vom 12.3.2002, S. 31.
[5] ABl. L 16 vom 23.1.2004, S. 57.

(40) Die vorliegende Richtlinie sollte weder für Aufträge gelten, die die Ausübung einer der in Artikel 3 bis 7 genannten Tätigkeiten ermöglichen sollen, noch für Wettbewerbe zur Ausübung einer solchen Tätigkeit, wenn diese Tätigkeit in dem Mitgliedstaat, in dem sie ausgeübt wird, auf Märkten ohne Zugangsbeschränkungen dem direkten Wettbewerb ausgesetzt ist. Es sollte daher ein Verfahren eingeführt werden, das auf alle unter diese Richtlinie fallenden Sektoren anwendbar ist und es ermöglicht, die Auswirkungen einer aktuellen oder künftigen Liberalisierung zu berücksichtigen. Ein solches Verfahren sollte den betroffenen Auftraggebern Rechtssicherheit bieten und eine angemessene Entscheidungsfindung ermöglichen, so dass innerhalb kurzer Fristen eine einheitliche Anwendung des einschlägigen Gemeinschaftsrechts gewährleistet ist.

(41) Der unmittelbare Einfluss des Wettbewerbs sollte nach objektiven Kriterien festgestellt werden, wobei die besonderen Merkmale des betreffenden Sektors zu berücksichtigen sind. Die Umsetzung und Anwendung gemeinschaftlicher Rechtsvorschriften zur Liberalisierung eines bestimmten Sektors oder Teilsektors gelten als hinreichende Vermutung für den freien Zugang zu dem betreffenden Markt. Entsprechende angemessene Rechtsvorschriften sollten in einem Anhang aufgeführt werden, der von der Kommission aktualisiert werden kann. Bei der Aktualisierung trägt die Kommission insbesondere dem Umstand Rechnung, dass eventuell Maßnahmen verabschiedet wurden, die eine echte Öffnung von Sektoren, für die in Anhang XI noch keine Rechtsvorschriften aufgeführt sind, für den Wettbewerb bewirken; dazu zählt z. B. die Öffnung des Schienenverkehrs für den Wettbewerb. Geht der freie Zugang zu einem Markt nicht auf die Anwendung einschlägigen Gemeinschaftsrechts zurück, sollte dieser freie Zugang de jure und de facto nachgewiesen werden. Im Hinblick darauf stellt die Anwendung einer Richtlinie, wie beispielsweise der Richtlinie 94/22/EG, durch einen Mitgliedstaat, durch die ein bestimmter Sektor liberalisiert wird, auf einen anderen Sektor wie beispielsweise den Kohlesektor einen Sachverhalt dar, der für die Zwecke des Artikels 30 zu berücksichtigen ist.

(42) Die von den Auftraggebern erarbeiteten technischen Spezifikationen sollten es erlauben, die öffentlichen Beschaffungsmärkte für den Wettbewerb zu öffnen. Hierfür sollte es möglich sein, Angebote einzureichen, die die Vielfalt technischer Lösungsmöglichkeiten widerspiegeln. Damit dies gewährleistet ist, sollten einerseits Leistungs- und Funktionsanforderungen in technischen Spezifikationen erlaubt sein, und andererseits sollten im Falle der Bezugnahme auf eine europäische Norm, oder wenn eine solche nicht vorliegt, auf eine nationale Norm, Angebote auf der Grundlage anderer gleichwertiger Lösungen, die die Anforderungen des Auftraggebers erfüllen und auch hinsichtlich der Sicherheitsanforderungen gleichwertig sind, von den Auftraggebern berücksichtigt werden. Die Bieter sollten die Möglichkeit haben, die Gleichwertigkeit ihrer Lösung mit allen ihnen zu Gebote stehenden Nachweisen zu belegen. Die Auftraggeber sollten jede Entscheidung, dass die Gleichwertigkeit in einem bestimmten Fall nicht gegeben ist, begründen können. Auftraggeber, die für die technischen Spezifikationen eines Auftrags Umweltanforderungen festlegen möchten, können die Umwelteigenschaften — wie eine bestimmte Produktionsmethode — und/oder Auswirkungen bestimmter Warengruppen oder Dienstleistungen auf die Umwelt festlegen. Sie können — müssen aber nicht — geeignete Spezifikationen verwenden, die in Umweltgütezeichen definiert sind, wie z. B. im Europäischen Umweltgütezeichen, in (pluri-)nationalen Umweltgütezeichen oder anderen Umweltgütezeichen, sofern die Anforderungen an das Gütezeichen auf der Grundlage von wissenschaftlich abgesicherten Informationen im Rahmen eines Verfahrens ausgearbeitet und erlassen werden, an dem interessierte Kreise — wie z. B. staatliche Stellen, Verbraucher, Hersteller, Einzelhändler und Umweltorganisationen — teilnehmen können, und sofern das Gütezeichen für alle interessierten Parteien zugänglich und verfügbar ist. Die Auftraggeber sollten, wo immer dies möglich ist, technische Spezifikationen festlegen, die das Kriterium der Zugänglichkeit für Personen mit einer Behinderung oder das Kriterium der Konzeption für alle Benutzer berücksichtigen. Die technischen Spezifikationen sind klar festzulegen, so dass alle Bieter wissen, was die Anforderungen des Auftraggebers umfassen.

(43) Um die Beteiligung von kleinen und mittleren Unternehmen an öffentlichen Aufträgen zu fördern, ist es angebracht, Bestimmungen über Unteraufträge vorzusehen.

(44) Die Bedingungen für die Ausführung eines Auftrags sind mit der Richtlinie vereinbar, wenn sie nicht unmittelbar oder mittelbar zu einer Diskriminierung führen und in der als Aufruf zum Wettbewerb dienenden Bekanntmachung oder in den Verdingungsunterlagen angegeben sind. Sie können insbesondere dem Ziel dienen, die berufliche Ausbildung auf den Baustellen sowie die Beschäftigung von Personen zu fördern, deren Eingliederung besondere Schwierigkeiten bereitet, die Arbeitslosigkeit zu bekämpfen oder die Umwelt zu schützen. So können unter anderem z. B. die — während der Ausführung des Auftrags geltenden — Verpflichtungen genannt werden, Langzeitarbeitslose einzustellen oder Ausbildungsmaßnahmen für Arbeitnehmer oder Jugendliche durchzuführen, oder die Bestimmungen der grundlegenden Übereinkommen der Internationalen Arbeitsorganisation (IAO), für den Fall, dass diese nicht in innerstaatliches Recht umgesetzt worden sind, im Wesentlichen einzuhalten, oder ein Kontingent von behinderten Personen einzustellen, das über dem nach innerstaatlichem Recht vorgeschriebenen Kontingent liegt.

(45) Die im Bereich der Arbeitsbedingungen und der Sicherheit am Arbeitsplatz geltenden nationalen und gemeinschaftlichen Gesetze, Regelungen und Tarifverträge sind während der Ausführung eines Auftrags anwendbar, sofern derartige Vorschriften sowie ihre Anwendung mit dem Gemeinschaftsrecht vereinbar sind. Für grenzüberschreitende Situationen, in denen Arbeitnehmer eines Mitgliedstaats zur Ausführung eines Auftrags Dienstleistungen in einem anderen Mitgliedstaat erbringen, legt die Richtlinie 96/71/EG des Europäischen Parlaments und des Rates vom 16. Dezember 1996 über die Entsendung von Arbeitnehmern im Rahmen der

Erbringung von Dienstleistungen [1] die Mindestbedingungen fest, die der Aufnahmestaat in Bezug auf die entsandten Arbeitnehmer einzuhalten hat. Enthält das nationale Recht entsprechende Bestimmungen, so kann die Nichteinhaltung dieser Verpflichtungen als eine schwere Verfehlung oder als ein Verstoß betrachtet werden, der die berufliche Zuverlässigkeit des Wirtschaftsteilnehmers in Frage stellt und dessen Ausschluss von dem Verfahren zur Vergabe eines Auftrags zur Folge haben kann.

(46) Angesichts der neuen Informations- und Kommunikationstechnologie und der Erleichterungen, die sie für die Bekanntmachung von Aufträgen und die Effizienz und Transparenz der Vergabeverfahren mit sich bringen können, ist es angebracht, die elektronischen Mittel den klassischen Mitteln zur Kommunikation und zum Informationsaustausch gleichzusetzen. Soweit möglich sollten das gewählte Mittel und die gewählte Technologie mit den in den anderen Mitgliedstaaten verwendeten Technologien kompatibel sein.

(47) Der Einsatz elektronischer Vorrichtungen spart Zeit. Dementsprechend ist es angebracht, beim Einsatz dieser elektronischen Vorrichtungen eine Verkürzung der Mindestfristen vorzusehen, jedoch unter der Voraussetzung, dass sie mit den auf Gemeinschaftsebene vorgesehenen spezifischen Übertragungsmodalitäten vereinbar sind. Es ist jedoch sicherzustellen, dass die Kumulierung der Fristverkürzungen nicht zu unverhältnismäßig kurzen Fristen führt.

(48) Die Richtlinie 1999/93/EG des Europäischen Parlaments und des Rates vom 13. Dezember 1999 über gemeinschaftliche Rahmenbedingungen für elektronische Signaturen [2] und die Richtlinie 2000/31/EG des Europäischen Parlaments und des Rates vom 8. Juni 2000 über bestimmte rechtliche Aspekte der Dienste der Informationsgesellschaft, insbesondere des elektronischen Geschäftsverkehrs, im Binnenmarkt („Richtlinie über den elektronischen Geschäftsverkehr“) [3] sollten für die elektronische Übermittlung von Informationen im Rahmen der vorliegenden Richtlinie gelten. Die Verfahren zur Vergabe öffentlicher Aufträge und die für Wettbewerbe geltenden Vorschriften erfordern einen höheren Grad an Sicherheit und Vertraulichkeit als in den genannten Richtlinien vorgesehen ist. Daher sollten die Vorrichtungen für den elektronischen Eingang von Angeboten, Anträgen auf Teilnahme und von Plänen und Vorhaben besonderen zusätzlichen Anforderungen genügen. Zu diesem Zweck sollte die Verwendung elektronischer Signaturen, insbesondere fortgeschrittener elektronischer Signaturen, so weit wie möglich gefördert werden. Ferner können Systeme der freiwilligen Akkreditierung günstige Rahmenbedingungen dafür bieten, dass sich das Niveau der Zertifizierungsdienste für diese Vorrichtungen erhöht.

(49) Es ist zweckmäßig, die Teilnehmer an einem Vergabeverfahren über Entscheidungen über den Abschluss einer Rahmenvereinbarung oder die Zuschlagserteilung oder den Verzicht auf das Verfahren möglichst kurzfristig zu unterrichten, um zu vermeiden, dass die Einreichung von Anträgen auf Überprüfung unmöglich wird; die Unterrichtung sollte daher möglichst rasch und generell innerhalb von 15 Tagen nach der Entscheidung erfolgen.

(50) Es sollte klargestellt werden, dass Auftraggeber, die die Eignungskriterien in einem offenen Verfahren festlegen, dies entsprechend objektiven Kriterien und Regeln tun müssen, wie auch die Eignungskriterien in den nichtoffenen Verfahren und Verhandlungsverfahren objektiv sein sollten. Diese objektiven Regeln und Kriterien implizieren ebenso wie die Eignungskriterien nicht unbedingt Gewichtungen.

(51) Es ist wichtig, die Rechtsprechung des Gerichtshofs zu den Fällen zu berücksichtigen, in denen sich ein Wirtschaftsteilnehmer auf die wirtschaftlichen, finanziellen oder technischen Kapazitäten anderer Unternehmen beruft, unabhängig davon, in welchem Rechtsverhältnis er zu diesen Unternehmen steht, um die Eignungskriterien zu erfüllen oder im Rahmen von Prüfungssystemen seinen Antrag auf Prüfung zu stützen. In dem zuletzt genannten Fall hat der Wirtschaftsteilnehmer den Nachweis dafür zu erbringen, dass er während der gesamten Geltungsdauer der Prüfung tatsächlich über diese Kapazitäten verfügt. Für diese Prüfung kann ein Auftraggeber daher ein zu erreichendes Leistungsniveau, und, wenn sich der betreffende Wirtschaftsteilnehmer beispielsweise auf die Finanzkraft eines anderen Auftraggebers stützt, insbesondere die Übernahme einer gegebenenfalls gesamtschuldnerischen Verpflichtung durch den anderen Auftraggeber vorschreiben.

Die Prüfungssysteme sollten entsprechend objektiven Regeln und Kriterien verwaltet werden, die sich — nach Wahl des Auftraggebers — auf die Kapazitäten des Wirtschaftsteilnehmers und/oder die besonderen Merkmale der von dem System erfassten Arbeiten, Lieferungen oder Dienstleistungen beziehen können. Zum Zweck der Prüfung kann der Auftraggeber eigene Kontrollen durchführen, um die Merkmale der betreffenden Arbeiten, Lieferungen oder Dienstleistungen insbesondere unter dem Gesichtspunkt der Kompatibilität und der Sicherheit zu beurteilen.

(52) Soweit für die Teilnahme an einem Vergabeverfahren oder einem Wettbewerb der Nachweis einer bestimmten Qualifikation gefordert wird, werden die einschlägigen Gemeinschaftsvorschriften über die gegenseitige Anerkennung von Diplomen, Prüfungszeugnissen und sonstigen Befähigungsnachweisen angewandt.

(53) In geeigneten Fällen, in denen die Art der Arbeiten und/oder Dienstleistungen es rechtfertigt, dass bei Ausführung des Auftrags Umweltmanagementmaßnahmen

[1] ABl. L 18 vom 21.1.1997, S. 1.
[2] ABl. L 13 vom 19.1.2000, S. 12.
[3] ABl. L 178 vom 17.7.2000, S. 1.

oder -systeme zur Anwendung kommen, kann die Anwendung solcher Maßnahmen bzw. Systeme vorgeschrieben werden. Umweltmanagementsysteme können unabhängig von ihrer Registrierung gemäß den Gemeinschaftsvorschriften wie der Verordnung (EG) Nr. 761/2001 (EMAS) [1] als Nachweis für die technische Leistungsfähigkeit des Wirtschaftsteilnehmers zur Ausführung des Auftrags dienen. Darüber hinaus sollte eine Beschreibung der von dem Wirtschaftsteilnehmer angewandten Maßnahmen zur Gewährleistung desselben Umweltschutzniveaus alternativ zu den registrierten Umweltmanagementsystemen als Beweismittel akzeptiert werden.

(54) Es sollten Vorkehrungen getroffen werden, um der Vergabe von öffentlichen Aufträgen an Wirtschaftsteilnehmer, die sich an einer kriminellen Vereinigung beteiligt oder der Bestechung oder des Betrugs zu Lasten der finanziellen Interessen der Gemeinschaft oder der Geldwäsche schuldig gemacht haben, vorzubeugen. Da Auftraggeber, die nicht öffentliche Auftraggeber sind, möglicherweise keinen Zugang zu sicheren Beweisen für derartige Sachverhalte haben, sollte es diesen Auftraggebern überlassen werden, die Ausschlusskriterien gemäß Artikel 45 Absatz 1 der Richtlinie 2004/18/EG anzuwenden oder nicht. Infolgedessen sollten nur die Auftraggeber zur Anwendung von Artikel 45 Absatz 1 verpflichtet sein. Die Auftraggeber sollten gegebenenfalls von den Prüfungsantragstellern, Bewerbern oder Bietern einschlägige Unterlagen anfordern und, wenn sie Zweifel in Bezug auf die persönliche Lage dieser Wirtschaftsteilnehmer hegen, die zuständigen Behörden des betreffenden Mitgliedstaates um Mitarbeit ersuchen können. Diese Wirtschaftsteilnehmer sollten ausgeschlossen werden, wenn dem Auftraggeber bekannt ist, dass es eine nach einzelstaatlichem Recht ergangene rechtskräftige gerichtliche Entscheidung im Zusammenhang mit derartigen Straftaten gibt.

Enthält das nationale Recht entsprechende Bestimmungen, so kann ein Verstoß gegen das Umweltrecht oder gegen Rechtsvorschriften betreffend unrechtmäßige Absprachen im Auftragswesen, der mit einem rechtskräftigen Urteil oder einem Beschluss gleicher Wirkung sanktioniert wurde, als Verstoß, der die berufliche Zuverlässigkeit des Wirtschaftsteilnehmers in Frage stellt, oder als schwere Verfehlung betrachtet werden.

Die Nichteinhaltung nationaler Bestimmungen zur Umsetzung der Richtlinien 2000/78/EG [2] und 76/207/EWG [3] des Rates zur Gleichbehandlung von Arbeitnehmern, die mit einem rechtskräftigen Urteil oder einem Beschluss gleicher Wirkung sanktioniert wurde, kann als Verstoß, der die berufliche Zuverlässigkeit des Wirtschaftsteilnehmers in Frage stellt, oder als schwere Verfehlung betrachtet werden.

(55) Der Zuschlag muss nach objektiven Kriterien erteilt werden, die die Beachtung der Grundsätze der Transparenz, Nichtdiskriminierung und Gleichbehandlung gewährleisten und sicherstellen, dass die Angebote unter wirksamen Wettbewerbsbedingungen bewertet werden. Dementsprechend sollten nur zwei Zuschlagskriterien zugelassen werden: das des „niedrigsten Preises“ und das des „wirtschaftlich günstigsten Angebots“.

Um bei der Zuschlagserteilung die Einhaltung des Gleichbehandlungsgrundsatzes sicherzustellen, ist die — in der Rechtsprechung anerkannte — Verpflichtung zur Sicherstellung der erforderlichen Transparenz vorzusehen, damit sich jeder Bieter angemessen über die Kriterien und Modalitäten unterrichten kann, anhand deren das wirtschaftlich günstigste Angebot ermittelt wird. Die Auftraggeber haben daher die Zuschlagskriterien und deren jeweilige Gewichtung anzugeben, und zwar so rechtzeitig, dass diese Angaben den Bietern bei der Erstellung ihrer Angebote bekannt sind. Die Auftraggeber können in begründeten Ausnahmefällen, die zu rechtfertigen sie in der Lage sein müssen, auf die Angabe der Gewichtung der Zuschlagskriterien verzichten, wenn diese Gewichtung insbesondere aufgrund der Komplexität des Auftrags nicht im Vorhinein vorgenommen werden kann. In diesen Fällen müssen sie diese Kriterien in der absteigenden Reihenfolge ihrer Bedeutung angeben.

Beschließen die Auftraggeber, dem wirtschaftlich günstigsten Angebot den Zuschlag zu erteilen, so sollten sie die Angebote unter dem Gesichtspunkt des besten Preis-Leistungs-Verhältnisses bewerten. Zu diesem Zweck sollten sie die wirtschaftlichen und qualitativen Kriterien festlegen, anhand deren insgesamt das für den Auftraggeber wirtschaftlich günstigste Angebot bestimmt werden kann. Die Festlegung dieser Kriterien hängt insofern vom Auftragsgegenstand ab, als sie es ermöglichen müssen, das Leistungsniveau jedes einzelnen Angebots im Verhältnis zu dem in den technischen Spezifikationen beschriebenen Auftragsgegenstand zu bewerten sowie das Preis-Leistungs-Verhältnis jedes Angebots zu bestimmen. Damit die Gleichbehandlung gewährleistet ist, müssen die Zuschlagskriterien einen Vergleich und eine objektive Bewertung der Angebote ermöglichen. Wenn diese Voraussetzungen erfüllt sind, versetzen die wirtschaftlichen und qualitativen Zuschlagskriterien, wie z. B. Kriterien zur Erfüllung von Umweltanforderungen, den Auftraggeber in die Lage, auf Bedürfnisse der betroffenen Allgemeinheit, so wie es in den Leistungsbeschreibungen festgelegt ist, einzugehen. Unter denselben Voraussetzungen kann ein Auftraggeber auch Kriterien zur Erfüllung sozialer Anforderungen anwenden, die insbesondere den — in den vertraglichen Spezifikationen festgelegten — Bedürfnissen besonders benachteiligter Bevölkerungsgruppen entsprechen, denen die Nutznießer/Nutzer der Bauleistungen, Lieferungen oder Dienstleistungen angehören.

[1] Verordnung (EG) Nr. 761/2001 des Europäischen Parlaments und des Rates vom 19. März 2001 über die freiwillige Beteiligung von Organisationen an einem Gemeinschaftssystem für Umweltmanagement und die Umweltbetriebsprüfung (EMA) (ABl. L 114 vom 24.4.2001, S. 1).

[2] Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf (ABl. L 303 vom 2.12.2000, S. 16).

[3] Richtlinie 76/207/EWG des Rates vom 9. Februar 1976 zur Verwirklichung des Grundsatzes der Gleichbehandlung von Männern und Frauen hinsichtlich des Zugangs zur Beschäftigung, zur Berufsbildung und zum beruflichen Aufstieg sowie in Bezug auf die Arbeitsbedingungen (ABl. L 39 vom 14.2.1976, S. 40). Geändert durch die Richtlinie 2002/73/EG (ABl. L 269 vom 5.10.2002, S. 15).

(56) Die Zuschlagskriterien sollten nicht die Anwendung nationaler Bestimmungen beeinflussen, die die Vergütung bestimmter Dienstleistungen, wie die Dienstleistung von Architekten, Ingenieuren oder Rechtsanwälten, regeln.

(57) Die Verordnung (EWG, Euratom) Nr. 1182/71 des Rates vom 3. Juni 1971 zur Festlegung der Regeln für die Fristen, Daten und Termine [1] sollte für die Berechnung der in der vorliegenden Richtlinie genannten Fristen gelten.

(58) Die vorliegende Richtlinie sollte unbeschadet der internationalen Verpflichtungen der Gemeinschaft oder der Mitgliedstaaten gelten und nicht die Anwendung anderer Bestimmungen des Vertrags, insbesondere der Artikel 81 und 86, berühren.

(59) Die Richtlinie sollte nicht die Frist gemäß Anhang XXV berühren, innerhalb deren die Mitgliedstaaten zur Umsetzung und Anwendung der Richtlinie 93/38/EWG verpflichtet sind.

(60) Die zur Durchführung dieser Richtlinie erforderlichen Maßnahmen sollten gemäß dem Beschluss 1999/468/EG des Rates vom 28. Juni 1999 zur Festlegung der Modalitäten für die Ausübung der der Kommission übertragenen Durchführungsbefugnisse [2] erlassen werden —

HABEN FOLGENDE RICHTLINIE ERLASSEN:

INHALT

[1] ABl. L 124 vom 8.6.1971, S. 1.

[2] ABl. L 184 vom 17.7.1999, S. 23.

TITEL I

ALLGEMEINE BESTIMMUNGEN FÜR AUFTRÄGE UND WETTBEWERBE

KAPITEL I

Grundbegriffe

Artikel 1

Definitionen

(1) Für die Zwecke dieser Richtlinie gelten die Definitionen dieses Artikels.

(2) a) „Liefer-, Bau- und Dienstleistungsaufträge“ sind zwischen einem oder mehreren der in Artikel 2 Absatz 2 aufgeführten Auftraggeber und einem oder mehreren Unternehmern, Lieferanten oder Dienstleistern geschlossene entgeltliche schriftliche Verträge.

b) „Bauaufträge“ sind Aufträge über entweder die Ausführung oder gleichzeitig die Planung und die Ausführung von Bauvorhaben im Zusammenhang mit einer der in Anhang XII genannten Tätigkeiten oder eines Bauwerks oder die Erbringung einer Bauleistung durch Dritte, gleichgültig mit welchen Mitteln, gemäß den vom Auftraggeber genannten Erfordernissen. Ein „Bauwerk“ ist das Ergebnis einer Gesamtheit von Tief- oder Hochbauarbeiten, das seinem Wesen nach eine wirtschaftliche oder technische Funktion erfüllen soll.

c) „Lieferaufträge“ sind andere Aufträge als die unter Buchstabe b) genannten; sie betreffen den Kauf, das Leasing, die Miete, die Pacht oder den Ratenkauf, mit oder ohne Kaufoption, von Waren.

Ein Auftrag über die Lieferung von Waren, der das Verlegen und Anbringen lediglich als Nebenarbeiten umfasst, gilt als „Lieferauftrag“.

d) „Dienstleistungsaufträge“ sind Aufträge über die Erbringung von Dienstleistungen im Sinne von Anhang XVII, die keine Bau- oder Lieferaufträge sind.

Ein Auftrag, der sowohl Waren als auch Dienstleistungen im Sinne von Anhang XVII umfasst, gilt als „Dienstleistungsauftrag“, wenn der Wert der betreffenden Dienstleistungen den Wert der in den Auftrag einbezogenen Waren übersteigt.

Ein Auftrag über die Erbringung von Dienstleistungen im Sinne von Anhang XVII, der Tätigkeiten im Sinne von Anhang XII lediglich als Nebenarbeiten im Verhältnis zum Hauptauftragsgegenstand umfasst, gilt als Dienstleistungsauftrag.

(3) a) „Baukonzession“ ist ein Vertrag, der von einem Bauauftrag nur insoweit abweicht, als die Gegenleistung für die Bauleistungen ausschließlich in dem Recht zur Nutzung des Bauwerks oder in diesem Recht zuzüglich der Zahlung eines Preises besteht.

b) „Dienstleistungskonzession“ ist ein Vertrag, der von einem Diensteistungsauftrag nur insoweit abweicht, als die Gegenleistung für die Erbringung der Dienstleistungen ausschließlich in dem Recht zur Nutzung der Dienstleistung oder in diesem Recht zuzüglich der Zahlung eines Preises besteht.

(4) „Rahmenvereinbarung“ ist eine Vereinbarung zwischen einem oder mehreren Auftraggebern im Sinne des Artikels 2 Absatz 2 und einem oder mehreren Wirtschaftsteilnehmern, die zum Ziel hat, die Bedingungen für die Aufträge, die im Laufe eines bestimmten Zeitraums vergeben werden sollen, festzulegen, insbesondere in Bezug auf den Preis und gegebenenfalls die in Aussicht genommenen Mengen.

(5) „Dynamisches Beschaffungssystem“ ist ein vollelektronisches Verfahren für Beschaffungen von marktüblichen Leistungen, bei denen die allgemein auf dem Markt verfügbaren Merkmale den Anforderungen des Auftraggebers genügen; dieses Verfahren ist zeitlich befristet und steht während der gesamten Verfahrensdauer jedem Wirtschaftsteilnehmer offen, der die Eignungskriterien erfüllt und ein erstes Angebot im Einklang mit den Verdingungsunterlagen unterbreitet hat.

(6) Eine „elektronische Auktion“ ist ein iteratives Verfahren, bei dem mittels einer elektronischen Vorrichtung nach einer ersten vollständigen Bewertung der Angebote jeweils neue, nach unten korrigierte Preise und/oder neue, auf bestimmte Komponenten der Angebote abstellende Werte vorgelegt werden, und das eine automatische Klassifizierung dieser Angebote ermöglicht. Folglich dürfen bestimmte Bau- und Dienstleistungsaufträge, bei denen eine geistige Leistung zu erbringen ist — wie z. B. die Konzeption von Bauarbeiten —, nicht Gegenstand von elektronischen Auktionen sein.

(7) „Unternehmer“, „Lieferant“ und „Dienstleistungserbringer“ sind entweder natürliche oder juristische Personen oder Auftraggeber im Sinne von Artikel 2 Absatz 2 Buchstabe a) oder b) oder Gruppen dieser Personen und/oder Einrichtungen, die auf dem Markt die Ausführung von Bauleistungen, die Errichtung von Bauwerken, die Lieferung von Waren bzw. die Erbringung von Dienstleistungen anbieten.

Der Begriff „Wirtschaftsteilnehmer“ umfasst sowohl Unternehmer als auch Lieferanten und Dienstleistungserbringer. Er dient ausschließlich der Vereinfachung des Textes.

„Bieter“ ist ein Wirtschaftsteilnehmer, der ein Angebot vorlegt, ein „Bewerber“ derjenige, der sich um eine Aufforderung zur Teilnahme an einem nichtoffenen Verfahren oder Verhandlungsverfahren bewirbt.

(8) „Zentrale Beschaffungsstelle“ ist ein öffentlicher Auftraggeber im Sinne von Artikel 2 Absatz 1 Buchstabe a) oder ein öffentlicher Auftraggeber im Sinne von Artikel 1 Absatz 9 der Richtlinie 2004/18/EG, der

— für Auftraggeber bestimmte Waren und/oder Dienstleistungen erwirbt oder

— öffentliche Aufträge vergibt oder Rahmenvereinbarungen über Bauleistungen, Waren oder Dienstleistungen für Auftraggeber schließt.

(9) „Offene, nichtoffene und Verhandlungsverfahren“ sind die von den Auftraggebern angewandten Vergabeverfahren, bei denen

a) im Fall des offenen Verfahrens alle interessierten Wirtschaftsteilnehmer ein Angebot abgeben können,

b) im Fall des nichtoffenen Verfahrens sich alle Wirtschaftsteilnehmer um die Teilnahme bewerben können und nur die vom Auftraggeber aufgeforderten Bewerber ein Angebot abgeben können,

c) im Fall von Verhandlungsverfahren der Auftraggeber sich an Wirtschaftsteilnehmer seiner Wahl wendet und mit einem oder mehreren von ihnen über die Auftragsbedingungen verhandelt,

(10) „Wettbewerbe“ sind Auslobungsverfahren, die dazu dienen, dem Auftraggeber insbesondere auf den Gebieten der Raumplanung, der Stadtplanung, der Architektur und des Bauwesens oder der Datenverarbeitung einen Plan oder eine Planung zu verschaffen, deren Auswahl durch ein Preisgericht aufgrund vergleichender Beurteilung mit oder ohne Verteilung von Preisen erfolgt.

(11) „Schriftlich“ ist jede aus Wörtern oder Ziffern bestehende Darstellung, die gelesen, reproduziert und mitgeteilt werden kann. Darin können auch elektronisch übermittelte und gespeicherte Informationen enthalten sein.

(12) „Elektronisch“ ist ein Verfahren, bei dem elektronische Geräte für die Verarbeitung (einschließlich digitaler Kompression) und Speicherung von Daten zum Einsatz kommen und bei dem Informationen über Kabel, über Funk, mit optischen Verfahren oder mit anderen elektromagnetischen Verfahren übertragen, weitergeleitet und empfangen werden.

(13) Das „Gemeinsame Vokabular für öffentliche Aufträge“, nachstehend „CPV“ (Common Procurement Vocabulary) genannt, bezeichnet die mit der Verordnung (EG) Nr. 2195/2002 des Europäischen Parlaments und des Rates vom 5. November 2002 über das Gemeinsame Vokabular für öffentliche Aufträge [1] angenommene, auf öffentliche Aufträge anwendbare Referenzklassifikation; es gewährleistet zugleich die Übereinstimmung mit den übrigen bestehenden Klassifikationen.

Sollte es aufgrund etwaiger Abweichungen zwischen der CPV-Nomenklatur und der NACE-Nomenklatur nach Anhang XII oder zwischen der CPV-Nomenklatur und der CPC-Nomenklatur (vorläufige Fassung) nach Anhang XVII zu unterschiedlichen Auslegungen bezüglich des Anwendungsbereichs der vorliegenden Richtlinie kommen, so hat jeweils die NACE-Nomenklatur bzw. die CPC-Nomenklatur Vorrang.

[1] ABl. L 340 vom 16.12.2002, S. 2.

KAPITEL II

Definition der Auftraggeber und Tätigkeiten

Abschnitt 1

Stellen

Artikel 2

Auftraggeber

(1) Im Sinne dieser Richtlinie bezeichnet der Ausdruck:

a) „öffentlicher Auftraggeber" den Staat, die Gebietskörperschaften, die Einrichtungen des öffentlichen Rechts und die Verbände, die aus einer oder mehreren dieser Körperschaften oder Einrichtungen des öffentlichen Rechts bestehen.

Als „Einrichtung des öffentlichen Rechts" gilt jede Einrichtung, die

— zu dem besonderen Zweck gegründet wurde, im Allgemeininteresse liegende Aufgaben nicht gewerblicher Art zu erfüllen,

— Rechtspersönlichkeit besitzt und

— überwiegend vom Staat, von den Gebietskörperschaften oder von anderen Einrichtungen des öffentlichen Rechts finanziert wird, hinsichtlich ihrer Leistung der Aufsicht durch Letztere unterliegt, oder deren Verwaltungs-, Leitungs- oder Aufsichtsorgan mehrheitlich aus Mitgliedern besteht, die vom Staat, von den Gebietskörperschaften oder von anderen Einrichtungen des öffentlichen Rechts ernannt worden sind;

b) „öffentliches Unternehmen" jedes Unternehmen, auf das der Auftraggeber aufgrund von Eigentum, finanzieller Beteiligung oder der für das Unternehmen geltenden Vorschriften unmittelbar oder mittelbar einen beherrschenden Einfluss ausüben kann.

Es wird vermutet, dass der Auftraggeber einen beherrschenden Einfluss auf ein Unternehmen ausübt, wenn er unmittelbar oder mittelbar

— die Mehrheit des gezeichneten Kapitals des Unternehmens hält oder

— über die Mehrheit der mit den Anteilen am Unternehmen verbundenen Stimmrechte verfügt oder

— mehr als die Hälfte der Mitglieder des Verwaltungs-, Leitungs- oder Aufsichtsorgans des Unternehmens ernennen kann.

(2) Diese Richtlinie gilt für Auftraggeber, die

a) öffentliche Auftraggeber oder öffentliche Unternehmen sind und eine Tätigkeit im Sinne der Artikel 3 bis 7 ausüben, oder,

b) wenn sie keine öffentlichen Auftraggeber oder keine öffentlichen Unternehmen sind, eine Tätigkeit im Sinne der Artikel 3 bis 7 oder mehrere dieser Tätigkeiten auf der Grundlage von besonderen oder ausschließlichen Rechten ausüben, die von einer zuständigen Behörde eines Mitgliedstaats gewährt wurden.

(3) „Besondere oder ausschließliche Rechte" im Sinne dieser Richtlinie sind Rechte, die von einer zuständigen Behörde eines Mitgliedstaats mittels Rechts- oder Verwaltungsvorschriften gewährt wurden und dazu führen, dass die Ausübung einer der in den Artikeln 3 bis 7 genannten Tätigkeiten einem oder mehreren Unternehmen vorbehalten wird und dass die Möglichkeit anderer Unternehmen, diese Tätigkeit auszuüben, erheblich beeinträchtigt wird.

Abschnitt 2

Tätigkeiten

Artikel 3

Gas, Wärme und Elektrizität

(1) Im Bereich von Gas und Wärme fallen unter diese Richtlinie:

a) die Bereitstellung und das Betreiben fester Netze zur Versorgung der Allgemeinheit im Zusammenhang mit der Erzeugung, der Fortleitung und der Abgabe von Gas und Wärme,

b) die Einspeisung von Gas oder Wärme in diese Netze.

(2) Die Einspeisung von Gas oder Wärme in Netze zur Versorgung der Allgemeinheit durch einen Auftraggeber, der kein öffentlicher Auftraggeber ist, gilt nicht als Tätigkeit im Sinne des Absatzes 1, sofern

a) die Erzeugung von Gas oder Wärme durch den betreffenden Auftraggeber sich zwangsläufig aus der Ausübung einer Tätigkeit ergibt, die nicht unter die Absätze 1 oder 3 oder die Artikel 4 bis 7 fällt, und

b) die Einspeisung in das öffentliche Netz nur darauf abzielt, diese Erzeugung wirtschaftlich zu nutzen und bei Zugrundelegung des Mittels der letzten drei Jahre einschließlich des laufenden Jahres nicht mehr als 20 % des Umsatzes des Auftraggebers ausmacht.

(3) Im Bereich der Elektrizität fallen unter diese Richtlinie:

a) die Bereitstellung und das Betreiben fester Netze zur Versorgung der Allgemeinheit im Zusammenhang mit der Erzeugung, der Fortleitung und der Abgabe von Elektrizität,

b) die Einspeisung von Elektrizität in diese Netze.

(4) Die Einspeisung von Elektrizität in Netze zur Versorgung der Allgemeinheit durch einen Auftraggeber, der kein öffentlicher Auftraggeber ist, gilt nicht als Tätigkeit im Sinne des Absatzes 3, sofern

a) die Erzeugung von Elektrizität durch den betreffenden Auftraggeber erfolgt, weil sie für die Ausübung einer Tätigkeit erforderlich ist, die nicht unter die Absätze 1 oder 3 oder die Artikel 4 bis 7 fällt, und

b) die Einspeisung in das öffentliche Netz nur von dem Eigenverbrauch des betreffenden Auftraggebers abhängt und bei Zugrundelegung des Mittels der letzten drei Jahre einschließlich des laufenden Jahres nicht mehr als 30 % der gesamten Energieerzeugung des Auftraggebers ausmacht.

Artikel 4

Wasser

(1) Unter diese Richtlinie fallen folgende Tätigkeiten:

a) die Bereitstellung und das Betreiben fester Netze zur Versorgung der Allgemeinheit im Zusammenhang mit der Gewinnung, der Fortleitung und der Abgabe von Trinkwasser,

b) die Einspeisung von Trinkwasser in diese Netze.

(2) Diese Richtlinie findet auch auf die Vergabe von Aufträgen und die Durchführung von Wettbewerben durch Auftraggeber Anwendung, die eine Tätigkeit im Sinne des Absatzes 1 ausüben, wenn diese Aufträge

a) mit Wasserbauvorhaben sowie Bewässerungs- und Entwässerungsvorhaben im Zusammenhang stehen, sofern die zur Trinkwasserversorgung bestimmte Wassermenge mehr als 20 % der mit den entsprechenden Vorhaben bzw. Bewässerungs- oder Entwässerungsanlagen zur Verfügung gestellten Gesamtwassermenge ausmacht, oder

b) mit der Ableitung oder Klärung von Abwässern im Zusammenhang stehen.

(3) Die Einspeisung von Trinkwasser in Netze zur Versorgung der Allgemeinheit durch einen Auftraggeber, der kein öffentlicher Auftraggeber ist, gilt nicht als Tätigkeit im Sinne des Absatzes 1, sofern

a) die Erzeugung von Trinkwasser durch den betreffenden Auftraggeber erfolgt, weil sie für die Ausübung einer Tätigkeit erforderlich ist, die nicht unter Artikel 3 bis 7 fällt und

b) die Einspeisung in das öffentliche Netz nur von dem Eigenverbrauch des betreffenden Auftraggebers abhängt und bei Zugrundelegung des Mittels der letzten drei Jahre einschließlich des laufenden Jahres nicht mehr als 30 % der gesamten Trinkwassererzeugung des Auftraggebers ausmacht.

Artikel 5

Verkehrsleistungen

(1) Unter diese Richtlinie fallen die Bereitstellung oder das Betreiben von Netzen zur Versorgung der Allgemeinheit mit Verkehrsleistungen per Schiene, automatische Systeme, Straßenbahn, Trolleybus, Bus oder Kabel.

Im Verkehrsbereich gilt ein Netz als vorhanden, wenn die Verkehrsleistung gemäß den von einer zuständigen Behörde eines Mitgliedstaats festgelegten Bedingungen erbracht wird; dazu gehören die Festlegung der Strecken, die Transportkapazitäten und die Fahrpläne.

(2) Die vorliegende Richtlinie gilt nicht für Stellen, die Busverkehrsleistungen für die Allgemeinheit erbringen, die vom Anwendungsbereich der Richtlinie 93/38/EWG nach deren Artikel 2 Absatz 4 ausgenommen worden sind.

Artikel 6

Postdienste

(1) Unter diese Richtlinie fällt die Bereitstellung von Postdiensten oder — unter den Bedingungen nach Absatz 2 Buchstabe c) — von anderen Diensten als Postdiensten.

(2) Für die Zwecke dieser Richtlinie und unbeschadet der Richtlinie 97/67/EG gelten folgende Definitionen:

a) „Postsendung“ ist eine adressierte Sendung in der endgültigen Form, in der sie befördert wird, ungeachtet ihres Gewichts. Neben Briefsendungen handelt es sich dabei z. B. um Bücher, Kataloge, Zeitungen und Zeitschriften sowie um Postpakete, die Waren mit oder ohne Handelswert enthalten, ungeachtet ihres Gewichts;

b) „Postdienste“ sind Dienste, die die Abholung, das Sortieren, den Transport und die Zustellung von Postsendungen betreffen. Diese Dienste umfassen:

— „reservierte Postdienste“: Postdienste, die nach Artikel 7 der Richtlinie 97/67/EG reserviert sind oder reserviert werden können;

— „sonstige Postdienste“: Postdienste, die nach Artikel 7 der Richtlinie 97/67/EG nicht reserviert werden können;

c) „andere Dienste als Postdienste“ sind Dienstleistungen, die in den folgenden Bereichen erbracht werden:

— Managementdienste für Postversandstellen (Dienste vor dem Versand und nach dem Versand, wie beispielsweise „Mailroom management“);

— Mehrwertdienste, die mit elektronischen Mitteln verknüpft sind und gänzlich mit diesen Mitteln erbracht werden (wie die abgesicherte Übermittlung von verschlüsselten Dokumenten per E-Mail, Adressenverwaltungsdienste und die Übermittlung von registrierten E-Mail-Sendungen);

— Dienste, die nicht unter Buchstabe a) erfasste Sendungen wie etwa nicht adressierte Postwurfsendungen betreffen;

— Finanzdienstleistungen gemäß den in Kategorie 6 von Anhang XVII Teil A und in Artikel 24 Buchstabe c) getroffenen Festlegungen, insbesondere Postanweisungen und -überweisungen;

— philatelistische Dienstleistungen und

— logistische Dienstleistungen (Dienstleistungen, bei denen die materielle Auslieferung und/oder Lagerung mit anderen nicht postalischen Aufgaben kombiniert wird),

sofern diese Dienste von einer Einrichtung erbracht werden, die auch Postdienste im Sinne des Buchstabens b) erster oder zweiter Gedankenstrich erbringt, und die Voraussetzungen des Artikels 30 Absatz 1 bezüglich der unter diese Gedankenstriche fallenden Dienstleistungen nicht erfüllt sind.

Artikel 7

Aufsuchen und Förderung von Erdöl, Gas, Kohle und anderen festen Brennstoffen sowie Häfen und Flughäfen

Unter diese Richtlinie fallen Tätigkeiten zur Nutzung eines geografisch abgegrenzten Gebietes zum Zwecke

a) des Aufsuchens und der Förderung von Erdöl, Gas, Kohle und anderen festen Brennstoffen oder

b) der Bereitstellung von Flughäfen, Häfen und anderen Verkehrsendeinrichtungen für Beförderungsunternehmen im Luft-, See- oder Binnenschiffsverkehr.

Artikel 8

Verzeichnis der Auftraggeber

Die nicht erschöpfenden Verzeichnisse der Auftraggeber im Sinne dieser Richtlinie sind in den Anhängen I bis X aufgeführt. Die Mitgliedstaaten geben der Kommission regelmäßig die Änderungen ihrer Verzeichnisse bekannt.

Artikel 9

Aufträge, die mehrere Tätigkeiten betreffen

(1) Für einen Auftrag zur Durchführung mehrerer Tätigkeiten gelten die Vorschriften für die Tätigkeit, die den Hauptgegenstand darstellt.

Die Wahl zwischen der Vergabe eines einzigen Auftrags und der Vergabe mehrerer getrennter Aufträge darf jedoch nicht mit der Zielsetzung erfolgen, die Anwendung dieser Richtlinie oder gegebenenfalls der Richtlinie 2004/18/EG zu umgehen.

(2) Unterliegt eine der Tätigkeiten, die der Auftrag umfasst, der vorliegenden Richtlinie, die andere Tätigkeit jedoch der genannten Richtlinie 2004/18/EG und ist es objektiv nicht möglich, festzustellen, welche Tätigkeit den Hauptgegenstand des Auftrags darstellt, so ist der Auftrag gemäß den Bestimmungen der genannten Richtlinie 2004/18/EG zu vergeben.

(3) Unterliegt eine der Tätigkeiten, die der Auftrag umfasst, der vorliegenden Richtlinie, die andere Tätigkeit jedoch weder der vorliegenden Richtlinie noch der genannten Richtlinie 2004/18/EG und ist es objektiv nicht möglich, festzustellen, welche Tätigkeit den Hauptgegenstand des Auftrags darstellt, so ist der Auftrag gemäß den Bestimmungen der vorliegenden Richtlinie zu vergeben.

KAPITEL III

Allgemeine Grundsätze

Artikel 10

Grundsätze für die Vergabe von Aufträgen

Die Auftraggeber behandeln alle Wirtschaftsteilnehmer gleich und nichtdiskriminierend und gehen in transparenter Weise vor.

TITEL II

VORSCHRIFTEN FÜR AUFTRÄGE

KAPITEL I

Allgemeine Bestimmungen

Artikel 11

Wirtschaftsteilnehmer

(1) Bewerber oder Bieter, die gemäß den Rechtsvorschriften des Mitgliedstaats, in dem sie ansässig sind, zur Erbringung der betreffenden Leistung berechtigt sind, dürfen nicht allein deshalb zurückgewiesen werden, weil sie gemäß den Rechtsvorschriften des Mitgliedstaats, in dem der Auftrag vergeben wird, natürliche oder juristische Personen sein müssten.

Bei Dienstleistungs- und Bauaufträgen sowie bei Lieferaufträgen, die zusätzliche Dienstleistungen und/oder Arbeiten wie Verlegen und Anbringen umfassen, können juristische Personen jedoch verpflichtet werden, in ihrem Angebot oder ihrem Antrag auf Teilnahme die Namen und die beruflichen Qualifikationen der Personen anzugeben, die für die Durchführung des betreffenden Auftrags verantwortlich sein sollen.

(2) Angebote oder Anträge auf Teilnahme können auch von Gruppen von Wirtschaftsteilnehmern eingereicht werden. Die Auftraggeber können nicht verlangen, dass nur Gruppen von Wirtschaftsteilnehmern, die eine bestimmte Rechtsform haben, ein Angebot oder einen Antrag auf Teilnahme einreichen können; allerdings kann von der ausgewählten Gruppe von Wirtschaftsteilnehmern verlangt werden, dass sie eine bestimmte Rechtsform annimmt, wenn ihr der Zuschlag erteilt worden ist, sofern dies für die ordnungsgemäße Durchführung des Auftrags erforderlich ist.

Artikel 12

Bedingungen aus den im Rahmen der Welthandelsorganisation geschlossenen Übereinkommen

Bei der Vergabe von Aufträgen durch die Auftraggeber wenden die Mitgliedstaaten untereinander Bedingungen an, die ebenso günstig sind wie diejenigen, die sie gemäß dem Übereinkommen Wirtschaftsteilnehmern aus Drittländern einräumen. Zu diesem Zweck konsultieren die Mitgliedstaaten einander im Beratenden Ausschuss für öffentliches Auftragswesen über die Maßnahmen, die aufgrund des Übereinkommens zu treffen sind.

Artikel 13

Vertraulichkeit

(1) Die Auftraggeber können die Übermittlung technischer Spezifikationen an interessierte Wirtschaftsteilnehmer, die Prüfung und die Auswahl von Wirtschaftsteilnehmern und die Zuschlagserteilung mit Auflagen zum Schutz der Vertraulichkeit der von ihnen zur Verfügung gestellten Informationen verbinden.

(2) Unbeschadet der Bestimmungen dieser Richtlinie — insbesondere der Artikel 43 und 49, die die Pflichten im Zusammenhang mit der Bekanntmachung vergebener Aufträge und der Unterrichtung der Bewerber und Bieter regeln — gibt ein Auftraggeber nach Maßgabe des innerstaatlichen Rechts, dem er unterliegt, keine ihm von den Wirtschaftsteilnehmern übermittelten und von diesen als vertraulich eingestuften Informationen weiter, wozu insbesondere technische und Betriebsgeheimnisse sowie die vertraulichen Aspekte der Angebote selbst gehören.

Artikel 14

Rahmenvereinbarungen

(1) Die Auftraggeber können eine Rahmenvereinbarung als Auftrag im Sinne von Artikel 1 Absatz 2 ansehen und gemäß dieser Richtlinie schließen.

(2) Haben die Auftraggeber eine Rahmenvereinbarung gemäß dieser Richtlinie geschlossen, so können sie bei der Vergabe von Aufträgen, denen diese Rahmenvereinbarung zugrunde liegt, Artikel 40 Absatz 3 Buchstabe i) in Anspruch nehmen.

(3) Ist eine Rahmenvereinbarung nicht gemäß dieser Richtlinie geschlossen worden, so können die Auftraggeber Artikel 40 Absatz 3 Buchstabe i) nicht in Anspruch nehmen.

(4) Die Auftraggeber dürfen Rahmenvereinbarungen nicht dazu missbrauchen, den Wettbewerb zu verhindern, einzuschränken oder zu verfälschen.

Artikel 15

Dynamische Beschaffungssysteme

(1) Die Mitgliedstaaten können vorsehen, dass die Auftraggeber auf dynamische Beschaffungssysteme zurückgreifen können.

(2) Zur Einrichtung eines dynamischen Beschaffungssystems befolgen die Auftraggeber die Vorschriften des offenen Verfahrens in allen Phasen bis zur Erteilung des Zuschlags für den im Rahmen dieses Systems zu erteilenden Auftrag. Alle Bieter, welche die Eignungskriterien erfüllen und ein unverbindliches Angebot im Einklang mit den Verdingungsunterlagen und den etwaigen zusätzlichen Dokumenten unterbreitet haben, werden zur Teilnahme am System zugelassen; die unverbindlichen Angebote können jederzeit nachgebessert werden, sofern sie dabei mit den Verdingungsunterlagen vereinbar bleiben. Die Auftraggeber verwenden bei der Einrichtung des Systems und bei der Vergabe der Aufträge in dessen Rahmen ausschließlich elektronische Mittel gemäß Artikel 48 Absätze 2 bis 5.

(3) Zur Einrichtung des dynamischen Beschaffungssystems verfahren die Auftraggeber wie folgt:

a) Sie veröffentlichen eine Bekanntmachung, in der sie präzisieren, dass es sich um ein dynamisches Beschaffungssystem handelt;

b) in den Verdingungsunterlagen geben sie u. a. die Art der in Betracht gezogenen Anschaffungen an, die Gegenstand dieses Systems sind, sowie alle erforderlichen Informationen betreffend das Beschaffungssystem, die verwendete elektronische Ausrüstung und die technischen Vorkehrungen und Merkmale der Verbindung;

c) sie gewähren auf elektronischem Wege ab dem Zeitpunkt der Veröffentlichung der Bekanntmachung und bis zur Beendigung des Systems freien, unmittelbaren und uneingeschränkten Zugang zu den Verdingungsunterlagen und zu jedem zusätzlichen Dokument und geben in der Bekanntmachung die Internet-Adresse an, unter der diese Dokumente abgerufen werden können.

(4) Die Auftraggeber räumen während der gesamten Laufzeit des dynamischen Beschaffungssystems jedem Wirtschaftsteilnehmer die Möglichkeit ein, ein unverbindliches Angebot zu unterbreiten, um gemäß Absatz 2 zur Teilnahme am System zugelassen zu werden. Sie schließen die Evaluierung binnen einer Frist von höchstens 15 Tagen ab dem Zeitpunkt der Vorlage des unverbindlichen Angebots ab. Sie können die Evaluierung jedoch verlängern, sofern nicht zwischenzeitlich ein Aufruf zum Wettbewerb erfolgt.

Die Auftraggeber unterrichten den Bieter gemäß Unterabsatz 1 unverzüglich darüber, ob er zur Teilnahme am dynamischen Beschaffungssystem zugelassen oder sein unverbindliches Angebot abgelehnt wurde.

(5) Für jeden Einzelauftrag hat ein gesonderter Aufruf zum Wettbewerb zu erfolgen. Vor diesem Aufruf zum Wettbewerb veröffentlichen die Auftraggeber eine vereinfachte Bekanntmachung, in der alle interessierten Wirtschaftsteilnehmer aufgefordert werden, ein unverbindliches Angebot nach Absatz 4 abzugeben, und zwar binnen einer Frist, die nicht weniger als 15 Tage ab dem Versand der vereinfachten Bekanntmachung betragen darf. Die Auftraggeber nehmen den Aufruf zum Wettbewerb erst dann vor, wenn alle fristgerecht eingegangenen unverbindlichen Angebote ausgewertet wurden.

(6) Die Auftraggeber fordern alle zur Teilnahme am System zugelassenen Bieter zur Einreichung von Angeboten für alle im Rahmen des Systems zu vergebenden Aufträge auf. Für die Einreichung der Angebote legen sie eine hinreichend lange Frist fest.

Sie vergeben den Auftrag an den Bieter, der nach den in der Bekanntmachung für die Einrichtung des dynamischen Beschaffungssystems aufgestellten Zuschlagskriterien das beste Angebot vorgelegt hat. Diese Kriterien können gegebenenfalls in der in Unterabsatz 1 genannten Aufforderung präzisiert werden.

(7) Mit Ausnahme von Sonderfällen, die in angemessener Weise zu rechtfertigen sind, darf die Laufzeit eines dynamischen Beschaffungssystems vier Jahre nicht überschreiten.

Die Auftraggeber dürfen dieses System nicht in einer Weise anwenden, durch die der Wettbewerb verhindert, eingeschränkt oder verfälscht wird.

Den betreffenden Wirtschaftsteilnehmern oder den am System teilnehmenden Parteien dürfen keine Bearbeitungsgebühren in Rechnung gestellt werden.

KAPITEL II

Schwellenwerte und Ausnahmen

Abschnitt 1

Schwellenwerte

Artikel 16

Schwellenwerte für öffentliche Aufträge

Diese Richtlinie gilt für Aufträge, die nicht aufgrund der Ausnahme nach den Artikeln 19 bis 26 oder nach Artikel 30 in Bezug auf die Ausübung der betreffenden Tätigkeit ausgeschlossen sind und deren geschätzter Wert ohne Mehrwertsteuer (MwSt.) die folgenden Schwellenwerte nicht unterschreitet:

a) 499 000 EUR bei Liefer- und Dienstleistungsaufträgen;

b) 6 242 000 EUR bei Bauaufträgen.

Artikel 17

Methoden zur Berechnung des geschätzten Wertes von Aufträgen, von Rahmenvereinbarungen und von dynamischen Beschaffungssystemen

(1) Grundlage für die Berechnung des geschätzten Auftragswertes ist der Gesamtwert ohne MWSt, der vom Auftraggeber voraussichtlich zu zahlen ist. Bei dieser Berechnung ist der geschätzte Gesamtwert einschließlich aller Optionen und der etwaigen Verlängerungen des Vertrags zu berücksichtigen.

Wenn der Auftraggeber Prämien oder Zahlungen an Bewerber oder Bieter vorsieht, hat er diese bei der Berechnung des geschätzten Auftragswertes zu berücksichtigen.

(2) Die Auftraggeber dürfen die Anwendung dieser Richtlinie nicht dadurch umgehen, dass sie Bauvorhaben oder Beschaffungsvorhaben einer bestimmten Menge von Waren und/oder Dienstleistungen aufteilen oder für die Berechnung des geschätzten Auftragswertes besondere Verfahren anwenden.

(3) Der zu berücksichtigende geschätzte Wert einer Rahmenvereinbarung oder eines dynamischen Beschaffungssystems ist gleich dem geschätzten Gesamtwert ohne MWSt aller für die gesamte Laufzeit der Rahmenvereinbarung oder des Beschaffungssystems geplanten Aufträge.

(4) Für die Anwendung des Artikels 16 beziehen die Auftraggeber den Wert der Bauarbeiten sowie aller für die Ausführung der Arbeiten erforderlichen Waren und Dienstleistungen, die sie dem Unternehmer zur Verfügung stellen, in den geschätzten Wert der Bauaufträge ein.

(5) Der Wert der Waren oder Dienstleistungen, die für die Ausführung eines bestimmten Bauauftrags nicht erforderlich sind, darf nicht zum Wert dieses Bauauftrags hinzugefügt werden, wenn durch die Einbeziehung die Beschaffung dieser Waren oder Dienstleistungen der Anwendung dieser Richtlinie entzogen würde.

(6) a) Kann ein Bauvorhaben oder die beabsichtigte Beschaffung von Dienstleistungen zu Aufträgen führen, die gleichzeitig in Losen vergeben werden, so ist der geschätzte Gesamtwert aller dieser Lose zugrunde zu legen.

Erreicht oder übersteigt der kumulierte Wert der Lose den in Artikel 16 genannten Schwellenwert, so gilt diese Richtlinie für die Vergabe jedes Loses.

Der Auftraggeber kann jedoch von dieser Bestimmung abweichen, wenn es sich um Lose handelt, deren geschätzter Wert ohne MwSt. bei Dienstleistungen unter 80 000 EUR und bei Bauleistungen unter 1 000 000 EUR liegt, sofern der kumulierte Wert dieser Lose 20 % des kumulierten Werts aller Lose nicht übersteigt.

b) Kann ein Vorhaben zum Zweck des Erwerbs gleichartiger Waren zu Aufträgen führen, die gleichzeitig in Losen vergeben werden, so wird bei der Anwendung von Artikel 16 der geschätzte Gesamtwert aller dieser Lose berücksichtigt.

Erreicht oder übersteigt der kumulierte Wert der Lose den in Artikel 16 genannten Schwellenwert, so gilt diese Richtlinie für die Vergabe jedes Loses.

Der Auftraggeber kann jedoch von dieser Bestimmung abweichen, wenn es sich um Lose handelt, deren geschätzter Wert ohne MwSt. unter 80 000 EUR liegt, sofern der kumulierte Wert dieser Lose 20 % des kumulierten Wertes aller Lose nicht übersteigt.

(7) Bei regelmäßig wiederkehrenden Aufträgen oder Daueraufträgen über Lieferungen oder Dienstleistungen wird der geschätzte Auftragswert wie folgt berechnet:

a) entweder auf der Basis des tatsächlichen Gesamtwerts entsprechender aufeinander folgender Aufträge aus den vorangegangenen zwölf Monaten oder dem vorangegangenen Haushaltsjahr; dabei sind voraussichtliche Änderungen bei Mengen oder Kosten während der auf den ursprünglichen Auftrag folgenden zwölf Monate nach Möglichkeit zu berücksichtigen;

b) oder auf der Basis des geschätzten Gesamtwerts aufeinander folgender Aufträge, die während der auf die erste Lieferung folgenden zwölf Monate bzw. während des Haushaltsjahres, soweit dieses länger als zwölf Monate ist, vergeben werden.

(8) Die Berechnung des geschätzten Wertes eines Auftrags, der sowohl Dienstleistungen als auch Lieferungen umfasst, erfolgt auf der Grundlage des Gesamtwertes der Dienstleistungen und Lieferungen ohne Berücksichtigung ihrer jeweiligen Anteile. Diese Berechnung umfasst den Wert der Arbeiten für das Verlegen und Anbringen.

(9) Bei Lieferaufträgen für Leasing, Miete, Pacht oder Ratenkauf von Waren wird der geschätzte Auftragswert wie folgt berechnet:

a) bei zeitlich begrenzten Aufträgen mit höchstens zwölf Monaten Laufzeit auf der Basis des geschätzten Gesamtwerts für die Laufzeit des Auftrags oder, bei einer Laufzeit von mehr als zwölf Monaten, auf der Basis des Gesamtwerts einschließlich des geschätzten Restwerts,

b) bei Aufträgen mit unbestimmter Laufzeit oder bei Aufträgen, deren Laufzeit nicht bestimmt werden kann, auf der Basis des Monatswerts multipliziert mit 48.

(10) Bei der Berechnung des geschätzten Auftragswertes von Dienstleistungsaufträgen sind gegebenenfalls folgende Beträge zu berücksichtigen:

a) bei Versicherungsleistungen die Versicherungsprämie und andere vergleichbare Vergütungen,

b) bei Bank- und anderen Finanzdienstleistungen die Gebühren, Provisionen, Zinsen und andere vergleichbare Vergütungen,

c) bei Aufträgen über Planungsarbeiten die Gebühren, Provisionen und andere vergleichbare Vergütungen.

(11) Bei Dienstleistungsaufträgen, für die kein Gesamtpreis angegeben wird, ist Berechnungsgrundlage für den geschätzten Auftragswert

a) bei zeitlich begrenzten Aufträgen mit einer Laufzeit von bis zu 48 Monaten der Gesamtwert für die gesamte Laufzeit dieser Aufträge;

b) bei Aufträgen mit unbestimmter Laufzeit oder mit einer Laufzeit von mehr als 48 Monaten der Monatswert multipliziert mit 48.

Abschnitt 2

Aufträge und Konzessionen sowie Aufträge, für die besondere Regelungen gelten

UNTERABSCHNITT 1

Artikel 18

Bau- oder Dienstleistungskonzessionen

Diese Richtlinie gilt nicht für die Bau- oder Dienstleistungskonzessionen, die von Auftraggebern, die eine oder mehrere Tätigkeiten gemäß den Artikeln 3 bis 7 ausüben, zum Zwecke der Durchführung dieser Tätigkeiten vergeben werden.

UNTERABSCHNITT 2

Ausnahmebestimmungen, die auf alle Auftraggeber und auf alle Aufträge anwendbar sind

Artikel 19

Aufträge, die zum Zwecke der Weiterveräußerung oder der Vermietung an Dritte vergeben werden

(1) Diese Richtlinie gilt nicht für Aufträge, die zum Zwecke der Weiterveräußerung oder der Vermietung an Dritte vergeben werden, vorausgesetzt, dass dem Auftraggeber kein besonderes oder ausschließliches Recht zum Verkauf oder zur Vermietung des Auftragsgegenstands zusteht und dass andere Einrichtungen die Möglichkeit haben, ihn unter gleichen Bedingungen wie der Auftraggeber zu verkaufen oder zu vermieten.

(2) Die Auftraggeber teilen der Kommission auf deren Verlangen alle Kategorien von Waren und Tätigkeiten mit, die ihres Erachtens unter die Ausnahmeregelung nach Absatz 1 fallen. Die Kommission kann Listen der Kategorien von Waren und Tätigkeiten, die ihres Erachtens unter die Ausnahmeregelung fallen, in regelmäßigen Abständen im Amtsblatt der Europäischen Union zur Information veröffentlichen. Hierbei wahrt sie die Vertraulichkeit der sensiblen geschäftlichen Angaben, soweit die Auftraggeber dies bei der Übermittlung der Informationen geltend machen.

Artikel 20

Aufträge, die zu anderen Zwecken als der Durchführung einer unter die Richtlinie fallenden Tätigkeit oder zur Durchführung einer unter die Richtlinie fallenden Tätigkeit in einem Drittland vergeben werden

(1) Diese Richtlinie gilt nicht für Aufträge, die die Auftraggeber zu anderen Zwecken als der Durchführung ihrer in den Artikeln 3 bis 7 beschriebenen Tätigkeiten oder zur Durchführung derartiger Tätigkeiten in einem Drittland in einer Weise vergeben, die nicht mit der physischen Nutzung eines Netzes oder geografischen Gebiets in der Gemeinschaft verbunden ist.

(2) Die Auftraggeber teilen der Kommission auf deren Verlangen alle Tätigkeiten mit, die ihres Erachtens unter die Ausnahmeregelung nach Absatz 1 fallen. Die Kommission kann Listen der Tätigkeitskategorien, die ihres Erachtens unter die Ausnahmeregelung fallen, in regelmäßigen Abständen im Amtsblatt der Europäischen Union zur Information veröffentlichen. Hierbei wahrt sie die Vertraulichkeit der sensiblen geschäftlichen Angaben, soweit die Auftraggeber dies bei der Übermittlung der Informationen geltend machen.

Artikel 21

Aufträge, die der Geheimhaltung unterliegen oder bestimmte Sicherheitsmaßnahmen erfordern

Diese Richtlinie gilt nicht für Aufträge, die von den Mitgliedstaaten für geheim erklärt werden oder deren Ausführung nach den in dem betreffenden Mitgliedstaat geltenden Rechts- oder Verwaltungsvorschriften besondere Sicherheitsmaßnahmen erfordert, oder wenn der Schutz grundlegender Sicherheitsinteressen dieses Mitgliedstaats es gebietet.

Artikel 22

Aufträge, die auf der Grundlage internationaler Vorschriften vergeben werden

Diese Richtlinie gilt nicht für Aufträge, die anderen Verfahrensregeln unterliegen und aufgrund:

a) einer gemäß dem Vertrag geschlossenen internationalen Übereinkunft zwischen einem Mitgliedstaat und einem oder mehreren Drittländern über Lieferungen, Bauleistungen, Dienstleistungen oder Wettbewerbe für ein von den Unterzeichnerstaaten gemeinsam zu verwirklichendes oder zu nutzendes Projekt; jede Übereinkunft wird der Kommission mitgeteilt, die hierzu den in Artikel 68 genannten Beratenden Ausschuss für öffentliches Auftragswesen anhören kann;

b) einer internationalen Übereinkunft im Zusammenhang mit der Stationierung von Truppen, die die Unternehmen eines Mitgliedstaats oder eines Drittstaats betrifft;

c) des besonderen Verfahrens einer internationalen Organisation

vergeben werden.

Artikel 23

Aufträge, die an ein verbundenes Unternehmen, ein gemeinsames Unternehmen oder an einen Auftraggeber vergeben werden, der an einem gemeinsamen Unternehmen beteiligt ist

(1) Ein „verbundenes Unternehmen" im Sinne dieses Artikels ist jedes Unternehmen, dessen Jahresabschluss gemäß der Siebenten Richtlinie 83/349/EWG des Rates vom 13. Juni 1983 aufgrund von Artikel 44 Absatz 2 Buchstabe g) des Vertrags über den konsolidierten Abschluss [1] [2] mit demjenigen des Auftraggebers konsolidiert wird; im Fall von Auftraggebern, die nicht unter diese Richtlinie fallen, sind verbundene Unternehmen diejenigen, auf die der Auftraggeber unmittelbar oder mittelbar einen beherrschenden Einfluss im Sinne von Artikel 2 Absatz 1 Buchstabe b) ausüben kann oder die einen beherrschenden Einfluss auf den Auftraggeber ausüben können oder die ebenso wie der Auftraggeber dem beherrschenden Einfluss eines anderen Unternehmens unterliegen, sei es aufgrund der Eigentumsverhältnisse, der finanziellen Beteiligung oder der für das Unternehmen geltenden Vorschriften.

(2) Sofern die in Absatz 3 festgelegten Bedingungen erfüllt sind, gilt diese Richtlinie nicht für Aufträge,

a) die ein Auftraggeber an ein mit ihm verbundenes Unternehmen vergibt oder

b) die ein gemeinsames Unternehmen, das mehrere Auftraggeber ausschließlich zur Durchführung von Tätigkeiten im Sinne der Artikel 3 bis 7 gebildet haben, an ein Unternehmen vergibt, das mit einem dieser Auftraggeber verbunden ist.

(3) Absatz 2 gilt

a) für Dienstleistungsaufträge, sofern mindestens 80 % des von dem verbundenen Unternehmen während der letzten drei Jahre mit Dienstleistungsaufträgen erzielten durchschnittlichen Umsatzes aus der Erbringung von Dienstleistungen für die mit ihm verbundenen Unternehmen stammen;

b) für Lieferaufträge, sofern mindestens 80 % des von dem verbundenen Unternehmen während der letzten drei Jahre mit Lieferaufträgen erzielten durchschnittlichen Umsatzes aus der Erbringung von Lieferungen für die mit ihm verbundenen Unternehmen stammen;

c) für Bauaufträge, sofern mindestens 80 % des von dem verbundenen Unternehmen während der letzten drei Jahre mit Bauaufträgen erzielten durchschnittlichen Umsatzes aus der Erbringung von Bauleistungen für die mit ihm verbundenen Unternehmen stammen.

Liegen für die letzten drei Jahre keine Umsatzzahlen vor, weil das verbundene Unternehmen gerade gegründet wurde oder erst vor kurzem seine Tätigkeit aufgenommen hat, genügt es, wenn das Unternehmen, vor allem durch Prognosen über die Tätigkeitsentwicklung, glaubhaft macht, dass die Erreichung des unter Buchstabe a), b) oder c) genannten Umsatzziels wahrscheinlich ist.

Werden gleiche oder gleichartige Dienstleistungen, Lieferungen oder Bauarbeiten von mehr als einem mit dem Auftraggeber verbundenen Unternehmen erbracht, so werden die oben genannten Prozentsätze unter Berücksichtigung des Gesamtumsatzes errechnet, den diese verbundenen Unternehmen mit der Erbringung von Dienstleistungen, Lieferungen bzw. Bauarbeiten erzielen.

(4) Diese Richtlinie gilt nicht für Aufträge,

a) die ein gemeinsames Unternehmen, das mehrere Auftraggeber ausschließlich zur Durchführung von Tätigkeiten im Sinne der Artikel 3 bis 7 gebildet haben, an einen dieser Auftraggeber vergibt oder

b) die ein Auftraggeber an ein solches gemeinsames Unternehmen vergibt, an dem er beteiligt ist,

sofern das gemeinsame Unternehmen errichtet wurde, um die betreffende Tätigkeit während eines Zeitraums von mindestens drei Jahren durchzuführen, und in dem Rechtsakt zur Gründung des gemeinsamen Unternehmens festgelegt wird, dass die dieses Unternehmen bildenden Auftraggeber dem Unternehmen zumindest während des gleichen Zeitraums angehören werden.

(5) Die Auftraggeber erteilen der Kommission auf deren Verlangen folgende Auskünfte bezüglich der Anwendung der Absätze 2, 3 und 4:

a) die Namen der betreffenden Unternehmen oder gemeinsamen Unternehmen,

b) die Art und Wert der jeweiligen Aufträge,

c) die Angaben, die nach Auffassung der Kommission erforderlich sind, um zu belegen, dass die Beziehungen zwischen dem Auftraggeber und dem Unternehmen oder gemeinsamen Unternehmen, an das die Aufträge vergeben werden, den Anforderungen dieses Artikels genügen.

[1] ABl. L 193 vom 18.7.1983, S. 1. Zuletzt geändert durch die Richtlinie 2001/65/EG des Europäischen Parlaments und des Rates (ABl. L 283 vom 27.10.2001, S. 28).

[2] Anmerkung des Herausgebers: Der Titel der Richtlinie ist angepasst worden, um der Umnummerierung der Artikel des Vertrags gemäß Artikel 12 des Vertrags von Amsterdam Rechnung zu tragen; die ursprüngliche Bezugnahme galt Artikel 54 Absatz 3 Buchstabe g) des Vertrags.

UNTERABSCHNITT 3

Ausnahmebestimmungen, die auf alle Auftraggeber, jedoch nur auf Dienstleistungsaufträge anwendbar sind

Artikel 24

Aufträge für Dienstleistungen, die vom Anwendungsbereich dieser Richtlinie ausgeschlossen sind

Diese Richtlinie gilt nicht für Dienstleistungsaufträge, die Folgendes zum Gegenstand haben:

a) Erwerb oder Miete von Grundstücken oder vorhandenen Gebäuden oder anderem unbeweglichen Vermögen oder Rechte daran ungeachtet der Finanzmodalitäten dieser Aufträge; jedoch fallen Finanzdienstleistungsverträge jeder Form, die gleichzeitig, vor oder nach dem Kauf- oder Mietvertrag abgeschlossen werden, unter diese Richtlinie;

b) Schiedsgerichts- und Schlichtungstätigkeiten;

c) Finanzdienstleistungen im Zusammenhang mit der Ausgabe, dem Verkauf, dem Ankauf oder der Übertragung von Wertpapieren oder anderen Finanzinstrumenten, insbesondere Geschäfte, die der Geld- oder Kapitalbeschaffung der Auftraggeber dienen;

d) Arbeitsverträge;

e) Forschungs- und Entwicklungsdienstleistungen, deren Ergebnisse nicht ausschließlich Eigentum des Auftraggebers für seinen Gebrauch bei der Ausübung seiner eigenen Tätigkeit sind, sofern die Dienstleistung vollständig durch den Auftraggeber vergütet wird.

Artikel 25

Dienstleistungsaufträge, die aufgrund eines ausschließlichen Rechts vergeben werden

Diese Richtlinie gilt nicht für Dienstleistungsaufträge, die an eine Stelle, die selbst ein öffentlicher Auftraggeber im Sinne des Artikels 2 Absatz 1 Buchstabe a) ist, oder an einen Zusammenschluss öffentlicher Auftraggeber aufgrund eines ausschließlichen Rechts vergeben werden, das diese Stelle oder dieser Zusammenschluss aufgrund veröffentlichter, mit dem Vertrag übereinstimmender Rechts- oder Verwaltungsvorschriften innehat.

UNTERABSCHNITT 4

Ausnahmebestimmungen, die nur auf bestimmte Auftraggeber anwendbar sind

Artikel 26

Aufträge, die von bestimmten Auftraggebern zur Beschaffung von Wasser und zur Lieferung von Energie oder Brennstoffen zur Energieerzeugung vergeben werden

Diese Richtlinie gilt nicht für

a) Aufträge zur Beschaffung von Wasser, die von Auftraggebern, die eine oder beide der in Artikel 4 Absatz 1 bezeichneten Tätigkeiten ausüben, vergeben werden;

b) Aufträge zur Lieferung von Energie oder von Brennstoffen zur Energieerzeugung, die von Auftraggebern, die eine der in Artikel 3 Absatz 1, Artikel 3 Absatz 3 oder Artikel 7 Buchstabe a) bezeichneten Tätigkeiten ausüben, vergeben werden.

UNTERABSCHNITT 5

Aufträge, für die besondere Vorschriften gelten, Vorschriften über zentrale Beschaffungsstellen sowie das allgemeine Verfahren bei unmittelbarem Einfluss des Wettbewerbs

Artikel 27

Aufträge, für die besondere Vorschriften gelten

Das Königreich der Niederlande, das Vereinigte Königreich, die Republik Österreich und die Bundesrepublik Deutschland sorgen unbeschadet des Artikels 30 durch entsprechende Genehmigungsbedingungen oder sonstige geeignete Maßnahmen dafür, dass jeder Auftraggeber, der in den Bereichen tätig ist, die in den Entscheidungen 93/676/EG, 97/367/EG, 2002/205/EG und 2004/74/EG genannt werden,

a) den Grundsatz der Nichtdiskriminierung und der wettbewerbsorientierten Zuschlagserteilung bei der Vergabe der Liefer-, Bau- und Dienstleistungsaufträge beachtet, insbesondere hinsichtlich der den Wirtschaftsteilnehmern zur Verfügung gestellten Informationen über seine Absicht, einen Auftrag zu vergeben;

b) der Kommission unter den Bedingungen, die diese in der Entscheidung 93/327/EWG der Kommission vom 13. Mai 1993 zur Festlegung der Voraussetzungen, unter denen die öffentlichen Auftraggeber, die geografisch abgegrenzte Gebiete zum Zwecke der Suche oder Förderung von Erdöl, Gas, Kohle oder anderen Festbrennstoffen nutzen, der Kommission Auskunft über die von ihnen vergebenen Aufträge zu erteilen haben [1] festgelegt hat.

Artikel 28

Vorbehaltene Aufträge

Die Mitgliedstaaten können im Rahmen von Programmen für geschützte Beschäftigungsverhältnisse vorsehen, dass nur geschützte Werkstätten an den Verfahren zur Vergabe von Aufträgen teilnehmen oder solche Aufträge ausführen dürfen, sofern die Mehrheit der Arbeitnehmer Behinderte sind, die aufgrund der Art oder der Schwere ihrer Behinderung keine Berufstätigkeit unter normalen Bedingungen ausüben können.

In der Bekanntmachung, die als Aufruf zum Wettbewerb dient, ist auf diesen Artikel Bezug zu nehmen.

[1] ABl. L 129 vom 27.5.1993, S. 25.

Artikel 29

Vergabe von Aufträgen und Abschluss von Rahmenvereinbarungen durch zentrale Beschaffungsstellen

(1) Die Mitgliedstaaten können festlegen, dass die Auftraggeber Bauleistungen, Waren und/oder Dienstleistungen durch zentrale Beschaffungsstellen erwerben dürfen.

(2) Bei Auftraggebern, die Bauleistungen, Waren und/oder Dienstleistungen durch eine zentrale Beschaffungsstelle gemäß Artikel 1 Absatz 8 erwerben, wird vermutet, dass sie diese Richtlinie eingehalten haben, sofern diese zentrale Beschaffungsstelle diese oder — gegebenenfalls — die Richtlinie 2004/18/EG eingehalten hat.

Artikel 30

Verfahren zur Feststellung, ob eine bestimmte Tätigkeit unmittelbar dem Wettbewerb ausgesetzt ist

(1) Aufträge, die die Ausübung einer Tätigkeit im Sinne der Artikel 3 bis 7 ermöglichen sollen, fallen nicht unter diese Richtlinie, wenn die Tätigkeit in dem Mitgliedstaat, in dem sie ausgeübt wird, auf Märkten mit freiem Zugang unmittelbar dem Wettbewerb ausgesetzt ist.

(2) Ob eine Tätigkeit im Sinne von Absatz 1 unmittelbar dem Wettbewerb ausgesetzt ist, wird nach Kriterien festgestellt, die mit den Wettbewerbsbestimmungen des Vertrags in Einklang stehen, wie den Merkmalen der betreffenden Waren und Dienstleistungen, dem Vorhandensein alternativer Waren und Dienstleistungen, den Preisen und dem tatsächlichen oder möglichen Vorhandensein mehrerer Anbieter der betreffenden Waren und Dienstleistungen.

(3) Der Zugang zu einem Markt gilt als frei im Sinne von Absatz 1, wenn der betreffende Mitgliedstaat die in Anhang XI genannten Vorschriften des Gemeinschaftsrechts umgesetzt hat und anwendet.

Kann der freie Zugang zu einem Markt nicht gemäß Unterabsatz 1 vermutet werden, so muss der Nachweis erbracht werden, dass der Zugang zu diesem Markt de jure und de facto frei ist.

(4) Ist ein Mitgliedstaat der Ansicht, dass Absatz 1 unter Beachtung der Absätze 2 und 3 auf eine bestimmte Tätigkeit anwendbar ist, so unterrichtet er die Kommission hiervon und teilt ihr alle sachdienlichen Informationen mit, insbesondere über Gesetze, Verordnungen, Verwaltungsvorschriften, Vereinbarungen und Absprachen, die Aufschluss darüber geben, ob die in Absatz 1 genannten Bedingungen erfüllt sind, und ergänzt diese Informationen gegebenenfalls um die Stellungnahme einer für die betreffende Tätigkeit zuständigen unabhängigen nationalen Behörde.

Aufträge, die die Ausübung der betreffenden Tätigkeit ermöglichen sollen, fallen nicht mehr unter diese Richtlinie, wenn die Kommission

— eine Entscheidung angenommen hat, mit der die Anwendbarkeit von Absatz 1 gemäß Absatz 6 sowie innerhalb der dort festgelegten Frist festgestellt wird,

— oder keine Entscheidung über diese Anwendbarkeit innerhalb der betreffenden Frist angenommen hat.

Gilt der Zugang zu einem Markt jedoch als frei im Sinne von Absatz 3 Unterabsatz 1 und hat eine für die betreffende Tätigkeit zuständige unabhängige nationale Behörde die Anwendbarkeit von Absatz 1 festgestellt, so fallen Aufträge, die die Ausübung der betreffenden Tätigkeit ermöglichen sollen, nicht mehr unter diese Richtlinie, wenn die Kommission nicht durch eine gemäß Absatz 6 sowie innerhalb der dort festgelegten Frist angenommene Entscheidung festgestellt hat, dass Absatz 1 nicht anwendbar ist.

(5) Wenn die Rechtsvorschriften des betreffenden Mitgliedstaates dergleichen vorsehen, können die Auftraggeber beantragen, dass die Kommission durch Entscheidung gemäß Absatz 6 die Anwendbarkeit von Absatz 1 auf eine bestimmte Tätigkeit feststellt. In diesem Fall informiert die Kommission den betroffenen Mitgliedstaat unverzüglich darüber.

Der betroffene Mitgliedstaat teilt der Kommission unter Berücksichtigung der Absätze 2 und 3 alle sachdienlichen Informationen mit, insbesondere über Gesetze, Verordnungen, Verwaltungsvorschriften, Vereinbarungen und Absprachen, die Aufschluss darüber geben, ob die in Absatz 1 genannten Bedingungen erfüllt sind, und ergänzt diese Informationen gegebenenfalls um die Stellungnahme einer für die betreffende Tätigkeit zuständigen unabhängigen nationalen Behörde.

Die Kommission kann ein Verfahren für eine Entscheidung, mit der die Anwendbarkeit von Absatz 1 auf eine bestimmte Tätigkeit festgestellt wird, auch auf eigene Veranlassung einleiten. In diesem Falle unterrichtet die Kommission unverzüglich den betreffenden Mitgliedstaat.

Trifft die Kommission binnen der in Absatz 6 genannten Frist keine Entscheidung über die Anwendbarkeit von Absatz 1 auf eine bestimmte Tätigkeit, so gilt Absatz 1 als anwendbar.

(6) Die Kommission entscheidet über eine Mitteilung oder einen Antrag gemäß diesem Artikel nach dem in Artikel 68 Absatz 2 genannten Verfahren binnen drei Monaten ab dem ersten Arbeitstag nach dem Tag, an dem ihr die Mitteilung oder der Antrag zugegangen ist. Diese Frist kann jedoch in hinreichend begründeten Fällen einmalig um höchstens drei Monate verlängert werden, und zwar insbesondere, wenn die Angaben in der Mitteilung oder im Antrag oder in den beigefügten Unterlagen unvollständig oder unzutreffend sind oder sich die dargestellten Sachverhalte wesentlich ändern. Diese Verlängerung ist auf einen Monat begrenzt, wenn eine für die betreffende Tätigkeit zuständige unabhängige nationale Behörde die Anwendbarkeit von Absatz 1 in den Fällen gemäß Absatz 4 Unterabsatz 3 festgestellt hat.

Läuft für eine Tätigkeit in einem Mitgliedstaat bereits ein Verfahren im Sinne dieses Artikels, so gelten Anträge betreffend dieselbe Tätigkeit in demselben Mitgliedstaat, die zu einem späteren Zeitpunkt, jedoch vor Ablauf der durch den ersten Antrag eröffneten Frist eingehen, nicht als Neuanträge und werden im Rahmen des ersten Antrags bearbeitet.

Die Kommission legt die Einzelheiten der Anwendung der Absätze 4, 5 und 6 gemäß dem in Artikel 68 Absatz 2 genannten Verfahren fest.

Dazu gehören mindestens:

a) die Bekanntgabe des Termins, zu dem die dreimonatige Frist nach Unterabsatz 1 zu laufen beginnt, sowie — bei Verlängerung der Frist — des Beginns und der Dauer dieser Verlängerung im Amtsblatt zu Informationszwecken;

b) die Bekanntgabe der etwaigen Anwendbarkeit von Absatz 1 gemäß Absatz 4 Unterabsatz 2 bzw. 3 oder Absatz 5 Unterabsatz 4, und

c) die Einzelheiten der Übermittlung etwaiger Stellungnahmen einer für die betreffende Tätigkeit zuständigen unabhängigen Behörde zu relevanten Fragen im Sinne der Absätze 1 und 2.

KAPITEL III

Bestimmungen für Dienstleistungsaufträge

Artikel 31

Dienstleistungsaufträge gemäß Anhang XVII Teil A

Aufträge über Dienstleistungen gemäß Anhang XVII Teil A werden nach den Artikeln 34 bis 59 vergeben.

Artikel 32

Dienstleistungsaufträge gemäß Anhang XVII Teil B

Aufträge über Dienstleistungen gemäß Anhang XVII Teil B unterliegen nur den Artikeln 34 und 43.

Artikel 33

Gemischte Aufträge über Dienstleistungen gemäß Anhang XVII Teil A und gemäß Anhang XVII Teil B

Aufträge sowohl über Dienstleistungen gemäß Anhang XVII Teil A als auch über Dienstleistungen gemäß Anhang XVII Teil B werden nach Maßgabe der Artikel 34 bis 59 vergeben, wenn der Wert der Dienstleistungen gemäß Anhang XVII Teil A höher ist als derjenige der Dienstleistungen gemäß Anhang XVII Teil B. In allen anderen Fällen werden die Aufträge nach Maßgabe der Artikel 34 und 43 vergeben.

KAPITEL IV

Besondere Vorschriften über die Verdingungsunterlagen und die Auftragsunterlagen

Artikel 34

Technische Spezifikationen

(1) Die technischen Spezifikationen im Sinne von Anhang XXI Nummer 1 sind in der Auftragsdokumentation, wie der Bekanntmachung, den Auftragsunterlagen oder den zusätzlichen Dokumenten, enthalten. Wenn möglich, sollten diese technischen Spezifikationen das Kriterium der Zugänglichkeit für Personen mit einer Behinderung oder das Kriterium der Konzeption für alle Benutzer berücksichtigen.

(2) Die technischen Spezifikationen müssen allen Bietern gleichermaßen zugänglich sein und dürfen die Öffnung der öffentlichen Beschaffungsmärkte für den Wettbewerb nicht in ungerechtfertigter Weise behindern.

(3) Unbeschadet zwingender einzelstaatlicher technischer Vorschriften, soweit diese mit dem Gemeinschaftsrecht vereinbar sind, sind die technischen Spezifikationen wie folgt zu formulieren:

a) entweder mit Bezugnahme auf die in Anhang XXI definierten technischen Spezifikationen in der Rangfolge nationaler Normen, mit denen europäische Normen umgesetzt werden, europäische technische Zulassungen, gemeinsame technische Spezifikationen, internationale Normen und andere technische Bezugsysteme, die von den europäischen Normungsgremien erarbeitet wurden, oder, falls solche Normen und Spezifikationen fehlen, mit Bezugnahme auf nationale Normen, nationale technische Zulassungen oder nationale technische Spezifikationen für die Planung, Berechnung und Ausführung von Bauwerken und den Einsatz von Produkten. Jede Bezugnahme ist mit dem Zusatz „oder gleichwertig“ zu versehen;

b) oder in Form von Leistungs- oder Funktionsanforderungen; die letztgenannten können auch Umwelteigenschaften umfassen. Die Anforderungen sind jedoch so genau zu fassen, dass sie den Bietern ein klares Bild vom Auftragsgegenstand vermitteln und dem Auftraggeber die Erteilung des Zuschlags ermöglichen;

c) oder in Form von Leistungs- oder Funktionsanforderungen gemäß Buchstabe b) unter Bezugnahme auf die Spezifikationen gemäß Buchstabe a), wobei zur Vermutung der Konformität mit diesen Leistungs- oder Funktionsanforderungen auf die Spezifikationen nach Buchstabe a) Bezug zu nehmen ist;

d) oder mit Bezugnahme auf die Spezifikationen gemäß Buchstabe a) hinsichtlich bestimmter Merkmale und mit Bezugnahme auf die Leistungs- oder Funktionsanforderungen gemäß Buchstabe b) hinsichtlich anderer Merkmale.

(4) Macht der Auftraggeber von der Möglichkeit Gebrauch, auf die in Absatz 3 Buchstabe a) genannten Spezifikationen zu verweisen, so kann er ein Angebot nicht mit der Begründung ablehnen, die angebotenen Waren und Dienstleistungen entsprächen nicht den von ihm herangezogenen Spezifikationen, sofern der Bieter in seinem Angebot dem Auftraggeber mit geeigneten Mitteln nachweist, dass die von ihm vorgeschlagenen Lösungen den Anforderungen der technischen Spezifikation, auf die Bezug genommen wurde, gleichermaßen entsprechen.

Als geeignetes Mittel kann eine technische Beschreibung des Herstellers oder ein Prüfbericht einer anerkannten Stelle gelten.

(5) Macht der Auftraggeber von der Möglichkeit nach Absatz 3 Gebrauch, die technischen Spezifikationen in Form von Leistungs- oder Funktionsanforderungen zu formulieren, so darf er ein Angebot über Waren, Dienstleistungen oder Bauleistungen, die einer nationalen Norm, mit der eine europäische Norm umgesetzt wird, oder einer europäischen technischen Zulassung, einer gemeinsamen technischen Spezifikation, einer internationalen Norm oder einem technischen Bezugssystem, das von den europäischen Normungsgremien erarbeitet wurde, entsprechen, nicht zurückweisen, wenn diese Spezifikationen die von ihm geforderten Leistungs- und Funktionsanforderungen betreffen.

Der Bieter weist in seinem Angebot mit allen geeigneten Mitteln dem Auftraggeber nach, dass die der Norm entsprechende jeweilige Ware, Dienstleistung oder Bauleistung den Leistungs- oder Funktionsanforderungen des Auftraggebers entspricht.

Als geeignetes Mittel kann eine technische Beschreibung des Herstellers oder ein Prüfbericht einer anerkannten Stelle gelten.

(6) Schreiben die Auftraggeber Umwelteigenschaften in Form von Leistungs- oder Funktionsanforderungen gemäß Absatz 3 Buchstabe b) vor, so können sie die detaillierten Spezifikationen oder gegebenenfalls Teile davon verwenden, die in europäischen, (pluri-)nationalen oder anderen Umweltgütezeichen definiert sind, wenn

— diese Spezifikationen sich zur Definition der Merkmale der Waren oder Dienstleistungen eignen, die Gegenstand des Auftrags sind,

— die Anforderungen an das Gütezeichen auf der Grundlage von wissenschaftlich abgesicherten Informationen ausgearbeitet werden,

— die Umweltgütezeichen im Rahmen eines Verfahrens erlassen werden, an dem alle interessierten Kreise — wie staatliche Stellen, Verbraucher, Hersteller, Handels- und Umweltorganisationen — teilnehmen können, und

— die Gütezeichen für alle Betroffenen zugänglich sind.

Die Auftraggeber können angeben, dass bei Waren oder Dienstleistungen, die mit einem Umweltgütezeichen ausgestattet sind, vermutet wird, dass sie den in den Verdingungsunterlagen festgelegten technischen Spezifikationen genügen; sie müssen jedes andere geeignete Beweismittel, wie z. B. technische Unterlagen des Herstellers oder einen Prüfbericht einer anerkannten Stelle, akzeptieren.

(7) „Anerkannte Stellen“ im Sinne dieses Artikels sind die Prüf- und Eichlaboratorien sowie die Inspektions- und Zertifizierungsstellen, die mit den anwendbaren europäischen Normen übereinstimmen.

Die Auftraggeber erkennen Bescheinigungen von in anderen Mitgliedstaaten ansässigen anerkannten Stellen an.

(8) Soweit es nicht durch den Auftragsgegenstand gerechtfertigt ist, darf in technischen Spezifikationen nicht auf eine bestimmte Produktion oder Herkunft oder ein besonderes Verfahren oder auf Marken, Patente, Typen, einen bestimmten Ursprung oder eine bestimmte Produktion verwiesen werden, wenn dadurch bestimmte Unternehmen oder bestimmte Produkte begünstigt oder ausgeschlossen werden. Solche Verweise sind jedoch ausnahmsweise zulässig, wenn der Auftragsgegenstand nach den Absätzen 3 und 4 nicht hinreichend genau und allgemein verständlich beschrieben werden kann; solche Verweise sind mit dem Zusatz „oder gleichwertig“ zu versehen.

Artikel 35

Mitteilung der technischen Spezifikationen

(1) Die Auftraggeber teilen den an einem Auftrag interessierten Wirtschaftsteilnehmern auf Antrag die technischen Spezifikationen mit, die regelmäßig in ihren Liefer-, Bau- oder Dienstleistungsaufträgen genannt werden oder die sie bei Aufträgen, die Gegenstand der regelmäßigen nicht verbindlichen Bekanntmachungen im Sinne von Artikel 41 Absatz 1 sind, benutzen wollen.

(2) Soweit sich solche technischen Spezifikationen aus Unterlagen ergeben, die interessierten Wirtschaftsteilnehmern zur Verfügung stehen, genügt eine Bezugnahme auf diese Unterlagen.

Artikel 36

Varianten

(1) Bei Aufträgen, die nach dem Kriterium des wirtschaftlich günstigsten Angebots vergeben werden, können die Auftraggeber von Bietern vorgelegte Varianten berücksichtigen, die den von ihnen festgelegten Mindestanforderungen entsprechen.

Die Auftraggeber geben in den Spezifikationen an, ob sie Varianten zulassen, und nennen bei Zulässigkeit von Varianten die Mindestanforderungen, die Varianten erfüllen müssen, und geben an, in welcher Art und Weise sie einzureichen sind.

(2) Bei den Verfahren zur Vergabe von Liefer- oder Dienstleistungsaufträgen dürfen Auftraggeber, die gemäß Absatz 1 Varianten zugelassen haben, eine Variante nicht allein deshalb zurückweisen, weil sie, wenn sie den Zuschlag erhalten sollte, entweder zu einem Dienstleistungsauftrag anstatt zu einem Lieferauftrag oder zu einem Lieferauftrag anstatt zu einem Dienstleistungsauftrag führen würde.

Artikel 37

Unteraufträge

In den Auftragsunterlagen kann der Auftraggeber den Bieter auffordern oder von einem Mitgliedstatt verpflichtet werden, den Bieter aufzufordern, ihm in seinem Angebot den Teil des Auftrags, den der Bieter gegebenenfalls im Wege von Unteraufträgen an Dritte zu vergeben gedenkt, sowie die bereits vorgeschlagenen Unterauftragnehmer bekannt zu geben. Die Haftung des hauptverantwortlichen Wirtschaftsteilnehmers bleibt von dieser Bekanntgabe unberührt.

Artikel 38

Bedingungen für die Auftragsausführung

Die Auftraggeber können zusätzliche Bedingungen für die Ausführung des Auftrags vorschreiben, sofern diese mit dem Gemeinschaftsrecht vereinbar sind und in der Bekanntmachung, die als Aufruf zum Wettbewerb dient, oder in den Verdingungsunterlagen angegeben werden. Die Bedingungen für die Ausführung eines Auftrags können insbesondere soziale und umweltbezogene Aspekte betreffen.

Artikel 39

Verpflichtungen im Zusammenhang mit Steuern, Umweltschutz, Arbeitsschutzvorschriften und Arbeitsbedingungen

(1) Der Auftraggeber kann in den Auftragsunterlagen die Stelle(n) angeben, bei der (denen) die Bewerber oder Bieter die erforderlichen Auskünfte über die Verpflichtungen im Zusammenhang mit der steuerlichen Behandlung und dem Umweltschutz erhalten können sowie über die Verpflichtungen, die sich aus den Vorschriften über Arbeitsschutz und Arbeitsbedingungen ergeben, die in dem Mitgliedstaat, in der Region oder an dem Ort gelten, an dem die Leistungen zu erbringen sind, und die während der Ausführung des Auftrags auf die vor Ort ausgeführten Bauleistungen oder die erbrachten Dienstleistungen anzuwenden sind; der Auftraggeber kann auch durch einen Mitgliedstaat zu dieser Angabe verpflichtet werden.

(2) Der Auftraggeber, der die Auskünfte nach Absatz 1 erteilt, verlangt von den Bietern oder Bewerbern eines Vergabeverfahrens die Angabe, dass sie bei der Ausarbeitung ihres Angebots den Verpflichtungen aus den am Ort der Leistungserbringung geltenden Vorschriften über Arbeitsschutz und Arbeitsbedingungen Rechnung getragen haben.

Unterabsatz 1 steht der Anwendung des Artikels 57 nicht entgegen.

KAPITEL V

Verfahren

Artikel 40

Anwendung des offenen, des nichtoffenen und des Verhandlungsverfahrens

(1) Die Auftraggeber wenden bei der Vergabe ihrer Liefer-, Bau- und Dienstleistungsaufträge die Verfahren in einer für die Zwecke dieser Richtlinie angepassten Form an.

(2) Die Auftraggeber können jedes der in Artikel 1 Absatz 9 Buchstaben a), b) oder c) bezeichneten Verfahren wählen, vorausgesetzt, dass vorbehaltlich des Absatzes 3 des vorliegenden Artikels ein Aufruf zum Wettbewerb gemäß Artikel 42 durchgeführt wird.

(3) Die Auftraggeber können in den folgenden Fällen auf ein Verfahren ohne vorherigen Aufruf zum Wettbewerb zurückgreifen:

a) wenn im Rahmen eines Verfahrens mit vorherigem Aufruf zum Wettbewerb kein Angebot oder kein geeignetes Angebot oder keine Bewerbung abgegeben worden ist, sofern die ursprünglichen Bedingungen des Auftrags nicht wesentlich geändert werden;

b) wenn ein Auftrag nur zum Zweck von Forschung, Versuchen, Untersuchungen oder Entwicklung und nicht mit dem Ziel der Gewinnerzielung oder der Deckung der Forschungs- und Entwicklungskosten vergeben wird, und sofern die Vergabe eines derartigen Auftrags einer wettbewerblichen Vergabe von Folgeaufträgen, die insbesondere diese Ziele verfolgen, nicht vorgreift;

c) wenn der Auftrag wegen seiner technischen oder künstlerischen Besonderheiten oder aufgrund des Schutzes von ausschließlichen Rechten nur von einem bestimmten Wirtschaftsteilnehmer ausgeführt werden kann;

d) soweit zwingend erforderlich und wenn bei äußerster Dringlichkeit im Zusammenhang mit Ereignissen, die die Auftraggeber nicht voraussehen konnten, es nicht möglich ist, die in den offenen, den nichtoffenen oder den Verhandlungsverfahren mit vorherigem Aufruf zum Wettbewerb vorgesehenen Fristen einzuhalten;

e) im Fall von Lieferaufträgen bei zusätzlichen, vom ursprünglichen Lieferanten durchzuführenden Lieferungen, die entweder zur teilweisen Erneuerung von gängigen Lieferungen oder Einrichtungen oder zur Erweiterung von Lieferungen oder bestehenden Einrichtungen bestimmt sind, wenn ein Wechsel des Lieferanten den Auftraggeber zum Kauf von Material unterschiedlicher technischer Merkmale zwänge und dies eine technische Unvereinbarkeit oder unverhältnismäßige technische Schwierigkeiten bei Gebrauch und Wartung mit sich brächte;

f) bei zusätzlichen Bau- oder Dienstleistungen, die weder in dem der Vergabe zugrunde liegenden Entwurf noch im zuerst vergebenen Auftrag vorgesehen waren, die aber wegen eines unvorhergesehenen Ereignisses zur Ausführung dieses Auftrags erforderlich sind, sofern der Auftrag an den Bauunternehmer oder Dienstleistungserbringer vergeben wird, der den ersten Auftrag ausführt,

   — wenn sich diese zusätzlichen Bau- oder Dienstleistungen in technischer oder wirtschaftlicher Hinsicht nicht ohne wesentlichen Nachteil für die Auftraggeber vom Hauptauftrag trennen lassen oder

   — wenn diese zusätzlichen Arbeiten oder Dienstleistungen zwar von der Ausführung des ersten Auftrags getrennt werden können, aber für dessen weitere Ausführungsstufen unbedingt erforderlich sind;

g) bei neuen Bauaufträgen, die in der Wiederholung gleichartiger Bauleistungen bestehen, die vom selben Auftraggeber an den Unternehmer vergeben werden, der den ersten Auftrag erhalten hat, sofern sie einem Grundentwurf entsprechen und dieser Entwurf Gegenstand eines ersten Auftrags war, der nach einem Aufruf zum Wettbewerb vergeben wurde; die Möglichkeit der Anwendung dieses Verfahrens muss bereits bei der Ausschreibung des ersten Bauabschnitts angegeben werden; der für die Fortsetzung der Bauarbeiten in Aussicht genommene Gesamtauftragswert wird vom Auftraggeber bei der Anwendung der Artikel 16 und 17 berücksichtigt;

h) wenn es sich um die Lieferung von Waren handelt, die an Rohstoffbörsen notiert und gekauft werden;

i) bei Aufträgen, die aufgrund einer Rahmenvereinbarung vergeben werden sollen, sofern die in Artikel 14 Absatz 2 genannte Bedingung erfüllt ist;

j) bei Gelegenheitskäufen, wenn Waren aufgrund einer besonders günstigen Gelegenheit, die sich für einen sehr kurzen Zeitraum ergeben hat, zu einem Preis beschafft werden können, der erheblich unter den marktüblichen Preisen liegt;

k) beim Kauf von Waren zu besonders günstigen Bedingungen von einem Lieferanten, der seine Geschäftstätigkeit endgültig aufgibt, oder bei Verwaltern von Konkursen, Vergleichen mit Gläubigern oder ähnlichen im einzelstaatlichen Recht vorgesehenen Verfahren;

l) wenn der betreffende Dienstleistungsauftrag im Anschluss an einen gemäß dieser Richtlinie durchgeführten Wettbewerb nach den einschlägigen Bestimmungen an den Gewinner oder einen der Gewinner des Wettbewerbs vergeben wird; im letzten Fall sind alle Gewinner des Wettbewerbs zur Teilnahme an Verhandlungen einzuladen.

KAPITEL VI

Veröffentlichung und Transparenz

Abschnitt 1

Veröffentlichung der Bekanntmachungen

Artikel 41

Regelmäßige nichtverbindliche Bekanntmachungen und Bekanntmachungen über das Bestehen eines Prüfungssystems

(1) Die Auftraggeber teilen mindestens einmal jährlich in regelmäßigen nichtverbindlichen Bekanntmachungen gemäß Anhang XV Teil A, die von der Kommission oder von ihnen selbst in ihrem „Beschafferprofil" nach Anhang XX Absatz 2 Buchstabe b) veröffentlicht werden, Folgendes mit:

a) bei Lieferungen den geschätzten Gesamtwert der Aufträge oder der Rahmenvereinbarungen, aufgeschlüsselt nach Warengruppen, die sie in den kommenden zwölf Monaten vergeben wollen, wenn der geschätzte Gesamtwert nach Maßgabe der Artikel 16 und 17 mindestens 750 000 EUR beträgt.

   Die Warengruppe wird von den Auftraggebern unter Bezugnahme auf die Positionen des CPV festgelegt;

b) bei Dienstleistungen den geschätzten Gesamtwert der Aufträge oder der Rahmenvereinbarungen, die sie in den kommenden zwölf Monaten vergeben bzw. abschließen wollen, aufgeschlüsselt nach den in Anhang XVII Teil A genannten Kategorien, wenn dieser geschätzte Gesamtwert nach Maßgabe der Artikel 16 und 17 mindestens 750 000 EUR beträgt;

c) bei Bauaufträgen die wesentlichen Merkmale der Aufträge oder der Rahmenvereinbarungen, die sie in den kommenden zwölf Monaten vergeben bzw. abschließen wollen, wenn deren geschätzter Wert nach Maßgabe des Artikels 17 mindestens den in Artikel 16 genannten Schwellenwert erreicht.

Die unter den Buchstaben a) und b) genannten Bekanntmachungen werden nach Beginn des Haushaltsjahres unverzüglich an die Kommission gesendet oder im Beschafferprofil veröffentlicht.

Die unter Buchstabe c) genannte Bekanntmachung wird nach der Entscheidung, mit der die den beabsichtigten Bauaufträgen oder Rahmenvereinbarungen zugrunde liegende Planung genehmigt wird, unverzüglich an die Kommission gesendet oder im Beschafferprofil veröffentlicht.

Veröffentlichen Auftraggeber eine regelmäßige nichtverbindliche Bekanntmachung in ihrem Beschafferprofil, so melden sie der Kommission auf elektronischem Wege unter Beachtung der Angaben in Anhang XX Absatz 3 zu Format und Verfahren bei der Übermittlung die Veröffentlichung einer regelmäßigen nichtverbindlichen Bekanntmachung in einem Beschafferprofil.

Die Bekanntmachung gemäß den Buchstaben a), b) und c) sind nur dann zwingend vorgeschrieben, wenn die Auftraggeber die Möglichkeit wahrnehmen, die Frist für den Eingang von Angeboten gemäß Artikel 45 Absatz 4 zu verkürzen.

Dieser Absatz gilt nicht für Verfahren ohne vorherigen Aufruf zum Wettbewerb.

(2) Die Auftraggeber können regelmäßige nichtverbindliche Bekanntmachungen insbesondere im Zusammenhang mit bedeutenden Vorhaben veröffentlichen oder durch die Kommission veröffentlichen lassen; sie brauchen keine Informationen zu enthalten, die bereits in einer vorangegangenen regelmäßigen nichtverbindlichen Bekanntmachung enthalten waren, sofern deutlich darauf hingewiesen wird, dass es sich hierbei um zusätzliche Bekanntmachungen handelt.

(3) Entscheiden sich die Auftraggeber für die Einführung eines Prüfungssystems gemäß Artikel 53, so ist dieses Gegenstand einer Bekanntmachung nach Anhang XIV, die über den Zweck des Prüfungssystems und darüber informiert, wie die Prüfungsregeln angefordert werden können. Beträgt die Laufzeit des Systems mehr als drei Jahre, so ist die Bekanntmachung jährlich zu veröffentlichen. Bei kürzerer Laufzeit genügt eine Bekanntmachung zu Beginn des Verfahrens.

Artikel 42

Bekanntmachungen, die als Aufruf zum Wettbewerb dienen

(1) Bei Liefer-, Bau- und Dienstleistungsaufträgen kann ein Aufruf zum Wettbewerb erfolgen

a) durch Veröffentlichung einer regelmäßigen nichtverbindlichen Bekanntmachung gemäß Anhang XV Teil A oder

b) durch Veröffentlichung einer Bekanntmachung über das Bestehen eines Prüfungssystems gemäß Anhang XIV oder

c) durch Veröffentlichung einer Bekanntmachung gemäß Anhang XIII Teil A, Teil B oder Teil C.

(2) Bei dynamischen Beschaffungssystemen erfolgt der Aufruf zum Wettbewerb für die Einrichtung des Systems über eine Bekanntmachung gemäß Absatz 1 Buchstabe c), für die Vergabe von Aufträgen auf der Grundlage eines solchen Systems dagegen über eine vereinfachte Bekanntmachung gemäß Anhang XIII Teil D.

(3) Erfolgt der Aufruf zum Wettbewerb durch Veröffentlichung einer regelmäßigen nichtverbindlichen Bekanntmachung, so

a) müssen in der Bekanntmachung die Lieferungen, Bauarbeiten oder Dienstleistungen, die Gegenstand des zu vergebenden Auftrags sein werden, genannt werden;

b) muss die Bekanntmachung den Hinweis enthalten, dass dieser Auftrag im nichtoffenen Verfahren oder im Verhandlungsverfahren ohne spätere Veröffentlichung eines Aufrufs zum Wettbewerb vergeben wird, sowie die Aufforderung an die interessierten Wirtschaftsteilnehmer, ihr Interesse schriftlich mitzuteilen; und

c) muss die Bekanntmachung gemäß Anhang XX spätestens 12 Monate vor dem Zeitpunkt der Absendung der Aufforderung im Sinne des Artikels 47 Absatz 5 veröffentlicht werden. Der Auftraggeber hält im Übrigen die in Artikel 45 vorgesehenen Fristen ein.

Artikel 43

Bekanntmachungen über vergebene Aufträge

(1) Auftraggeber, die einen Auftrag vergeben oder eine Rahmenvereinbarung geschlossen haben, senden spätestens zwei Monate nach der Zuschlagserteilung beziehungsweise nach Abschluss der Rahmenvereinbarung gemäß den Bedingungen, die von der Kommission nach dem in Artikel 68 Absatz 2 genannten Verfahren festzulegen sind, eine Bekanntmachung über die Zuschlagserteilung gemäß Anhang XVI ab.

Bei Aufträgen, die innerhalb einer Rahmenvereinbarung gemäß Artikel 14 Absatz 2 vergeben werden, brauchen die Auftraggeber nicht für jeden Einzelauftrag, der aufgrund der Rahmenvereinbarung vergeben wird, eine Bekanntmachung mit den Ergebnissen des Vergabeverfahrens abzusenden.

Die Auftraggeber verschicken spätestens zwei Monate nach jeder Zuschlagserteilung eine Bekanntmachung über die Aufträge, die im Rahmen eines dynamischen Beschaffungssystems vergeben wurden. Sie können diese Bekanntmachungen jedoch quartalsweise zusammenfassen. In diesem Fall versenden sie die Zusammenstellung spätestens zwei Monate nach Quartalsende.

(2) Die gemäß Anhang XVI übermittelten, zur Veröffentlichung bestimmten Angaben sind gemäß Anhang XX zu veröffentlichen. Dabei berücksichtigt die Kommission alle in geschäftlicher Hinsicht sensiblen Angaben, auf die die Auftraggeber bei der Übermittlung der Angaben über die Anzahl der eingegangenen Angebote, die Identität der Wirtschaftsteilnehmer und die Preise hinweisen.

(3) Vergeben Auftraggeber einen Dienstleistungsauftrag für Forschung und Entwicklung („F&E-Auftrag“) im Rahmen eines Verfahrens ohne Aufruf zum Wettbewerb gemäß Artikel 40 Absatz 3 Buchstabe b), so können sie die gemäß Anhang XVI zu liefernden Angaben über Art und Umfang der zu erbringenden Dienstleistungen auf den Vermerk „Forschungs- und Entwicklungsdienstleistungen“ beschränken.

Vergeben ein Auftraggeber einen Auftrag für Forschung und Entwicklung, der nicht im Rahmen eines Verfahrens ohne Aufruf zum Wettbewerb gemäß Artikel 40 Absatz 3 Buchstabe b) vergeben werden kann, so können sie die gemäß Anhang XVI zu liefernden Angaben über Art und Umfang der Dienstleistungen aus Gründen der Vertraulichkeit im Geschäftsverkehr beschränken.

In diesen Fällen achten sie darauf, dass die nach diesem Absatz veröffentlichten Angaben zumindest ebenso detailliert sind wie diejenigen, die in der Bekanntmachung des Aufrufs zum Wettbewerb gemäß Artikel 42 Absatz 1 veröffentlicht werden.

Setzen die Auftraggeber ein Prüfungssystem ein, so haben sie in diesen Fällen darauf zu achten, dass die Angaben zumindest ebenso detailliert sind wie die Kategorie im Verzeichnis der geprüften Dienstleistungserbringer gemäß Artikel 53 Absatz 7.

(4) Im Falle von Aufträgen über die in Anhang XVII Teil B genannten Dienstleistungen geben die Auftraggeber in ihrer Bekanntmachung an, ob sie mit der Veröffentlichung einverstanden sind.

(5) Die Angaben gemäß Anhang XVI, die als nicht für die Veröffentlichung bestimmt gekennzeichnet sind, werden nur in vereinfachter Form gemäß Anhang XX zu statistischen Zwecken veröffentlicht.

Artikel 44

Abfassung und Modalitäten für die Veröffentlichung der Bekanntmachungen

(1) Die Bekanntmachungen enthalten die in den Anhängen XIII, XIV, XV Teil A, XV Teil B und XVI aufgeführten Informationen und gegebenenfalls jede andere vom Auftraggeber für sinnvoll erachtete Angabe gemäß dem jeweiligen Muster der Standardformulare, die von der Kommission gemäß den in Artikel 68 Absatz 2 genannten Verfahren angenommen werden.

(2) Die von den Auftraggebern an die Kommission gesendeten Bekanntmachungen werden entweder auf elektronischem Wege unter Beachtung der Muster und Verfahren bei der Übermittlung nach Anhang XX Absatz 3 oder auf anderem Wege übermittelt.

Die in den Artikeln 41, 42 und 43 genannten Bekanntmachungen werden gemäß den technischen Merkmalen für die Veröffentlichung in Anhang XX Nummer 1 Buchstaben a) und b) veröffentlicht.

(3) Bekanntmachungen, die gemäß dem Muster und unter Beachtung der Verfahren bei der Übermittlung in Anhang XX Nummer 3 auf elektronischem Wege erstellt und übermittelt wurden, werden spätestens fünf Tage nach ihrer Absendung veröffentlicht.

Bekanntmachungen, die nicht gemäß dem Muster und unter Beachtung der Verfahren bei der Übermittlung in Anhang XX Nummer 3 auf elektronischem Wege übermittelt wurden, werden spätestens zwölf Tage nach ihrer Absendung veröffentlicht. Jedoch wird in Ausnahmefällen die in Artikel 42 Absatz 1 Buchstabe c genannte Bekanntmachung auf Verlangen des Auftraggebers innerhalb von fünf Tagen veröffentlicht, sofern sie per Fax übermittelt worden ist.

(4) Die Bekanntmachungen werden ungekürzt in einer vom Auftraggeber hierfür gewählten Amtssprache der Gemeinschaft veröffentlicht, wobei nur der in dieser Originalsprache veröffentlichte Text verbindlich ist. Eine Zusammenfassung der wichtigsten Bestandteile einer jeden Bekanntmachung wird in den anderen Amtssprachen veröffentlicht.

Die Kosten für die Veröffentlichung der Bekanntmachung durch die Kommission gehen zulasten der Gemeinschaft.

(5) Die Bekanntmachungen und ihr Inhalt dürfen auf nationaler Ebene nicht vor dem Tag ihrer Absendung an die Kommission veröffentlicht werden.

Die auf nationaler Ebene veröffentlichten Bekanntmachungen dürfen nur die Angaben enthalten, die in den an die Kommission abgesendeten Bekanntmachungen enthalten sind oder in einem Beschafferprofil gemäß Artikel 41 Absatz 1 Unterabsatz 1 veröffentlicht wurden, und müssen zusätzlich auf das Datum der Absendung der Bekanntmachung an die Kommission bzw. der Veröffentlichung im Beschafferprofil hinweisen.

Die regelmäßigen nichtverbindlichen Bekanntmachungen dürfen nicht in einem Beschafferprofil veröffentlicht werden, bevor die Ankündigung dieser Veröffentlichung an die Kommission abgesendet wurde; das Datum der Absendung ist anzugeben.

(6) Die Auftraggeber tragen dafür Sorge, dass die den Tag der Absendung nachweisen können.

(7) Die Kommission stellt dem Auftraggeber eine Bestätigung der Veröffentlichung der übermittelten Informationen aus, in der das Datum dieser Veröffentlichung angegeben ist. Diese Bestätigung dient als Nachweis für die Veröffentlichung.

(8) Der Auftraggeber kann gemäß den Absätzen 1 bis 7 Bekanntmachungen über Aufträge veröffentlichen, die nicht der Veröffentlichungspflicht nach dieser Richtlinie unterliegen.

Abschnitt 2

Fristen

Artikel 45

Fristen für den Eingang der Anträge auf Teilnahme und der Angebote

(1) Bei der Festsetzung der Fristen für den Eingang der Angebote und der Anträge auf Teilnahme berücksichtigen die Auftraggeber unbeschadet der in diesem Artikel festgelegten Mindestfristen insbesondere die Komplexität des Auftrags und die Zeit, die für die Ausarbeitung der Angebote erforderlich ist.

(2) Bei offenen Verfahren beträgt die Frist für den Eingang der Angebote mindestens 52 Tage, gerechnet ab dem Tag der Absendung der Bekanntmachung.

(3) Bei nichtoffenen Verfahren und Verhandlungsverfahren mit vorherigem Aufruf zum Wettbewerb gilt folgende Regelung:

a) Die Frist für den Eingang von Teilnahmeanträgen aufgrund einer gemäß Artikel 42 Absatz 1 Buchstabe c) veröffentlichten Bekanntmachung oder einer Aufforderung durch die Auftraggeber gemäß Artikel 47 Absatz 5 beträgt grundsätzlich mindestens 37 Tage gerechnet ab dem Tag der Absendung der Bekanntmachung oder der Aufforderung; sie darf auf keinen Fall kürzer sein als 22 Tage, wenn die Bekanntmachung nicht auf elektronischem Wege oder per Fax zur Veröffentlichung übermittelt wurde, bzw. nicht kürzer als 15 Tage, wenn sie auf solchem Wege übermittelt wurde.

b) Die Frist für den Eingang von Angeboten kann im gegenseitigen Einvernehmen zwischen dem Auftraggeber und den ausgewählten Bewerbern festgelegt werden, vorausgesetzt, dass allen Bewerbern dieselbe Frist für die Erstellung und Einreichung der Angebote eingeräumt wird.

c) Ist eine einvernehmliche Festlegung der Frist für den Eingang der Angebote nicht möglich, setzt der Auftraggeber eine Frist fest, die grundsätzlich mindestens 24 Tage beträgt, die aber keinesfalls kürzer sein darf als 10 Tage, gerechnet ab der Aufforderung zur Einreichung eines Angebots.

(4) Hat der Auftraggeber gemäß Anhang XX eine regelmäßige nichtverbindliche Bekanntmachung gemäß Artikel 41 Absatz 1 veröffentlicht, beträgt die Frist für den Eingang der Angebote im offenen Verfahren grundsätzlich mindestes 36 Tage, keinesfalls jedoch weniger als 22 Tage, gerechnet ab dem Tag der Absendung der Bekanntmachung.

Die verkürzten Fristen sind zulässig, sofern die nichtverbindliche regelmäßige Bekanntmachung neben den nach Anhang XV Teil A Abschnitt I geforderten Informationen alle in Anhang XV Teil A Abschnitt II geforderten Informationen enthielt — soweit letztere zum Zeitpunkt der Veröffentlichung der Bekanntmachung vorliegen — und sofern spätestens 52 Tage und frühestens 12 Monate vor dem Tag der Absendung der in Artikel 42 Absatz 1 Buchstabe c) vorgesehenen Bekanntmachung zur Veröffentlichung übermittelt wurde.

(5) Bei Bekanntmachungen, die unter Beachtung der Angaben in Anhang XX Nummer 3 zu Muster und Übermittlungsmodalitäten elektronisch erstellt und versandt werden, können die Frist für den Eingang der Anträge auf Teilnahme im nichtoffenen und im Verhandlungsverfahren und die Frist für den Eingang der Angebote im offenen Verfahren um 7 Tage verkürzt werden.

(6) Macht der Auftraggeber gemäß Anhang XX ab dem Tag der Veröffentlichung der Bekanntmachung, die als Aufruf zum Wettbewerb dient, die Auftrags- und alle zusätzlichen Unterlagen uneingeschränkt, unmittelbar und vollständig elektronisch zugänglich, so kann die Frist für den Eingang von Angeboten im offenen und nichtoffenen Verfahren sowie im Verhandlungsverfahren um weitere fünf Tage verkürzt werden, es sei denn, es handelt sich um eine gemäß Absatz 3 Buchstabe b) im gegenseitigen Einvernehmen festgelegte Frist. In der Bekanntmachung ist die Internet-Adresse anzugeben, unter der diese Unterlagen abrufbar sind.

(7) Im offenen Verfahren darf die Kumulierung der Verkürzungen gemäß den Absätzen 4, 5 und 6 keinesfalls zu einer Frist für den Eingang von Angeboten führen, die, gerechnet ab dem Tag der Absendung der Bekanntmachung, kürzer ist als 15 Tage.

Wurde die Bekanntmachung jedoch nicht per Fax oder auf elektronischem Weg übermittelt, darf die Kumulierung der Verkürzungen gemäß den Absätzen 4, 5 und 6 im offenen Verfahren keinesfalls zu einer Frist für den Eingang von Angeboten führen, die, gerechnet ab dem Tag der Absendung der Bekanntmachung, kürzer ist als 22 Tage.

(8) Die Kumulierung der Verkürzungen gemäß den Absätzen 4, 5 und 6 darf keinesfalls zu einer Frist für den Eingang von Teilnahmeanträgen aufgrund einer gemäß Artikel 42 Absatz 1 Buchstabe c) veröffentlichten Bekanntmachung oder einer Aufforderung durch den Auftraggeber gemäß Artikel 47 Absatz 5 führen, die, gerechnet ab dem Tag der Absendung der Bekanntmachung oder der Aufforderung, kürzer ist als 15 Tage.

Beim nichtoffenen Verfahren und beim Verhandlungsverfahren darf die Kumulierung der Verkürzungen gemäß den Absätzen 4, 5 und 6 keinesfalls zu einer Frist für den Eingang der Angebote führen, die, gerechnet ab dem Tag der Aufforderung zur Angebotsabgabe, kürzer ist als 10 Tage, es sei denn, es handelt sich um eine gemäß Absatz 3 Buchstabe b) im gegenseitigen Einvernehmen festgelegte Frist.

(9) Wurden, aus welchem Grund auch immer, die Verdingungsunterlagen und die zusätzlichen Unterlagen oder Auskünfte, obwohl sie rechtzeitig angefordert wurden, nicht innerhalb der in den Artikeln 46 und 47 festgesetzten Fristen zugesandt bzw. erteilt oder können die Angebote nur nach einer Ortsbesichtigung oder Einsichtnahme in zusätzliche Unterlagen zu den Verdingungsunterlagen vor Ort erstellt werden, so sind die Fristen für den Eingang der Angebote angemessen zu verlängern — es sei denn, es handelt sich um eine gemäß Absatz 3 Buchstabe b) im gegenseitigen Einvernehmen festgelegte Frist —, so dass alle betroffenen Wirtschaftsteilnehmer von allen für die Erstellung eines Angebots erforderlichen Informationen Kenntnis nehmen können.

(10) Anhang XXII enthält eine Tabelle, in der die in diesem Artikel festgelegten Fristen zusammengefasst sind.

Artikel 46

Offene Verfahren: Verdingungsunterlagen, zusätzliche Unterlagen und Auskünfte

(1) Machen Auftraggeber bei offenen Verfahren nicht die Verdingungsunterlagen und alle zusätzlichen Unterlagen auf elektronischem Weg gemäß Artikel 45 Absatz 6 uneingeschränkt, unmittelbar und vollständig verfügbar, so werden die Verdingungsunterlagen und zusätzlichen Unterlagen den Wirtschaftsteilnehmern binnen 6 Tagen nach Eingang des Antrags zugesandt, sofern dieser Antrag rechtzeitig vor dem Fristende für den Eingang der Angebote eingegangen ist.

(2) Zusätzliche Auskünfte zu den Verdingungsunterlagen erteilen der Auftraggeber oder die zuständigen Stellen, sofern sie rechtzeitig angefordert worden sind, spätestens sechs Tage vor dem Fristende für den Eingang der Angebote.

Artikel 47

Aufforderung zur Angebotsabgabe oder zur Verhandlung

(1) Bei nichtoffenen Verfahren und bei Verhandlungsverfahren fordert der Auftraggeber die ausgewählten Bewerber gleichzeitig schriftlich auf, ihre Angebote einzureichen oder zu verhandeln. Die Aufforderung an die Bewerber enthält Folgendes:

— entweder eine Kopie der Verdingungsunterlagen und der zusätzlichen Unterlagen,

— oder einen Hinweis auf den Zugang zu den im ersten Gedankenstrich genannten Verdingungsunterlagen und die zusätzlichen Unterlagen, wenn sie gemäß Artikel 45 Absatz 6 auf elektronischem Wege unmittelbar zugänglich gemacht werden.

(2) Hält eine andere Einrichtung als der für das Vergabeverfahren zuständige Auftraggeber die Verdingungsunterlagen und/oder zusätzliche Unterlagen bereit, so werden die Anschrift der Stelle, bei der diese Verdingungsunterlagen und zusätzlichen Unterlagen angefordert werden können, und gegebenenfalls der Termin, bis zu dem sie angefordert werden können, angegeben; ferner sind der Betrag und die Bedingungen für die Zahlung des Betrags anzugeben, der für den Erhalt der Unterlagen zu entrichten ist. Die zuständigen Stellen schicken diese Unterlagen den Wirtschaftsteilnehmern nach Erhalt der Anfrage unverzüglich zu.

(3) Die zusätzlichen Informationen über die Verdingungsunterlagen bzw. die zusätzlichen Unterlagen werden vom Auftraggeber bzw. von den zuständigen Stellen spätestens sechs Tage vor dem für die Einreichung von Angeboten festgelegten Ausschlusstermin übermittelt, sofern die Anfrage rechtzeitig eingegangen ist.

(4) Die Aufforderung zur Angebotsabgabe umfasst außerdem zumindest

a) gegebenenfalls den Tag, bis zu dem die zusätzlichen Unterlagen angefordert werden können, sowie den Betrag und die Bedingungen für die Zahlung des Betrages, der für diese Unterlagen zu entrichten ist;

b) den Tag, bis zu dem die Angebote eingehen müssen, die Anschrift der Stelle, bei der sie einzureichen sind, sowie die Sprache/Sprachen, in der/denen sie abzufassen sind;

c) einen Hinweis auf alle veröffentlichten Bekanntmachungen;

d) gegebenenfalls die Bezeichnung der beizufügenden Unterlagen;

e) die Kriterien für die Zuschlagserteilung, wenn sie nicht in der als Aufruf zum Wettbewerb verwendeten Bekanntmachung über das Bestehen eines Prüfungssystems enthalten sind;

f) die relative Gewichtung der Zuschlagskriterien oder gegebenenfalls die nach ihrer Bedeutung eingestufte Reihenfolge dieser Kriterien, wenn diese Angaben nicht in der Bekanntmachung, der Bekanntmachung über das Bestehen eines Prüfungssystems oder in den Verdingungsunterlagen enthalten sind.

(5) Erfolgt ein Aufruf zum Wettbewerb mittels einer regelmäßigen nichtverbindlichen Bekanntmachung, so fordert der Auftraggeber später alle Bewerber auf, ihr Interesse auf der Grundlage von genauen Angaben über den betreffenden Auftrag zu bestätigen, bevor mit der Auswahl der Bieter oder der Teilnehmer an einer Verhandlung begonnen wird.

Diese Aufforderung umfasst zumindest folgende Angaben:

a) Art und Umfang, einschließlich aller Optionen auf zusätzliche Aufträge, und, sofern möglich, eine Einschätzung der Frist für die Ausübung dieser Optionen; bei wiederkehrenden Aufträgen Art und Umfang und, sofern möglich, das voraussichtliche Datum der Veröffentlichung der Bekanntmachungen zukünftiger Aufrufe zum Wettbewerb für die Bauarbeiten, Lieferungen oder Dienstleistungen, die Gegenstand des Auftrags sein sollen;

b) Art des Verfahrens: nichtoffenes Verfahren oder Verhandlungsverfahren;

c) gegebenenfalls Zeitpunkt, zu dem die Lieferung bzw. die Bauarbeiten oder Dienstleistungen beginnen bzw. abgeschlossen werden;

d) Anschrift und letzter Tag für die Vorlage des Antrags auf Aufforderung zur Angebotsabgabe sowie Sprache oder Sprachen, in der/denen die Angebote abzugeben sind;

e) Anschrift der Stelle, die den Zuschlag erteilt und die Auskünfte gibt, die für den Erhalt der Verdingungsunterlagen und anderer Unterlagen notwendig sind;

f) alle wirtschaftlichen und technischen Anforderungen, finanziellen Garantien und Angaben, die von den Wirtschaftsteilnehmern verlangt werden;

g) Höhe und Zahlungsbedingungen der für die Vergabeunterlagen zu entrichtenden Beträge;

h) Art des Auftrags, der Gegenstand der Ausschreibung ist: Kauf, Leasing, Miete oder Mietkauf oder eine Kombination dieser Arten und

i) die Zuschlagskriterien sowie deren relative Gewichtung oder gegebenenfalls die nach ihrer Bedeutung eingestufte Reihenfolge dieser Kriterien, wenn diese Angaben nicht in der Bekanntmachung oder in den Verdingungsunterlagen oder in der Aufforderung zur Abgabe eines Angebots oder zu Verhandlungen enthalten sind.

Abschnitt 3

Mitteilungen

Artikel 48

Bestimmungen über Mitteilungen

(1) Jede Mitteilung sowie jede in diesem Titel genannte Übermittlung von Informationen kann nach Wahl des Auftraggebers per Post, per Fax, auf elektronischem Wege gemäß den Absätzen 4 und 5, auf telefonischem Wege in den in Absatz 6 genannten Fällen und unter den dort aufgeführten Bedingungen oder durch eine Kombination dieser Kommunikationsmittel erfolgen.

(2) Das gewählte Kommunikationsmittel muss allgemein verfügbar sein, so dass der Zugang der Wirtschaftsteilnehmer zum Vergabeverfahren nicht beschränkt wird.

(3) Bei der Mitteilung bzw. bei Austausch und Speicherung von Informationen sind die Vollständigkeit der Daten sowie die Vertraulichkeit der Angebote und der Anträge auf Teilnahme zu gewährleisten; der Auftraggeber darf vom Inhalt der Angebote und der Anträge auf Teilnahme erst nach Ablauf der Frist für ihre Einreichung Kenntnis nehmen.

(4) Die für die elektronische Übermittlung zu verwendenden Vorrichtungen und ihre technischen Merkmale dürfen keinen diskriminierenden Charakter haben und müssen allgemein zugänglich sowie mit den allgemein verbreiteten Erzeugnissen der Informations- und Kommunikationstechnologie kompatibel sein.

(5) Für die Übermittlung und die Vorrichtungen für den elektronischen Eingang der Angebote sowie für die Vorrichtungen für den elektronischen Eingang der Anträge auf Teilnahme gelten die folgenden Bestimmungen:

a) Die Informationen über die Spezifikationen, die für die elektronische Übermittlung der Angebote und Anträge auf Teilnahme erforderlich sind, einschließlich Verschlüsselung, müssen den interessierten Parteien zugänglich sein. Außerdem müssen die Vorrichtungen, die für den elektronischen Eingang der Angebote und Anträge auf Teilnahme verwendet werden, den Anforderungen des Anhangs XXIV genügen.

b) Die Mitgliedstaaten können unter Beachtung des Artikels 5 der Richtlinie 1999/93/EG verlangen, dass elektronisch übermittelte Angebote mit einer fortgeschrittenen elektronischen Signatur gemäß Artikel 5 Absatz 1 der genannten Richtlinie zu versehen sind.

c) Die Mitgliedstaaten können Systeme der freiwilligen Akkreditierung einführen oder beibehalten, die zu einem verbesserten Angebot von Zertifizierungsdiensten für diese Vorrichtungen führen sollen.

d) Bieter und Bewerber sind verpflichtet, vor Ablauf der vorgeschriebenen Frist für die Vorlage der Angebote und Anträge auf Teilnahme die in Artikel 52 Absatz 2, Artikel 52 Absatz 3, Artikel 53 und Artikel 54 genannten Unterlagen, Bescheinigungen und Erklärungen einzureichen, wenn diese nicht auf elektronischem Wege verfügbar sind.

(6) Folgende Bestimmungen gelten für die Übermittlung der Anträge auf Teilnahme:

a) Anträge auf Teilnahme am Vergabeverfahren können schriftlich oder fernmündlich gestellt werden.

b) Werden Anträge auf Teilnahme fernmündlich gestellt, sind diese vor Ablauf der Frist für den Eingang der Anträge schriftlich zu bestätigen.

c) Die Auftraggeber können verlangen, dass per Fax gestellte Anträge auf Teilnahme auf dem Postweg oder auf elektronischem Wege bestätigt werden, damit ein gesetzlich gültiger Nachweis vorliegt. Eine solche Anforderung ist, zusammen mit der Frist für die Übermittlung der Bestätigung per Post oder auf elektronischem Wege, vom Auftraggeber in der als Aufruf zum Wettbewerb verwendeten Bekanntmachung oder in der Aufforderung gemäß Artikel 47 Absatz 5 anzugeben.

Artikel 49

Unterrichtung der Prüfungsantragsteller, Bewerber und Bieter

(1) Die Auftraggeber informieren die beteiligten Wirtschaftsteilnehmer schnellstmöglich, auf Antrag auch schriftlich, über ihre Entscheidungen über den Abschluss einer Rahmenvereinbarung, die Zuschlagserteilung oder die Zulassung zur Teilnahme an einem dynamischen Beschaffungssystem, einschließlich der Gründe, aus denen beschlossen wurde, auf den Abschluss einer Rahmenvereinbarung oder die Vergabe eines als Aufruf zum Wettbewerb dienenden Auftrags zu verzichten oder das Verfahren erneut einzuleiten bzw. kein dynamisches Beschaffungssystem einzurichten.

(2) Auf Verlangen der betroffenen Partei unterrichtet der Auftraggeber unverzüglich

— jeden nicht erfolgreichen Bewerber über die Gründe für die Ablehnung seiner Bewerbung,

— jeden nicht berücksichtigten Bieter über die Gründe für die Ablehnung seines Angebots; dazu gehört in den Fällen nach Artikel 34 Absätze 4 und 5 auch eine Unterrichtung über die Gründe für seine Entscheidung, dass keine Gleichwertigkeit vorliegt oder dass die Bauarbeiten, Lieferungen oder Dienstleistungen nicht den Leistungs- oder Funktionsanforderungen entsprechen,

— jeden Bieter, der ein ordnungsgemäßes Angebot eingereicht hat, über die Merkmale und Vorteile des ausgewählten Angebots sowie über den Namen des Zuschlagsempfängers oder der Parteien der Rahmenvereinbarung.

Der Beantwortungszeitraum darf eine Frist von 15 Tagen ab Eingang der schriftlichen Anfrage auf keinen Fall überschreiten.

Die Auftraggeber können jedoch beschließen, bestimmte in Absatz 1 genannte Angaben über die Zuschlagserteilung oder den Abschluss von Rahmenvereinbarungen bzw. die Zulassung zur Teilnahme an einem dynamischen Beschaffungssystem nicht mitzuteilen, wenn die Offenlegung dieser Angaben den Gesetzesvollzug behindern, in sonstiger Weise dem öffentlichen Interesse zuwiderlaufen, die berechtigten geschäftlichen Interessen öffentlicher oder privater Wirtschaftsteilnehmer — einschließlich der Interessen des Wirtschaftsteilnehmers, dem der Auftrag erteilt wurde — schädigen oder den lauteren Wettbewerb zwischen ihnen beeinträchtigen würde.

(3) Die Auftraggeber, die ein Prüfungssystem einrichten und verwalten, unterrichten die Antragsteller innerhalb einer Frist von sechs Monaten über die Entscheidung, die sie zur Qualifikation der Antragsteller getroffen haben.

Kann die Entscheidung über die Qualifikation nicht innerhalb von vier Monaten nach Eingang eines Prüfungsantrags getroffen werden, so hat der Auftraggeber dem Antragsteller spätestens 2 Monate nach Eingang des Antrags die Gründe für eine längere Bearbeitungszeit mitzuteilen und anzugeben, wann über die Annahme oder die Ablehnung seines Antrags entschieden wird.

(4) Negative Entscheidungen über die Qualifikation werden den Antragstellern schnellstmöglich, in jedem Falle aber innerhalb von höchstens fünfzehn Tagen nach der Entscheidung, unter Angabe von Gründen mitgeteilt. Die Gründe müssen sich auf die in Artikel 53 Absatz 2 genannten Prüfungskriterien beziehen.

(5) Auftraggeber, die ein Prüfungssystem einrichten oder verwalten, dürfen einem Wirtschaftsteilnehmer die Qualifikation nur aus Gründen aberkennen, die auf den in Artikel 53 Absatz 2 genannten Zuschlagskriterien beruhen. Die beabsichtigte Aberkennung der Qualifikation muss dem betreffenden Wirtschaftsteilnehmer mindestens 15 Tage vor dem für die Aberkennung der Qualifikation vorgesehenen Termin schriftlich unter Angabe der Gründe hierfür mitgeteilt werden.

Artikel 50

Aufbewahrung der Unterlagen über vergebene Aufträge

(1) Die Auftraggeber bewahren sachdienliche Unterlagen über jeden Auftrag auf, die es ihnen zu einem späteren Zeitpunkt ermöglichen, Entscheidungen zu begründen, die Folgendes betreffen:

a) Qualifikation und Auswahl der Wirtschaftsteilnehmer sowie Zuschlagserteilung,

b) Rückgriff auf Verfahren ohne vorherigen Aufruf zum Wettbewerb gemäß Artikel 40 Absatz 3,

c) Nichtanwendung der Kapitel III bis VI dieses Titels aufgrund der Ausnahmebestimmungen von Titel I Kapitel II und von Kapitel II des vorliegenden Titels.

Die Auftraggeber treffen geeignete Maßnahmen, um den Ablauf der mit elektronischen Mitteln durchgeführten Vergabeverfahren zu dokumentieren.

(2) Die Unterlagen müssen mindestens 4 Jahre lang ab der Zuschlagserteilung aufbewahrt werden, damit der Auftraggeber der Kommission in dieser Zeit auf Anfrage die erforderlichen Auskünfte erteilen kann.

KAPITEL VII

Ablauf des Verfahrens

Artikel 51

Allgemeine Bestimmungen

(1) Die Auswahl der Bewerber in den Vergabeverfahren ist wie folgt geregelt:

a) Haben die Auftraggeber gemäß Artikel 54 Absätze 1, 2 oder 4 Regeln und Kriterien für den Ausschluss von Bietern oder Bewerbern aufgestellt, so schließen sie Wirtschaftsteilnehmer, die diese Regeln und Kriterien erfüllen, aus.

b) Die Auftraggeber wählen Bieter und Bewerber nach den gemäß Artikel 54 festgelegten objektiven Regeln und Kriterien aus.

c) In nichtoffenen Verfahren und in Verhandlungsverfahren mit einem Aufruf zum Wettbewerb verringern die Auftraggeber gegebenenfalls nach Artikel 54 die Zahl der gemäß den Buchstaben a) und b) ausgewählten Bewerber.

(2) Erfolgt der Aufruf zum Wettbewerb durch eine Bekanntmachung über das Bestehen eines Prüfungssystems und zum Zwecke der Auswahl von Bewerbern in Vergabeverfahren Einzelaufträge, die Gegenstand des Aufrufs zum Wettbewerb sind, so gilt Folgendes:

a) Die Auftraggeber prüfen die Wirtschaftsteilnehmer gemäß Artikel 53.

b) Sie wenden die Bestimmungen des Absatzes 1, die für nichtoffene Verfahren oder Verhandlungsverfahren relevant sind, auf die geprüften Wirtschaftsteilnehmer an.

(3) Die Auftraggeber prüfen die Übereinstimmung der von den ausgewählten Bietern vorgelegten Angebote mit den für sie geltenden Vorschriften und Anforderungen und vergeben den Auftrag nach den Kriterien der Artikel 55 und 57.

Abschnitt 1

Prüfung und qualitative Auswahl

Artikel 52

Gegenseitige Anerkennung im Zusammenhang mit administrativen, technischen oder finanziellen Bedingungen sowie betreffend Zertifikate, Nachweise und Prüfbescheinigungen

(1) Bei der Auswahl der Teilnehmer an einem nichtoffenen Verfahren oder einem Verhandlungsverfahren dürfen die Auftraggeber mit ihrer Entscheidung über die Qualifikation sowie bei der Überarbeitung der Kriterien und Regeln nicht

a) bestimmten Wirtschaftsteilnehmern administrative, technische oder finanzielle Verpflichtungen auferlegen, die sie anderen nicht auferlegt hätten,

b) Prüfungen oder Nachweise verlangen, die sich mit bereits vorliegenden objektiven Nachweisen überschneiden.

(2) Verlangen Auftraggeber zum Nachweis dafür, dass der Wirtschaftsteilnehmer bestimmte Qualitätssicherungsnormen erfüllt, die Vorlage von Bescheinigungen unabhängiger Stellen, so nehmen sie auf Qualitätssicherungsverfahren Bezug, die den einschlägigen europäischen Normen genügen und von entsprechenden Stellen gemäß den europäischen Zertifizierungsnormen zertifiziert sind.

Die Auftraggeber erkennen gleichwertige Bescheinigungen von Stellen aus anderen Mitgliedstaaten an. Sie erkennen auch andere Nachweise für gleichwertige Qualitätssicherungsmaßnahmen von den Wirtschaftsteilnehmern an.

(3) Bei Bau- und Dienstleistungsaufträgen können die Auftraggeber zur Überprüfung der technischen Leistungsfähigkeit des Wirtschaftsteilnehmers in bestimmten Fällen einen Hinweis auf die Umweltmanagementmaßnahmen verlangen, die der Wirtschaftsteilnehmer bei der Ausführung des Auftrags anwenden kann. Verlangen die Auftraggeber zum Nachweis dafür, dass der Wirtschaftsteilnehmer bestimmte Normen für das Umweltmanagement erfüllt, die Vorlage von Bescheinigungen unabhängiger Stellen, so nehmen sie auf das EMAS oder auf Normen für das Umweltmanagement Bezug, die auf den einschlägigen europäischen oder internationalen Normen beruhen und von entsprechenden Stellen gemäß dem Gemeinschaftsrecht oder gemäß einschlägigen europäischen oder internationalen Zertifizierungsnormen zertifiziert sind.

Die Auftraggeber erkennen gleichwertige Bescheinigungen von Stellen aus anderen Mitgliedstaaten an. Daneben erkennen sie auch andere Nachweise über gleichwertige Qualitätssicherungsmaßnahmen von den Wirtschaftsteilnehmern an.

Artikel 53

Prüfungssysteme

(1) Auftraggeber, die dies wünschen, können ein Prüfungssystem für Wirtschaftsteilnehmer einrichten und verwalten.

Auftraggeber, die ein Prüfungssystem einrichten oder verwalten, stellen sicher, dass die Wirtschaftsteilnehmer jederzeit eine Prüfung verlangen können.

(2) Das System nach Absatz 1 kann verschiedene Prüfungsstufen umfassen.

Es wird auf der Grundlage objektiver Prüfkriterien und -regeln gehandhabt, die von dem Auftraggeber aufgestellt werden.

Umfassen diese Kriterien und Regeln technische Spezifikationen, kommt Artikel 34 zur Anwendung. Diese Kriterien und Regeln können bei Bedarf aktualisiert werden.

(3) Die in Absatz 2 genannten Prüfkriterien und -regeln können auch die in Artikel 45 der Richtlinie 2004/18/EG aufgeführten Ausschlusskriterien gemäß den darin genannten Bedingungen beinhalten.

Handelt es sich um einen Auftraggeber im Sinne von Artikel 2 Absatz 1 Buchstabe a), umfassen diese Kriterien und Regeln die in Artikel 45 Absatz 1 der Richtlinie 2004/18/EG genannten Ausschlusskriterien.

(4) Enthalten die in Absatz 2 genannten Prüfungskriterien und -regeln Anforderungen an die wirtschaftliche und finanzielle Leistungsfähigkeit des Wirtschaftsteilnehmers, kann sich dieser gegebenenfalls auf die Leistungsfähigkeit anderer Unternehmen stützen, unabhängig von dem Rechtsverhältnis, in dem er zu diesen Unternehmen steht. In diesem Fall muss er dem Auftraggeber nachweisen, dass er während der gesamten Gültigkeit des Prüfungssystems über diese Ressourcen verfügt, beispielsweise durch eine entsprechende Verpflichtungserklärung dieser Unternehmen.

Unter denselben Bedingungen kann sich auch eine in Artikel 11 genannte Gruppe von Wirtschaftsteilnehmern auf die Fähigkeiten der einzelnen Mitglieder der Gruppe oder anderer Unternehmen stützen.

(5) Umfassen die in Absatz 2 genannten Prüfungskriterien und -regeln Anforderungen an die technischen und/oder beruflichen Fähigkeiten des Wirtschaftsteilnehmers, so kann sich dieser gegebenenfalls auf die Kapazitäten anderer Unternehmen stützen, unabhängig von dem Rechtsverhältnis, in dem er zu diesen Unternehmen steht. In diesem Fall muss er dem Auftraggeber nachweisen, dass er während der gesamten Gültigkeit des Prüfungssystems über diese Ressourcen verfügt, beispielsweise durch eine entsprechende Verpflichtungserklärung dieser Unternehmen, dem Wirtschaftsteilnehmer die erforderlichen Ressourcen zur Verfügung zu stellen.

Unter denselben Bedingungen kann sich auch eine in Artikel 11 genannte Gruppe von Wirtschaftsteilnehmern auf die Kapazitäten der einzelnen Mitglieder der Gruppe oder anderer Unternehmen stützen.

(6) Die Prüfungskriterien und -regeln nach Absatz 2 werden interessierten Wirtschaftsteilnehmern auf Antrag zur Verfügung gestellt. Die Überarbeitung dieser Kriterien und Regeln wird interessierten Wirtschaftsteilnehmern mitgeteilt.

Entspricht das Prüfungssystem bestimmter anderer Auftraggeber oder Stellen nach Ansicht eines Auftraggebers dessen Anforderungen, so teilt er den interessierten Wirtschaftsteilnehmern die Namen dieser dritten Auftraggeber oder Stellen mit.

(7) Es wird ein Verzeichnis der geprüften Wirtschaftsteilnehmer geführt; es kann in Kategorien nach Auftragsarten, für deren Durchführung die Prüfung Gültigkeit hat, aufgegliedert werden.

(8) Wenn Auftraggeber ein Prüfungssystem einrichten oder verwalten, müssen sie insbesondere die Bestimmungen des Artikels 41 Absatz 3 (Bekanntmachungen über das Bestehen eines Prüfungssystems), des Artikels 49 Absätze 3, 4 und 5 (Unterrichtung der die Prüfung beantragenden Wirtschaftsteilnehmer), des Artikels 51 Absatz 2 (Auswahl der Bewerber, wenn ein Aufruf zum Wettbewerb durch eine Bekanntmachung über das Bestehen eines Prüfungssystems erfolgt) sowie des Artikels 52 (gegenseitige Anerkennung im Zusammenhang mit administrativen, technischen oder finanziellen Bedingungen sowie betreffend Zertifikate, Nachweise und Prüfbescheinigungen) einhalten.

(9) Erfolgt ein Aufruf zum Wettbewerb durch Veröffentlichung einer Bekanntmachung über das Bestehen eines Prüfungssystems, so werden die Bieter in einem nichtoffenen Verfahren oder die Teilnehmer an einem Verhandlungsverfahren unter den Bewerbern ausgewählt, die sich im Rahmen eines solchen Systems qualifiziert haben.

Artikel 54

Eignungskriterien

(1) Auftraggeber, die die Eignungskriterien in einem offenen Verfahren festlegen, müssen dies entsprechend den objektiven Kriterien und Regeln tun, die den interessierten Wirtschaftsteilnehmern zugänglich sind.

(2) Auftraggeber, die die Bewerber für die Teilnahme an einem nichtoffenen Verfahren oder an einem Verhandlungsverfahren auswählen, richten sich dabei nach den objektiven Regeln und Kriterien, die sie festgelegt haben und die den interessierten Wirtschaftsteilnehmern zugänglich sind.

(3) In nichtoffenen Verfahren und in Verhandlungsverfahren können sich die Kriterien auf die objektive Notwendigkeit des Auftraggebers gründen, die Zahl der Bewerber so weit zu verringern, dass ein angemessenes Verhältnis zwischen den Besonderheiten des Vergabeverfahrens und den zu seiner Durchführung erforderlichen Ressourcen sichergestellt ist. Es sind jedoch so viele Bewerber zu berücksichtigen, dass ein angemessener Wettbewerb gewährleistet ist.

(4) Die in den Absätzen 1 und 2 genannten Kriterien können die in Artikel 45 der Richtlinie 2004/18/EG genannten Ausschlussgründe gemäß den darin genannten Bedingungen umfassen.

Handelt es sich bei dem Auftraggeber um einen öffentlichen Auftraggeber im Sinne von Artikel 2 Absatz 1 Buchstabe a), so umfassen die in den Absätzen 1 und 2 dieses Artikels genannten Kriterien die in Artikel 45 Absatz 1 der Richtlinie 2004/18/EG aufgeführten Ausschlusskriterien.

(5) Umfassen die in Absatz 1 und 2 genannten Kriterien Anforderungen an die wirtschaftliche und finanzielle Leistungsfähigkeit des Wirtschaftsteilnehmers, kann sich dieser gegebenenfalls und bei einem bestimmten Auftrag auf die Kapazitäten anderer Unternehmen stützen, unabhängig von dem Rechtsverhältnis, in dem er zu diesen Unternehmen steht. In diesem Fall weist er dem Auftraggeber nach, dass er über die notwendigen Ressourcen verfügt, beispielsweise durch eine entsprechende Verpflichtungserklärung dieser Unternehmen.

Unter denselben Bedingungen kann sich auch eine in Artikel 11 genannte Gruppe von Wirtschaftsteilnehmern auf die Kapazitäten der einzelnen Mitglieder der Gruppe oder anderer Unternehmen stützen.

(6) Umfassen die in Absatz 2 genannten Kriterien und Regeln Anforderungen an die technischen und/oder beruflichen Fähigkeiten des Wirtschaftsteilnehmers, kann er sich gegebenenfalls auf die Kapazitäten anderer Unternehmen stützen, unabhängig von dem Rechtsverhältnis, in dem er zu diesen Unternehmen steht. In diesem Fall muss er dem Auftraggeber nachweisen, dass er über die notwendigen Mittel verfügt, beispielsweise durch eine entsprechende Verpflichtungserklärung dieser Unternehmen.

Unter denselben Bedingungen kann sich auch eine in Artikel 11 genannte Gruppe von Wirtschaftsteilnehmern auf die Kapazitäten der einzelnen Mitglieder der Gruppe oder anderer Unternehmen stützen.

Abschnitt 2

Zuschlagserteilung

Artikel 55

Zuschlagskriterien

(1) Unbeschadet nationaler Rechts- und Verwaltungsvorschriften über die Vergütung bestimmter Dienstleistungen sind die für die Zuschlagserteilung maßgebenden Kriterien

a) entweder, wenn der Zuschlag auf das aus Sicht des Auftraggebers wirtschaftlich günstigste Angebot erfolgt, verschiedene mit dem Auftragsgegenstand zusammenhängende Kriterien wie: Lieferfrist bzw. Ausführungsdauer, Betriebskosten, Rentabilität, Qualität, Ästhetik und Zweckmäßigkeit, Umwelteigenschaften, technischer Wert, Kundendienst und technische Hilfe, Zusagen hinsichtlich der Ersatzteile, Versorgungssicherheit, Preis, oder

b) ausschließlich der niedrigste Preis.

(2) Unbeschadet des Unterabsatzes 3 gibt der Auftraggeber im Fall von Absatz 1 Buchstabe a) an, wie er die einzelnen Kriterien gewichtet, die er ausgewählt hat, um das wirtschaftlich günstigste Angebot zu ermitteln.

Diese Gewichtung kann mittels einer Marge angegeben werden, deren größte Bandbreite angemessen sein muss.

Kann nach Ansicht des Auftraggebers die Gewichtung aus nachvollziehbaren Gründen nicht angegeben werden, so gibt der Auftraggeber die Kriterien in der absteigenden Reihenfolge ihrer Bedeutung an.

Die relative Gewichtung oder die nach der Bedeutung eingestufte Reihenfolge der Kriterien wird — soweit erforderlich — in der als Aufruf zum Wettbewerb verwendeten Bekanntmachung, in der Aufforderung zur Interessensbestätigung gemäß Artikel 47 Absatz 5, in der Aufforderung zur Angebotsabgabe oder zur Verhandlung oder in den Verdingungsunterlagen angegeben.

Artikel 56

Durchführung von elektronischen Auktionen

(1) Die Mitgliedstaaten können vorschreiben, dass die Auftraggeber elektronische Auktionen durchführen dürfen.

(2) Bei der Verwendung des offenen und nichtoffenen Verfahrens sowie des Verhandlungsverfahrens mit vorherigem Aufruf zum Wettbewerb kann der Auftraggeber beschließen, dass der Vergabe eines Auftrags eine elektronische Auktion vorausgeht, sofern die Spezifikationen des Auftrags hinreichend präzise beschrieben werden können.

Eine elektronische Auktion kann unter den gleichen Bedingungen bei einem Aufruf zum Wettbewerb für die im Rahmen des in Artikel 15 genannten dynamischen Beschaffungssystems zu vergebenden Aufträge durchgeführt werden.

Die elektronische Auktion erstreckt sich

a) entweder allein auf die Preise, wenn der Zuschlag für den Auftrag zum niedrigsten Preis erteilt wird,

b) oder auf die Preise und/oder die Auftragswerte der in den Verdingungsunterlagen genannten Angebotskomponenten, wenn das wirtschaftlich günstigste Angebot den Zuschlag für den Auftrag erhält.

(3) Ein Auftraggeber, der die Durchführung einer elektronischen Auktion beschließt, weist in der als Aufruf zum Wettbewerb verwendeten Bekanntmachung darauf hin.

Die Verdingungsunterlagen enthalten unter anderem folgende Einzelheiten:

a) die Komponenten, deren Auftragswerte Gegenstand der elektronischen Auktion sein werden, sofern diese Komponenten in der Weise quantifizierbar sind, dass sie in Ziffern oder in Prozentangaben ausgedrückt werden können;

b) gegebenenfalls die Obergrenzen der Auftragswerte, die unterbreitet werden können, wie sie sich aus den Spezifikationen des Auftragsgegenstandes ergeben;

c) die Informationen, die den Bietern im Laufe der elektronischen Auktion zur Verfügung gestellt werden, sowie gegebenenfalls den Termin, an dem sie ihnen zur Verfügung gestellt werden;

d) die relevanten Angaben zum Ablauf der elektronischen Auktion;

e) die Bedingungen, unter denen die Bieter Gebote abgeben können, und insbesondere die Mindestabstände, die bei Abgabe dieser Geboten gegebenenfalls einzuhalten sind;

f) die relevanten Angaben zu der verwendeten elektronischen Vorrichtung und zu den technischen Modalitäten und Merkmalen der Anschlussverbindung.

(4) Vor der Durchführung der elektronischen Auktion nehmen die Auftraggeber anhand des bzw. der Zuschlagskriterien und der dafür festgelegten Gewichtung eine erste vollständige Evaluierung der Angebote vor.

Alle Bieter, die zulässige Angebote unterbreitet haben, werden zur gleichen Zeit auf elektronischem Wege aufgefordert, neue Preise und/oder Auftragswerte vorzulegen; die Aufforderung enthält sämtliche relevanten Angaben betreffend die individuelle Verbindung zur verwendeten elektronischen Vorrichtung sowie das Datum und die Uhrzeit des Beginns der elektronischen Auktion. Die elektronische Auktion kann mehrere aufeinander folgende Phasen umfassen. Sie darf frühestens zwei Arbeitstage nach der Versendung der Aufforderungen beginnen.

(5) Erfolgt der Zuschlag auf das wirtschaftlich günstigste Angebot, so wird der Aufforderung das Ergebnis der vollständigen Bewertung des jeweiligen Angebots, die entsprechend der Gewichtung nach Artikel 55 Absatz 2 Unterabsatz 1 durchgeführt wurde, beigefügt.

In der Aufforderung ist ebenfalls die mathematische Formel vermerkt, nach der bei der elektronischen Auktion die automatische Neuordnung entsprechend den vorgelegten neuen Preisen und/oder den neuen Werten vorgenommen wird. Aus dieser Formel geht auch die Gewichtung aller Kriterien für die Ermittlung des wirtschaftlich günstigsten Angebots hervor, so wie sie in der Bekanntmachung, die als Aufruf zum Wettbewerb dient, oder in den Verdingungsunterlagen angegeben ist; zu diesem Zweck werden etwaige Margen durch einen im Voraus festgelegten Wert ausgedrückt.

Sind Varianten zulässig, so muss für jede einzelne Variante getrennt eine Formel angegeben werden.

(6) Die Auftraggeber übermitteln allen Bietern im Laufe einer jeden Phase der elektronischen Auktion ständig und unverzüglich die Informationen, die erforderlich sind, damit den Bietern jederzeit ihr jeweiliger Rang bekannt ist; sie können ferner zusätzliche Informationen zu anderen vorgelegten Preisen oder Werten übermitteln, sofern dies in den Verdingungsunterlagen angegeben ist; darüber hinaus können sie jederzeit die Zahl der Teilnehmer an der Phase der Auktion bekannt geben; sie dürfen jedoch keinesfalls während der Phasen der elektronischen Auktion die Identität der Bieter bekannt geben.

(7) Die Auftraggeber schließen die elektronische Auktion nach einem oder mehreren der folgenden Verfahren ab:

a) sie geben in der Aufforderung zur Teilnahme an der Auktion das Datum und die Uhrzeit an, die von vornherein festgelegt wurden;

b) sie schließen das Verfahren ab, wenn Preise oder neuen Werte mehr eingehen, die den Anforderungen an die Mindestabstände gerecht werden. In diesem Falle geben die Auftraggeber in der Aufforderung zur Teilnahme an der Auktion die Frist an, die sie ab dem Erhalt der letzten Vorlage bis zum Abschluss der elektronischen Auktion verstreichen lassen;

c) sie schließen das Verfahren ab, wenn die Auktionsphasen in der Anzahl, die in der Aufforderung zur Teilnahme an der Auktion angegeben war, durchgeführt wurden.

Wenn die Auftraggeber beschlossen haben, die elektronische Auktion gemäß Buchstabe c), gegebenenfalls kombiniert mit dem Verfahren nach Buchstabe b), abzuschließen, wird in der Aufforderung zur Teilnahme an der Auktion der Zeitplan für jede Auktionsphase angegeben.

(8) Nach Abschluss der elektronischen Auktion vergeben die Auftraggeber den Auftrag gemäß Artikel 55 entsprechend den Ergebnissen der elektronischen Auktion.

(9) Auftraggeber dürfen nicht missbräuchlich oder dergestalt elektronische Auktionen durchführen, dass der Wettbewerb ausgeschaltet, eingeschränkt oder verfälscht wird, oder dergestalt, dass der Auftragsgegenstand, wie er im Zuge der Veröffentlichung der Bekanntmachung ausgeschrieben und in den Verdingungsunterlagen definiert worden ist, verändert wird.

Artikel 57

Ungewöhnlich niedrige Angebote

(1) Erscheinen im Fall eines bestimmten Auftrags Angebote im Verhältnis zur Leistung ungewöhnlich niedrig, so muss der Auftraggeber vor Ablehnung dieser Angebote schriftlich Aufklärung über die Bestandteile des Angebots verlangen, wo er dies für angezeigt hält.

Die betreffenden Erläuterungen können insbesondere Folgendes betreffen:

a) die Wirtschaftlichkeit des Fertigungsverfahrens, der Erbringung der Dienstleistung oder des Bauverfahrens,

b) die technischen Lösungen und/oder außergewöhnlich günstigen Bedingungen, über die der Bieter bei der Lieferung der Waren, der Erbringung der Dienstleistung oder der Durchführung der Bauleistungen verfügt,

c) die Originalität der vom Bieter angebotenen Lieferungen, Dienstleistungen oder Bauleistungen,

d) die Einhaltung der Vorschriften über Arbeitsschutz und Arbeitsbedingungen, die am Ort der Lieferung, Dienstleistung oder Bauleistungen gelten,

e) die etwaige Gewährung einer staatlichen Beihilfe an den Bieter.

(2) Der Auftraggeber prüft die betreffende Zusammensetzung und berücksichtigt dabei die gelieferten Nachweise, indem er mit dem Bieter Rücksprache hält.

(3) Stellt der Auftraggeber fest, dass ein Angebot ungewöhnlich niedrig ist, weil der Bieter eine staatliche Beihilfe erhalten hat, so darf er das Angebot allein aus diesem Grund nur nach Rücksprache mit dem Bieter ablehnen, sofern dieser binnen einer von dem Auftraggeber festzulegenden ausreichenden Frist nicht nachweisen kann, dass die betreffende Beihilfe rechtmäßig gewährt wurde. Lehnt der Auftraggeber ein Angebot unter diesen Umständen ab, so teilt er dies der Kommission mit.

Abschnitt 3

Angebote, die Erzeugnisse aus Drittländern und Beziehungen mit diesen umfassen

Artikel 58

Angebote, die Erzeugnisse aus Drittländern umfassen

(1) Dieser Artikel gilt für Angebote, die Erzeugnisse mit Ursprung in Drittländern umfassen, mit denen die Gemeinschaft keine Übereinkunft in einem multilateralen oder bilateralen Rahmen geschlossen hat, durch die ein tatsächlicher Zugang der Unternehmen der Gemeinschaft zu den Märkten dieser Drittländer unter vergleichbaren Bedingungen gewährleistet wird. Er gilt unbeschadet der Verpflichtungen der Gemeinschaft oder ihrer Mitgliedstaaten gegenüber Drittländern.

(2) Ein im Hinblick auf die Vergabe eines Lieferauftrages eingereichtes Angebot kann zurückgewiesen werden, wenn der gemäß der Verordnung (EWG) Nr. 2913/92 des Rates vom 12. Oktober 1992 zur Festlegung des Zollkodex der Gemeinschaften [1] bestimmte Anteil der Erzeugnisse mit Ursprung in Drittländern mehr als 50 % des Gesamtwertes der in dem Angebot enthaltenen Erzeugnisse beträgt. Im Sinne dieses Artikels gilt Software, die in der Ausstattung für Telekommunikationsnetze verwendet wird, als Erzeugnis.

(3) Sind zwei oder mehrere Angebote gemäß den in Artikel 55 aufgestellten Zuschlagskriterien gleichwertig, so ist vorbehaltlich des Unterabsatzes 2 das Angebot zu bevorzugen, das gemäß Absatz 2 nicht zurückgewiesen werden kann. Die Preise solcher Angebote gelten im Sinne dieses Artikels als gleichwertig, sofern sie um nicht mehr als 3 % voneinander abweichen.

Ein Angebot ist jedoch dann nicht gemäß Unterabsatz 1 zu bevorzugen, wenn seine Annahme den Auftraggeber zum Erwerb von Ausrüstungen zwingen würde, die andere technische Merkmale als bereits genutzte Ausrüstungen haben und dies zu Inkompatibilität oder technischen Schwierigkeiten bei Betrieb und Wartung oder zu unverhältnismäßigen Kosten führen würde.

(4) Im Sinne dieses Artikels werden bei der Bestimmung des Anteils der aus Drittländern stammenden Erzeugnisse gemäß Absatz 2 diejenigen Drittländer nicht berücksichtigt, auf die der Geltungsbereich dieser Richtlinie durch einen Beschluss des Rates gemäß Absatz 1 ausgedehnt worden ist.

(5) Die Kommission unterbreitet dem Rat — erstmalig im zweiten Halbjahr des ersten Jahres nach Inkrafttreten dieser Richtlinie — einen jährlichen Bericht über die Fortschritte bei den multilateralen bzw. bilateralen Verhandlungen über den Zugang von Unternehmen der Gemeinschaft zu den Märkten von Drittländern in den unter diese Richtlinie fallenden Bereichen, über alle durch diese Verhandlungen erzielten Ergebnisse sowie über die tatsächliche Anwendung aller geschlossenen Übereinkünfte.

Ausgehend von diesen Entwicklungen kann der Rat diesen Artikel auf Vorschlag der Kommission mit qualifizierter Mehrheit ändern.

Artikel 59

Beziehungen zu Drittländern im Bereich der Bau-, Lieferungs- und Dienstleistungsaufträge

(1) Die Mitgliedstaaten informieren die Kommission über alle allgemeinen Schwierigkeiten rechtlicher oder faktischer Art, auf die ihre Unternehmen bei der Bewerbung um Dienstleistungsaufträge in Drittländern stoßen und die ihnen von ihren Unternehmen gemeldet werden.

(2) Die Kommission legt dem Rat bis spätestens 31. Dezember 2005 und anschließend in regelmäßigen Abständen einen Bericht über den Zugang zu Dienstleistungsaufträgen in Drittländern vor; dieser Bericht umfasst auch den Stand der Verhandlungen mit den betreffenden Drittländern, insbesondere im Rahmen der Welthandelsorganisationen.

(3) Die Kommission versucht Probleme durch Intervention in einem Drittland zu bereinigen, wenn sie aufgrund der in Absatz 2 genannten Berichte oder aufgrund anderer Informationen feststellt, dass das betreffende Drittland bei Vergabe von Dienstleistungsaufträgen

a) Unternehmen aus der Gemeinschaft keinen effektiven Zugang bietet, der mit dem in der Gemeinschaft gewährten Zugang für Unternehmen aus dem betreffenden Drittland vergleichbar ist,

b) Unternehmen aus der Gemeinschaft keine Inländerbehandlung oder nicht die gleichen Wettbewerbsmöglichkeiten wie inländischen Unternehmen bietet oder

c) Unternehmen aus anderen Drittländern gegenüber Unternehmen aus der Gemeinschaft bevorzugt.

(4) Die Mitgliedstaaten informieren die Kommission über alle Schwierigkeiten rechtlicher oder faktischer Art, auf die ihre Unternehmen stoßen bzw. die ihre Unternehmen ihnen melden und die auf die Nichteinhaltung der in Anhang XXIII aufgeführten Vorschriften des internationalen Arbeitsrechts zurückzuführen sind, wenn diese Unternehmen sich um Aufträge in Drittländern beworben haben.

(5) Die Kommission kann unter den in den Absätzen 3 und 4 genannten Bedingungen dem Rat jederzeit vorschlagen, die Vergabe von Dienstleistungsaufträgen an folgende Unternehmen während eines in einer entsprechenden Entscheidung festzulegenden Zeitraums einzuschränken oder auszusetzen:

a) Unternehmen, die dem Recht des betreffenden Drittlandes unterliegen;

[1] ABl. L 302 vom 19.10.1992, S. 1. Zuletzt geändert durch Verordnung (EG) Nr. 2700/2000 des Europäischen Parlaments und des Rates (ABl. L 311 vom 12.12.2000, S. 17).

b) mit den in Buchstabe a) bezeichneten Unternehmen verbundene Unternehmen, die ihren Sitz in der Gemeinschaft haben, die jedoch nicht in unmittelbarer und tatsächlicher Verbindung mit der Wirtschaft eines Mitgliedstaats stehen;

c) Unternehmen, die Angebote für Dienstleistungen mit Ursprung in dem betreffenden Drittland einreichen.

Der Rat entscheidet unverzüglich mit qualifizierter Mehrheit.

Die Kommission kann diese Maßnahmen entweder aus eigener Veranlassung oder auf Antrag eines Mitgliedstaats vorschlagen.

(6) Dieser Artikel lässt die Verpflichtungen der Gemeinschaft gegenüber Drittländern unberührt, die sich aus internationalen Übereinkommen über das öffentliche Beschaffungswesen — insbesondere aus von im Rahmen der WTO geschlossenen Übereinkommen — ergeben.

TITEL III

VORSCHRIFTEN ÜBER WETTBEWERBE IM DIENSTLEISTUNGSBEREICH

Artikel 60

Allgemeine Bestimmung

(1) Die Bestimmungen für die Durchführung eines Wettbewerbs müssen Absatz 2 dieses Artikels, Artikel 61 und den Artikeln 63 bis 66 entsprechen und sind den an der Teilnahme am Wettbewerb Interessierten mitzuteilen.

(2) Die Zulassung zur Teilnahme an einem Wettbewerb darf nicht beschränkt werden

a) auf das Gebiet eines Mitgliedstaats oder einen Teil davon,

b) aufgrund der Tatsache, dass nach dem Recht des Mitgliedstaats, in dem der Wettbewerb organisiert wird, nur natürliche oder nur juristische Personen teilnehmen dürften.

Artikel 61

Schwellenwerte

(1) Dieser Titel findet auf Wettbewerbe Anwendung, die im Rahmen von Vergabeverfahren für Dienstleistungsaufträge durchgeführt werden, deren geschätzter Wert ohne MwSt. mindestens 499 000 EUR beträgt.

Im Sinne dieses Absatzes bezeichnet der Begriff „Schwellenwert" den geschätzten Wert des Dienstleistungsauftrags ohne MWSt einschließlich etwaiger Preisgelder und/oder Zahlungen an die Teilnehmer.

(2) Dieser Titel findet auf sämtliche Wettbewerbe Anwendung, bei denen der Gesamtbetrag der Preisgelder und Zahlungen an Teilnehmer mindestens 499 000 EUR beträgt.

Im Sinne dieses Absatzes bezeichnet der Begriff „Schwellenwert" den Gesamtwert dieser Preisgelder und Zahlungen, einschließlich des geschätzten Wertes des Dienstleistungsauftrags ohne MwSt., der später nach Artikel 40 Absatz 3 vergeben werden könnte, sofern der Auftraggeber eine derartige Vergabe in der Wettbewerbsbekanntmachung nicht ausschließt.

Artikel 62

Ausgenommene Wettbewerbe

Dieser Titel findet keine Anwendung auf Wettbewerbe,

1. die für Dienstleistungsaufträge in denselben Fällen durchgeführt werden, die in den Artikeln 20, 21 und 22 für Dienstleistungsaufträge genannt sind;

2. die in dem betreffenden Mitgliedstaat zur Durchführung einer Tätigkeit organisiert werden, auf die Artikel 30 Absatz 1 gemäß einer Entscheidung der Kommission anwendbar ist oder gemäß Absatz 4 Unterabsätze 2 oder 3 oder Absatz 5 Unterabsatz 4 desselben Artikels als anwendbar gilt.

Artikel 63

Vorschriften über die Veröffentlichung und die Transparenz

(1) Auftraggeber, die einen Wettbewerb durchführen wollen, rufen mittels einer Bekanntmachung zum Wettbewerb auf. Auftraggeber, die einen Wettbewerb durchgeführt haben, übermitteln eine Bekanntmachung über die Ergebnisse. Der Aufruf zum Wettbewerb enthält die in Anhang XVIII aufgeführten Informationen, und die Bekanntmachung der Ergebnisse eines Wettbewerbs enthält die in Anhang XIX aufgeführten Informationen gemäß dem Format der Standardvordrucke, die von der Kommission nach dem in Artikel 68 Absatz 2 genannten Verfahren beschlossen werden.

Die Bekanntmachung der Ergebnisse eines Wettbewerbs wird der Kommission binnen zwei Monaten nach Abschluss des Wettbewerbs gemäß den von der Kommission nach dem Verfahren des Artikels 68 Absatz 2 festzulegenden Bedingungen übermittelt. Dabei trägt die Kommission allen in geschäftlicher Hinsicht sensiblen Aspekten Rechnung, auf die die Auftraggeber bei der Übermittlung der Angaben über die Anzahl der eingegangenen Pläne und Entwürfe, die Identität der Wirtschaftsteilnehmer und die angebotenen Preise hinweisen.

(2) Artikel 44 Absätze 2 bis 8 gilt ferner für Bekanntmachungen betreffend Wettbewerbe.

Artikel 64

Kommunikationsmittel

(1) Artikel 48 Absätze 1, 2 und 4 gilt für alle Mitteilungen im Zusammenhang mit Wettbewerben.

(2) Die Übermittlung, der Austausch und die Speicherung von Informationen erfolgen dergestalt, dass Vollständigkeit und Vertraulichkeit der von den Teilnehmern des Wettbewerbs übermittelten Informationen gewährleistet sind und das Preisgericht vom Inhalt der Pläne und Entwürfe erst Kenntnis erhält, wenn die Frist für ihre Vorlage verstrichen ist.

(3) Für die Vorrichtungen für den elektronischen Eingang der Pläne und Entwürfe gelten die folgenden Bestimmungen:

a) die Informationen über die Spezifikationen, die für die elektronische Übermittlung der Pläne und Entwürfe erforderlich sind, einschließlich Verschlüsselung, müssen den betroffenen Parteien zugänglich sein. Außerdem müssen die Vorrichtungen für den elektronischen Eingang der Pläne und Entwürfe den Anforderungen des Anhangs XXIV genügen;

b) die Mitgliedstaaten können Systeme der freiwilligen Akkreditierung einführen oder beibehalten, die zu einem erhöhten Angebot von Zertifizierungsdiensten für diese Vorrichtungen führen sollen.

Artikel 65

Durchführung des Wettbewerbs, Auswahl der Teilnehmer und das Preisgericht

(1) Bei der Durchführung von Wettbewerben wenden die Auftraggeber dieser Richtlinie entsprechende Verfahren an.

(2) Bei Wettbewerben mit beschränkter Teilnehmerzahl legen die Auftraggeber eindeutige und nichtdiskriminierende Auswahlkriterien fest. In jedem Fall muss die Zahl der Bewerber, die zur Teilnahme aufgefordert werden, ausreichen, um einen echten Wettbewerb zu gewährleisten.

(3) Das Preisgericht darf nur aus natürlichen Personen bestehen, die von den Teilnehmern des Wettbewerbs unabhängig sind. Wird von den Wettbewerbsteilnehmern eine bestimmte berufliche Qualifikation verlangt, so muss mindestens ein Drittel der Preisrichter über dieselbe oder eine gleichwertige Qualifikation verfügen.

Artikel 66

Entscheidungen des Preisgerichts

(1) Das Preisgericht ist in seinen Entscheidungen und Stellungnahmen unabhängig.

(2) Es prüft die von den Bewerbern vorgelegten Pläne und Wettbewerbsarbeiten unter Wahrung der Anonymität und nur anhand der Kriterien, die in der Wettbewerbsbekanntmachung genannt sind.

(3) Es erstellt über die Rangfolge der von ihm ausgewählten Projekte einen von den Preisrichtern zu unterzeichnenden Bericht, in dem auf die einzelnen Wettbewerbsarbeiten eingegangen wird und die Bemerkungen des Preisgerichts sowie gegebenenfalls noch zu klärende Fragen aufgeführt sind.

(4) Bis zur Stellungnahme oder zur Entscheidung des Preisgerichts ist Anonymität zu wahren.

(5) Die Bewerber können bei Bedarf aufgefordert werden, zur Klärung bestimmter Aspekte der Wettbewerbsarbeiten Antworten auf Fragen zu erteilen, die das Preisgericht in seinem Protokoll festgehalten hat.

(6) Über den Dialog zwischen den Preisrichtern und den Bewerbern wird ein umfassendes Protokoll erstellt.

TITEL IV

STATISTISCHE PFLICHTEN, DURCHFÜHRUNGSBEFUGNISSE UND SCHLUSSBESTIMMUNGEN

Artikel 67

Statistische Pflichten

(1) Die Mitgliedstaaten tragen entsprechend den Modalitäten, die nach dem in Artikel 68 Absatz 2 genannten Verfahren festzulegen sind, dafür Sorge, dass die Kommission jährlich einen statistischen Bericht über den nach Mitgliedstaat und Tätigkeitskategorie der Anhänge I bis X aufgeschlüsselten Gesamtwert der vergebenen Aufträge erhält, die unterhalb der in Artikel 16 festgelegten Schwellenwerte liegen, die jedoch, durch die Bestimmungen dieser Richtlinie erfasst wären, wenn es diese Schwellenwerte nicht gäbe.

(2) Im Zusammenhang mit den Tätigkeitskategorien in den Anhängen II, III, V, IX und X tragen die Mitgliedstaaten dafür Sorge, dass die Kommission entsprechend den Modalitäten, die nach dem Verfahren des Artikels 68 Absatz 2 festzulegen sind, spätestens am 31. Oktober 2004 und danach jeweils vor dem 31. Oktober jedes Jahres eine statistische Aufstellung der im Vorjahr vergebenen Aufträge erhält. Diese statistische Aufstellung enthält sämtliche Angaben, die erforderlich sind, um die ordnungsgemäße Anwendung des Abkommens zu überprüfen.

Die nach Unterabsatz 1 geforderten Angaben betreffen nicht Aufträge, die F&E-Dienstleistungen der Kategorie 8 des Anhangs XVII Teil A, Fernmeldedienstleistungen der Kategorie 5 XVII Teil A des Fernmeldewesens mit den CPC-Referenznummern 7524, 7525 und 7526 und Dienstleistungen des Anhangs XVII Teil B zum Gegenstand haben.

(3) Die Modalitäten nach den Absätzen 1 und 2 werden so festgelegt, dass sichergestellt ist, dass

a) Aufträge von geringerer Bedeutung im Interesse einer verwaltungsmäßigen Vereinfachung ausgeschlossen werden können, ohne dass dadurch die Brauchbarkeit der Statistiken in Frage gestellt wird;

b) die Vertraulichkeit der übermittelten Angaben gewahrt wird.

Artikel 68

Ausschussverfahren

(1) Die Kommission wird von dem mit Artikel 1 des Beschlusses 71/306/EWG des Rates [1] eingesetzten Beratenden Ausschuss für öffentliches Auftragswesen (nachstehend „Ausschuss" genannt) unterstützt.

(2) Wird auf diesen Absatz Bezug genommen, so gelten die Artikel 3 und 7 des Beschlusses 1999/468/EG unter Beachtung von dessen Artikel 8.

(3) Der Ausschuss gibt sich eine Geschäftsordnung.

Artikel 69

Neufestsetzung der Schwellenwerte

(1) Die Kommission überprüft die in Artikel 16 genannten Schwellenwerte alle zwei Jahre ab dem 30. April 2004 und setzt sie — gegebenenfalls unter Berücksichtigung von Unterabsatz 2 — nach dem in Artikel 68 Absatz 2 genannten Verfahren neu fest.

Die Berechnung dieser Schwellenwerte beruht auf dem durchschnittlichen Tageskurs des Euro ausgedrückt in Sonderziehungsrechten während der 24 Monate, die am letzten Augusttag enden, der der Neufestsetzung zum 1. Januar vorausgeht. Der so neu festgesetzte Schwellenwert wird, sofern erforderlich, auf volle Tausend Euro abgerundet, um die Einhaltung der geltenden Schwellenwerte zu gewährleisten, die in dem Übereinkommen vorgesehen sind und in SZR ausgedrückt werden.

(2) Anlässlich der in Absatz 1 genannten Neufestsetzung passt die Kommission nach dem in Artikel 68 Absatz 2 genannten Verfahren die in Artikel 61 (Wettbewerbe) festgesetzten Schwellenwerte an die für Dienstleistungsaufträge geltenden Schwellenwerte an.

Der Gegenwert der gemäß Absatz 1 festgesetzten Schwellenwerte in den nationalen Währungen der Mitgliedstaaten, die nicht an der Währungsunion teilnehmen, wird grundsätzlich alle zwei Jahre ab dem 1. Januar 2004 überprüft. Die Berechnung dieses Wertes beruht auf dem durchschnittlichen Tageskurs dieser Währungen in Euro, während des Zeitraums von 24 Monaten, der am letzten Augusttag endet, der der Neufestsetzung mit Wirkung zum 1. Januar vorausgeht.

(3) Die gemäß Absatz 1 neu festgesetzten Schwellenwerte, ihr Gegenwert in den nationalen Währungen sowie die angepassten Schwellenwerte gemäß Absatz 2 werden von der Kommission im Amtsblatt der Europäischen Union zu Beginn des Monats November nach ihrer Neufestsetzung veröffentlicht.

[1] ABl. L 185 vom 16.8.1971, S. 15. Geändert durch Beschluss 77/62/EWG (ABl. L 13 vom 15.1.1977, S. 15).

Artikel 70

Änderungen

Die Kommission kann nach dem in Artikel 68 Absatz 2 genannten Verfahren Folgendes ändern:

a) die Listen der Auftraggeber in den Anhängen I bis X, so dass sie den in den Artikeln 2 bis 7 genannten Kriterien entsprechen;

b) die Verfahren für Erstellung, Übermittlung, Eingang, Übersetzung, Erhebung und Verteilung der in den Artikeln 41, 42, 43 und 63 genannten Bekanntmachungen;

c) die Modalitäten für gezielte Bezugnahmen auf bestimmte Positionen der CPV-Klassifikation in den Bekanntmachungen;

d) die Referenznummern der Nomenklatur, auf die in Anhang XVII Bezug genommen wird, sofern der materielle Anwendungsbereich der Richtlinie davon unberührt bleibt, und die Modalitäten für die Bezugnahme in den Bekanntmachungen auf bestimmte Positionen dieser Klassifikation innerhalb der im Anhang aufgeführten Dienstleistungskategorien;

e) die Referenznummern der Nomenklatur gemäß Anhang XI, sofern der materielle Anwendungsbereich der Richtlinie davon unberührt bleibt, und die Modalitäten für die Bezugnahme auf bestimmte Positionen dieser Klassifikation in den Bekanntmachungen;

f) Anhang XI;

g) das Verfahren des Anhangs XX zur die Übermittlung und Veröffentlichung von Daten aus Verwaltungsgründen oder zur Anpassung an den technischen Fortschritt;

h) die Modalitäten und technischen Merkmale der Vorrichtungen für den elektronischen Eingang gemäß Anhang XXIV Buchstaben a), f) und g);

i) aus den in Artikel 67 Absatz 3 genannten Gründen der Verwaltungsvereinfachung die Verfahren für Anwendung und Erstellung, Übermittlung, Eingang, Übersetzung, Erhebung und Verteilung der in Artikel 67 Absätze 1 und 2 genannten statistischen Aufstellungen;

j) die technischen Modalitäten der in Artikel 69 Absatz 1 und Absatz 2 Unterabsatz 2 genannten Berechnungsmethoden.

Artikel 71

Umsetzung

(1) Die Mitgliedstaaten erlassen die erforderlichen Rechts- und Verwaltungsvorschriften, um dieser Richtlinie spätestens am 31. Januar 2006 nachzukommen. Sie setzen die Kommission unverzüglich davon in Kenntnis.

Zur Anwendung der Vorschriften, die erforderlich sind, um Artikel 6 dieser Richtlinie nachzukommen, können die Mitgliedstaaten einen zusätzlichen Zeitraum von bis zu 35 Monaten nach Ablauf der in Unterabsatz 1 vorgesehenen Frist in Anspruch nehmen.

Wenn die Mitgliedstaaten diese Vorschriften erlassen, nehmen sie in den Vorschriften selbst oder durch einen Hinweis bei ihrer amtlichen Veröffentlichung auf diese Richtlinie Bezug. Die Mitgliedstaaten regeln die Einzelheiten dieser Bezugnahme.

Artikel 30 ist ab dem 30. April 2004 anwendbar.

(2) Die Mitgliedstaaten teilen der Kommission den Wortlaut der wichtigsten innerstaatlichen Rechtsvorschriften mit, die sie auf dem unter diese Richtlinie fallenden Gebiet erlassen.

Artikel 72

Kontrollmechanismen

Gemäß der Richtlinie 92/13/EWG des Rates vom 25. Februar 1992 zur Koordinierung der Rechts- und Verwaltungsvorschriften für die Anwendung der Gemeinschaftsvorschriften über die Auftragsvergabe durch Auftraggeber im Bereich der Wasser-, Energie- und Verkehrsversorgung sowie im Telekommunikationssektor [1] gewährleisten die Mitgliedstaaten die Anwendung der vorliegenden Richtlinie durch wirksame, zugängliche und transparente Mechanismen.

Zu diesem Zweck können sie unter anderem eine unabhängige Stelle benennen oder einrichten.

Artikel 73

Aufhebungen

Die Richtlinie 93/38/EWG wird unbeschadet der Verpflichtungen der Mitgliedstaaten im Zusammenhang mit den Fristen für die Umsetzung in innerstaatliches Recht nach Anhang XXV aufgehoben.

Verweise auf die aufgehobene Richtlinie gelten als Verweise auf die vorliegende Richtlinie und sind gemäß der Entsprechungstabelle in Anhang XXVI zu lesen.

Artikel 74

Inkrafttreten

Diese Richtlinie tritt am Tag ihrer Veröffentlichung im *Amtsblatt der Europäischen Union in Kraft.*

Artikel 75

Adressaten

Diese Richtlinie ist an alle Mitgliedstaaten gerichtet.

Geschehen zu Straßburg am 31. März 2004.

Im Namen des Europäischen Parlaments	*Im Namen des Rates*
Der Präsident	*Der Präsident*
P. COX	D. ROCHE

[1] ABl. L 76 vom 23.3.1992, S. 14. Zuletzt geändert durch die Beitrittsakte 1994.

RICHTLINIE 2004/18/EG DES EUROPÄISCHEN PARLAMENTS UND DES RATES

vom 31. März 2004

über die Koordinierung der Verfahren zur Vergabe öffentlicher Bauaufträge, Lieferaufträge und Dienstleistungsaufträge

DAS EUROPÄISCHE PARLAMENT UND DER RAT DER EUROPÄISCHEN UNION —

gestützt auf den Vertrag zur Gründung der Europäischen Gemeinschaft, insbesondere auf Artikel 47 Absatz 2, Artikel 55 und Artikel 95,

auf Vorschlag der Kommission ([1]),

nach Stellungnahme des Europäischen Wirtschafts- und Sozialausschusses ([2]),

nach Stellungnahme des Ausschusses der Regionen ([3]),

gemäß dem Verfahren des Artikels 251 des Vertrags ([4]), aufgrund des vom Vermittlungsausschuss am 9. Dezember 2003 gebilligten gemeinsamen Entwurfs,

in Erwägung nachstehender Gründe:

(1) Anlässlich weiterer Änderungen der Richtlinie 92/50/EWG des Rates vom 18. Juni 1992 über die Koordinierung der Verfahren zur Vergabe öffentlicher Dienstleistungsaufträge ([5]), der Richtlinie 93/36/EWG des Rates vom 14. Juni 1993 über die Koordinierung der Verfahren zur Vergabe öffentlicher Lieferaufträge ([6]) und der Richtlinie 93/37/EWG des Rates vom 14. Juni 1993 über die Koordinierung der Verfahren zur Vergabe öffentlicher Bauaufträge ([7]) mit dem Ziel, die Texte zu vereinfachen und zu modernisieren, so wie dies sowohl von den öffentlichen Auftraggebern als auch von den Wirtschaftsteilnehmern als Reaktion auf das Grünbuch der Kommission vom 27. November 1996 angeregt wurde, empfiehlt sich aus Gründen der Klarheit eine Neufassung in einem einzigen Text. Die vorliegende Richtlinie gründet sich auf die Rechtsprechung des Gerichtshofs, insbesondere auf die Urteile zu den Zuschlagskriterien, wodurch klargestellt wird, welche Möglichkeiten die öffentlichen Auftraggeber haben, auf Bedürfnisse der betroffenen Allgemeinheit, einschließlich im ökologischen und/oder sozialen Bereich, einzugehen, sofern derartige Kriterien im Zusammenhang mit dem Auftragsgegenstand stehen, dem öffentlichen Auftraggeber keine unbeschränkte Wahlfreiheit einräumen, ausdrücklich erwähnt sind und den in Erwägungsgrund 2 genannten grundlegenden Prinzipien entsprechen.

(2) Die Vergabe von Aufträgen in den Mitgliedstaaten auf Rechnung des Staates, der Gebietskörperschaften und anderer Einrichtungen des öffentlichen Rechts ist an die Einhaltung der im Vertrag niedergelegten Grundsätze gebunden, insbesondere des Grundsatzes des freien Warenverkehrs, des Grundsatzes der Niederlassungsfreiheit und des Grundsatzes der Dienstleistungsfreiheit sowie der davon abgeleiteten Grundsätze wie z.B. des Grundsatzes der Gleichbehandlung, des Grundsatzes der Nichtdiskriminierung, des Grundsatzes der gegenseitigen Anerkennung, des Grundsatzes der Verhältnismäßigkeit und des Grundsatzes der Transparenz. Für öffentliche Aufträge, die einen bestimmten Wert überschreiten, empfiehlt sich indessen die Ausarbeitung von auf diesen Grundsätzen beruhenden Bestimmungen zur gemeinschaftlichen Koordinierung der nationalen Verfahren für die Vergabe solcher Aufträge, um die Wirksamkeit dieser Grundsätze und die Öffnung des öffentlichen Beschaffungswesens für den Wettbewerb zu garantieren. Folglich sollten diese Koordinierungsbestimmungen nach Maßgabe der genannten Regeln und Grundsätze sowie gemäß den anderen Bestimmungen des Vertrags ausgelegt werden.

(3) Die Koordinierungsbestimmungen sollten die in den einzelnen Mitgliedstaaten geltenden Verfahren und Verwaltungspraktiken so weit wie möglich berücksichtigen.

(4) Die Mitgliedstaaten sollten dafür sorgen, dass die Teilnahme einer Einrichtung des öffentlichen Rechts als Bieter in einem Verfahren zur Vergabe öffentlicher Aufträge keine Wettbewerbsverzerrungen gegenüber privatrechtlichen Bietern verursacht.

(5) Nach Artikel 6 des Vertrags müssen die Erfordernisse des Umweltschutzes bei der Festlegung und Durchführung der in Artikel 3 des Vertrags genannten Gemeinschaftspolitiken und maßnahmen insbesondere zur Förderung einer nachhaltigen Entwicklung einbezogen werden. Diese Richtlinie stellt daher klar, wie die öffentlichen Auftraggeber zum Umweltschutz und zur Förderung einer nachhaltigen Entwicklung beitragen können, und garantiert ihnen gleichzeitig, dass sie für ihre Aufträge ein optimales Preis/Leistungsverhältnis erzielen können.

([1]) ABl. C 29 E vom 30.1.2001, S. 11 und ABl. C 203 E vom 27.8.2002, S. 210.
([2]) ABl. C 193 vom 10.7.2001, S. 7.
([3]) ABl. C 144 vom 16.5.2001, S. 23.
([4]) Stellungnahme des Europäischen Parlaments vom 17. Januar 2002 (ABl. C 271 E vom 7.11.2002, S. 176), Gemeinsamer Standpunkt des Rates vom 20. März 2003 (ABl. C 147 E vom 24.6.2003, S. 1), Standpunkt des Europäischen Parlaments vom 2. Juli 2003 (noch nicht im Amtsblatt veröffentlicht). Legislative Entschließung des Parlaments vom 29. Januar 2004 (noch nicht im Amtsblatt veröffentlicht) und Beschluss des Rates vom 2. Februar 2004.
([5]) ABl. L 209 vom 24.7.1992, S. 1. Zuletzt geändert durch die Richtlinie 2001/78/EG der Kommission (ABl. L 285 vom 29.10.2001, S. 1).
([6]) ABl. L 199 vom 9.8.1993, S. 1. Zuletzt geändert durch die Richtlinie 2001/78/EG der Kommission.
([7]) ABl. L 199 vom 9.8.1993, S. 54. Zuletzt geändert durch die Richtlinie 2001/78/EG der Kommission.

(6) Keine Bestimmung dieser Richtlinie sollte dem Erlass oder der Durchsetzung von Maßnahmen entgegenstehen, die zum Schutz der öffentlichen Sittlichkeit, Ordnung und Sicherheit oder zum Schutz der Gesundheit und des Lebens von Menschen und Tieren oder der Gesundheit von Pflanzen, insbesondere im Hinblick auf eine nachhaltige Entwicklung, notwendig sind, sofern diese Maßnahmen mit dem Vertrag im Einklang stehen.

(7) Mit dem Beschluss 94/800/EG des Rates vom 22. Dezember 1994 über den Abschluss der Übereinkünfte im Rahmen der multilateralen Verhandlungen der Uruguay-Runde (1986-1994) im Namen der Europäischen Gemeinschaft in Bezug auf die in ihre Zuständigkeiten fallenden Bereiche [1] wurde unter anderem das WTO-Übereinkommen über das öffentliche Beschaffungswesen, nachstehend „Übereinkommen" genannt, genehmigt, das zum Ziel hat, einen multilateralen Rahmen ausgewogener Rechte und Pflichten im öffentlichen Beschaffungswesen festzulegen, um den Welthandel zu liberalisieren und auszuweiten.

Aufgrund der internationalen Rechte und Pflichten, die sich für die Gemeinschaft aus der Annahme des Übereinkommens ergeben, sind auf Bieter und Erzeugnisse aus Drittländern, die dieses Übereinkommen unterzeichnet haben, die darin enthaltenen Regeln anzuwenden. Das Übereinkommen hat keine unmittelbare Wirkung. Es ist daher angebracht, dass die unter das Übereinkommen fallenden öffentlichen Auftraggeber, die der vorliegenden Richtlinie nachkommen und sie auf Wirtschaftsteilnehmer aus Drittländern anwenden, die das Übereinkommen unterzeichnet haben, sich damit im Einklang mit dem Übereinkommen befinden. Diese Koordinierungsbestimmungen sollten den Wirtschaftsteilnehmern in der Gemeinschaft die gleichen günstigen Teilnahmebedingungen bei der Vergabe öffentlicher Aufträge garantieren, wie sie auch den Wirtschaftsteilnehmern aus Drittländern, die das Übereinkommen unterzeichnet haben, gewährt werden.

(8) Bevor ein Verfahren zur Vergabe eines öffentlichen Auftrags eingeleitet wird, können die öffentlichen Auftraggeber unter Rückgriff auf einen „technischen Dialog" eine Stellungnahme einholen bzw. entgegennehmen, die bei der Erstellung der Verdingungsunterlagen (*) verwendet werden kann, vorausgesetzt, dass diese Stellungnahme den Wettbewerb nicht ausschaltet.

(9) Angesichts der für die öffentlichen Bauaufträge kennzeichnenden Vielfalt der Aufgaben sollte der öffentliche Auftraggeber sowohl die getrennte als auch die gemeinsame Vergabe von öffentlichen Aufträgen für die Ausführung und Planung der Bauvorhaben vorsehen können. Diese Richtlinie bezweckt nicht, eine gemeinsame oder eine getrennte Vergabe vorzuschreiben. Die Entscheidung über eine getrennte oder die gemeinsame Vergabe des öffentlichen Auftrags muss sich an qualitativen und wirtschaftlichen Kriterien orientieren, die in den einzelstaatlichen Vorschriften festgelegt werden können.

(10) Ein öffentlicher Auftrag gilt nur dann als öffentlicher Bauauftrag, wenn er speziell die Ausführung der in Anhang I genannten Tätigkeiten zum Gegenstand hat; er kann sich jedoch auf andere Leistungen erstrecken, die für die Ausführung dieser Tätigkeiten erforderlich sind. Öffentliche Dienstleistungsaufträge, insbesondere im Bereich der Grundstücksverwaltung, können unter bestimmten Umständen Bauleistungen umfassen. Sofern diese Bauleistungen jedoch nur Nebenarbeiten im Verhältnis zum Hauptgegenstand des Vertrags darstellen und eine mögliche Folge oder eine Ergänzung des letzteren sind, rechtfertigt die Tatsache, dass der Vertrag diese Bauleistungen umfasst, nicht eine Einstufung des Vertrags als öffentlicher Bauauftrag.

(11) Es sollten eine gemeinschaftliche Definition der Rahmenvereinbarungen sowie spezifische Vorschriften für die Rahmenvereinbarungen, die für in den Anwendungsbereich dieser Richtlinie fallende Aufträge geschlossen werden, vorgesehen werden. Nach diesen Vorschriften kann ein öffentlicher Auftraggeber, wenn er eine Rahmenvereinbarung gemäß den Vorschriften dieser Richtlinie insbesondere über Veröffentlichung, Fristen und Bedingungen für die Abgabe von Angeboten abschließt, während der Laufzeit der Rahmenvereinbarung Aufträge auf der Grundlage dieser Rahmenvereinbarung entweder durch Anwendung der in der Rahmenvereinbarung enthaltenen Bedingungen oder, falls nicht alle Bedingungen im Voraus in dieser Vereinbarung festgelegt wurden, durch erneute Eröffnung des Wettbewerbs zwischen den Parteien der Rahmenvereinbarung in Bezug auf die nicht festgelegten Bedingungen vergeben. Bei der Wiedereröffnung des Wettbewerbs sollten bestimmte Vorschriften eingehalten werden, um die erforderliche Flexibilität und die Einhaltung der allgemeinen Grundsätze, insbesondere des Grundsatzes der Gleichbehandlung, zu gewährleisten. Aus diesen Gründen sollte die Laufzeit der Rahmenvereinbarung begrenzt werden und sollte vier Jahre nicht überschreiten dürfen, außer in von den öffentlichen Auftraggebern ordnungsgemäß begründeten Fällen.

(12) Es werden fortlaufend bestimmte neue Techniken der Online-Beschaffung entwickelt. Diese Techniken ermöglichen es, den Wettbewerb auszuweiten und die Effizienz des öffentlichen Beschaffungswesens - insbesondere durch eine Verringerung des Zeitaufwands und die durch die Verwendung derartiger neuer Techniken erzielten Einsparungseffekte - zu verbessern. Die öffentlichen Auftraggeber können Techniken der Online-Beschaffung einsetzen, solange bei ihrer Verwendung die Vorschriften dieser Richtlinie und die Grundsätze der Gleichbehandlung, der Nichtdiskriminierung und der Transparenz eingehalten werden. Insofern können Bieter insbesondere in den Fällen, in denen im Zuge der Durchführung einer Rahmenvereinbarung ein erneuter Aufruf zum Wettbewerb erfolgt oder ein dynamisches Beschaffungssystem zum Einsatz kommt, ihr Angebot in Form ihres elektronischen Katalogs einreichen, sofern sie die vom öffentlichen Auftraggeber gewählten Kommunikationsmittel gemäß Artikel 42 verwenden.

[1] ABl. L 336 vom 23.12.1994, S. 1.

(*) in Österreich: Ausschreibungsunterlagen.

(13) In Anbetracht des Umstands, dass sich Online-Beschaffungssysteme rasch verbreiten, sollten schon jetzt geeignete Vorschriften erlassen werden, die es den öffentlichen Auftraggebern ermöglichen, die durch diese Systeme gebotenen Möglichkeiten umfassend zu nutzen. Deshalb sollte ein vollelektronisch arbeitendes dynamisches Beschaffungssystem für Beschaffungen marktüblicher Leistungen definiert und präzise Vorschriften für die Einrichtung und die Arbeitsweise eines solchen Systems festgelegt werden, um sicherzustellen, dass jeder Wirtschaftsteilnehmer, der sich daran beteiligen möchte, gerecht behandelt wird. Jeder Wirtschaftsteilnehmer sollte sich an einem solchen System beteiligen können, sofern er ein vorläufiges Angebot im Einklang mit den Verdingungsunterlagen einreicht und die Eignungskriterien (*) erfüllt. Dieses Beschaffungsverfahren ermöglicht es den öffentlichen Auftraggebern, durch die Einrichtung eines Verzeichnisses von bereits ausgewählten Bietern und die neuen Bietern eingeräumte Möglichkeit, sich daran zu beteiligen, dank der eingesetzten elektronischen Mittel über ein besonders breites Spektrum von Angeboten zu verfügen, und somit durch Ausweitung des Wettbewerbs eine optimale Verwendung der öffentlichen Mittel zu gewährleisten.

(14) Elektronische Auktionen stellen eine Technik dar, die sich noch stärker verbreiten wird; deshalb sollten diese Auktionen im Gemeinschaftsrecht definiert und speziellen Vorschriften unterworfen werden, um sicherzustellen, dass sie unter uneingeschränkter Wahrung der Grundsätze der Gleichbehandlung, der Nichtdiskriminierung und der Transparenz ablaufen. Dazu ist vorzusehen, dass diese elektronischen Auktionen nur Aufträge für Bauleistungen, Lieferungen oder Dienstleistungen betreffen, für die präzise Spezifikationen erstellt werden können. Dies kann insbesondere bei wiederkehrenden Liefer-, Bau- und Dienstleistungsaufträgen der Fall sein. Zu dem selben Zweck muss es auch möglich sein, die jeweilige Rangfolge der Bieter zu jedem Zeitpunkt der elektronischen Auktion festzustellen. Der Rückgriff auf elektronische Auktionen bietet den öffentlichen Auftraggebern die Möglichkeit, die Bieter zur Vorlage neuer, nach unten korrigierter Preise aufzufordern, und - sofern das wirtschaftlich günstigste Angebot den Zuschlag erhalten soll - auch andere als die preisbezogenen Angebotskomponenten zu verbessern. Zur Wahrung des Grundsatzes der Transparenz dürfen allein diejenigen Komponenten Gegenstand elektronischer Auktionen sein, die auf elektronischem Wege - ohne Eingreifen und/oder Beurteilung seitens des öffentlichen Auftraggebers – automatisch bewertet werden können, d.h. nur die Komponenten, die quantifizierbar sind, so dass sie in Ziffern oder in Prozentzahlen ausgedrückt werden können. Hingegen sollten diejenigen Aspekte der Angebote, bei denen nichtquantifizierbare Komponenten zu beurteilen sind, nicht Gegenstand von elektronischen Auktionen sein. Folglich sollten bestimmte Bau- und Dienstleistungsaufträge, bei denen eine geistige Leistung zu erbringen ist - wie z. B. die Konzeption von Bauarbeiten-, nicht Gegenstand von elektronischen Auktionen sein.

(15) In den Mitgliedstaaten haben sich verschiedene zentrale Beschaffungsverfahren entwickelt. Mehrere öffentliche Auftraggeber haben die Aufgabe, für andere öffentliche Auftraggeber Ankäufe zu tätigen oder öffentliche Aufträge zu vergeben/Rahmenvereinbarungen zu schließen. In Anbetracht der großen Mengen, die beschafft werden, tragen diese Verfahren zur Verbesserung des Wettbewerbs und zur Rationalisierung des öffentlichen Beschaffungswesens bei. Daher sollte der Begriff der für öffentliche Auftraggeber tätigen zentralen Beschaffungsstelle im Gemeinschaftsrecht definiert werden. Außerdem sollte unter Einhaltung der Grundsätze der Nichtdiskriminierung und der Gleichbehandlung definiert werden, unter welchen Voraussetzungen davon ausgegangen werden kann, dass öffentliche Auftraggeber, die Bauleistungen, Waren und/oder Dienstleistungen über eine zentrale Beschaffungsstelle beziehen, diese Richtlinie eingehalten haben.

(16) Zur Berücksichtigung der unterschiedlichen Gegebenheiten in den Mitgliedstaaten sollte es in das Ermessen derselben gestellt werden, zu entscheiden, ob für die öffentlichen Auftraggeber die Möglichkeit vorgesehen werden soll, auf Rahmenvereinbarungen, zentrale Beschaffungsstellen, dynamische Beschaffungssysteme, elektronische Auktionen und Verhandlungsverfahren, wie sie in dieser Richtlinie vorgesehen und geregelt sind, zurückzugreifen.

(17) Eine Vielzahl von Schwellenwerten für die Anwendung der gegenwärtig in Kraft befindlichen Koordinierungsbestimmungen erschwert die Arbeit der öffentlichen Auftraggeber. Im Hinblick auf die Währungsunion ist es darüber hinaus angebracht, in Euro ausgedrückte Schwellenwerte festzulegen. Folglich sollten Schwellenwerte in Euro festgesetzt werden, die die Anwendung dieser Bestimmungen vereinfachen und gleichzeitig die Einhaltung der im Übereinkommen genannten Schwellenwerte sicherstellen, die in Sonderziehungsrechten ausgedrückt sind. Vor diesem Hintergrund sind die in Euro ausgedrückten Schwellenwerte regelmäßig zu überprüfen, um sie gegebenenfalls an mögliche Kursschwankungen des Euro gegenüber dem Sonderziehungsrecht anzupassen.

(18) Der Dienstleistungsbereich lässt sich für die Anwendung der Regeln dieser Richtlinie und zur Beobachtung am besten durch eine Unterteilung in Kategorien in Anlehnung an bestimmte Positionen einer gemeinsamen Nomenklatur beschreiben und in zwei Anhängen, II Teil A und II Teil B, nach der für sie geltenden Regelung zusammenfassen. Für die in Anhang II Teil B genannten Dienstleistungen sollten die Bestimmungen dieser Richtlinie unbeschadet der Anwendung besonderer gemeinschaftsrechtlicher Bestimmungen für die jeweiligen Dienstleistungen gelten.

(19) Die volle Anwendung dieser Richtlinie auf Dienstleistungsaufträge sollte für eine Übergangszeit auf Aufträge beschränkt werden, bei denen ihre Bestimmungen dazu beitragen, alle Möglichkeiten für eine Zunahme des grenzüberschreitenden Handels voll auszunutzen. Aufträge für andere Dienstleistungen sollten in diesem Übergangszeitraum beobachtet werden, bevor die volle

(*) In Österreich kann dieser Begriff auch Auswahlkriterien umfassen.

Anwendung dieser Richtlinie beschlossen werden kann. Es ist daher ein entsprechendes Beobachtungsinstrument zu schaffen. Dieses Instrument sollte gleichzeitig den Betroffenen die einschlägigen Informationen zugänglich machen.

(20) Öffentliche Aufträge, die von öffentlichen Auftraggebern aus den Bereichen Wasser, Energie, Verkehr und Postdienste vergeben werden und die Tätigkeiten in diesen Bereichen betreffen, fallen unter die Richtlinie 2004/17/EG des Europäischen Parlaments und des Rates vom 31. März 2004 zur Koordinierung der Auftragsvergabe durch Auftraggeber im Bereich der Wasser-, Energie- und Verkehrsversorgung sowie der Postdienste [1]. Dagegen müssen Aufträge, die von öffentlichen Auftraggebern im Rahmen der Nutzung von Dienstleistungen im Bereich der Seeschifffahrt, Küstenschifffahrt oder Binnenschifffahrt vergeben werden, in den Anwendungsbereich der vorliegenden Richtlinie fallen.

(21) Da infolge der gemeinschaftlichen Rechtsvorschriften zur Liberalisierung des Telekommunikationssektors auf den Telekommunikationsmärkten inzwischen wirksamer Wettbewerb herrscht, müssen öffentliche Aufträge in diesem Bereich aus dem Anwendungsbereich der vorliegenden Richtlinie ausgeklammert werden, sofern sie allein mit dem Ziel vergeben werden, den Auftraggebern bestimmte Tätigkeiten auf dem Telekommunikationssektor zu ermöglichen. Zur Definition dieser Tätigkeiten wurden die Begriffsbestimmungen der Artikel 1, 2 und 8 der Richtlinie 93/38/EWG des Rates vom 14. Juni 1993 zur Koordinierung der Auftragsvergabe durch Auftraggeber im Bereich der Wasser-, Energie- und Verkehrsversorgung sowie im Telekommunikationssektor [2] übernommen, was bedeutet, dass die vorliegende Richtlinie nicht für Aufträge gilt, die nach Artikel 8 der Richtlinie 93/38/EWG von deren Anwendungsbereich ausgenommen worden sind.

(22) Es sollte vorgesehen werden, dass in bestimmten Fällen von der Anwendung der Maßnahmen zur Koordinierung der Verfahren aus Gründen der Staatssicherheit oder der staatlichen Geheimhaltung abgesehen werden kann, oder wenn besondere Vergabeverfahren zur Anwendung kommen, die sich aus internationalen Übereinkünften ergeben, die die Stationierung von Truppen betreffen oder für internationale Organisationen gelten.

(23) Gemäß Artikel 163 des Vertrags trägt unter anderem die Unterstützung der Forschung und der technischen Entwicklung dazu bei, die wissenschaftlichen und technischen Grundlagen der gemeinschaftlichen Industrie zu stärken; die Öffnung der öffentlichen Dienstleistungsmärkte hat einen Anteil an der Erreichung dieses Zieles. Die Mitfinanzierung von Forschungsprogrammen sollte nicht Gegenstand dieser Richtlinie sein; nicht unter diese Richtlinie fallen deshalb Aufträge über Forschungs- und Entwicklungsdienstleistungen, mit Ausnahme derer, deren Ergebnisse ausschließlich Eigentum des öffentlichen Auftraggebers für die Nutzung bei der Ausübung seiner eigenen Tätigkeit sind, sofern die Dienstleistung vollständig durch den öffentlichen Auftraggeber vergütet wird.

(24) Dienstleistungsaufträge, die den Erwerb oder die Miete von unbeweglichem Vermögen oder Rechten daran betreffen, weisen Merkmale auf, die die Anwendung von Vorschriften über die Vergabe von öffentlichen Aufträgen unangemessen erscheinen lassen.

(25) Bei der Vergabe öffentlicher Aufträge über bestimmte audiovisuelle Dienstleistungen im Fernseh- und Rundfunkbereich sollten besondere kulturelle und gesellschaftspolitische Erwägungen berücksichtigt werden können, die die Anwendung von Vergabevorschriften unangemessen erscheinen lassen. Aus diesen Gründen muss eine Ausnahme für die öffentlichen Dienstleistungsaufträge vorgesehen werden, die den Ankauf, die Entwicklung, die Produktion oder die Koproduktion gebrauchsfertiger Programme sowie andere Vorbereitungsdienste zum Gegenstand haben, wie z. B. Dienste im Zusammenhang mit den für die Programmproduktion erforderlichen Drehbüchern oder künstlerischen Leistungen, sowie Aufträge betreffend die Ausstrahlungszeit von Sendungen. Diese Ausnahme sollte jedoch nicht für die Bereitstellung des für die Produktion, die Koproduktion und die Ausstrahlung dieser Programme erforderlichen technischen Materials gelten. Als Sendung sollte die Übertragung und Verbreitung durch jegliches elektronische Netzwerk gelten.

(26) Schiedsgerichts- und Schlichtungsdienste werden normalerweise von Organisationen oder Personen übernommen, deren Bestellung oder Auswahl in einer Art und Weise erfolgt, die sich nicht nach Vergabevorschriften für öffentliche Aufträge richten kann.

(27) Entsprechend dem Übereinkommen gehören Instrumente der Geld-, Wechselkurs-, öffentlichen Kredit- oder Geldreservepolitik sowie andere Politiken, die Geschäfte mit Wertpapieren oder anderen Finanzinstrumenten mit sich bringen, insbesondere Geschäfte, die der Geld- oder Kapitalbeschaffung der öffentlichen Auftraggeber dienen, nicht zu den finanziellen Dienstleistungen im Sinne der

[1] Vgl. S. 1 dieses Amtsblatts.
[2] ABl. L 199 vom 9.8.1993, S. 84. Zuletzt geändert durch die Richtlinie 2001/78/EG des Europäischen Parlaments und des Rates (ABl. L 285 vom 29.10.2001. S. 1).

vorliegenden Richtlinie. Verträge über Emission, Verkauf, Ankauf oder Übertragung von Wertpapieren oder anderen Finanzinstrumenten sind daher nicht erfasst. Dienstleistungen der Zentralbanken sind gleichermaßen ausgeschlossen.

(28) Beruf und Beschäftigung sind Schlüsselelemente zur Gewährleistung gleicher Chancen für alle und tragen zur Eingliederung in die Gesellschaft bei. In diesem Zusammenhang tragen geschützte Werkstätten und geschützte Beschäftigungsprogramme wirksam zur Eingliederung oder Wiedereingliederung von Menschen mit Behinderungen in den Arbeitsmarkt bei. Derartige Werkstätten sind jedoch möglicherweise nicht in der Lage, unter normalen Wettbewerbsbedingungen Aufträge zu erhalten. Es ist daher angemessen, vorzusehen, dass Mitgliedstaaten das Recht, an Verfahren zur Vergabe öffentlicher Aufträge teilzunehmen, derartigen Werkstätten oder die Ausführung eines Auftrags geschützten Beschäftigungsprogrammen vorbehalten können.

(29) Die von öffentlichen Beschaffern erarbeiteten technischen Spezifikationen sollten es erlauben, die öffentlichen Beschaffungsmärkte für den Wettbewerb zu öffnen. Hierfür muss es möglich sein, Angebote einzureichen, die die Vielfalt technischer Lösungsmöglichkeiten widerspiegeln. Damit dies gewährleistet ist, müssen einerseits Leistungs- und Funktionsanforderungen in technischen Spezifikationen erlaubt sein, und andererseits müssen im Falle der Bezugnahme auf eine europäische Norm – oder wenn eine solche nicht vorliegt, auf eine nationale Norm – Angebote auf der Grundlage gleichwertiger Lösungen vom öffentlichen Auftraggeber geprüft werden. Die Bieter sollten die Möglichkeit haben, die Gleichwertigkeit ihrer Lösungen mit allen ihnen zur Verfügung stehenden Nachweisen zu belegen. Die öffentlichen Auftraggeber müssen jede Entscheidung, dass die Gleichwertigkeit in einem bestimmten Fall nicht gegeben ist, begründen können. Öffentliche Auftraggeber, die für die technischen Spezifikationen eines Auftrags Umweltanforderungen festlegen möchten, können die Umwelteigenschaften - wie eine bestimmte Produktionsmethode - und/oder Auswirkungen bestimmter Warengruppen oder Dienstleistungen auf die Umwelt festlegen. Sie können – müssen aber nicht – geeignete Spezifikationen verwenden, die in Umweltgütezeichen wie z.B. dem Europäischen Umweltgütezeichen, (pluri)nationalen Umweltgütezeichen oder anderen Umweltgütezeichen definiert sind, sofern die Anforderungen an das Gütezeichen auf der Grundlage von wissenschaftlich abgesicherten Informationen im Rahmen eines Verfahrens ausgearbeitet und erlassen werden, an dem interessierte Kreise – wie z.B. staatliche Stellen, Verbraucher, Hersteller, Händler und Umweltorganisationen – teilnehmen können, und sofern das Gütezeichen für alle interessierten Parteien zugänglich und verfügbar ist. Die öffentlichen Auftraggeber sollten, wo immer dies möglich ist, technische Spezifikationen festlegen, die das Kriterium der Zugänglichkeit für Personen mit einer Behinderung oder das Kriterium der Konzeption für alle Benutzer berücksichtigen. Die technischen Spezifikationen sind klar festzulegen, so dass alle Bieter wissen, was die Anforderungen des öffentlichen Auftraggebers umfassen.

(30) Zusätzliche Angaben über die Aufträge müssen entsprechend den Gepflogenheiten in den Mitgliedstaaten in den Verdingungsunterlagen für jeden einzelnen Auftrag bzw. in allen gleichwertigen Unterlagen enthalten sein.

(31) Für öffentliche Auftraggeber, die besonders komplexe Vorhaben durchführen, kann es – ohne dass ihnen dies anzulasten wäre - objektiv unmöglich sein, die Mittel zu bestimmen, die ihren Bedürfnissen gerecht werden können, oder zu beurteilen, was der Markt an technischen bzw. finanziellen/rechtlichen Lösungen bieten kann. Eine derartige Situation kann sich insbesondere bei der Durchführung bedeutender integrierter Verkehrsinfrastrukturprojekte, großer Computernetzwerke oder Vorhaben mit einer komplexen und strukturierten Finanzierung ergeben, deren finanzielle und rechtliche Konstruktion nicht im Voraus vorgeschrieben werden kann. Daher sollte für Fälle, in denen es nicht möglich sein sollte, derartige Aufträge unter Anwendung offener oder nichtoffener Verfahren zu vergeben, ein flexibles Verfahren vorgesehen werden, das sowohl den Wettbewerb zwischen Wirtschaftsteilnehmern gewährleistet als auch dem Erfordernis gerecht wird, dass der öffentliche Auftraggeber alle Aspekte des Auftrags mit jedem Bewerber erörtern kann. Dieses Verfahren darf allerdings nicht in einer Weise angewandt werden, durch die der Wettbewerb eingeschränkt oder verzerrt wird, insbesondere indem grundlegende Elemente geändert oder dem ausgewählten Bieter neue wesentliche Elemente auferlegt werden oder indem andere Bieter als derjenige, der das wirtschaftlich günstigste Angebot abgegeben hat, einbezogen werden.

(32) Um den Zugang von kleinen und mittleren Unternehmen zu öffentlichen Aufträgen zu fördern, sollten Bestimmungen über Unteraufträge vorgesehen werden.

(33) Bedingungen für die Ausführung eines Auftrags sind mit dieser Richtlinie vereinbar, sofern sie nicht unmittelbar oder mittelbar zu einer Diskriminierung führen und in der Bekanntmachung oder in den Verdingungsunterlagen angegeben sind. Sie können insbesondere dem Ziel dienen, die berufliche Ausbildung auf den Baustellen sowie die Beschäftigung von Personen zu fördern, deren Eingliederung besondere Schwierigkeiten bereitet, die Arbeitslosigkeit zu bekämpfen oder die Umwelt zu schützen. In diesem Zusammenhang sind z.B. unter anderem die - für die Ausführung des Auftrags geltenden - Verpflichtungen zu nennen, Langzeitarbeitslose einzustellen oder Ausbildungsmaßnahmen für Arbeitnehmer oder Jugendliche durchzuführen, oder die Bestimmungen der grundlegenden Übereinkommen der Internationalen Arbeitsorganisation (IAO), für den Fall, dass diese nicht in innerstaatliches Recht umgesetzt worden sind, im Wesentlichen einzuhalten, oder ein Kontingent von behinderten Personen einzustellen, das über dem nach nationalem Recht vorgeschriebenen Kontingent liegt.

(34) Die im Bereich der Arbeitsbedingungen und der Sicherheit am Arbeitsplatz geltenden nationalen und gemeinschaftlichen Gesetze, Regelungen und Tarifverträge sind während der Ausführung eines öffentlichen Auftrags anwendbar, sofern derartige Vorschriften sowie ihre Anwendung mit dem Gemeinschaftsrecht vereinbar sind. Für grenzüberschreitende Situationen, in denen Arbeitnehmer eines Mitgliedstaats Dienstleistungen in einem anderen Mitgliedstaat zur Ausführung eines öffentlichen Auftrags erbringen, enthält die Richtlinie 96/71/EG des Europäischen Parlaments und des Rates vom 16. Dezember 1996 über die Entsendung von Arbeitnehmern im Rahmen der Erbringung von Dienstleistungen ([1]) die Mindestbedingungen, die im Aufnahmeland in Bezug auf die entsandten Arbeitnehmer einzuhalten sind. Enthält das nationale Recht entsprechende Bestimmungen, so kann die Nichteinhaltung dieser Verpflichtungen als eine schwere Verfehlung oder als ein Delikt betrachtet werden, das die berufliche Zuverlässigkeit des Wirtschaftsteilnehmers in Frage stellt und dessen Ausschluss vom Verfahren zur Vergabe eines öffentlichen Auftrags zur Folge haben kann.

(35) Angesichts der neuen Informations- und Kommunikationstechnologien und der Erleichterungen, die sie für die Bekanntmachung von Aufträgen und hinsichtlich der Effizienz und Transparenz der Vergabeverfahren mit sich bringen können, ist es angebracht, die elektronischen Mittel den klassischen Mitteln zur Kommunikation und zum Informationsaustausch gleichzusetzen. Soweit möglich, sollten das gewählte Mittel und die gewählte Technologie mit den in den anderen Mitgliedstaaten verwendeten Technologien kompatibel sein.

(36) Damit auf dem Gebiet des öffentlichen Auftragswesens ein wirksamer Wettbewerb entsteht, ist es erforderlich, dass die Bekanntmachungen der öffentlichen Auftraggeber der Mitgliedstaaten gemeinschaftsweit veröffentlicht werden. Die Angaben in diesen Bekanntmachungen müssen es den Wirtschaftsteilnehmern in der Gemeinschaft erlauben zu beurteilen, ob die vorgeschlagenen Aufträge für sie von Interesse sind. Zu diesem Zweck sollten sie hinreichend über den Auftragsgegenstand und die Auftragsbedingungen informiert werden. Es ist daher wichtig, für veröffentlichte Bekanntmachungen durch geeignete Mittel, wie die Verwendung von Standardformularen sowie die Verwendung des durch die Verordnung (EG) Nr. 2195/2002 des Europäischen Parlaments und des Rates ([2]) als Referenzklassifikation für öffentliche Aufträge vorgesehenen Gemeinsamen Vokabulars für öffentliche Aufträge (Common Procurement Vocabulary, CPV), eine bessere Publizität zu gewährleisten. Bei den nichtoffenen Verfahren sollte die Bekanntmachung es den Wirtschaftsteilnehmern der Mitgliedstaaten insbesondere ermöglichen, ihr Interesse an den Aufträgen dadurch zu bekunden, dass sie sich bei den öffentlichen Auftraggebern um eine Aufforderung bewerben, unter den vorgeschriebenen Bedingungen ein Angebot einzureichen.

(37) Die Richtlinie 1999/93/EG des Europäischen Parlaments und des Rates vom 13. Dezember 1999 über gemeinschaftliche Rahmenbedingungen für elektronische Signaturen ([3]) und die Richtlinie 2000/31/EG des Europäischen Parlaments und des Rates vom 8. Juni 2000 über bestimmte rechtliche Aspekte der Dienste der Informationsgesellschaft, insbesondere des elektronischen Geschäftsverkehrs, im Binnenmarkt („Richtlinie über den elektronischen Geschäftsverkehr") ([4]) sollten für die elektronische Übermittlung von Informationen im Rahmen der vorliegenden Richtlinie gelten. Die Verfahren zur Vergabe öffentlicher Aufträge und die für Wettbewerbe geltenden Vorschriften erfordern einen höheren Grad an Sicherheit und Vertraulichkeit als in den genannten Richtlinien vorgesehen ist. Daher sollten die Vorrichtungen für den elektronischen Eingang von Angeboten, Anträgen auf Teilnahme und von Plänen und Vorhaben besonderen zusätzlichen Anforderungen genügen. Zu diesem Zweck sollte die Verwendung elektronischer Signaturen, insbesondere fortgeschrittener elektronischer Signaturen, so zeit wie möglich gefördert werden. Ferner könnten Systeme der freiwilligen Akkreditierung günstige Rahmenbedingungen dafür bieten, dass sich das Niveau der Zertifizierungsdienste für diese Vorrichtungen erhöht.

(38) Der Einsatz elektronischer Mittel spart Zeit. Dementsprechend ist beim Einsatz dieser elektronischen Mittel eine Verkürzung der Mindestfristen vorzusehen, unter der Voraussetzung, dass sie mit den auf gemeinschaftlicher Ebene vorgesehenen spezifischen Übermittlungsmodalitäten vereinbar sind.

(39) Die Prüfung der Eignung der Bieter im Rahmen von offenen Verfahren und der Bewerber im Rahmen von nichtoffenen Verfahren und von Verhandlungsverfahren mit Veröffentlichung einer Bekanntmachung sowie im Rahmen des wettbewerblichen Dialogs und deren Auswahl sollten unter transparenten Bedingungen erfolgen. Zu diesem Zweck sind nichtdiskriminierende Kriterien festzulegen, anhand deren die öffentlichen Auftraggeber die Bewerber auswählen können, sowie die Mittel, mit denen die Wirtschaftsteilnehmer nachweisen können, dass sie diesen Kriterien genügen. Im Hinblick auf die Transparenz sollte der öffentliche Auftraggeber gehalten sein, bei einer Aufforderung zum Wettbewerb für einen Auftrag die Eignungskriterien zu nennen, die er anzuwenden gedenkt, sowie gegebenenfalls die Fachkompetenz, die er von den Wirtschaftsteilnehmern fordert, um sie zum Vergabeverfahren zuzulassen.

(40) Ein öffentlicher Auftraggeber kann die Zahl der Bewerber im nichtoffenen Verfahren und im Verhandlungsverfahren mit Veröffentlichung einer Bekanntmachung sowie beim wettbewerblichen Dialog begrenzen. Solch eine Begrenzung sollte auf der Grundlage objektiver Kriterien erfolgen, die in der Bekanntmachung

([1]) ABl. L 18 vom 21.1.1997 S. 1.
([2]) ABl. L 340 vom 16.12.2002, S.1.
([3]) ABl. L 13 vom 19.1.2000, S. 12.
([4]) ABl. L 178 vom 17.7.2000, S. 1.

anzugeben sind. Diese objektiven Kriterien setzen nicht unbedingt Gewichtungen voraus. Hinsichtlich der Kriterien betreffend die persönliche Lage des Wirtschaftsteilnehmers kann ein allgemeiner Verweis in der Bekanntmachung auf die in Artikel 45 genannten Fälle ausreichen.

(41) Im Rahmen des wettbewerblichen Dialogs und der Verhandlungsverfahren mit Veröffentlichung einer Bekanntmachung empfiehlt es sich, aufgrund der eventuell erforderlichen Flexibilität sowie der mit diesen Vergabemethoden verbundenen zu hohen Kosten den öffentlichen Auftraggebern die Möglichkeit zu bieten, eine Abwicklung des Verfahrens in sukzessiven Phasen vorzusehen, so dass die Anzahl der Angebote, die noch Gegenstand des Dialogs oder der Verhandlungen sind, auf der Grundlage von vorher angegebenen Zuschlagskriterien schrittweise reduziert wird. Diese Reduzierung sollte - sofern die Anzahl der geeigneten Lösungen oder Bewerber es erlaubt - einen wirksamen Wettbewerb gewährleisten.

(42) Soweit für die Teilnahme an einem Verfahren zur Vergabe eines öffentlichen Auftrags oder an einem Wettbewerb der Nachweis einer bestimmten Qualifikation gefordert wird, sind die einschlägigen Gemeinschaftsvorschriften über die gegenseitige Anerkennung von Diplomen, Prüfungszeugnissen und sonstigen Befähigungsnachweisen anzuwenden.

(43) Es sind Vorkehrungen zu treffen, um der Vergabe öffentlicher Aufträge an Wirtschaftsteilnehmer, die sich an einer kriminellen Vereinigung beteiligt oder der Bestechung oder des Betrugs zu Lasten der finanziellen Interessen der Europäischen Gemeinschaften oder der Geldwäsche schuldig gemacht haben, vorzubeugen. Die öffentlichen Auftraggeber sollten gegebenenfalls von den Bewerbern/Bietern geeignete Unterlagen anfordern und, wenn sie Zweifel in Bezug auf die persönliche Lage dieser Bewerber/Bieter hegen, die zuständigen Behörden des betreffenden Mitgliedstaates um Mitarbeit ersuchen können. Diese Wirtschaftsteilnehmer sollten ausgeschlossen werden, wenn dem öffentlichen Auftraggeber bekannt ist, dass es eine nach einzelstaatlichem Recht ergangene endgültige und rechtskräftige gerichtliche Entscheidung zu derartigen Straftaten gibt. Enthält das nationale Recht entsprechende Bestimmungen, so kann ein Verstoß gegen das Umweltrecht oder gegen Rechtsvorschriften über unrechtmäßige Absprachen bei öffentlichen Aufträgen, der mit einem rechtskräftigen Urteil oder einem Beschluss gleicher Wirkung geahndet wurde, als Delikt, das die berufliche Zuverlässigkeit des Wirtschaftsteilnehmers in Frage stellt, oder als schwere Verfehlung betrachtet werden.

Die Nichteinhaltung nationaler Bestimmungen zur Umsetzung der Richtlinien 2000/78/EG [1] und 76/207/EWG [2] des Rates zur Gleichbehandlung von Arbeitnehmern, die mit einem rechtskräftigen Urteil oder einem Beschluss gleicher Wirkung sanktioniert wurde, kann als Verstoß, der die berufliche Zuverlässigkeit des Wirtschaftsteilnehmers in Frage stellt, oder als schwere Verfehlung betrachtet werden.

(44) In geeigneten Fällen, in denen die Art der Arbeiten und/oder Dienstleistungen es rechtfertigt, dass bei Ausführung des öffentlichen Auftrags Umweltmanagementmaßnahmen oder -systeme zur Anwendung kommen, kann die Anwendung solcher Maßnahmen bzw. Systeme vorgeschrieben werden. Umweltmanagementsysteme können unabhängig von ihrer Registrierung gemäß den Gemeinschaftsvorschriften wie die Verordnung (EG) Nr. 761/2001 (EMAS) [3] als Nachweis für die technische Leistungsfähigkeit des Wirtschaftsteilnehmers zur Ausführung des Auftrags dienen. Darüber hinaus sollte eine Beschreibung der von dem Wirtschaftsteilnehmer angewandten Maßnahmen zur Gewährleistung desselben Umweltschutzniveaus alternativ zu den registrierten Umweltmanagementsystemen als Beweismittel akzeptiert werden.

(45) Diese Richtlinie sieht vor, dass die Mitgliedstaaten offizielle Verzeichnisse von Bauunternehmern, Lieferanten oder Dienstleistungserbringern oder eine Zertifizierung durch öffentliche oder privatrechtliche Stellen einführen können, und regelt auch die Wirkungen einer solchen Eintragung in ein Verzeichnis oder einer solchen Bescheinigung im Rahmen eines Verfahrens zur Vergabe eines öffentlichen Auftrags in einem anderen Mitgliedstaat. Hinsichtlich der offiziellen Verzeichnisse der zugelassenen Wirtschaftsteilnehmer muss die Rechtsprechung des Gerichtshofes in den Fällen berücksichtigt werden, in denen sich ein Wirtschaftsteilnehmer, der zu einer Gruppe gehört, der wirtschaftlichen, finanziellen oder technischen Kapazitäten anderer Unternehmen der Gruppe bedient, um seinen Antrag auf Eintragung in das Verzeichnis zu stützen. In diesem Fall hat der Wirtschaftsteilnehmer den Nachweis dafür zu erbringen, dass er während der gesamten Geltungsdauer der Eintragung

[1] Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf (ABl. L 303 vom 2.12.2000, S. 16).

[2] Richtlinie 76/207/EWG des Rates vom 9. Februar 1976 zur Verwirklichung des Grundsatzes der Gleichbehandlung von Männern und Frauen hinsichtlich des Zugangs zur Beschäftigung, zur Berufsbildung und zum beruflichen Aufstieg sowie in Bezug auf die Arbeitsbedingungen (ABl. L 39 vom 14.2.1976, S. 40). Geändert durch die Richtlinie 2002/73/EG des Europäischen Parlaments und des Rates (ABl. L 269 vom 5.10.2002, S. 15).

[3] Verordnung (EG) Nr. 761/2001 des Europäischen Parlaments und des Rates vom 19. März 2001 über die freiwillige Beteiligung von Organisationen an einem Gemeinschaftssystem für das Umweltmanagement und die Umweltbetriebsprüfung (EMAS) (ABl. L 114 vom 24.4.2001, S. 1).

effektiv über diese Kapazitäten verfügt. Für diese Eintragung kann ein Mitgliedstaat daher ein zu erreichendes Leistungsniveau und, wenn sich der betreffende Wirtschaftsteilnehmer beispielsweise auf die Finanzkraft eines anderen Unternehmens der Gruppe stützt, insbesondere die Übernahme einer erforderlichenfalls gesamtschuldnerischen Verpflichtung durch das zuletzt genannte Unternehmen vorschreiben.

(46) Die Zuschlagserteilung sollte auf der Grundlage objektiver Kriterien erfolgen, die die Einhaltung der Grundsätze der Transparenz, der Nichtdiskriminierung und der Gleichbehandlung gewährleisten und sicherstellen, dass die Angebote unter wirksamen Wettbewerbsbedingungen bewertet werden. Dementsprechend sind nur zwei Zuschlagskriterien zuzulassen: das des „niedrigsten Preises“ und das des „wirtschaftlich günstigsten Angebots“.

Um bei der Zuschlagserteilung die Einhaltung des Gleichbehandlungsgrundsatzes sicherzustellen, ist die - in der Rechtsprechung anerkannte - Verpflichtung zur Sicherstellung der erforderlichen Transparenz vorzusehen, damit sich jeder Bieter angemessen über die Kriterien und Modalitäten unterrichten kann, anhand deren das wirtschaftlich günstigste Angebot ermittelt wird. Die öffentlichen Auftraggeber haben daher die Zuschlagskriterien und deren jeweilige Gewichtung anzugeben, und zwar so rechtzeitig, dass diese Angaben den Bietern bei der Erstellung ihrer Angebote bekannt sind. Die öffentlichen Auftraggeber können in begründeten Ausnahmefällen, die zu rechtfertigen sie in der Lage sein sollten, auf die Angabe der Gewichtung der Zuschlagskriterien verzichten, wenn diese Gewichtung insbesondere aufgrund der Komplexität des Auftrags nicht im Vorhinein vorgenommen werden kann. In diesen Fällen sollten sie diese Kriterien in der absteigenden Reihenfolge ihrer Bedeutung angeben.

Beschließen die öffentlichen Auftraggeber, dem wirtschaftlich günstigsten Angebot den Zuschlag zu erteilen, so bewerten sie die Angebote unter dem Gesichtspunkt des besten Preis-Leistungs-Verhältnisses. Zu diesem Zweck legen sie die wirtschaftlichen und qualitativen Kriterien fest, anhand deren insgesamt das für den öffentlichen Auftraggeber wirtschaftlich günstigste Angebot bestimmt werden kann. Die Festlegung dieser Kriterien hängt insofern vom Auftragsgegenstand ab, als sie es ermöglichen müssen, das Leistungsniveau jedes einzelnen Angebots im Verhältnis zu dem in den technischen Spezifikationen beschriebenen Auftragsgegenstand zu bewerten sowie das Preis-Leistungs-Verhältnis jedes Angebots zu bestimmen.

Damit die Gleichbehandlung gewährleistet ist, sollten die Zuschlagskriterien einen Vergleich und eine objektive Bewertung der Angebote ermöglichen. Wenn diese Voraussetzungen erfüllt sind, versetzen die wirtschaftlichen und qualitativen Zuschlagskriterien wie auch die Kriterien über die Erfüllung der Umwelterfordernisse den öffentlichen Auftraggeber in die Lage, auf Bedürfnisse der betroffenen Allgemeinheit, so wie es in den Leistungsbeschreibungen festgelegt ist, einzugehen. Unter denselben Voraussetzungen kann ein öffentlicher Auftraggeber auch Kriterien zur Erfüllung sozialer Anforderungen anwenden, die insbesondere den - in den vertraglichen Spezifikationen festgelegten - Bedürfnissen besonders benachteiligter Bevölkerungsgruppen entsprechen, denen die Nutznießer/Nutzer der Bauleistungen, Lieferungen oder Dienstleistungen angehören.

(47) Bei öffentlichen Dienstleistungsaufträgen dürfen die Zuschlagskriterien nicht die Anwendung nationaler Bestimmungen beeinträchtigen, die die Vergütung bestimmter Dienstleistungen, wie beispielsweise die Vergütung von Architekten, Ingenieuren und Rechtsanwälten, regeln oder – bei Lieferaufträgen – die Anwendung nationaler Bestimmungen, die feste Preise für Schulbücher festlegen, beeinträchtigen.

(48) Bestimmte technische Vorschriften, insbesondere diejenigen bezüglich der Bekanntmachungen, der statistischen Berichte sowie der verwendeten Nomenklaturen und die Vorschriften hinsichtlich des Verweises auf diese Nomenklaturen müssen nach Maßgabe der Entwicklung der technischen Erfordernisse angenommen und geändert werden. Auch die Verzeichnisse der öffentlichen Auftraggeber in den Anhängen müssen aktualisiert werden. Zu diesem Zweck ist ein flexibles und rasches Beschlussverfahren einzuführen.

(49) Die zur Durchführung dieser Richtlinie erforderlichen Maßnahmen sollten gemäß dem Beschluss 1999/468/EG des Rates vom 28. Juni 1999 zur Festlegung der Modalitäten für die Ausübung der der Kommission übertragenen Durchführungsbefugnisse [1] erlassen werden.

(50) Die Verordnung (EWG, Euratom) Nr. 1182/71 des Rates vom 3. Juni 1971 zur Festlegung der Regeln für die Fristen, Daten und Termine [2] sollte für die Berechnung der in der vorliegenden Richtlinie genannten Fristen gelten.

(51) Diese Richtlinie sollte die Pflichten der Mitgliedstaaten betreffend die in Anhang XI aufgeführten Fristen für die Umsetzung und Anwendung der Richtlinien 92/50/EWG, 93/36/EWG und 93/37/EWG unberührt lassen -

HABEN FOLGENDE RICHTLINIE ERLASSEN:

[1] ABl. L 184 vom 17.7.1999, S. 23.
[2] ABl. L 124 vom 8.6.1971, S. 1.

INHALTSVERZEICHNIS

TITEL I

DEFINITIONEN UND ALLGEMEINE GRUNDSÄTZE

Artikel 1

Definitionen

(1) Für die Zwecke dieser Richtlinie gelten die Definitionen der Absätze 2 bis 15.

(2) a) „Öffentliche Aufträge“ sind zwischen einem oder mehreren Wirtschaftsteilnehmern und einem oder mehreren öffentlichen Auftraggebern geschlossene schriftliche entgeltliche Verträge über die Ausführung von Bauleistungen, die Lieferung von Waren oder die Erbringung von Dienstleistungen im Sinne dieser Richtlinie.

b) „Öffentliche Bauaufträge“ sind öffentliche Aufträge über entweder die Ausführung oder gleichzeitig die Planung und die Ausführung von Bauvorhaben im Zusammenhang mit einer der in Anhang I genannten Tätigkeiten oder eines Bauwerks oder die Erbringung einer Bauleistung durch Dritte, gleichgültig mit welchen Mitteln, gemäß den vom öffentlichen Auftraggeber genannten Erfordernissen. Ein „Bauwerk“ ist das Ergebnis einer Gesamtheit von Tief- oder Hochbauarbeiten, das seinem Wesen nach eine wirtschaftliche oder technische Funktion erfüllen soll.

c) „Öffentliche Lieferaufträge“ sind andere öffentliche Aufträge als die unter Buchstabe b genannten; sie betreffen den Kauf, das Leasing, die Miete, die Pacht oder den Ratenkauf, mit oder ohne Kaufoption, von Waren.

Ein öffentlicher Auftrag über die Lieferung von Waren, der das Verlegen und Anbringen lediglich als Nebenarbeiten umfasst, gilt als öffentlicher Lieferauftrag.

d) „Öffentliche Dienstleistungsaufträge“ sind öffentliche Aufträge über die Erbringung von Dienstleistungen im Sinne von Anhang II, die keine öffentlichen Bau- oder Lieferaufträge sind.

Ein öffentlicher Auftrag, der sowohl Waren als auch Dienstleistungen im Sinne von Anhang II umfasst, gilt als „öffentlicher Dienstleistungsauftrag“, wenn der Wert der betreffenden Dienstleistungen den Wert der in den Auftrag einbezogenen Waren übersteigt.

Ein öffentlicher Auftrag über die Erbringung von Dienstleistungen im Sinne von Anhang II, der Tätigkeiten im Sinne von Anhang I lediglich als Nebenarbeiten im Verhältnis zum Hauptauftragsgegenstand umfasst, gilt als öffentlicher Dienstleistungsauftrag.

(3) „Öffentliche Baukonzessionen" sind Verträge, die von öffentlichen Bauaufträgen nur insoweit abweichen, als die Gegenleistung für die Bauleistungen ausschließlich in dem Recht zur Nutzung des Bauwerks oder in diesem Recht zuzüglich der Zahlung eines Preises besteht.

(4) „Dienstleistungskonzessionen" sind Verträge, die von öffentlichen Dienstleistungsaufträgen nur insoweit abweichen, als die Gegenleistung für die Erbringung der Dienstleistungen ausschließlich in dem Recht zur Nutzung der Dienstleistung oder in diesem Recht zuzüglich der Zahlung eines Preises besteht.

(5) Eine „Rahmenvereinbarung" ist eine Vereinbarung zwischen einem oder mehreren öffentlichen Auftraggebern und einem oder mehreren Wirtschaftsteilnehmern, die zum Ziel hat, die Bedingungen für die Aufträge, die im Laufe eines bestimmten Zeitraums vergeben werden sollen, festzulegen, insbesondere in Bezug auf den Preis und gegebenenfalls die in Aussicht genommene Menge.

(6) Ein „dynamisches Beschaffungssystem" ist ein vollelektronisches Verfahren für Beschaffungen von marktüblichen Leistungen, bei denen die allgemein auf dem Markt verfügbaren Merkmale den Anforderungen des öffentlichen Auftraggebers genügen; dieses Verfahren ist zeitlich befristet und steht während der gesamten Verfahrensdauer jedem Wirtschaftsteilnehmer offen, der die Eignungskriterien erfüllt und ein erstes Angebot im Einklang mit den Verdingungsunterlagen unterbreitet hat.

(7) Eine „elektronische Auktion" ist ein iteratives Verfahren, bei dem mittels einer elektronischen Vorrichtung nach einer ersten vollständigen Bewertung der Angebote jeweils neue, nach unten korrigierte Preise und/oder neue, auf bestimmte Komponenten der Angebote abstellende Werte vorgelegt werden, und das eine automatische Klassifizierung dieser Angebote ermöglicht. Folglich dürfen bestimmte Bau- und Dienstleistungsaufträge, bei denen eine geistige Leistung zu erbringen ist - wie z.B. die Konzeption von Bauarbeiten -, nicht Gegenstand von elektronischen Auktionen sein.

(8) Die Begriffe „Unternehmer", „Lieferant" und „Dienstleistungserbringer" bezeichnen natürliche oder juristische Personen, öffentliche Einrichtungen oder Gruppen dieser Personen und/oder Einrichtungen, die auf dem Markt die Ausführung von Bauleistungen, die Errichtung von Bauwerken, die Lieferung von Waren bzw. die Erbringung von Dienstleistungen anbieten.

Der Begriff „Wirtschaftsteilnehmer" umfasst sowohl Unternehmer als auch Lieferanten und Dienstleistungserbringer. Er dient ausschließlich der Vereinfachung des Textes.

Ein Wirtschaftsteilnehmer, der ein Angebot vorgelegt hat, wird als „Bieter" bezeichnet. Derjenige, der sich um eine Aufforderung zur Teilnahme an einem nichtoffenen Verfahren, einem Verhandlungsverfahren oder einem wettbewerblichen Dialog beworben hat, wird als „Bewerber" bezeichnet.

(9) „Öffentliche Auftraggeber" sind der Staat, die Gebietskörperschaften, die Einrichtungen des öffentlichen Rechts und die Verbände, die aus einer oder mehreren dieser Körperschaften oder Einrichtungen des öffentlichen Rechts bestehen.

Als „Einrichtung des öffentlichen Rechts" gilt jede Einrichtung, die

a) zu dem besonderen Zweck gegründet wurde, im Allgemeininteresse liegende Aufgaben nicht gewerblicher Art zu erfüllen,

b) Rechtspersönlichkeit besitzt und

c) überwiegend vom Staat, von Gebietskörperschaften oder von anderen Einrichtungen des öffentlichen Rechts finanziert wird, hinsichtlich ihrer Leitung der Aufsicht durch Letztere unterliegt oder deren Verwaltungs-, Leitungs- oder Aufsichtsorgan mehrheitlich aus Mitgliedern besteht, die vom Staat, von den Gebietskörperschaften oder von anderen Einrichtungen des öffentlichen Rechts ernannt worden sind.

Die nicht erschöpfenden Verzeichnisse der Einrichtungen und Kategorien von Einrichtungen des öffentlichen Rechts, die die in Unterabsatz 2 Buchstaben a, b und c genannten Kriterien erfüllen, sind in Anhang III enthalten. Die Mitgliedstaaten geben der Kommission regelmäßig die Änderungen ihrer Verzeichnisse bekannt.

(10) Eine „zentrale Beschaffungsstelle" ist ein öffentlicher Auftraggeber, der

— für öffentliche Auftraggeber bestimmte Waren und/oder Dienstleistungen erwirbt oder

— öffentliche Aufträge vergibt oder Rahmenvereinbarungen über Bauleistungen, Waren oder Dienstleistungen für öffentliche Auftraggeber schließt.

(11) a) „Offene Verfahren" sind Verfahren, bei denen alle interessierten Wirtschaftsteilnehmer ein Angebot abgeben können.

b) „Nichtoffene Verfahren" sind Verfahren, bei denen sich alle Wirtschaftsteilnehmer um die Teilnahme bewerben können und bei denen nur die vom öffentlichen Auftraggeber aufgeforderten Wirtschaftsteilnehmer ein Angebot abgeben können.

c) Der „wettbewerbliche Dialog" ist ein Verfahren, bei dem sich alle Wirtschaftsteilnehmer um die Teilnahme bewerben können und bei dem der öffentliche Auftraggeber einen Dialog mit den zu diesem Verfahren zugelassenen Bewerbern führt, um eine oder mehrere seinen Bedürfnissen entsprechende Lösungen herauszuarbeiten, auf deren Grundlage bzw. Grundlagen die ausgewählten Bewerber zur Angebotsabgabe aufgefordert werden.

Für die Zwecke des Rückgriffs auf das in Unterabsatz 1 genannte Verfahren gilt ein öffentlicher Auftrag als „besonders komplex", wenn der öffentliche Auftraggeber

— objektiv nicht in der Lage ist, die technischen Mittel gemäß Artikel 23 Absatz 3 Buchstaben b, c oder d anzugeben, mit denen seine Bedürfnisse und seine Ziele erfüllt werden können und/oder

— objektiv nicht in der Lage ist, die rechtlichen und/oder finanziellen Konditionen eines Vorhabens anzugeben.

d) „Verhandlungsverfahren" sind Verfahren, bei denen der öffentliche Auftraggeber sich an Wirtschaftsteilnehmer seiner Wahl wendet und mit einem oder mehreren von ihnen über die Auftragsbedingungen verhandelt.

e) „Wettbewerbe" sind Auslobungsverfahren, die dazu dienen, dem öffentlichen Auftraggeber insbesondere auf den Gebieten der Raumplanung, der Stadtplanung, der Architektur und des Bauwesens oder der Datenverarbeitung einen Plan oder eine Planung zu verschaffen, deren Auswahl durch ein Preisgericht aufgrund vergleichender Beurteilung mit oder ohne Verteilung von Preisen erfolgt.

(12) Der Begriff „schriftlich" umfasst jede aus Wörtern oder Ziffern bestehende Darstellung, die gelesen, reproduziert und mitgeteilt werden kann. Darin können auch elektronisch übermittelte und gespeicherte Informationen enthalten sein.

(13) „Elektronisch" ist ein Verfahren, bei dem elektronische Geräte für die Verarbeitung (einschließlich digitaler Kompression) und Speicherung von Daten zum Einsatz kommen und bei dem Informationen über Kabel, über Funk, mit optischen Verfahren oder mit anderen elektromagnetischen Verfahren übertragen, weitergeleitet und empfangen werden.

(14) Das „Gemeinsame Vokabular für öffentliche Aufträge", nachstehend „CPV" (Common Procurement Vocabulary) genannt, bezeichnet die mit der Verordnung (EG) Nr. 2195/2002 angenommene, auf öffentliche Aufträge anwendbare Referenzklassifikation; es gewährleistet zugleich die Übereinstimmung mit den übrigen bestehenden Klassifikationen.

Sollte es aufgrund etwaiger Abweichungen zwischen der CPV-Nomenklatur und der NACE-Nomenklatur nach Anhang I oder zwischen der CPV-Nomenklatur und der CPC-Nomenklatur (vorläufige Fassung) nach Anhang II zu unterschiedlichen Auslegungen bezüglich des Anwendungsbereichs der vorliegenden Richtlinie kommen, so hat jeweils die NACE-Nomenklatur bzw. die CPC-Nomenklatur Vorrang.

(15) Für die Zwecke von Artikel 13, von Artikel 57 Buchstabe a und von Artikel 68 Buchstabe b bezeichnet der Ausdruck

a) „öffentliches Telekommunikationsnetz" die öffentliche Telekommunikationsinfrastruktur, mit der Signale zwischen definierten Netzabschlusspunkten über Draht, über Richtfunk, auf optischem oder anderem elektromagnetischen Wege übertragen werden können;

b) „Netzabschlusspunkt" die Gesamtheit der physischen Verbindungen und technischen Zugangsspezifikationen, die Teil des öffentlichen Telekommunikationsnetzes sind und für den Zugang zu diesem Netz und zur effizienten Kommunikation mittels dieses Netzes erforderlich sind;

c) „öffentliche Telekommunikationsdienste" Telekommunikationsdienste, mit deren Erbringung die Mitgliedstaaten ausdrücklich insbesondere eine oder mehrere Fernmeldeorganisationen betraut haben;

d) „Telekommunikationsdienste" Dienste, die ganz oder teilweise in der Übertragung und Weiterleitung von Signalen auf dem Telekommunikationsnetz durch Telekommunikationsverfahren bestehen, mit Ausnahme von Rundfunk und Fernsehen.

Artikel 2

Grundsätze für die Vergabe von Aufträgen

Die öffentlichen Auftraggeber behandeln alle Wirtschaftsteilnehmer gleich und nichtdiskriminierend und gehen in transparenter Weise vor.

Artikel 3

Zuerkennung besonderer oder ausschließlicher Rechte: Nichtdiskriminierungsklausel

Wenn ein öffentlicher Auftraggeber einer Einrichtung, die kein öffentlicher Auftraggeber ist, besondere oder ausschließliche Rechte zur Ausführung einer Tätigkeit des öffentlichen Dienstleistungsbereichs zuerkennt, muss in dem Rechtsakt über die Zuerkennung dieses Rechts bestimmt sein, dass die betreffende Einrichtung bei der Vergabe von Lieferaufträgen an Dritte im Rahmen dieser Tätigkeit den Grundsatz der Nichtdiskriminierung aus Gründen der Staatsangehörigkeit beachten muss.

TITEL II

VORSCHRIFTEN FÜR ÖFFENTLICHE AUFTRÄGE

KAPITEL I

Allgemeine Bestimmungen

Artikel 4

Wirtschaftsteilnehmer

(1) Bewerber oder Bieter, die gemäß den Rechtsvorschriften des Mitgliedstaats, in dem sie ihre Niederlassung haben, zur Erbringung der betreffenden Leistung berechtigt sind, dürfen nicht allein deshalb zurückgewiesen werden, weil sie gemäß den Rechtsvorschriften des Mitgliedstaats, in dem der Auftrag vergeben wird, eine natürliche oder eine juristische Person sein müssten.

Bei öffentlichen Dienstleistungs- und Bauaufträgen sowie bei öffentlichen Lieferaufträgen, die zusätzliche Dienstleistungen und/oder Arbeiten wie Verlegen und Anbringen umfassen, können juristische Personen jedoch verpflichtet werden, in ihrem Angebot oder ihrem Antrag auf Teilnahme die Namen und die beruflichen Qualifikationen der Personen anzugeben, die für die Erbringung der betreffenden Leistung verantwortlich sein sollen.

(2) Angebote oder Anträge auf Teilnahme können auch von Gruppen von Wirtschaftsteilnehmern eingereicht werden. Die öffentlichen Auftraggeber können nicht verlangen, dass nur Gruppen von Wirtschaftsteilnehmern, die eine bestimmte Rechtsform haben, ein Angebot oder einen Antrag auf Teilnahme einreichen können; allerdings kann von der ausgewählten Gruppe von Wirtschaftsteilnehmern verlangt werden, dass sie eine bestimmte Rechtsform annimmt, wenn ihr der Zuschlag erteilt worden ist, sofern dies für die ordnungsgemäße Durchführung des Auftrags erforderlich ist.

Artikel 5

Bedingungen aus den im Rahmen der Welthandelsorganisation geschlossenen Übereinkommen

Bei der Vergabe öffentlicher Aufträge durch die öffentlichen Auftraggeber wenden die Mitgliedstaaten untereinander Bedingungen an, die ebenso günstig sind wie diejenigen, die sie gemäß dem Übereinkommen Wirtschaftsteilnehmern aus Drittländern einräumen. Zu diesem Zweck konsultieren die Mitgliedstaaten einander in dem in Artikel 77 genannten Beratenden Ausschuss für öffentliches Auftragswesen über die Maßnahmen, die aufgrund des Übereinkommens zu treffen sind.

Artikel 6

Vertraulichkeit

Unbeschadet der Bestimmungen dieser Richtlinie – insbesondere der Artikel 35 Absatz 4 und Artikel 41, die die Pflichten im Zusammenhang mit der Bekanntmachung vergebener Aufträge und der Unterrichtung der Bewerber und Bieter regeln – gibt ein öffentlicher Auftraggeber nach Maßgabe des innerstaatlichen Rechts, dem er unterliegt, keine ihm von den Wirtschaftsteilnehmern übermittelten und von diesen als vertraulich eingestuften Informationen weiter, wozu insbesondere technische und Betriebsgeheimnisse sowie die vertraulichen Aspekte der Angebote selbst gehören.

KAPITEL II

Anwendungsbereich

Abschnitt 1

Schwellenwerte

Artikel 7

Schwellenwerte für öffentliche Aufträge

Diese Richtlinie gilt für die Vergabe öffentlicher Aufträge, die nicht aufgrund der Ausnahmen nach den Artikeln 10 und 11 und nach den Artikeln 12 bis 18 ausgeschlossen sind und deren geschätzter Wert netto ohne Mehrwertsteuer (MwSt) die folgenden Schwellenwerte erreicht oder überschreitet:

a) 162 000 EUR bei öffentlichen Liefer- und Dienstleistungsaufträgen, die von den in Anhang IV genannten zentralen Regierungsbehörden als öffentlichen Auftraggebern vergeben werden und die nicht unter Buchstabe b dritter Gedankenstrich fallen; bei öffentlichen Lieferaufträgen, die von öffentlichen Auftraggebern im Verteidigungsbereich vergeben werden, gilt dies nur für Aufträge über Waren, die in Anhang V erfasst sind;

b) 249 000 EUR

— bei öffentlichen Liefer- und Dienstleistungsaufträgen, die von anderen als den in Anhang IV genannten öffentlichen Auftraggebern vergeben werden;

— bei öffentlichen Lieferaufträgen, die von den in Anhang IV genannten öffentlichen Auftraggebern im Verteidigungsbereich vergeben werden, sofern es sich um Aufträge über Waren handelt, die nicht in Anhang V aufgeführt sind;

— bei öffentlichen Dienstleistungsaufträgen, die von öffentlichen Auftraggebern für die in Anhang II Teil A Kategorie 8 genannten Dienstleistungen, für die in Anhang II Teil A Kategorie 5 genannten Dienstleistungen im Telekommunikationsbereich, deren CPV-Positionen den CPC-Referenznummern 7524, 7525 und 7526 entsprechen, und/oder für die in Anhang II Teil B genannten Dienstleistungen vergeben werden;

c) 6 242 000 EUR bei öffentlichen Bauaufträgen.

Artikel 8

Aufträge, die zu mehr als 50 % von öffentlichen Auftraggebern subventioniert werden

Die Bestimmungen dieser Richtlinie finden Anwendung auf die Vergabe von

a) Bauaufträgen, die zu mehr als 50 % von öffentlichen Auftraggebern direkt subventioniert werden und deren geschätzter Wert netto ohne MwSt mindestens 6 242 000 EUR beträgt,

   — wenn diese Bauaufträge Tiefbauarbeiten im Sinne des Anhangs I betreffen;

   — wenn diese Bauaufträge die Errichtung von Krankenhäusern, Sport-, Erholungs- und Freizeitanlagen, Schulen und Hochschulen sowie Verwaltungsgebäuden zum Gegenstand haben;

b) Dienstleistungsaufträgen, die zu mehr als 50 % von öffentlichen Auftraggebern direkt subventioniert werden und deren geschätzter Wert ohne MwSt mindestens 249 000 EUR beträgt, wenn diese Aufträge mit einem Bauauftrag im Sinne des Buchstabens a verbunden sind.

Die Mitgliedstaaten treffen die erforderlichen Maßnahmen, damit die die Subvention gewährenden öffentlichen Auftraggeber für die Einhaltung dieser Richtlinie Sorge tragen, wenn diese Aufträge nicht von ihnen selbst, sondern von einer oder mehreren anderen Einrichtungen vergeben werden, bzw. selbst diese Richtlinie einhalten, wenn sie selbst im Namen und für Rechnung dieser anderen Einrichtungen diese Aufträge vergeben.

Artikel 9

Methoden zur Berechnung des geschätzten Wertes von öffentlichen Aufträgen, von Rahmenvereinbarungen und von dynamischen Beschaffungssystemen

(1) Grundlage für die Berechnung des geschätzten Auftragswertes ist der Gesamtwert ohne MwSt, der vom öffentlichen Auftraggeber voraussichtlich zu zahlen ist. Bei dieser Berechnung ist der geschätzte Gesamtwert einschließlich aller Optionen und der etwaigen Verlängerungen des Vertrags zu berücksichtigen.

Wenn der öffentliche Auftraggeber Prämien oder Zahlungen an Bewerber oder Bieter vorsieht, hat er diese bei der Berechnung des geschätzten Auftragswertes zu berücksichtigen.

(2) Für die Schätzung ist der Wert zum Zeitpunkt der Absendung der Bekanntmachung gemäß Artikel 35 Absatz 2 oder, falls eine solche Bekanntmachung nicht erforderlich ist, zum Zeitpunkt der Einleitung des Vergabeverfahrens durch den öffentlichen Auftraggeber maßgeblich.

(3) Ein Bauvorhaben oder ein Beschaffungsvorhaben mit dem Ziel, eine bestimmte Menge von Waren und/oder Dienstleistungen zu beschaffen, darf nicht zu dem Zwecke aufgeteilt werden, das Vorhaben der Anwendung dieser Richtlinie zu entziehen.

(4) Bei der Berechnung des geschätzten Auftragswerts von öffentlichen Bauaufträgen wird außer dem Wert der Bauleistungen auch der geschätzte Gesamtwert der für die Ausführung der Bauleistungen nötigen und vom öffentlichen Auftraggeber dem Unternehmer zur Verfügung gestellten Lieferungen berücksichtigt.

(5) a) Kann ein Bauvorhaben oder die beabsichtigte Beschaffung von Dienstleistungen zu Aufträgen führen, die gleichzeitig in Losen vergeben werden, so ist der geschätzte Gesamtwert aller dieser Lose zugrunde zu legen.

   Erreicht oder übersteigt der kumulierte Wert der Lose den in Artikel 7 genannten Schwellenwert, so gilt diese Richtlinie für die Vergabe jedes Loses.

   Der öffentliche Auftraggeber kann jedoch von dieser Bestimmung abweichen, wenn es sich um Lose handelt, deren geschätzter Gesamtwert ohne MwSt bei Dienstleistungen unter 80 000 EUR und bei Bauleistungen unter 1 000 000 EUR liegt, sofern der kumulierte Wert dieser Lose 20 % des kumulierten Werts aller Lose nicht übersteigt.

   b) Kann ein Vorhaben zum Zweck des Erwerbs gleichartiger Waren zu Aufträgen führen, die gleichzeitig in Losen vergeben werden, so wird bei der Anwendung von Artikel 7 Buchstaben a und b der geschätzte Gesamtwert aller dieser Lose berücksichtigt.

   Erreicht oder übersteigt der kumulierte Wert der Lose den in Artikel 7 genannten Schwellenwert, so gilt die Richtlinie für die Vergabe jedes Loses.

   Der öffentliche Auftraggeber kann jedoch von dieser Bestimmung abweichen, wenn es sich um Lose handelt, deren geschätzter Gesamtwert ohne MwSt unter 80 000 EUR liegt, sofern der kumulierte Wert dieser Lose 20 % des kumulierten Wertes aller Lose nicht übersteigt.

(6) Bei öffentlichen Lieferaufträgen für Leasing, Miete, Pacht oder Ratenkauf von Waren wird der geschätzte Auftragswert wie folgt berechnet:

a) bei zeitlich begrenzten öffentlichen Aufträgen mit höchstens zwölf Monaten Laufzeit auf der Basis des geschätzten Gesamtwerts für die Laufzeit des Auftrags oder, bei einer Laufzeit von mehr als zwölf Monaten, auf der Basis des Gesamtwerts einschließlich des geschätzten Restwerts,

b) bei öffentlichen Aufträgen mit unbestimmter Laufzeit oder bei Aufträgen, deren Laufzeit nicht bestimmt werden kann, auf der Basis des Monatswerts multipliziert mit 48.

(7) Bei regelmäßig wiederkehrenden öffentlichen Aufträgen oder Daueraufträgen über Lieferungen oder Dienstleistungen wird der geschätzte Auftragswert wie folgt berechnet:

a) entweder auf der Basis des tatsächlichen Gesamtwerts entsprechender aufeinander folgender Aufträge aus den vorangegangenen zwölf Monaten oder dem vorangegangenen Haushaltsjahr; dabei sind voraussichtliche Änderungen bei Mengen oder Kosten während der auf den ursprünglichen Auftrag folgenden zwölf Monate nach Möglichkeit zu berücksichtigen;

b) oder auf der Basis des geschätzten Gesamtwerts aufeinander folgender Aufträge, die während der auf die erste Lieferung folgenden zwölf Monate bzw. während des Haushaltsjahres, soweit dieses länger als zwölf Monate ist, vergeben werden.

Die Wahl der Methode zur Berechnung des geschätzten Wertes eines öffentlichen Auftrags darf nicht in der Absicht erfolgen, die Anwendung dieser Richtlinie zu umgehen.

(8) Bei Dienstleistungsaufträgen wird der geschätzte Auftragswert wie folgt berechnet:

a) je nach Art der Dienstleistung:

i) bei Versicherungsleistungen: auf der Basis der Versicherungsprämie und sonstiger Entgelte;

ii) bei Bank- und anderen Finanzdienstleistungen: auf der Basis der Gebühren, Provisionen und Zinsen sowie anderer vergleichbarer Vergütungen;

iii) bei Aufträgen über Planungsarbeiten: auf der Basis der Gebühren, Provisionen sowie anderer vergleichbarer Vergütungen;

b) bei Aufträgen, für die kein Gesamtpreis angegeben wird:

i) bei zeitlich begrenzten Aufträgen mit einer Laufzeit von bis zu 48 Monaten: auf der Basis des geschätzten Gesamtwerts für die Laufzeit des Vertrages;

ii) bei Verträgen mit unbestimmter Laufzeit oder mit einer Laufzeit von mehr als 48 Monaten: auf der Basis des Monatswerts multipliziert mit 48.

(9) Der zu berücksichtigende Wert einer Rahmenvereinbarung oder eines dynamischen Beschaffungssystems ist gleich dem geschätzten Gesamtwert ohne MwSt aller für die gesamte Laufzeit der Rahmenvereinbarung oder des dynamischen Beschaffungssystems geplanten Aufträge.

Abschnitt 2

Besondere Sachverhalte

Artikel 10

Aufträge im Verteidigungsbereich

Diese Richtlinie gilt, vorbehaltlich des Artikels 296 des Vertrags, für die Vergabe öffentlicher Aufträge durch öffentliche Auftraggeber im Verteidigungsbereich.

Artikel 11

Vergabe von öffentlichen Aufträgen und Abschluss von Rahmenvereinbarungen durch zentrale Beschaffungsstellen

(1) Die Mitgliedstaaten können festlegen, dass die öffentlichen Auftraggeber Bauleistungen, Waren und/oder Dienstleistungen durch zentrale Beschaffungsstellen erwerben dürfen.

(2) Bei öffentlichen Auftraggebern, die Bauleistungen, Waren und/oder Dienstleistungen durch eine zentrale Beschaffungsstelle gemäß Artikel 1 Absatz 10 erwerben, wird vermutet, dass sie diese Richtlinie eingehalten haben, sofern diese zentrale Beschaffungsstelle sie eingehalten hat.

Abschnitt 3

Aufträge, die nicht unter die Richtlinie fallen

Artikel 12

Aufträge im Bereich der Wasser-, Energie- und Verkehrsversorgung und der Postdienste

Diese Richtlinie gilt weder für öffentliche Aufträge im Bereich der Richtlinie 2004/17/EG, die von öffentlichen Auftraggebern vergeben werden, die eine oder mehrere Tätigkeiten gemäß Artikel 3 bis 7 der genannten Richtlinie ausüben, und die der Durchführung dieser Tätigkeiten dienen, noch für öffentliche Aufträge, die gemäß Artikel 5 Absatz 2, Artikel 19, Artikel 26 und Artikel 30 der genannten Richtlinie nicht in ihren Geltungsbereich fallen.

Diese Richtlinie gilt jedoch weiterhin für öffentliche Aufträge, die von öffentlichen Auftraggebern vergeben werden, die eine oder mehrere Tätigkeiten gemäß Artikel 6 der Richtlinie 2004/17/EG ausüben, und die der Durchführung dieser Tätigkeiten dienen, solange der betreffende Mitgliedstaat von der in Artikel 71 Absatz 1 Unterabsatz 2 der genannten Richtlinie vorgesehenen Möglichkeit Gebrauch macht, um die Anwendung der Maßnahmen zu verschieben.

Artikel 13

Besondere Ausnahmen im Telekommunikationsbereich

Die vorliegende Richtlinie gilt nicht für öffentliche Aufträge, die hauptsächlich den Zweck haben, dem öffentlichen Auftraggeber die Bereitstellung oder den Betrieb öffentlicher Telekommunikationsnetze oder die Bereitstellung eines oder mehrerer Telekommunikationsdienste für die Öffentlichkeit zu ermöglichen.

Artikel 14

Aufträge, die der Geheimhaltung unterliegen oder bestimmte Sicherheitsmaßnahmen erfordern

Diese Richtlinie gilt nicht für öffentliche Aufträge, die für geheim erklärt werden oder deren Ausführung nach den in dem betreffenden Mitgliedstaat geltenden Rechts- und Verwaltungsvorschriften besondere Sicherheitsmaßnahmen erfordert, oder wenn der Schutz wesentlicher Sicherheitsinteressen dieses Mitgliedstaats es gebietet.

Artikel 15

Aufträge, die auf der Grundlage internationaler Vorschriften vergeben werden

Diese Richtlinie gilt nicht für öffentliche Aufträge, die anderen Verfahrensregeln unterliegen und aufgrund

a) einer gemäß dem Vertrag geschlossenen internationalen Übereinkunft zwischen einem Mitgliedstaat und einem oder mehreren Drittländern über Lieferungen, Bauleistungen oder Dienstleistungen für ein von den Unterzeichnerstaaten gemeinsam zu verwirklichendes oder zu nutzendes Projekt; jede Übereinkunft wird der Kommission mitgeteilt, die hierzu den in Artikel 77 genannten Beratenden Ausschuss für öffentliches Auftragswesen anhören kann;

b) einer internationalen Übereinkunft im Zusammenhang mit der Stationierung von Truppen, die Unternehmen eines Mitgliedstaats oder eines Drittstaats betrifft;

c) des besonderen Verfahrens einer internationalen Organisation

vergeben werden.

Artikel 16

Besondere Ausnahmen

Diese Richtlinie findet keine Anwendung auf öffentliche Dienstleistungsaufträge, die Folgendes zum Gegenstand haben:

a) Erwerb oder Miete von Grundstücken oder vorhandenen Gebäuden oder anderem unbeweglichen Vermögen oder Rechte daran ungeachtet der Finanzmodalitäten dieser Aufträge; jedoch fallen Finanzdienstleistungsverträge jeder Form, die gleichzeitig, vor oder nach dem Kauf- oder Mietvertrag abgeschlossen werden, unter diese Richtlinie;

b) Kauf, Entwicklung, Produktion oder Koproduktion von Programmen, die zur Ausstrahlung durch Rundfunk- oder Fernsehanstalten bestimmt sind, sowie die Ausstrahlung von Sendungen;

c) Schiedsgerichts- und Schlichtungstätigkeiten;

d) Finanzdienstleistungen im Zusammenhang mit der Ausgabe, dem Verkauf, dem Ankauf oder der Übertragung von Wertpapieren oder anderen Finanzinstrumenten, insbesondere Geschäfte, die der Geld- oder Kapitalbeschaffung der öffentlichen Auftraggeber dienen, sowie Dienstleistungen der Zentralbanken;

e) Arbeitsverträge;

f) Forschungs- und Entwicklungsdienstleistungen, deren Ergebnisse nicht ausschließlich Eigentum des öffentlichen Auftraggebers für seinen Gebrauch bei der Ausübung seiner eigenen Tätigkeit sind, sofern die Dienstleistung vollständig durch den öffentlichen Auftraggeber vergütet wird.

Artikel 17

Dienstleistungskonzessionen

Unbeschadet der Bestimmungen des Artikels 3 gilt diese Richtlinie nicht für Dienstleistungskonzessionen gemäß Artikel 1 Absatz 4.

Artikel 18

Dienstleistungsaufträge, die aufgrund eines ausschließlichen Rechts vergeben werden

Diese Richtlinie gilt nicht für öffentliche Dienstleistungsaufträge, die von einem öffentlichen Auftraggeber an einen anderen öffentlichen Auftraggeber oder an einen Verband von öffentlichen Auftraggebern aufgrund eines ausschließlichen Rechts vergeben werden, das dieser aufgrund veröffentlichter, mit dem Vertrag übereinstimmender Rechts- oder Verwaltungsvorschriften innehat.

Abschnitt 4

Sonderregelung

Artikel 19

Vorbehaltene Aufträge

Die Mitgliedstaaten können im Rahmen von Programmen für geschützte Beschäftigungsverhältnisse vorsehen, dass nur geschützte Werkstätten an den Verfahren zur Vergabe öffentlicher Aufträge teilnehmen oder solche Aufträge ausführen dürfen, sofern die Mehrheit der Arbeitnehmer Behinderte sind, die aufgrund der Art oder der Schwere ihrer Behinderung keine Berufstätigkeit unter normalen Bedingungen ausüben können.

Diese Bestimmung wird in der Bekanntmachung angegeben.

KAPITEL III

Regelungen für öffentliche Dienstleistungsaufträge

Artikel 20

Aufträge über Dienstleistungen gemäß Anhang II Teil A

Aufträge über Dienstleistungen gemäß Anhang II Teil A werden nach den Artikeln 23 bis 55 vergeben.

Artikel 21

Aufträge über Dienstleistungen gemäß Anhang II Teil B

Aufträge über Dienstleistungen gemäß Anhang II Teil B unterliegen nur Artikel 23 und Artikel 35 Absatz 4.

Artikel 22

Gemischte Aufträge über Dienstleistungen gemäß Anhang II Teil A und gemäß Anhang II Teil B

Aufträge sowohl über Dienstleistungen gemäß Anhang II Teil A als auch über Dienstleistungen gemäß Anhang II Teil B werden nach den Artikeln 23 bis 55 vergeben, wenn der Wert der Dienstleistungen gemäß Anhang II Teil A höher ist als derjenige der Dienstleistungen gemäß Anhang II Teil B. In allen anderen Fällen wird der Auftrag nach Artikel 23 und Artikel 35 Absatz 4 vergeben.

KAPITEL IV

Besondere Vorschriften über die Verdingungsunterlagen und die Auftragsunterlagen

Artikel 23

Technische Spezifikationen

(1) Die technischen Spezifikationen im Sinne von Anhang VI Nummer 1 sind in den Auftragsunterlagen, wie der Bekanntmachung, den Verdingungsunterlagen oder den zusätzlichen Dokumenten, enthalten. Wo immer dies möglich ist, sollten diese technischen Spezifikationen so festgelegt werden, dass den Zugangskriterien für Behinderte oder der Konzeption für alle Benutzer Rechnung getragen wird.

(2) Die technischen Spezifikationen müssen allen Bietern gleichermaßen zugänglich sein und dürfen die Öffnung der öffentlichen Beschaffungsmärkte für den Wettbewerb nicht in ungerechtfertigter Weise behindern.

(3) Unbeschadet zwingender einzelstaatlicher Vorschriften, soweit diese mit dem Gemeinschaftsrecht vereinbar sind, sind die technischen Spezifikationen wie folgt zu formulieren:

a) entweder unter Bezugnahme auf die in Anhang VI definierten technischen Spezifikationen in der Rangfolge nationale Normen, mit denen europäische Normen umgesetzt werden, europäische technische Zulassungen, gemeinsame technische Spezifikationen, internationale Normen und andere technische Bezugsysteme, die von den europäischen Normungsgremien erarbeitet wurden oder, falls solche Normen und Spezifikationen fehlen, mit Bezugnahme auf nationale Normen, nationale technische Zulassungen oder nationale technische Spezifikationen für die Planung, Berechnung und Ausführung von Bauwerken und den Einsatz von Produkten. Jede Bezugnahme ist mit dem Zusatz „oder gleichwertig“ zu versehen;

b) oder in Form von Leistungs- oder Funktionsanforderungen; diese können Umwelteigenschaften umfassen. Die Anforderungen sind jedoch so genau zu fassen, dass sie den Bietern ein klares Bild vom Auftragsgegenstand vermitteln und dem öffentlichen Auftraggeber die Erteilung des Zuschlags ermöglichen;

c) oder in Form von Leistungs- oder Funktionsanforderungen gemäß Buchstabe b unter Bezugnahme auf die Spezifikationen gemäß Buchstabe a als Mittel zur Vermutung der Konformität mit diesen Leistungs- oder Funktionsanforderungen;

d) oder mit Bezugnahme auf die Spezifikationen gemäß Buchstabe a hinsichtlich bestimmter Merkmale und mit Bezugnahme auf die Leistungs- oder Funktionsanforderungen gemäß Buchstabe b hinsichtlich anderer Merkmale.

(4) Macht der öffentliche Auftraggeber von der Möglichkeit Gebrauch, auf die in Absatz 3 Buchstabe a genannten Spezifikationen zu verweisen, so kann er ein Angebot nicht mit der Begründung ablehnen, die angebotenen Waren und Dienstleistungen entsprächen nicht den von ihm herangezogenen Spezifikationen, sofern der Bieter in seinem Angebot dem öffentlichen Auftraggeber mit geeigneten Mitteln nachweist, dass die von ihm vorgeschlagenen Lösungen den Anforderungen der technischen Spezifikation, auf die Bezug genommen wurde, gleichermaßen entsprechen.

Als geeignetes Mittel kann eine technische Beschreibung des Herstellers oder ein Prüfbericht einer anerkannten Stelle gelten.

(5) Macht der öffentliche Auftraggeber von der Möglichkeit nach Absatz 3 Gebrauch, die technischen Spezifikationen in Form von Leistungs- oder Funktionsanforderungen zu formulieren, so darf er ein Angebot über Bauleistungen, Waren oder Dienstleistungen, die einer nationalen Norm, mit der eine europäische Norm umgesetzt wird, oder einer europäischen technischen Zulassung, einer gemeinsamen technischen Spezifikation, einer internationalen Norm oder einem technischen Bezugssystem, das von den europäischen Normungsgremien erarbeitet wurde, entsprechen, nicht zurückweisen, wenn diese Spezifikationen die von ihm geforderten Leistungs- oder Funktionsanforderungen betreffen.

Der Bieter muss in seinem Angebot mit allen geeigneten Mitteln dem öffentlichen Auftraggeber nachweisen, dass die der Norm entsprechende jeweilige Bauleistung, Ware oder Dienstleistung den Leistungs- oder Funktionsanforderungen des öffentlichen Auftraggebers entspricht.

Als geeignetes Mittel kann eine technische Beschreibung des Herstellers oder ein Prüfbericht einer anerkannten Stelle gelten.

(6) Schreiben die öffentlichen Auftraggeber Umwelteigenschaften in Form von Leistungs- oder Funktionsanforderungen gemäß Absatz 3 Buchstabe b vor, so können sie die detaillierten Spezifikationen oder gegebenenfalls Teile davon verwenden, die in europäischen, (pluri-)nationalen Umweltgütezeichen oder anderen Umweltgütezeichen definiert sind, wenn

— sie sich zur Definition der Merkmale der Waren oder Dienstleistungen eignen, die Gegenstand des Auftrags sind,

— die Anforderungen an das Gütezeichen auf der Grundlage von wissenschaftlich abgesicherten Informationen ausgearbeitet werden;

— die Umweltgütezeichen im Rahmen eines Verfahrens erlassen werden, an dem interessierte Kreise - wie z.B. staatliche Stellen, Verbraucher, Hersteller, Händler und Umweltorganisationen - teilnehmen können,

— und wenn das Gütezeichen für alle Betroffenen zugänglich und verfügbar ist.

Die öffentlichen Auftraggeber können angeben, dass bei Waren oder Dienstleistungen, die mit einem Umweltgütezeichen ausgestattet sind, vermutet wird, dass sie den in den Verdingungsunterlagen festlegten technischen Spezifikationen genügen; sie müssen jedes andere geeignete Beweismittel, wie technische Unterlagen des Herstellers oder Prüfberichte anerkannter Stellen, akzeptieren.

(7) „Anerkannte Stellen" im Sinne dieses Artikels sind die Prüf- und Eichlaboratorien sowie die Inspektions- und Zertifizierungsstellen, die mit den anwendbaren europäischen Normen übereinstimmen.

Die öffentlichen Auftraggeber erkennen Bescheinigungen von in anderen Mitgliedstaaten ansässigen anerkannten Stellen an.

(8) Soweit es nicht durch den Auftragsgegenstand gerechtfertigt ist, darf in technischen Spezifikationen nicht auf eine bestimmte Produktion oder Herkunft oder ein besonderes Verfahren oder auf Marken, Patente, Typen, einen bestimmten Ursprung oder eine bestimmte Produktion verwiesen werden, wenn dadurch bestimmte Unternehmen oder bestimmte Produkte begünstigt oder ausgeschlossen werden. Solche Verweise sind jedoch ausnahmsweise zulässig, wenn der Auftragsgegenstand nach den Absätzen 3 und 4 nicht hinreichend genau und allgemein verständlich beschrieben werden kann; solche Verweise sind mit dem Zusatz „oder gleichwertig" zu versehen.

Artikel 24

Varianten

(1) Bei Aufträgen, die nach dem Kriterium des wirtschaftlich günstigsten Angebots vergeben werden, können die öffentlichen Auftraggeber es zulassen, dass die Bieter Varianten vorlegen.

(2) Die öffentlichen Auftraggeber geben in der Bekanntmachung an, ob Varianten zulässig sind; fehlt eine entsprechende Angabe, so sind keine Varianten zugelassen.

(3) Lassen die öffentlichen Auftraggeber Varianten zu, so nennen sie in den Verdingungsunterlagen die Mindestanforderungen, die Varianten erfüllen müssen, und geben an, in welcher Art und Weise sie einzureichen sind.

(4) Die öffentlichen Auftraggeber berücksichtigen nur Varianten, die die von ihnen verlangten Mindestanforderungen erfüllen.

Bei den Verfahren zur Vergabe öffentlicher Liefer- oder Dienstleistungsaufträge dürfen öffentliche Auftraggeber, die Varianten zugelassen haben, eine Variante nicht allein deshalb zurückweisen, weil sie, wenn sie den Zuschlag erhalten sollte, entweder zu einem Dienstleistungsauftrag anstatt zu einem öffentlichen Lieferauftrag bzw. zu einem Lieferauftrag anstatt zu einem öffentlichen Dienstleistungsauftrag führen würde.

Artikel 25

Unteraufträge

In den Verdingungsunterlagen kann der öffentliche Auftraggeber den Bieter auffordern oder er kann von einem Mitgliedstaat verpflichtet werden, den Bieter aufzufordern, ihm in seinem Angebot den Teil des Auftrags, den der Bieter gegebenenfalls im Wege von Unteraufträgen an Dritte zu vergeben gedenkt, sowie die bereits vorgeschlagenen Unterauftragnehmer bekannt zu geben.

Die Haftung des hauptverantwortlichen Wirtschaftsteilnehmers bleibt von dieser Bekanntgabe unberührt.

Artikel 26

Bedingungen für die Auftragsausführung

Die öffentlichen Auftraggeber können zusätzliche Bedingungen für die Ausführung des Auftrags vorschreiben, sofern diese mit dem Gemeinschaftsrecht vereinbar sind und in der Bekanntmachung oder in den Verdingungsunterlagen angegeben werden. Die Bedingungen für die Ausführung eines Auftrags können insbesondere soziale und umweltbezogene Aspekte betreffen.

Artikel 27

Verpflichtungen im Zusammenhang mit Steuern, Umweltschutz, Arbeitsschutzvorschriften und Arbeitsbedingungen

(1) Ein öffentlicher Auftraggeber kann in den Verdingungsunterlagen die Stelle(n) angeben, bei der (denen) die Bewerber oder Bieter die erforderlichen Auskünfte über ihre Verpflichtungen im Zusammenhang mit Steuern und dem Umweltschutz sowie über die Verpflichtungen erhalten, die sich aus den Vorschriften über Arbeitsschutz und Arbeitsbedingungen ergeben können, die in dem Mitgliedstaat, in der Region oder an dem Ort gelten, an dem die Leistungen zu erbringen sind, und die während der Ausführung des Auftrags auf die ausgeführten Bauaufträge oder die erbrachten Dienstleistungen anzuwenden sind; der öffentliche Auftraggeber kann auch durch einen Mitgliedstaat zu dieser Angabe verpflichtet werden.

(2) Ein öffentlicher Auftraggeber, der die Auskünfte nach Absatz 1 erteilt, verlangt von den Bietern oder Bewerbern eines Vergabeverfahrens die Angabe, dass sie bei der Ausarbeitung ihres Angebots den Verpflichtungen aus den am Ort der Leistungserbringung geltenden Vorschriften über Arbeitsschutz und Arbeitsbedingungen Rechnung getragen haben.

Unterabsatz 1 steht der Anwendung des Artikels 54 über die Prüfung ungewöhnlich niedriger Angebote nicht entgegen.

KAPITEL V

Verfahren

Artikel 28

Anwendung des offenen und des nichtoffenen Verfahrens, des Verhandlungsverfahrens und des wettbewerblichen Dialogs

Für die Vergabe ihrer öffentlichen Aufträge wenden die öffentlichen Auftraggeber die einzelstaatlichen Verfahren in einer für die Zwecke dieser Richtlinie angepassten Form an.

Sie vergeben diese Aufträge im Wege des offenen oder des nichtoffenen Verfahrens. Unter den besonderen in Artikel 29 ausdrücklich genannten Umständen können die öffentlichen Auftraggeber ihre öffentlichen Aufträge im Wege des wettbewerblichen Dialogs vergeben. In den Fällen und unter den Umständen, die in den Artikeln 30 und 31 ausdrücklich genannt sind, können sie auf ein Verhandlungsverfahren mit oder ohne Veröffentlichung einer Bekanntmachung zurückgreifen.

Artikel 29

Wettbewerblicher Dialog

(1) Bei besonders komplexen Aufträgen können die Mitgliedstaaten vorsehen, dass der öffentliche Auftraggeber, falls seines Erachtens die Vergabe eines öffentlichen Auftrags im Wege eines offenen oder nichtoffenen Verfahrens nicht möglich ist, den wettbewerblichen Dialog gemäß diesem Artikel anwenden kann.

Die Vergabe eines öffentlichen Auftrags darf ausschließlich nach dem Kriterium des wirtschaftlich günstigsten Angebots erfolgen.

(2) Die öffentlichen Auftraggeber veröffentlichen eine Bekanntmachung, in der sie ihre Bedürfnisse und Anforderungen formulieren, die sie in dieser Bekanntmachung und/oder in einer Beschreibung näher erläutern.

(3) Die öffentlichen Auftraggeber eröffnen mit den nach den einschlägigen Bestimmungen der Artikeln 44 bis 52 ausgewählten Bewerbern einen Dialog, dessen Ziel es ist, die Mittel, mit denen ihre Bedürfnisse am besten erfüllt werden können, zu ermitteln und festzulegen. Bei diesem Dialog können sie mit den ausgewählten Bewerbern alle Aspekte des Auftrags erörtern.

Die öffentlichen Auftraggeber tragen dafür Sorge, dass alle Bieter bei dem Dialog gleich behandelt werden. Insbesondere enthalten sie sich jeder diskriminierenden Weitergabe von Informationen, durch die bestimmte Bieter gegenüber anderen begünstigt werden könnten.

Die öffentlichen Auftraggeber dürfen Lösungsvorschläge oder vertrauliche Informationen eines teilnehmenden Bewerbers nicht ohne dessen Zustimmung an die anderen Teilnehmer weitergeben.

(4) Die öffentlichen Auftraggeber können vorsehen, dass das Verfahren in verschiedenen aufeinander folgenden Phasen abgewickelt wird, um so die Zahl der in der Dialogphase zu erörternden Lösungen anhand der in der Bekanntmachung oder in der Beschreibung angegebenen Zuschlagskriterien zu verringern. In der Bekanntmachung oder in der Beschreibung ist anzugeben, ob diese Möglichkeit in Anspruch genommen wird.

(5) Der öffentliche Auftraggeber setzt den Dialog fort, bis er - erforderlichenfalls nach einem Vergleich - die Lösung bzw. die Lösungen ermitteln kann, mit denen seine Bedürfnisse erfüllt werden können.

(6) Nachdem die öffentlichen Auftraggeber den Dialog für abgeschlossen erklären und die Teilnehmer entsprechend informiert haben, fordern sie diese auf, auf der Grundlage der eingereichten und in der Dialogphase näher ausgeführten Lösungen ihr endgültiges Angebot einzureichen. Diese Angebote müssen alle zur Ausführung des Projekts erforderlichen Einzelheiten enthalten.

Auf Verlangen des öffentlichen Auftraggebers können Klarstellungen, Präzisierungen und Feinabstimmungen zu diesen Angeboten gemacht werden. Diese Präzisierungen, Klarstellungen, Feinabstimmungen oder Ergänzungen dürfen jedoch keine Änderung der grundlegenden Elemente des Angebots oder der Ausschreibung zur Folge haben, die den Wettbewerb verfälschen oder sich diskriminierend auswirken könnte.

(7) Die öffentlichen Auftraggeber beurteilen die eingereichten Angebote anhand der in der Bekanntmachung oder in der Beschreibung festgelegten Zuschlagskriterien und wählen das wirtschaftlich günstigste Angebot gemäß Artikel 53 aus.

Auf Wunsch des öffentlichen Auftraggebers darf der Bieter, dessen Angebot als das wirtschaftlich günstigste ermittelt wurde, ersucht werden, bestimmte Aspekte des Angebots näher zu erläutern oder im Angebot enthaltene Zusagen zu bestätigen, sofern dies nicht dazu führt, dass wesentliche Aspekte des Angebots oder der Ausschreibung geändert werden, und sofern dies nicht die Gefahr von Wettbewerbsverzerrungen oder Diskriminierungen mit sich bringt.

(8) Die öffentlichen Auftraggeber können Prämien oder Zahlungen an die Teilnehmer am Dialog vorsehen.

Artikel 30

Fälle, die das Verhandlungsverfahren mit Veröffentlichung einer Bekanntmachung rechtfertigen

(1) Der öffentliche Auftraggeber kann in folgenden Fällen Aufträge im Verhandlungsverfahren vergeben, nachdem er eine Bekanntmachung veröffentlicht hat:

a) wenn im Rahmen eines offenen oder nichtoffenen Verfahrens oder eines wettbewerblichen Dialogs keine ordnungsgemäßen Angebote oder nur Angebote abgegeben worden sind, die nach den innerstaatlichen, mit den Artikeln 4, 24, 25 und 27 sowie mit Kapitel VII zu vereinbarenden Vorschriften unannehmbar sind, sofern die ursprünglichen Auftragsbedingungen nicht grundlegend geändert werden.

   Die öffentlichen Auftraggeber brauchen keine Bekanntmachung zu veröffentlichen, wenn sie in das betreffende Verhandlungsverfahren alle die Bieter und nur die Bieter einbeziehen, die die Kriterien der Artikel 46 bis 52 erfüllen und die im Verlauf des vorangegangenen offenen oder nichtoffenen Verfahrens oder wettbewerblichen Dialogs Angebote eingereicht haben, die den formalen Voraussetzungen für das Vergabeverfahren entsprechen;

b) in Ausnahmefällen, wenn es sich um Bauleistungen, Lieferungen oder Dienstleistungen handelt, die ihrer Natur nach oder wegen der damit verbundenen Risiken eine vorherige globale Preisgestaltung nicht zulassen;

c) bei Dienstleistungen, insbesondere bei Dienstleistungen der Kategorie 6 von Anhang II Teil A, und bei geistig-schöpferischen Dienstleistungen wie Bauplanungsdienstleistungen, sofern die zu erbringende Dienstleistung so beschaffen ist, dass vertragliche Spezifikationen nicht so genau festgelegt werden können, dass der Auftrag durch die Wahl des besten Angebots in Übereinstimmung mit den Vorschriften über offene und nichtoffene Verfahren vergeben werden kann;

d) bei öffentlichen Bauaufträgen, wenn es sich um Bauleistungen handelt, die ausschließlich zu Forschungs-, Versuchs- oder Entwicklungszwecken und nicht mit dem Ziel der Gewährleistung der Rentabilität oder der Deckung der Forschungs- und Entwicklungskosten durchgeführt werden.

(2) In den in Absatz 1 genannten Fällen verhandelt der öffentliche Auftraggeber mit den Bietern über die von diesen unterbreiteten Angebote, um sie entsprechend den in der Bekanntmachung, den Verdingungsunterlagen und etwaigen zusätzlichen Unterlagen angegebenen Anforderungen anzupassen und das beste Angebot im Sinne von Artikel 53 Absatz 1 zu ermitteln.

(3) Der öffentliche Auftraggeber trägt dafür Sorge, dass alle Bieter bei den Verhandlungen gleich behandelt werden. Insbesondere enthält er sich jeder diskriminierenden Weitergabe von Informationen, durch die bestimmte Bieter gegenüber anderen begünstigt werden könnten.

(4) Der öffentliche Auftraggeber kann vorsehen, dass das Verhandlungsverfahren in verschiedenen aufeinander folgenden Phasen abgewickelt wird, um so die Zahl der Angebote, über die verhandelt wird, anhand der in der Bekanntmachung oder in den Verdingungsunterlagen angegebenen Zuschlagskriterien zu verringern. In der Bekanntmachung oder in den Verdingungsunterlagen ist anzugeben, ob diese Möglichkeit in Anspruch genommen wird.

Artikel 31

Fälle, die das Verhandlungsverfahren ohne Veröffentlichung einer Bekanntmachung rechtfertigen

Öffentliche Auftraggeber können in folgenden Fällen Aufträge im Verhandlungsverfahren ohne vorherige Bekanntmachung vergeben:

1. Bei öffentlichen Bau-, Liefer- und Dienstleistungsaufträgen:

   a) wenn im Rahmen eines offenen oder nichtoffenen Verfahrens keine oder keine geeigneten Angebote oder keine Bewerbungen abgegeben worden sind, sofern die ursprünglichen Auftragsbedingungen nicht grundlegend geändert werden; der Kommission muss in diesem Fall ein Bericht vorgelegt werden, wenn sie dies wünscht;

   b) wenn der Auftrag aus technischen oder künstlerischen Gründen oder aufgrund des Schutzes von Ausschließlichkeitsrechten nur von einem bestimmten Wirtschaftsteilnehmer ausgeführt werden kann;

   c) soweit dies unbedingt erforderlich ist, wenn dringliche, zwingende Gründe im Zusammenhang mit Ereignissen, die die betreffenden öffentlichen Auftraggeber nicht voraussehen konnten, es nicht zulassen, die Fristen einzuhalten, die für die offenen, die nichtoffenen oder die in Artikel 30 genannten Verhandlungsverfahren mit Veröffentlichung einer Bekanntmachung vorgeschrieben sind. Die angeführten Umstände zur Begründung der zwingenden Dringlichkeit dürfen auf keinen Fall den öffentlichen Auftraggebern zuzuschreiben sein.

2. Bei öffentlichen Lieferaufträgen:

   a) wenn es sich um Erzeugnisse handelt, die ausschließlich zu Forschungs-, Versuchs-, Untersuchungs- oder Entwicklungszwecken hergestellt werden, wobei unter diese Bestimmung nicht eine Serienfertigung zum Nachweis der Marktfähigkeit des Erzeugnisses oder zur Deckung der Forschungs- und Entwicklungskosten fällt;

   b) bei zusätzlichen Lieferungen des ursprünglichen Unternehmers, die entweder zur teilweisen Erneuerung von gelieferten marktüblichen Waren oder Einrichtungen oder zur Erweiterung von Lieferungen oder bestehenden Einrichtungen bestimmt sind, wenn ein Wechsel des Unternehmers dazu führen würde, dass der öffentliche Auftraggeber Waren mit unterschiedlichen technischen Merkmalen kaufen müsste und dies eine technische Unvereinbarkeit oder unverhältnismäßige technische Schwierigkeiten bei Gebrauch und Wartung mit sich bringen würde; die Laufzeit dieser Aufträge sowie der Daueraufträge darf in der Regel drei Jahre nicht überschreiten;

   c) bei auf einer Warenbörse notierten und gekauften Waren;

   d) wenn Waren zu besonders günstigen Bedingungen bei Lieferanten, die ihre Geschäftstätigkeit endgültig einstellen, oder bei Insolvenz/Konkursverwaltern oder Liquidatoren im Rahmen eines Insolvenz/Konkurs-, Vergleichs- oder Ausgleichsverfahren oder eines in den Rechts- oder Verwaltungsvorschriften eines Mitgliedstaats vorgesehenen gleichartigen Verfahrens erworben werden.

3. Bei öffentlichen Dienstleistungsaufträgen, wenn im Anschluss an einen Wettbewerb der Auftrag gemäß den einschlägigen Bestimmungen an den Gewinner oder an einen der Gewinner des Wettbewerbs vergeben werden muss; im letzteren Fall müssen alle Gewinner des Wettbewerbs zur Teilnahme an den Verhandlungen aufgefordert werden.

4. Bei öffentlichen Bau- und Dienstleistungsaufträgen:

   a) für zusätzliche Bau- oder Dienstleistungen, die weder in dem der Vergabe zugrunde liegenden Entwurf noch im ursprünglich geschlossenen Vertrag vorgesehen sind, die aber wegen eines unvorhergesehenen Ereignisses zur Ausführung der darin beschriebenen Bau- oder Dienstleistung erforderlich sind, sofern der Auftrag an den Wirtschaftsteilnehmer vergeben wird, der diese Bau- oder Dienstleistung erbringt:

      — wenn sich diese zusätzlichen Bau- oder Dienstleistungen in technischer und wirtschaftlicher Hinsicht nicht ohne wesentlichen Nachteil für den öffentlichen Auftraggeber vom ursprünglichen Auftrag trennen lassen

oder

— wenn diese Bau- oder Dienstleistungen zwar von der Ausführung des ursprünglichen Auftrags getrennt werden können, aber für dessen Vollendung unbedingt erforderlich sind;

der Gesamtwert der Aufträge für die zusätzlichen Bau- oder Dienstleistungen darf jedoch 50 % des Wertes des ursprünglichen Auftrags nicht überschreiten;

b) bei neuen Bau- oder Dienstleistungen, die in der Wiederholung gleichartiger Bau- oder Dienstleistungen bestehen, die durch den gleichen öffentlichen Auftraggeber an den Auftragnehmer vergeben werden, der den ursprünglichen Auftrag erhalten hat, sofern sie einem Grundentwurf entsprechen und dieser Entwurf Gegenstand des ursprünglichen Auftrags war, der nach einem offenen oder einem nichtoffenen Verfahren vergeben wurde.

Die Möglichkeit der Anwendung dieses Verfahrens wird bereits beim Aufruf zum Wettbewerb für das erste Vorhaben angegeben; der für die Fortführung der Bau- oder Dienstleistungen in Aussicht genommene Gesamtauftragswert wird vom öffentlichen Auftraggeber bei der Anwendung des Artikels 7 berücksichtigt.

Dieses Verfahren darf jedoch nur binnen drei Jahren nach Abschluss des ursprünglichen Auftrags angewandt werden.

Artikel 32

Rahmenvereinbarungen

(1) Die Mitgliedstaaten können für die öffentlichen Auftraggeber die Möglichkeit des Abschlusses von Rahmenvereinbarungen vorsehen.

(2) Für den Abschluss einer Rahmenvereinbarung befolgen die öffentlichen Auftraggeber die Verfahrensvorschriften dieser Richtlinie in allen Phasen bis zur Zuschlagserteilung der Aufträge, die auf diese Rahmenvereinbarung gestützt sind. Für die Auswahl der Parteien einer Rahmenvereinbarung gelten die Zuschlagskriterien gemäß Artikel 53.

Aufträge, die auf einer Rahmenvereinbarung beruhen, werden nach den in den Absätzen 3 und 4 beschriebenen Verfahren vergeben. Diese Verfahren sind nur zwischen dem öffentlichen Auftraggeber und den Wirtschaftsteilnehmern anzuwenden, die von Anbeginn an an der Rahmenvereinbarung beteiligt sind.

Bei der Vergabe der auf einer Rahmenvereinbarung beruhenden Aufträge dürfen die Parteien keinesfalls substanzielle Änderungen an den Bedingungen dieser Rahmenvereinbarung vornehmen; dies ist insbesondere in dem in Absatz 3 genannten Fall zu beachten.

Mit Ausnahme von Sonderfällen, in denen dies insbesondere aufgrund des Gegenstands der Rahmenvereinbarung gerechtfertigt werden kann, darf die Laufzeit der Rahmenvereinbarung vier Jahre nicht überschreiten.

Der öffentliche Auftraggeber darf das Instrument der Rahmenvereinbarung nicht missbräuchlich oder in einer Weise anwenden, durch die der Wettbewerb behindert, eingeschränkt oder verfälscht wird.

(3) Wird eine Rahmenvereinbarung mit einem einzigen Wirtschaftsteilnehmer geschlossen, so werden die auf dieser Rahmenvereinbarung beruhenden Aufträge entsprechend den Bedingungen der Rahmenvereinbarung vergeben.

Für die Vergabe der Aufträge kann der öffentliche Auftraggeber den an der Rahmenvereinbarung beteiligten Wirtschaftsteilnehmer schriftlich konsultieren und ihn dabei auffordern, sein Angebot erforderlichenfalls zu vervollständigen.

(4) Wird eine Rahmenvereinbarung mit mehreren Wirtschaftsteilnehmern geschlossen, so müssen mindestens drei Parteien beteiligt sein, sofern eine ausreichend große Zahl von Wirtschaftsteilnehmern die Eignungskriterien und/oder eine ausreichend große Zahl von zulässigen Angeboten die Zuschlagskriterien erfüllt.

Die Vergabe von Aufträgen, die auf einer mit mehreren Wirtschaftsteilnehmern geschlossenen Rahmenvereinbarung beruhen, erfolgt

— entweder nach den Bedingungen der Rahmenvereinbarung ohne erneuten Aufruf zum Wettbewerb

— oder, sofern nicht alle Bedingungen in der Rahmenvereinbarung festgelegt sind, nach erneutem Aufruf der Parteien zum Wettbewerb zu denselben Bedingungen, die erforderlichenfalls zu präzisieren sind, oder gegebenenfalls nach anderen, in den Verdingungsunterlagen der Rahmenvereinbarung genannten Bedingungen, und zwar nach folgendem Verfahren:

a) Vor Vergabe jedes Einzelauftrags konsultieren die öffentlichen Auftraggeber schriftlich die Wirtschaftsteilnehmer, die in der Lage sind, den Auftrag auszuführen.

b) Die öffentlichen Auftraggeber setzen eine hinreichende Frist für die Abgabe der Angebote für jeden Einzelauftrag; dabei berücksichtigen sie unter anderem die Komplexität des Auftragsgegenstands und die für die Übermittlung der Angebote erforderliche Zeit.

c) Die Angebote sind schriftlich einzureichen, ihr Inhalt ist bis zum Ablauf der Einreichungsfrist geheim zu halten.

d) Die öffentlichen Auftraggeber vergeben die einzelnen Aufträge an den Bieter, der auf der Grundlage der in den Verdingungsunterlagen der Rahmenvereinbarung aufgestellten Zuschlagskriterien das jeweils beste Angebot vorgelegt hat.

Artikel 33

Dynamische Beschaffungssysteme

(1) Die Mitgliedstaaten können vorsehen, dass die öffentlichen Auftraggeber auf dynamische Beschaffungssysteme zurückgreifen können.

(2) Zur Einrichtung eines dynamischen Beschaffungssystems befolgen die öffentlichen Auftraggeber die Vorschriften des offenen Verfahrens in allen Phasen bis zur Erteilung des Zuschlags auf den im Rahmen dieses Systems zu vergebenden Auftrag. Alle Bieter, welche die Eignungskriterien erfüllen und ein unverbindliches Angebot im Einklang mit den Verdingungsunterlagen und den etwaigen zusätzlichen Dokumenten unterbreitet haben, werden zur Teilnahme am System zugelassen; die unverbindlichen Angebote können jederzeit nachgebessert werden, sofern sie dabei mit den Verdingungsunterlagen vereinbar bleiben. Die öffentlichen Auftraggeber verwenden bei der Einrichtung des Systems und bei der Vergabe der Aufträge in dessen Rahmen ausschließlich elektronische Mittel gemäß Artikel 42 Absätze 2 bis 5.

(3) Zur Einrichtung des dynamischen Beschaffungssystems verfahren die öffentlichen Auftraggeber wie folgt:

a) Sie veröffentlichen eine Bekanntmachung, in der sie präzisieren, dass es sich um ein dynamisches Beschaffungssystem handelt;

b) in den Verdingungsunterlagen präzisieren sie unter anderem die Art der in Betracht gezogenen Anschaffungen, die Gegenstand dieses Systems sind, sowie alle erforderlichen Informationen betreffend das Beschaffungssystem, die verwendete elektronische Ausrüstung und die technischen Vorkehrungen und Merkmale der Verbindung;

c) sie gewähren auf elektronischem Wege ab dem Zeitpunkt der Veröffentlichung der Bekanntmachung und bis zur Beendigung des Systems freien, unmittelbaren und uneingeschränkten Zugang zu den Verdingungsunterlagen und zu jedwedem zusätzlichen Dokument und geben in der Bekanntmachung die Internet-Adresse an, unter der diese Dokumente abgerufen werden können.

(4) Die öffentlichen Auftraggeber räumen während der gesamten Laufzeit des dynamischen Beschaffungssystems jedem Wirtschaftsteilnehmer die Möglichkeit ein, ein unverbindliches Angebot zu unterbreiten, um gemäß Absatz 2 zur Teilnahme am System zugelassen zu werden. Sie schließen die Evaluierung binnen einer Frist von höchstens 15 Tagen ab dem Zeitpunkt der Vorlage des unverbindlichen Angebots ab. Sie können die Evaluierung jedoch verlängern, sofern nicht zwischenzeitlich ein Aufruf zum Wettbewerb erfolgt.

Der öffentliche Auftraggeber unterrichtet den Bieter gemäß Unterabsatz 1 unverzüglich darüber, ob er zur Teilnahme am dynamischen Beschaffungssystem zugelassen oder sein unverbindliches Angebot abgelehnt wurde.

(5) Für jeden Einzelauftrag hat ein gesonderter Aufruf zum Wettbewerb zu erfolgen. Vor diesem Aufruf zum Wettbewerb veröffentlichen die öffentlichen Auftraggeber eine vereinfachte Bekanntmachung, in der alle interessierten Wirtschaftsteilnehmer aufgefordert werden, ein unverbindliches Angebot nach Absatz 4 abzugeben, und zwar binnen einer Frist, die nicht weniger als 15 Tage ab dem Versand der vereinfachten Bekanntmachung betragen darf. Die öffentlichen Auftraggeber nehmen den Aufruf zum Wettbewerb erst dann vor, wenn alle fristgerecht eingegangenen unverbindlichen Angebote ausgewertet wurden.

(6) Die öffentlichen Auftraggeber fordern alle zur Teilnahme am System zugelassenen Bieter zur Einreichung von Angeboten für alle im Rahmen des Systems zu vergebenden Aufträge auf. Für die Einreichung der Angebote legen sie eine hinreichend lange Frist fest.

Sie vergeben den Auftrag an den Bieter, der nach den in der Bekanntmachung für die Einrichtung des dynamischen Beschaffungssystems aufgestellten Zuschlagskriterien das beste Angebot vorgelegt hat. Diese Kriterien können gegebenenfalls in der in Unterabsatz 1 genannten Aufforderung präzisiert werden.

(7) Mit Ausnahme von Sonderfällen, die in angemessener Weise zu rechtfertigen sind, darf die Laufzeit eines dynamischen Beschaffungssystems vier Jahre nicht überschreiten.

Die öffentlichen Auftraggeber dürfen dieses System nicht in einer Weise anwenden, durch die der Wettbewerb behindert, eingeschränkt oder verfälscht wird.

Den betreffenden Wirtschaftsteilnehmern oder den am System teilnehmenden Parteien dürfen keine Bearbeitungsgebühren in Rechnung gestellt werden.

Artikel 34

Öffentliche Bauaufträge: besondere Regelungen für den sozialen Wohnungsbau

Im Fall öffentlicher Bauaufträge, die sich auf die Gesamtplanung und den Bau von Wohneinheiten im Rahmen des sozialen Wohnungsbaus erstrecken und bei denen die Planung wegen des Umfangs, der Komplexität und der voraussichtlichen Dauer der Arbeiten von Anfang an in enger Zusammenarbeit in einer Arbeitsgemeinschaft aus Beauftragten der öffentlichen Auftraggeber, Sachverständigen und dem für die Ausführung des Vorhabens vorgesehenen Unternehmer durchgeführt werden muss, kann ein besonderes Vergabeverfahren angewandt werden, um sicherzustellen, dass der zur Aufnahme in die Arbeitsgemeinschaft am besten geeignete Unternehmer ausgewählt wird.

Die öffentlichen Auftraggeber geben in der Bekanntmachung insbesondere eine möglichst genaue Beschreibung der auszuführenden Arbeiten, damit die daran interessierten Unternehmer das auszuführende Vorhaben richtig beurteilen können. Außerdem geben sie in dieser Bekanntmachung gemäß den in den Artikeln 46 bis 52 genannten Eignungskriterien an, welche persönlichen, technischen, wirtschaftlichen und finanziellen Anforderungen die Bewerber erfüllen müssen.

Wird ein solches Verfahren in Anspruch genommen, so wendet der öffentliche Auftraggeber die Artikel 2, 35, 36, 38, 39, 41, 42, 43 und 45 bis 52 an.

KAPITEL VI

Vorschriften über die Veröffentlichung und die Transparenz

Abschnitt 1

Veröffentlichung der Bekanntmachungen

Artikel 35

Bekanntmachungen

(1) Die öffentlichen Auftraggeber teilen im Rahmen einer Vorinformation, die von der Kommission oder von ihnen selbst in ihrem „Beschafferprofil" nach Anhang VIII Nummer 2 Buchstabe b veröffentlicht wird, Folgendes mit:

a) bei Lieferungen den geschätzten Gesamtwert der Aufträge oder der Rahmenvereinbarungen, aufgeschlüsselt nach Warengruppen, die sie in den kommenden 12 Monaten vergeben wollen, wenn der geschätzte Gesamtwert nach Maßgabe der Artikel 7 und 9 mindestens 750 000 EUR beträgt.

   Die Warengruppen werden vom öffentlichen Auftraggeber unter Bezugnahme auf die Positionen des CPV festgelegt;

b) bei Dienstleistungen den geschätzten Gesamtwert der Aufträge oder der Rahmenvereinbarungen, die sie in den kommenden 12 Monaten vergeben bzw. abschließen wollen, aufgeschlüsselt nach den in Anhang II Teil A genannten Kategorien, wenn dieser geschätzte Gesamtwert nach Maßgabe der Artikel 7 und 9 mindestens 750 000 EUR beträgt;

c) bei Bauleistungen die wesentlichen Merkmale der Aufträge oder der Rahmenvereinbarungen, die sie vergeben bzw. abschließen wollen, wenn deren geschätzter Wert nach Maßgabe des Artikels 9 mindestens den in Artikel 7 genannten Schwellenwert erreicht.

Die unter den Buchstaben a und b genannten Bekanntmachungen werden so bald wie möglich nach Beginn des Haushaltsjahres an die Kommission gesandt oder im Beschafferprofil veröffentlicht.

Die unter Buchstabe c genannte Bekanntmachung wird so bald wie möglich nach der Entscheidung, mit der die den beabsichtigten Bauaufträgen oder Rahmenvereinbarungen zugrunde liegende Planung genehmigt wird, an die Kommission gesandt oder im Beschafferprofil veröffentlicht.

Veröffentlicht ein öffentlicher Auftraggeber eine Vorinformation in seinem Beschafferprofil, so meldet er der Kommission zuvor auf elektronischem Wege die Veröffentlichung einer Vorinformation in einem Beschafferprofil., unter Beachtung der Angaben in Anhang VIII Nummer 3 zu Format und Verfahren bei der Übermittlung von Bekanntmachungen.

Die Veröffentlichung der unter den Buchstaben a, b und c genannten Bekanntmachungen ist nur verpflichtend, wenn der öffentliche Auftraggeber von der Möglichkeit einer Verkürzung der Fristen für den Eingang der Angebote gemäß Artikel 38 Absatz 4 Gebrauch machen möchte.

Dieser Absatz gilt nicht für Verhandlungsverfahren ohne vorherige Veröffentlichung einer Bekanntmachung.

(2) Ein öffentlicher Auftraggeber, der einen öffentlichen Auftrag oder eine Rahmenvereinbarung im Wege eines offenen, eines nichtoffenen oder - in den in Artikel 30 genannten Fällen - eines Verhandlungsverfahrens mit Veröffentlichung einer Bekanntmachung oder - in den in Artikel 29 genannten Fällen - im Wege eines wettbewerblichen Dialogs vergeben will, teilt seine Absicht durch eine Bekanntmachung mit.

(3) Ein öffentlicher Auftraggeber, der ein dynamisches Beschaffungssystem einrichten will, teilt seine Absicht durch eine Bekanntmachung mit.

Ein öffentlicher Auftraggeber, der auf der Grundlage eines dynamischen Beschaffungssystems einen Auftrag vergeben will, teilt seine Absicht durch eine vereinfachte Bekanntmachung mit.

(4) Ein öffentlicher Auftraggeber, der einen öffentlichen Auftrag vergeben oder eine Rahmenvereinbarung geschlossen hat, sendet spätestens 48 Tage nach der Vergabe des Auftrags beziehungsweise nach Abschluss der Rahmenvereinbarung eine Bekanntmachung mit den Ergebnissen des Vergabeverfahrens ab.

Bei Rahmenvereinbarungen im Sinne von Artikel 32 brauchen die öffentlichen Auftraggeber nicht für jeden Einzelauftrag, der aufgrund dieser Vereinbarung vergeben wird, eine Bekanntmachung mit den Ergebnissen des jeweiligen Vergabeverfahrens abzusenden.

Der öffentliche Auftraggeber verschickt spätestens 48 Tage nach jeder Auftragsvergabe eine Bekanntmachung mit dem Ergebnis der Vergabe der Einzelaufträge, die im Rahmen eines dynamischen Beschaffungssystems vergeben werden. Er kann diese Bekanntmachungen jedoch auf Quartalsbasis zusammenfassen. In diesem Fall versendet er die Zusammenstellung spätestens 48 Tage nach Quartalsende.

Bei öffentlichen Dienstleistungsaufträgen des Anhangs II Teil B gibt der öffentliche Auftraggeber in seiner Bekanntmachung an, ob er mit der Veröffentlichung einverstanden ist. Für diese Dienstleistungsaufträge legt die Kommission nach dem in Artikel 77 Absatz 2 genannten Verfahren die Regeln fest, nach denen auf der Grundlage dieser Bekanntmachungen statistische Berichte zu erstellen und zu veröffentlichen sind.

Bestimmte Angaben über die Auftragsvergabe oder den Abschluss der Rahmenvereinbarungen müssen jedoch nicht veröffentlicht werden, wenn die Offenlegung dieser Angaben den Gesetzesvollzug behindern, dem öffentlichen Interesse zuwiderlaufen, die berechtigten geschäftlichen Interessen öffentlicher oder privater Wirtschaftsteilnehmer schädigen oder den lauteren Wettbewerb zwischen ihnen beeinträchtigen würde.

Artikel 36

Abfassung und Modalitäten für die Veröffentlichung der Bekanntmachungen

(1) Die Bekanntmachungen enthalten die in Anhang VII Teil A aufgeführten Informationen und gegebenenfalls jede andere vom öffentlichen Auftraggeber für sinnvoll erachtete Angabe gemäß dem jeweiligen Muster der Standardformulare, die von der Kommission gemäß dem in Artikel 77 Absatz 2 genannten Verfahren angenommen werden.

(2) Die von den öffentlichen Auftraggebern an die Kommission gesendeten Bekanntmachungen werden entweder auf elektronischem Wege unter Beachtung der Angaben in Anhang VIII Nummer 3 zu Muster und Verfahren bei der Übermittlung oder auf anderem Wege übermittelt. Bei dem beschleunigten Verfahren nach Artikel 38 Absatz 8 sind die Bekanntmachungen unter Beachtung der Angaben in Anhang VIII Nummer 3 zu Muster und Verfahren bei der Übermittlung entweder per Fax oder auf elektronischem Wege zu übermitteln.

Die Bekanntmachungen werden gemäß den technischen Merkmalen für die Veröffentlichung in Anhang VIII Nummer 1 Buchstaben a und b veröffentlicht.

(3) Bekanntmachungen, die gemäß dem Muster und unter Beachtung der Verfahren bei der Übermittlung nach Anhang VIII Nummer 3 auf elektronischem Wege erstellt und übermittelt wurden, werden spätestens fünf Tage nach ihrer Absendung veröffentlicht.

Bekanntmachungen, die nicht gemäß dem Muster und unter Beachtung der Verfahren bei der Übermittlung nach Anhang VIII Nummer 3 auf elektronischem Wege übermittelt wurden, werden spätestens zwölf Tage nach ihrer Absendung oder bei dem beschleunigten Verfahren nach Artikel 38 Absatz 8 nicht später als fünf Tage nach ihrer Absendung veröffentlicht.

(4) Die Bekanntmachungen werden ungekürzt in einer vom öffentlichen Auftraggeber hierfür gewählten Amtssprache der Gemeinschaft veröffentlicht, wobei nur der in dieser Originalsprache veröffentlichte Text verbindlich ist. Eine Zusammenfassung der wichtigsten Bestandteile einer jeden Bekanntmachung wird in den anderen Amtssprachen veröffentlicht.

Die Kosten für die Veröffentlichung der Bekanntmachungen durch die Kommission gehen zulasten der Gemeinschaft.

(5) Die Bekanntmachungen und ihr Inhalt dürfen auf nationaler Ebene nicht vor dem Tag ihrer Absendung an die Kommission veröffentlicht werden.

Die auf nationaler Ebene veröffentlichten Bekanntmachungen dürfen nur die Angaben enthalten, die in den an die Kommission abgesendeten Bekanntmachungen enthalten sind oder in einem Beschafferprofil gemäß Artikel 35 Absatz 1 Unterabsatz 1 veröffentlicht wurden, und müssen zusätzlich auf das Datum der Absendung der Bekanntmachung an die Kommission bzw. der Veröffentlichung im Beschafferprofil hinweisen.

Die Vorinformationen dürfen nicht in einem Beschafferprofil veröffentlicht werden, bevor die Ankündigung dieser Veröffentlichung an die Kommission abgesendet wurde; das Datum der Absendung muss angegeben werden.

(6) Der Inhalt der Bekanntmachungen, die nicht auf elektronischem Wege gemäß dem Muster und unter Beachtung der Verfahren bei der Übermittlung nach Anhang VIII Nummer 3 abgesendet werden, ist auf ca. 650 Worte beschränkt.

(7) Die öffentlichen Auftraggeber müssen den Tag der Absendung der Bekanntmachungen nachweisen können.

(8) Die Kommission stellt dem öffentlichen Auftraggeber eine Bestätigung der Veröffentlichung der übermittelten Informationen aus, in der das Datum dieser Veröffentlichung angegeben ist. Diese Bestätigung dient als Nachweis der Veröffentlichung.

Artikel 37

Freiwillige Veröffentlichung

Die öffentlichen Auftraggeber können gemäß Artikel 36 Bekanntmachungen über öffentliche Aufträge veröffentlichen, die nicht der Veröffentlichungspflicht gemäß dieser Richtlinie unterliegen.

Abschnitt 2

Fristen

Artikel 38

Fristen für den Eingang der Anträge auf Teilnahme und der Angebote

(1) Bei der Festsetzung der Fristen für den Eingang der Angebote und der Anträge auf Teilnahme berücksichtigt der öffentliche Auftraggeber unbeschadet der in diesem Artikel festgelegten Mindestfristen insbesondere die Komplexität des Auftrags und die Zeit, die für die Ausarbeitung der Angebote erforderlich ist.

(2) Bei offenen Verfahren beträgt die Frist für den Eingang der Angebote mindestens 52 Tage, gerechnet ab dem Tag der Absendung der Bekanntmachung.

(3) Bei nichtoffenen Verfahren, den in Artikel 30 genannten Verhandlungsverfahren mit Veröffentlichung einer Bekanntmachung und dem wettbewerblichen Dialog

a) beträgt die Frist für den Eingang der Anträge auf Teilnahme mindestens 37 Tage, gerechnet ab dem Tag der Absendung der Bekanntmachung;

b) beträgt die Frist für den Eingang der Angebote bei den nichtoffenen Verfahren mindestens 40 Tage, gerechnet ab dem Tag der Absendung der Aufforderung zur Angebotsabgabe.

(4) Hat der öffentliche Auftraggeber eine Vorinformation veröffentlicht, kann die Frist für den Eingang der Angebote nach Absatz 2 und Absatz 3 Buchstabe b im Allgemeinen auf 36 Tage, jedoch auf keinen Fall auf weniger als 22 Tage, verkürzt werden.

Diese Frist beginnt an dem Tag der Absendung der Bekanntmachung bei offenen Verfahren und gerechnet ab dem Tag der Absendung der Aufforderung zur Angebotsabgabe bei nichtoffenen Verfahren zu laufen.

Die in Unterabsatz 1 genannte verkürzte Frist ist zulässig, sofern die Vorinformation alle die für die Bekanntmachung nach Anhang VII Teil A geforderten Informationen - soweit diese zum Zeitpunkt der Veröffentlichung der Bekanntmachung vorlagen - enthielt und die Vorinformation spätestens 52 Tage und frühestens 12 Monate vor dem Tag der Absendung der Bekanntmachung zur Veröffentlichung übermittelt wurde.

(5) Bei Bekanntmachungen, die gemäß dem Muster und unter Beachtung der Verfahren bei der Übermittlung nach Anhang VIII Nummer 3 elektronisch erstellt und versandt werden, können in offenen Verfahren die in den Absätzen 2 und 4 genannten Fristen für den Eingang der Angebote und in den nichtoffenen und Verhandlungsverfahren sowie beim wettbewerblichen Dialog die in Absatz 3 Buchstabe a genannte Frist für den Eingang der Anträge auf Teilnahme um 7 Tage verkürzt werden.

(6) Die in Absatz 2 und Absatz 3 Buchstabe b genannten Fristen für den Eingang der Angebote können um 5 Tage verkürzt werden, wenn der öffentliche Auftraggeber ab der Veröffentlichung der Bekanntmachung die Verdingungsunterlagen und alle zusätzlichen Unterlagen entsprechend den Angaben in Anhang VIII auf elektronischem Wege frei, direkt und vollständig verfügbar macht; in der Bekanntmachung ist die Internet-Adresse anzugeben, unter der diese Unterlagen abrufbar sind.

Diese Verkürzung kann mit der in Absatz 5 genannten Verkürzung kumuliert werden.

(7) Wurden, aus welchem Grund auch immer, die Verdingungsunterlagen und die zusätzlichen Unterlagen oder Auskünfte, obwohl sie rechtzeitig angefordert wurden, nicht innerhalb der in den Artikeln 39 und 40 festgesetzten Fristen zugesandt bzw. erteilt oder können die Angebote nur nach einer Ortsbesichtigung oder Einsichtnahme in Anlagen zu den Verdingungsunterlagen vor Ort erstellt werden, so sind die Fristen entsprechend zu verlängern, und zwar so, dass alle betroffenen Wirtschaftsteilnehmer von allen Informationen, die für die Erstellung des Angebotes notwendig sind, Kenntnis nehmen können.

(8) Bei nichtoffenen Verfahren und den in Artikel 30 genannten Verhandlungsverfahren mit Veröffentlichung einer Bekanntmachung kann der öffentliche Auftraggeber, wenn die Dringlichkeit die Einhaltung der in dem vorliegenden Artikel vorgesehenen Mindestfristen unmöglich macht, folgende Fristen festlegen:

a) mindestens 15 Tage für den Eingang der Anträge auf Teilnahme, gerechnet ab dem Tag der Absendung der Bekanntmachung, beziehungsweise mindestens 10 Tage, wenn die Bekanntmachung gemäß dem Muster und unter Beachtung der Modalitäten nach Anhang VIII Nummer 3 elektronisch übermittelt wurde,

b) bei nichtoffenen Verfahren mindestens 10 Tage für den Eingang der Angebote, gerechnet ab dem Tag der Absendung der Aufforderung zur Angebotsabgabe.

Artikel 39

Offene Verfahren: Verdingungsunterlagen, zusätzliche Unterlagen und Auskünfte

(1) Wenn der öffentliche Auftraggeber bei offenen Verfahren nicht die Verdingungsunterlagen und alle zusätzlichen Unterlagen auf elektronischem Weg gemäß Artikel 38 Absatz 6 frei, direkt und vollständig verfügbar macht, werden die Verdingungsunterlagen und zusätzlichen Unterlagen den Wirtschaftsteilnehmern binnen sechs Tagen nach Eingang des Antrags zugesandt, sofern dieser Antrag rechtzeitig vor dem Schlusstermin für den Eingang der Angebote eingegangen ist.

(2) Zusätzliche Auskünfte zu den Verdingungsunterlagen und den zusätzlichen Unterlagen erteilen der öffentliche Auftraggeber oder die zuständigen Stellen, sofern sie rechtzeitig angefordert worden sind, spätestens sechs Tage vor dem Schlusstermin für den Eingang der Angebote.

Abschnitt 3

Inhalt und Übermittlung von Informationen

Artikel 40

Aufforderung zur Angebotsabgabe, zur Teilnahme am Dialog oder zur Verhandlung

(1) Bei nichtoffenen Verfahren, beim wettbewerblichen Dialog und bei Verhandlungsverfahren mit Veröffentlichung einer Bekanntmachung gemäß Artikel 30 fordert der öffentliche Auftraggeber die ausgewählten Bewerber gleichzeitig schriftlich auf, ihre Angebote einzureichen oder zu verhandeln oder - im Falle des wettbewerblichen Dialogs - am Dialog teilzunehmen.

(2) Die Aufforderung an die Bewerber enthält Folgendes:

— entweder die Verdingungsunterlagen bzw. die Beschreibung und alle zusätzlichen Unterlagen

— oder die Angabe des Zugriffs auf die Verdingungsunterlagen und die anderen im ersten Gedankenstrich angegebenen Unterlagen, wenn sie nach Artikel 38 Absatz 6 auf elektronischem Wege unmittelbar zugänglich gemacht werden.

(3) Wenn eine andere Einrichtung als der für das Vergabeverfahren zuständige öffentliche Auftraggeber die Verdingungsunterlagen, die Beschreibung und/oder die zusätzlichen Unterlagen bereithält, ist in der Aufforderung die Anschrift der Stelle, bei der diese Unterlagen bzw. diese Beschreibung angefordert werden können, und gegebenenfalls der Termin anzugeben, bis zu dem sie angefordert werden können; ferner sind der Betrag und die Bedingungen für die Zahlung des Betrags anzugeben, der für den Erhalt der Unterlagen zu entrichten ist. Die zuständigen Stellen schicken diese Unterlagen den Wirtschaftsteilnehmern nach Erhalt der Anfrage unverzüglich zu.

(4) Die zusätzlichen Informationen über die Verdingungsunterlagen, die Beschreibung bzw. die zusätzlichen Unterlagen werden vom öffentlichen Auftraggeber bzw. von den zuständigen Stellen spätestens sechs Tage vor Ablauf der für die Einreichung von Angeboten festgelegten Frist übermittelt, sofern die Anfrage rechtzeitig eingegangen ist. Bei nichtoffenen Verfahren oder beschleunigten Verhandlungsverfahren beträgt diese Frist vier Tage.

(5) Die Aufforderung zur Angebotsabgabe, zur Verhandlung bzw. - im Falle des wettbewerblichen Dialogs - zur Teilnahme am Dialog enthält mindestens Folgendes:

a) einen Hinweis auf die veröffentlichte Bekanntmachung;

b) den Tag, bis zu dem die Angebote eingehen müssen, die Anschrift der Stelle, bei der sie einzureichen sind, sowie die Sprache(n), in der (denen) sie abzufassen sind;

c) beim wettbewerblichen Dialog den Termin und den Ort des Beginns der Konsultationsphase sowie die verwendete(n) Sprache(n);

d) die Bezeichnung der gegebenenfalls beizufügenden Unterlagen entweder zum Beleg der vom Bewerber gemäß Artikel 44 abgegebenen nachprüfbaren Erklärungen oder als Ergänzung der in demselben Artikel vorgesehenen Auskünfte, wobei keine anderen als die in den Artikeln 47 und 48 genannten Anforderungen gestellt werden dürfen;

e) die Gewichtung der Zuschlagskriterien oder gegebenenfalls die absteigende Reihenfolge der Bedeutung dieser Kriterien, wenn sie nicht in der Bekanntmachung, den Verdingungsunterlagen oder der Beschreibung enthalten sind.

Bei Aufträgen, die nach dem Verfahren des Artikels 29 vergeben werden, dürfen in der Aufforderung zur Teilnahme am Dialog die in Buchstabe b des vorliegenden Absatzes genannten Angaben jedoch nicht erscheinen, sondern sind in der Aufforderung zur Angebotsabgabe aufzuführen.

Artikel 41

Unterrichtung der Bewerber und Bieter

(1) Der öffentliche Auftraggeber teilt den Bewerbern und Bietern schnellstmöglich, auf Antrag auch schriftlich, seine Entscheidungen über den Abschluss einer Rahmenvereinbarung, die Zuschlagserteilung oder die Zulassung zur Teilnahme an einem dynamischen Beschaffungssystem mit, einschließlich der Gründe, aus denen beschlossen wurde, auf den Abschluss einer Rahmenvereinbarung oder die Vergabe eines Auftrags, für den eine Ausschreibung stattgefunden hat, zu verzichten und das Verfahren erneut einzuleiten bzw. kein dynamisches Beschaffungssystem einzurichten.

(2) Auf Verlangen der betroffenen Partei unterrichtet der öffentliche Auftraggeber unverzüglich

— jeden nicht erfolgreichen Bewerber über die Gründe für die Ablehnung seiner Bewerbung,

— jeden nicht berücksichtigten Bieter über die Gründe für die Ablehnung seines Angebots; dazu gehört in den Fällen des Artikels 23 Absätze 4 und 5 eine Unterrichtung über die Gründe für seine Entscheidung, dass keine Gleichwertigkeit vorliegt oder dass die Bauarbeiten, Lieferungen oder Dienstleistungen nicht den Leistungs- oder Funktionsanforderungen entsprechen,

— jeden Bieter, der ein ordnungsgemäßes Angebot eingereicht hat, über die Merkmale und Vorteile des ausgewählten Angebots sowie über den Namen des Zuschlagsempfängers oder der Parteien der Rahmenvereinbarung.

Der Beantwortungszeitraum darf eine Frist von 15 Tagen ab Eingang der schriftlichen Anfrage auf keinen Fall überschreiten.

(3) Die öffentlichen Auftraggeber können jedoch beschließen, bestimmte in Absatz 1 genannte Angaben über die Zuschlagserteilung, den Abschluss von Rahmenvereinbarungen oder die Zulassung zu einem dynamischen Beschaffungssystem nicht mitzuteilen, wenn die Offenlegung dieser Angaben den Gesetzesvollzug behindern, dem öffentlichen Interesse zuwiderlaufen, die berechtigten geschäftlichen Interessen öffentlicher oder privater Wirtschaftsteilnehmer schädigen oder den lauteren Wettbewerb zwischen ihnen beeinträchtigen würde.

Abschnitt 4

Mitteilungen

Artikel 42

Vorschriften über Mitteilungen

(1) Jede Mitteilung sowie jede in diesem Titel genannte Übermittlung von Informationen kann nach Wahl des öffentlichen Auftraggebers per Post, per Fax, auf elektronischem Wege gemäß den Absätzen 4 und 5, auf telefonischem Wege in den in Absatz 6 genannten Fällen und unter den dort aufgeführten Bedingungen oder durch eine Kombination dieser Kommunikationsmittel erfolgen.

(2) Die gewählten Kommunikationsmittel müssen allgemein verfügbar sein; sie dürfen daher nicht dazu führen, dass der Zugang der Wirtschaftsteilnehmer zum Vergabeverfahren beschränkt wird.

(3) Bei der Mitteilung bzw. Übermittlung und Speicherung von Informationen sind die Integrität der Daten und die Vertraulichkeit der Angebote und der Anträge auf Teilnahme zu gewährleisten; der öffentliche Auftraggeber darf vom Inhalt der Angebote und der Anträge auf Teilnahme erst nach Ablauf der Frist für ihre Einreichung Kenntnis erhalten.

(4) Die für die elektronische Übermittlung zu verwendenden Mittel und ihre technischen Merkmale dürfen keinen diskriminierenden Charakter haben und müssen allgemein zugänglich sowie mit den allgemein verbreiteten Erzeugnissen der Informations- und Kommunikationstechnologie kompatibel sein.

(5) Für die Vorrichtungen zur Übermittlung und für den elektronischen Eingang von Angeboten sowie für die Vorrichtungen für den elektronischen Eingang der Anträge auf Teilnahme gelten die folgenden Bestimmungen:

a) Die Informationen über die Spezifikationen, die für die elektronische Übermittlung der Angebote und Anträge auf Teilnahme erforderlich sind, einschließlich der Verschlüsselung, müssen den interessierten Parteien zugänglich sein. Außerdem müssen die Vorrichtungen, die für den elektronischen Eingang der Angebote und Anträge auf Teilnahme verwendet werden, den Anforderungen des Anhangs X genügen.

b) Die Mitgliedstaaten können unter Beachtung des Artikels 5 der Richtlinie 1999/93/EG verlangen, dass elektronisch übermittelte Angebote mit einer fortgeschrittenen elektronischen Signatur gemäß Artikel 5 Absatz 1 der genannten Richtlinie zu versehen sind.

c) Die Mitgliedstaaten können Systeme der freiwilligen Akkreditierung einführen oder beibehalten, die zu einem verbesserten Angebot von Zertifizierungsdiensten für diese Vorrichtungen führen sollen.

d) Bieter und Bewerber sind verpflichtet, vor Ablauf der vorgeschriebenen Frist für die Vorlage der Angebote und Anträge auf Teilnahme die in den Artikeln 45 bis 50 und 52 genannten Unterlagen, Bescheinigungen und Erklärungen einzureichen, wenn diese nicht auf elektronischem Wege verfügbar sind.

(6) Die nachfolgenden Bestimmungen gelten für die Übermittlung der Anträge auf Teilnahme:

a) Anträge auf Teilnahme am Vergabeverfahren können schriftlich oder telefonisch gestellt werden.

b) Werden Anträge auf Teilnahme telefonisch gestellt, sind diese vor Ablauf der Frist für den Eingang der Anträge schriftlich zu bestätigen.

c) Die öffentlichen Auftraggeber können verlangen, dass per Fax gestellte Anträge auf Teilnahme per Post oder auf elektronischem Wege bestätigt werden, sofern dies für das Vorliegen eines gesetzlich gültigen Nachweises erforderlich ist. In diesem Fall geben die öffentlichen Auftraggeber in der Bekanntmachung diese Anforderung zusammen mit der Frist für die Übermittlung der Bestätigung an.

Abschnitt 5

Vergabevermerke

Artikel 43

Inhalt der Vergabevermerke

Die öffentlichen Auftraggeber fertigen über jeden vergebenen Auftrag, jede Rahmenvereinbarung und jede Einrichtung eines dynamischen Beschaffungssystems einen Vergabevermerk an, der mindestens Folgendes umfasst:

a) den Namen und die Anschrift des öffentlichen Auftraggebers, Gegenstand und Wert des Auftrags, der Rahmenvereinbarung oder des dynamischen Beschaffungssystems;

b) die Namen der berücksichtigten Bewerber oder Bieter und die Gründe für ihre Auswahl;

c) die Namen der nicht berücksichtigten Bewerber oder Bieter und die Gründe für die Ablehnung;

d) die Gründe für die Ablehnung von ungewöhnlich niedrigen Angeboten;

e) den Namen des erfolgreichen Bieters und die Gründe für die Auswahl seines Angebots sowie - falls bekannt - den Anteil am Auftrag oder an der Rahmenvereinbarung, den der Zuschlagsempfänger an Dritte weiterzugeben beabsichtigt;

f) bei Verhandlungsverfahren die in den Artikeln 30 und 31 genannten Umstände, die die Anwendung dieses Verfahrens rechtfertigen;

g) bei dem wettbewerblichen Dialog die in Artikel 29 genannten Umstände, die die Anwendung dieses Verfahrens rechtfertigen;

h) gegebenenfalls die Gründe, aus denen der öffentliche Auftraggeber auf die Vergabe eines Auftrags, den Abschluss einer Rahmenvereinbarung oder die Einrichtung eines dynamischen Beschaffungssystems verzichtet hat.

Die öffentlichen Auftraggeber treffen geeignete Maßnahmen, um den Ablauf der mit elektronischen Mitteln durchgeführten Vergabeverfahren zu dokumentieren.

Der Vermerk bzw. sein wesentlicher Inhalt wird der Kommission auf deren Ersuchen mitgeteilt.

KAPITEL VII

Ablauf des Verfahrens

Abschnitt 1

Allgemeine Bestimmungen

Artikel 44

Überprüfung der Eignung und Auswahl der Teilnehmer, Vergabe des Auftrags

(1) Die Auftragsvergabe erfolgt aufgrund der in den Artikeln 53 und 55 festgelegten Kriterien unter Berücksichtigung des Artikels 24, nachdem die öffentlichen Auftraggeber die Eignung der Wirtschaftsteilnehmer, die nicht aufgrund von Artikel 45 und 46 ausgeschlossen wurden, geprüft haben; diese Eignungsprüfung erfolgt nach den in den Artikeln 47 bis 52 genannten Kriterien der wirtschaftlichen und finanziellen Leistungsfähigkeit sowie der beruflichen und technischen Fachkunde und gegebenenfalls nach den in Absatz 3 genannten nichtdiskriminierenden Vorschriften und Kriterien.

(2) Die öffentlichen Auftraggeber können Mindestanforderungen an die Leistungsfähigkeit gemäß den Artikeln 47 und 48 stellen, denen die Bewerber und Bieter genügen müssen.

Der Umfang der Informationen gemäß den Artikeln 47 und 48 sowie die für einen bestimmten Auftrag gestellten Mindestanforderungen an die Leistungsfähigkeit müssen mit dem Auftragsgegenstand zusammenhängen und ihm angemessen sein.

Die Mindestanforderungen werden in der Bekanntmachung angegeben.

(3) Bei den nichtoffenen Verfahren, beim Verhandlungsverfahren mit Veröffentlichung einer Bekanntmachung und beim wettbewerblichen Dialog können die öffentlichen Auftraggeber die Zahl an Bewerbern, die sie zur Abgabe von Angeboten auffordern bzw. zu Verhandlungen oder zum wettbewerblichen Dialog einladen werden, begrenzen, sofern geeignete Bewerber in ausreichender Zahl zur Verfügung stehen. Die öffentlichen Auftraggeber geben in der Bekanntmachung die von ihnen vorgesehenen objektiven und nicht diskriminierenden Kriterien oder Vorschriften, die vorgesehene Mindestzahl und gegebenenfalls auch die Höchstzahl an einzuladenden Bewerbern an.

Bei nichtoffenen Verfahren beträgt die Anzahl mindestens fünf Bewerber. Beim Verhandlungsverfahren mit Veröffentlichung einer Bekanntmachung und beim wettbewerblichen Dialog beträgt die Anzahl mindestens drei Bewerber. In jedem Fall muss die Zahl der eingeladenen Bewerber ausreichend hoch sein, damit ein echter Wettbewerb gewährleistet ist.

Die öffentlichen Auftraggeber laden eine Anzahl von Bewerbern ein, die zumindest der im Voraus bestimmten Mindestzahl an Bewerbern entspricht. Sofern die Zahl von Bewerbern, die die Eignungskriterien und Mindestanforderungen erfüllen, unter der Mindestzahl liegt, kann der öffentliche Auftraggeber das Verfahren fortführen, indem er den oder die Bewerber einlädt, die über die geforderte Leistungsfähigkeit verfügen. Der öffentliche Auftraggeber kann andere Wirtschaftsteilnehmer, die sich nicht um die Teilnahme beworben haben, oder Bewerber, die nicht über die geforderte Leistungsfähigkeit verfügen, nicht zu demselben Verfahren zulassen.

(4) Machen die öffentlichen Auftraggeber von der in Artikel 29 Absatz 4 und in Artikel 30 Absatz 4 vorgesehenen Möglichkeit Gebrauch, die Zahl der zu erörternden Lösungen oder der Angebote, über die verhandelt wird, zu verringern, so tun sie dies aufgrund der Zuschlagskriterien, die sie in der Bekanntmachung, in den Verdingungsunterlagen oder in der Beschreibung angegeben haben. In der Schlussphase müssen noch so viele Angebote vorliegen, dass ein echter Wettbewerb gewährleistet ist, sofern eine ausreichende Anzahl von Lösungen oder geeigneten Bewerbern vorliegt.

Abschnitt 2

Eignungskriterien

Artikel 45

Persönliche Lage des Bewerbers bzw. Bieters

(1) Ein Bewerber oder Bieter ist von der Teilnahme an einem Vergabeverfahren auszuschließen, wenn der öffentliche Auftraggeber Kenntnis davon hat, dass dieser Bewerber oder Bieter aus einem der nachfolgenden Gründe rechtskräftig verurteilt worden ist:

a) Beteiligung an einer kriminellen Organisation im Sinne von Artikel 2 Absatz 1 der gemeinsamen Maßnahme 98/773/JI des Rates ([1]),

b) Bestechung im Sinne von Artikel 3 des Rechtsakts des Rates vom 26. Mai 1997 ([2]) und von Artikel 3 Absatz 1 der gemeinsamen Maßnahme 98/742/JI des Rates ([3]),

c) Betrug im Sinne von Artikel 1 des Übereinkommens über den Schutz der finanziellen Interessen der Europäischen Gemeinschaften ([4]),

d) Geldwäsche im Sinne von Artikel 1 der Richtlinie 91/308/EWG des Rates vom 10. Juni 1991 zur Verhinderung der Nutzung des Finanzsystems zum Zwecke der Geldwäsche ([5]).

Die Mitgliedstaaten legen im Einklang mit ihren nationalen Rechtsvorschriften und unter Beachtung des Gemeinschaftsrechts die Bedingungen für die Anwendung dieses Absatzes fest.

Sie können Ausnahmen von der in Unterabsatz 1 genannten Verpflichtung aus zwingenden Gründen des Allgemeininteresses zulassen.

Zum Zwecke der Anwendung dieses Absatzes verlangen die öffentlichen Auftraggeber gegebenenfalls von den Bewerbern oder Bietern die Vorlage der in Absatz 3 genannten Unterlagen, und sie können die nach ihrem Ermessen erforderlichen Informationen über die persönliche Lage dieser Bewerber oder Bieter bei den zuständigen Behörden einholen, wenn sie Bedenken in Bezug auf die persönliche Lage dieser Bewerber oder Bieter haben. Betreffen die Informationen einen Bewerber oder Bieter, der in einem anderen Staat als der öffentliche Auftraggeber ansässig ist, so kann dieser die zuständigen Behörden um Mitarbeit ersuchen. Nach Maßgabe des nationalen Rechts des Mitgliedstaats, in dem der Bewerber oder Bieter ansässig ist, betreffen diese Ersuchen juristische und/oder natürliche Personen, gegebenenfalls auch die jeweiligen Unternehmensleiter oder jede andere Person, die befugt ist, den Bewerber oder Bieter zu vertreten, in seinem Namen Entscheidungen zu treffen oder ihn zu kontrollieren.

(2) Von der Teilnahme am Vergabeverfahren kann jeder Wirtschaftsteilnehmer ausgeschlossen werden,

a) der sich im Insolvenz-/Konkursverfahren oder einem gerichtlichen Ausgleichsverfahren oder in Liquidation befindet oder seine gewerbliche Tätigkeit eingestellt hat oder sich in einem Vergleichsverfahren oder Zwangsvergleich oder aufgrund eines in den einzelstaatlichen Rechtsvorschriften vorgesehenen gleichartigen Verfahrens in einer entsprechenden Lage befindet;

b) gegen den ein Insolvenz-/Konkursverfahren oder ein gerichtliches Ausgleichsverfahren oder ein Vergleichsverfahren oder ein Zwangsvergleich eröffnet wurde oder gegen den andere in den einzelstaatlichen Rechtsvorschriften vorgesehene gleichartige Verfahren eingeleitet worden sind;

c) die aufgrund eines nach den Rechtsvorschriften des betreffenden Landes rechtskräftigen Urteils wegen eines Deliktes bestraft worden sind, das ihre berufliche Zuverlässigkeit in Frage stellt;

d) die im Rahmen ihrer beruflichen Tätigkeit eine schwere Verfehlung begangen haben, die vom öffentlichen Auftraggeber nachweislich festgestellt wurde;

e) die ihre Verpflichtung zur Zahlung der Sozialbeiträge nach den Rechtsvorschriften des Landes, in dem sie niedergelassen sind, oder des Landes des öffentlichen Auftraggebers nicht erfüllt haben;

f) die ihre Verpflichtung zur Zahlung der Steuern und Abgaben nach den Rechtsvorschriften des Landes, in dem sie niedergelassen sind, oder des Landes des öffentlichen Auftraggebers nicht erfüllt haben;

([1]) ABl. L 351 vom 29.1.1998, S. 1.
([2]) ABl. C 195 vom 25.6.1997, S. 1.
([3]) ABl. L 358 vom 31.12.1998, S. 2.
([4]) ABl. C 316 vom 27.11.1995, S. 48.
([5]) ABl. L 166 vom 28.6.1991, S. 77. Geändert durch die Richtlinie 2001/97/EG des Europäischen Parlaments und des Rates (ABl. L 344 vom 28.12.2001, S. 76).

g) die sich bei der Erteilung von Auskünften, die gemäß diesem Abschnitt eingeholt werden können, in erheblichem Maße falscher Erklärungen schuldig gemacht oder diese Auskünfte nicht erteilt haben.

Die Mitgliedstaaten legen nach Maßgabe ihrer innerstaatlichen Rechtsvorschriften und unter Beachtung des Gemeinschaftsrechts die Bedingungen für die Anwendung dieses Absatzes fest.

(3) Als ausreichenden Nachweis dafür, dass die in Absatz 1 und Absatz 2 Buchstaben a, b, c, e oder f genannten Fälle auf den Wirtschaftsteilnehmer nicht zutreffen, akzeptiert der öffentliche Auftraggeber

a) im Fall von Absatz 1 und Absatz 2 Buchstaben a, b und c einen Auszug aus dem Strafregister oder – in Ermangelung eines solchen – eine gleichwertige Urkunde einer zuständigen Gerichts- oder Verwaltungsbehörde des Ursprungs- oder Herkunftslands, aus der hervorgeht, dass diese Anforderungen erfüllt sind;

b) im Fall von Absatz 2 Buchstaben e oder f eine von der zuständigen Behörde des betreffenden Mitgliedstaates ausgestellte Bescheinigung.

Wird eine Urkunde oder Bescheinigung von dem betreffenden Land nicht ausgestellt oder werden darin nicht alle in Absatz 1 und Absatz 2 Buchstaben a, b oder c vorgesehenen Fälle erwähnt, so kann sie durch eine eidesstattliche Erklärung oder in den Mitgliedstaaten, in denen es keine eidesstattliche Erklärung gibt, durch eine förmliche Erklärung ersetzt werden, die der betreffende Wirtschaftsteilnehmer vor einer zuständigen Gerichts- oder Verwaltungsbehörde, einem Notar oder einer dafür qualifizierten Berufsorganisation des Ursprungs- oder Herkunftslands abgibt.

(4) Die Mitgliedstaaten benennen die für die Ausgabe der Urkunden, Bescheinigungen oder Erklärungen nach Absatz 3 zuständigen Behörden und Stellen und unterrichten davon die Kommission. Die datenschutzrechtlichen Bestimmungen bleiben von dieser Mitteilung unberührt.

Artikel 46

Befähigung zur Berufsausübung

Jeder Wirtschaftsteilnehmer, der sich an einem Auftrag beteiligen möchte, kann aufgefordert werden, nachzuweisen, dass er im Berufs- oder Handelsregister seines Herkunftslandes vorschriftsmäßig eingetragen ist, bzw. eine Erklärung unter Eid oder eine Bescheinigung vorzulegen; für die Vergabe öffentlicher Bauaufträge gelten die Angaben in Anhang IX Teil A, für die Vergabe öffentlicher Lieferaufträge gelten die Angaben in Anhang IX Teil B und für die Vergabe öffentlicher Dienstleistungsaufträge gelten die Angaben in Anhang IX Teil C, und zwar nach Maßgabe der Bedingungen, die im Mitgliedstaat seiner Niederlassung gelten.

Müssen Bewerber oder Bieter eine bestimmte Berechtigung besitzen oder Mitglieder einer bestimmten Organisation sein, um die betreffende Dienstleistung in ihrem Ursprungsmitgliedstaat erbringen zu können, so kann der öffentliche Auftraggeber bei der Vergabe öffentlicher Dienstleistungsaufträge den Nachweis ihrer Berechtigung oder Mitgliedschaft verlangen.

Artikel 47

Wirtschaftliche und finanzielle Leistungsfähigkeit

(1) Die finanzielle und wirtschaftliche Leistungsfähigkeit des Wirtschaftsteilnehmers kann in der Regel durch einen oder mehrere der nachstehenden Nachweise belegt werden:

a) entsprechende Bankerklärungen oder gegebenenfalls Nachweis einer entsprechenden Berufshaftpflichtversicherung;

b) Vorlage von Bilanzen oder Bilanzauszügen, falls deren Veröffentlichung in dem Land, in dem der Wirtschaftsteilnehmer ansässig ist, gesetzlich vorgeschrieben ist;

c) eine Erklärung über den Gesamtumsatz und gegebenenfalls den Umsatz für den Tätigkeitsbereich, der Gegenstand der Ausschreibung ist, höchstens in den letzten drei Geschäftsjahren, entsprechend dem Gründungsdatum oder dem Datum der Tätigkeitsaufnahme des Wirtschaftsteilnehmers, sofern entsprechende Angaben verfügbar sind.

(2) Ein Wirtschaftsteilnehmer kann sich gegebenenfalls für einen bestimmten Auftrag auf die Kapazitäten anderer Unternehmen ungeachtet des rechtlichen Charakters der zwischen ihm und diesen Unternehmen bestehenden Verbindungen stützen. Er muss in diesem Falle dem öffentlichen Auftraggeber gegenüber nachweisen, dass ihm die erforderlichen Mittel zur Verfügung stehen, indem er beispielsweise die diesbezüglichen Zusagen dieser Unternehmen vorlegt.

(3) Unter denselben Voraussetzungen können sich Gemeinschaften von Wirtschaftsteilnehmern nach Artikel 4 auf die Kapazitäten der Mitglieder der Gemeinschaften oder anderer Unternehmen stützen.

(4) Die öffentlichen Auftraggeber geben in der Bekanntmachung oder in der Aufforderung zur Angebotsabgabe an, welche der in Absatz 1 genannten Nachweise sowie welche anderen Nachweise vorzulegen sind.

(5) Kann ein Wirtschaftsteilnehmer aus einem berechtigten Grund die vom öffentlichen Auftraggeber geforderten Nachweise nicht beibringen, so kann er den Nachweis seiner finanziellen und wirtschaftlichen Leistungsfähigkeit durch Vorlage jedes anderen vom öffentlichen Auftraggeber für geeignet erachteten Belegs erbringen.

Artikel 48

Technische und/oder berufliche Leistungsfähigkeit

(1) Die technische und/oder berufliche Leistungsfähigkeit des Wirtschaftsteilnehmers wird gemäß den Absätzen 2 und 3 bewertet und überprüft.

(2) Der Nachweis der technischen Leistungsfähigkeit des Wirtschaftsteilnehmers kann je nach Art, Menge oder Umfang und Verwendungszweck der Bauleistungen, der zu liefernden Erzeugnisse oder der Dienstleistungen wie folgt erbracht werden:

a) i) durch eine Liste der in den letzten fünf Jahren erbrachten Bauleistungen, wobei für die wichtigsten Bauleistungen Bescheinigungen über die ordnungsgemäße Ausführung beizufügen sind. Aus diesen Bescheinigungen muss Folgendes hervorgehen: der Wert der Bauleistung sowie Zeit und Ort der Bauausführung und die Angabe, ob die Arbeiten fachgerecht und ordnungsgemäß ausgeführt wurden; gegebenenfalls leitet die zuständige Behörde diese Bescheinigungen direkt dem öffentlichen Auftraggeber zu;

ii) durch eine Liste der in den letzten drei Jahren erbrachten wesentlichen Lieferungen oder Dienstleistungen mit Angabe des Werts, des Liefer- bzw. Erbringungszeitpunkts sowie des öffentlichen oder privaten Empfängers. Die Lieferungen und Dienstleistungen werden wie folgt nachgewiesen:

— durch eine von der zuständigen Behörde ausgestellte oder beglaubigte Bescheinigung, wenn es sich bei dem Empfänger um einen öffentlichen Auftraggeber handelte;

— wenn es sich bei dem Empfänger um einen privaten Erwerber handelt, durch eine vom Erwerber ausgestellte Bescheinigung oder, falls eine derartige Bescheinigung nicht erhältlich ist, durch eine einfache Erklärung des Wirtschaftsteilnehmers;

b) durch Angabe der technischen Fachkräfte oder der technischen Stellen, unabhängig davon, ob sie dem Unternehmen des Wirtschaftsteilnehmers angehören oder nicht, und zwar insbesondere derjenigen, die mit der Qualitätskontrolle beauftragt sind, und bei öffentlichen Bauaufträgen derjenigen, über die der Unternehmer für die Ausführung des Bauwerks verfügt;

c) durch die Beschreibung der technischen Ausrüstung des Lieferanten oder Dienstleistungserbringers, seiner Maßnahmen zur Qualitätssicherung und seiner Untersuchungs- und Forschungsmöglichkeiten;

d) sind die zu liefernden Erzeugnisse oder die zu erbringenden Dienstleistungen komplexer Art oder sollen sie ausnahmsweise einem besonderen Zweck dienen, durch eine Kontrolle, die vom öffentlichen Auftraggeber oder in dessen Namen von einer zuständigen amtlichen Stelle durchgeführt wird, die sich dazu bereit erklärt und sich in dem Land befindet, in dem der Lieferant oder Dienstleistungserbringer ansässig ist; diese Kontrolle betrifft die Produktionskapazität des Lieferanten bzw. die technische Leistungsfähigkeit des Dienstleistungserbringers und erforderlichenfalls seine Untersuchungs- und Forschungsmöglichkeiten sowie die von ihm für die Qualitätskontrolle getroffenen Vorkehrungen;

e) durch Studiennachweise und Bescheinigungen über die berufliche Befähigung des Dienstleistungserbringers oder Unternehmers und/oder der Führungskräfte des Unternehmens, insbesondere der für die Erbringung der Dienstleistungen oder für die Ausführung der Bauleistungen verantwortlichen Personen;

f) bei öffentlichen Bau- und Dienstleistungsaufträgen, und zwar nur in den entsprechenden Fällen durch Angabe der Umweltmanagementmaßnahmen, die der Wirtschaftsteilnehmer bei der Ausführung des Auftrags gegebenenfalls anwenden will;

g) durch eine Erklärung, aus der die durchschnittliche jährliche Beschäftigtenzahl des Dienstleistungserbringers oder des Unternehmers und die Zahl seiner Führungskräfte in den letzten drei Jahren ersichtlich ist;

h) durch eine Erklärung, aus der hervorgeht, über welche Ausstattung, welche Geräte und welche technische Ausrüstung der Dienstleistungserbringer oder Unternehmer für die Ausführung des Auftrags verfügt;

i) durch die Angabe, welche Teile des Auftrags der Dienstleistungserbringer unter Umständen als Unteraufträge zu vergeben beabsichtigt;

j) hinsichtlich der zu liefernden Erzeugnisse:

i) durch Muster, Beschreibungen und/oder Fotografien, wobei die Echtheit auf Verlangen des öffentlichen Auftraggebers nachweisbar sein muss;

ii) durch Bescheinigungen, die von als zuständig anerkannten Instituten oder amtlichen Stellen für Qualitätskontrolle ausgestellt wurden und in denen bestätigt wird, dass die durch entsprechende Bezugnahmen genau bezeichneten Erzeugnisse bestimmten Spezifikationen oder Normen entsprechen;

(3) Ein Wirtschaftsteilnehmer kann sich gegebenenfalls für einen bestimmten Auftrag auf die Kapazitäten anderer Unternehmen ungeachtet des rechtlichen Charakters der zwischen ihm und diesen Unternehmen bestehenden Verbindungen stützen. Er muss in diesem Falle dem öffentlichen Auftraggeber gegenüber nachweisen, dass ihm für die Ausführung des Auftrags die erforderlichen Mittel zur Verfügung stehen, indem er beispielsweise die Zusage dieser Unternehmen vorlegt, dass sie dem Wirtschaftsteilnehmer die erforderlichen Mittel zur Verfügung stellen.

(4) Unter denselben Voraussetzungen können sich Gemeinschaften von Wirtschaftsteilnehmern nach Artikel 4 auf die Leistungsfähigkeit der Mitglieder der Gemeinschaften oder anderer Unternehmen stützen.

(5) Bei der Vergabe öffentlicher Aufträge, die die Lieferung von Waren, für die Verlege- oder Anbringarbeiten erforderlich sind, die Erbringung von Dienstleistungen und/oder Bauleistungen zum Gegenstand haben, kann die Eignung der Wirtschaftsteilnehmer zur Erbringung dieser Leistungen oder zur Ausführung der Verlege- und Anbringarbeiten insbesondere anhand ihrer Fachkunde, Leistungsfähigkeit, Erfahrung und Zuverlässigkeit beurteilt werden.

(6) Der öffentliche Auftraggeber gibt in der Bekanntmachung oder in der Aufforderung zur Angebotsabgabe an, welche der in Absatz 2 genannten Nachweise vorzulegen sind.

Artikel 49

Qualitätssicherungsnormen

Verlangen die öffentlichen Auftraggeber zum Nachweis dafür, dass der Wirtschaftsteilnehmer bestimmte Qualitätssicherungsnormen erfüllt, die Vorlage von Bescheinigungen unabhängiger Stellen, so nehmen sie auf Qualitätssicherungsverfahren Bezug, die den einschlägigen europäischen Normen genügen und von entsprechenden Stellen zertifiziert sind, die den europäischen Zertifizierungsnormen entsprechen. Gleichwertige Bescheinigungen von Stellen aus anderen Mitgliedstaaten sind anzuerkennen. Die öffentlichen Auftraggeber erkennen auch andere gleichwertige Nachweise für Qualitätssicherungsmaßnahmen an.

Artikel 50

Normen für Umweltmanagement

Verlangen die öffentlichen Auftraggeber in den in Artikel 48 Absatz 2 Buchstabe f genannten Fällen zum Nachweis dafür, dass der Wirtschaftsteilnehmer bestimmte Normen für das Umweltmanagement erfüllt, die Vorlage von Bescheinigungen unabhängiger Stellen, so nehmen sie auf das Gemeinschaftssystem für das Umweltmanagement und die Umweltbetriebsprüfung (EMAS) oder auf Normen für das Umweltmanagement Bezug, die auf den einschlägigen europäischen oder internationalen Normen beruhen und von entsprechenden Stellen zertifiziert sind, die dem Gemeinschaftsrecht oder gemäß einschlägigen europäischen oder internationalen Zertifizierungsnormen entsprechen. Gleichwertige Bescheinigungen von Stellen in anderen Mitgliedstaaten sind anzuerkennen. Die öffentlichen Auftraggeber erkennen auch andere Nachweise für gleichwertige Umweltmanagement-Maßnahmen an, die von den Wirtschaftsteilnehmern vorgelegt werden.

Artikel 51

Zusätzliche Unterlagen und Auskünfte

Der öffentliche Auftraggeber kann Wirtschaftsteilnehmer auffordern, die in Anwendung der Artikel 45 bis 50 vorgelegten Bescheinigungen und Dokumente zu vervollständigen oder zu erläutern.

Artikel 52

Amtliche Verzeichnisse zugelassener Wirtschaftsteilnehmer und Zertifizierung durch öffentlich-rechtliche oder privatrechtliche Stellen

(1) Die Mitgliedstaaten können entweder amtliche Verzeichnisse zugelassener Bauunternehmer, Lieferanten oder Dienstleistungserbringer oder eine Zertifizierung durch öffentlich-rechtliche oder privatrechtliche Stellen einführen.

Die Mitgliedstaaten passen die Bedingungen für die Eintragung in diese Verzeichnisse sowie für die Ausstellung der Bescheinigungen durch die Zertifizierungsstellen an Artikel 45 Absatz 1 und Absatz 2 Buchstaben a bis d und g, Artikel 46, Artikel 47 Absätze 1, 4 und 5, Artikel 48 Absätze 1, 2, 5 und 6, Artikel 49 und gegebenenfalls Artikel 50 an.

Die Mitgliedstaaten passen die Bedingungen ferner an die Bestimmungen der Artikels 47 Absatz 2 und Artikels 48 Absatz 3 an, sofern Anträge auf Eintragung von Wirtschaftsteilnehmern gestellt werden, die zu einer Gruppe gehören und sich auf die von anderen Unternehmen der Gruppe bereitgestellten Kapazitäten stützen. Diese Wirtschaftsteilnehmer müssen in diesem Falle gegenüber der das amtliche Verzeichnis herausgebenden Behörde nachweisen, dass sie während der gesamten Geltungsdauer der Bescheinigung über ihre Eintragung in ein amtliches Verzeichnis über diese Kapazitäten verfügen und dass die Eignungskriterien, die nach den in Unterabsatz 2 genannten Artikeln vorgeschrieben sind und auf die sie sich für ihre Eintragung berufen, von den betreffenden anderen Unternehmen in diesem Zeitraum fortlaufend erfüllt werden.

(2) Wirtschaftsteilnehmer, die in solchen amtlichen Verzeichnissen eingetragen sind oder über eine Bescheinigung verfügen, können dem öffentlichen Auftraggeber bei jeder Vergabe eine Bescheinigung der zuständigen Stelle über die Eintragung oder die von der zuständigen Zertifizierungsstelle ausgestellte Bescheinigung vorlegen. In diesen Bescheinigungen sind die Nachweise, aufgrund deren die Eintragung in das Verzeichnis/-die Zertifizierung erfolgt ist, sowie die sich aus dem Verzeichnis ergebende Klassifizierung anzugeben.

(3) Die von den zuständigen Stellen bescheinigte Eintragung in die amtlichen Verzeichnisse bzw. die von der Zertifizierungsstelle ausgestellte Bescheinigung stellt für die öffentlichen Auftraggeber der anderen Mitgliedstaaten nur eine Eignungsvermutung in Bezug auf Artikel 45 Absatz 1 und Absatz 2 Buchstaben a bis d und g, Artikel 46, Artikel 47 Absatz 1 Buchstaben b und c sowie Artikel 48 Absatz 2 Buchstabe a Ziffer i und Buchstaben b, e, g und h für Bauunternehmer, Absatz 2 Buchstabe a Ziffer ii und Buchstaben b, c, d und j für Lieferanten sowie Absatz 2 Buchstabe a Ziffer ii und Buchstaben c bis i für Dienstleistungserbringer dar.

(4) Die Angaben, die den amtlichen Verzeichnissen bzw. der Zertifizierung zu entnehmen sind, können nicht ohne Begründung in Zweifel gezogen werden. Hinsichtlich der Zahlung der Sozialbeiträge und der Zahlung von Steuern und Abgaben kann bei jeder Vergabe von jedem in das Verzeichnis eingetragenen Wirtschaftsteilnehmer eine zusätzliche Bescheinigung verlangt werden.

Öffentliche Auftraggeber aus anderen Mitgliedstaaten wenden die Bestimmungen von Absatz 3 und des Unterabsatzes 1 des vorliegenden Absatzes nur zugunsten von Wirtschaftsteilnehmern an, die in dem Mitgliedstaat ansässig sind, in dem das amtliche Verzeichnis geführt wird.

(5) Für die Eintragung von Wirtschaftsteilnehmern aus anderen Mitgliedstaaten in ein amtliches Verzeichnis bzw. für ihre Zertifizierung durch die in Absatz 1 genannten Stellen können nur die für inländische Wirtschaftsteilnehmer vorgesehenen Nachweise und Erklärungen gefordert werden, in jedem Fall jedoch nur diejenigen, die in den Artikeln 45 bis 49 und gegebenenfalls in Artikel 50 genannt sind.

Eine solche Eintragung oder Zertifizierung kann jedoch den Wirtschaftsteilnehmern aus anderen Mitgliedstaaten nicht zur Bedingung für ihre Teilnahme an einer öffentlichen Ausschreibung gemacht werden. Die öffentlichen Auftraggeber erkennen gleichwertige Bescheinigungen von Stellen in anderen Mitgliedstaaten an. Sie erkennen auch andere gleichwertige Nachweise an.

(6) Die Wirtschaftsteilnehmer können jederzeit die Eintragung in ein amtliches Verzeichnis oder die Ausstellung der Bescheinigung beantragen. Sie sind innerhalb einer angemessen kurzen Frist von der Entscheidung der zuständigen Zertifizierungsstelle bzw. der Stelle, die das amtliche Verzeichnis führt, zu unterrichten.

(7) Die in Absatz 1 genannten Zertifizierungsstellen sind Stellen, die die europäischen Normen für die Zertifizierung erfüllen.

(8) Mitgliedstaaten, die amtliche Verzeichnisse führen oder über Zertifizierungsstellen im Sinne von Absatz 1 verfügen, sind gehalten, der Kommission und den übrigen Mitgliedstaaten die Anschrift der Stelle mitzuteilen, bei der die Anträge eingereicht werden können.

Abschnitt 3

Auftragsvergabe

Artikel 53

Zuschlagskriterien

(1) Der öffentliche Auftraggeber wendet unbeschadet der für die Vergütung von bestimmten Dienstleistungen geltenden einzelstaatlichen Rechts- und Verwaltungsvorschriften bei der Erteilung des Zuschlags folgende Kriterien an:

a) entweder - wenn der Zuschlag auf das aus Sicht des öffentlichen Auftraggebers wirtschaftlich günstigste Angebot erfolgt - verschiedene mit dem Auftragsgegenstand zusammenhängende Kriterien, z.B. Qualität, Preis, technischer Wert, Ästhetik, Zweckmäßigkeit, Umwelteigenschaften, Betriebskosten, Rentabilität, Kundendienst und technische Hilfe, Lieferzeitpunkt und Lieferungs- oder Ausführungsfrist

b) oder ausschließlich das Kriterium des niedrigsten Preises.

(2) Unbeschadet des Unterabsatzes 3 gibt der öffentliche Auftraggeber im Fall von Absatz 1 Buchstabe a in der Bekanntmachung oder den Verdingungsunterlagen oder - beim wettbewerblichen Dialog - in der Beschreibung an, wie er die einzelnen Kriterien gewichtet, um das wirtschaftlich günstigste Angebot zu ermitteln.

Diese Gewichtung kann mittels einer Marge angegeben werden, deren größte Bandbreite angemessen sein muss.

Kann nach Ansicht des öffentlichen Auftraggebers die Gewichtung aus nachvollziehbaren Gründen nicht angegeben werden, so gibt der öffentliche Auftraggeber in der Bekanntmachung oder in den Verdingungsunterlagen oder - beim wettbewerblichen Dialog - in der Beschreibung die Kriterien in der absteigenden Reihenfolge ihrer Bedeutung an.

Artikel 54

Durchführung von elektronischen Auktionen

(1) Die Mitgliedstaaten können festlegen, dass die öffentlichen Auftraggeber elektronischen Auktionen durchführen dürfen.

(2) Bei der Verwendung des offenen und nichtoffenen Verfahrens sowie des Verhandlungsverfahrens können die öffentlichen Auftraggeber im Falle des Artikels 30 Absatz 1 Buchstabe a beschließen, dass der Vergabe eines öffentlichen Auftrags eine elektronische Auktion vorausgeht, sofern die Spezifikationen des Auftrags hinreichend präzise beschrieben werden können.

Eine elektronische Auktion kann unter den gleichen Bedingungen bei einem erneuten Aufruf zum Wettbewerb der Parteien einer Rahmenvereinbarung nach Artikel 32 Absatz 4 Unterabsatz 2 zweiter Gedankenstrich und bei einem Aufruf zum Wettbewerb hinsichtlich der im Rahmen des in Artikel 33 genannten dynamischen Beschaffungssystems zu vergebenden Aufträge durchgeführt werden.

Die elektronische Auktion erstreckt sich

— entweder allein auf die Preise, wenn der Zuschlag für den Auftrag zum niedrigsten Preis erteilt wird,

— oder auf die Preise und/oder die Werte der in den Verdingungsunterlagen genannten Angebotskomponenten, wenn das wirtschaftlich günstigste Angebot den Zuschlag für den Auftrag erhält.

(3) Öffentliche Auftraggeber, die die Durchführung einer elektronischen Auktion beschließen, weisen in der Bekanntmachung darauf hin.

Die Verdingungsunterlagen enthalten unter anderem folgende Informationen:

a) die Komponenten, deren Werte Gegenstand der elektronischen Auktion sein werden, sofern diese Komponenten in der Weise quantifizierbar sind, dass sie in Ziffern oder in Prozentangaben ausgedrückt werden können;

b) gegebenenfalls die Obergrenzen der Werte, die unterbreitet werden können, wie sie sich aus den Spezifikationen des Auftragsgegenstandes ergeben;

c) die Informationen, die den Bietern im Laufe der elektronischen Auktion zur Verfügung gestellt werden, sowie den Termin, an dem sie ihnen gegebenenfalls zur Verfügung gestellt werden;

d) die relevanten Angaben zum Ablauf der elektronischen Auktion;

e) die Bedingungen, unter denen die Bieter Gebote tätigen können, und insbesondere die Mindestabstände, die bei diesen Geboten gegebenenfalls einzuhalten sind;

f) die relevanten Angaben zur verwendeten elektronischen Vorrichtung und zu den technischen Modalitäten und Merkmalen der Anschlussverbindung.

(4) Vor der Durchführung einer elektronischen Auktion nehmen die öffentlichen Auftraggeber anhand des bzw. der Zuschlagskriterien und der dafür festgelegten Gewichtung eine erste vollständige Evaluierung der Angebote vor.

Alle Bieter, die zulässige Angebote unterbreitet haben, werden gleichzeitig auf elektronischem Wege aufgefordert, neue Preise und/oder Werte vorzulegen; die Aufforderung enthält sämtliche relevanten Angaben betreffend die individuelle Verbindung zur verwendeten elektronischen Vorrichtung sowie das Datum und die Uhrzeit des Beginns der elektronischen Auktion. Die elektronische Auktion kann mehrere aufeinander folgende Phasen umfassen. Sie darf frühestens zwei Arbeitstage nach der Versendung der Aufforderungen beginnen.

(5) Erfolgt der Zuschlag auf das wirtschaftlich günstigste Angebot, so wird der Aufforderung das Ergebnis einer vollständigen Bewertung des Angebots des betreffenden Bieters, die entsprechend der Gewichtung nach Artikel 53 Absatz 2 Unterabsatz 1 durchgeführt wurde, beigefügt.

In der Aufforderung ist ebenfalls die mathematische Formel vermerkt, der zufolge bei der elektronischen Auktion die automatischen Neureihungen entsprechend den vorgelegten neuen Preisen und/oder den neuen Werten vorgenommen wird. Aus dieser Formel geht auch die Gewichtung aller Kriterien für die Ermittlung des wirtschaftlich günstigsten Angebots hervor, so wie sie in der Bekanntmachung oder in den Verdingungsunterlagen angegeben ist; zu diesem Zweck sind etwaige Margen durch einen im Voraus festgelegten Wert auszudrücken.

Sind Varianten zulässig, so muss für jede einzelne Variante getrennt eine Formel angegeben werden.

(6) Die öffentlichen Auftraggeber übermitteln allen Bietern im Laufe einer jeden Phase der elektronischen Auktion unverzüglich zumindest die Informationen, die erforderlich sind, damit den Bietern jederzeit ihr jeweiliger Rang bekannt ist. Sie können ferner zusätzliche Informationen zu anderen vorgelegten Preisen oder Werten übermitteln, sofern dies in den Verdingungsunterlagen angegeben ist. Darüber hinaus können sie jederzeit die Zahl der Teilnehmer an der Phase der Auktion bekannt geben. Sie dürfen jedoch keinesfalls während der Phasen der elektronischen Auktion die Identität der Bieter bekannt geben.

(7) Die öffentlichen Auftraggeber schließen die elektronische Auktion nach einer oder mehreren der folgenden Vorgehensweisen ab:

a) Sie geben in der Aufforderung zur Teilnahme an der Auktion das Datum und die Uhrzeit an, die von vornherein festgelegt wurden;

b) sie schließen das Verfahren ab, wenn keine neuen Preise oder neuen Werte mehr eingehen, die den Anforderungen an die Mindestabstände gerecht werden. In diesem Falle geben die öffentlichen Auftraggeber in der Aufforderung zur Teilnahme an der Auktion die Frist an, die sie ab dem Erhalt der letzten Vorlage bis zum Abschluss der elektronischen Auktion verstreichen lassen;

c) sie schließen das Verfahren ab, wenn die Auktionsphasen in der Anzahl, die in der Aufforderung zur Teilnahme an der Auktion angegeben war, durchgeführt wurden.

Wenn die öffentlichen Auftraggeber beschlossen haben, die elektronische Auktion gemäß Buchstabe c, gegebenenfalls kombiniert mit dem Verfahren nach Buchstabe b, abzuschließen, wird in der Aufforderung zur Teilnahme an der Auktion der Zeitplan für jede Auktionsphase angegeben.

(8) Nach Abschluss der elektronischen Auktion vergibt der öffentliche Auftraggeber den Auftrag gemäß Artikel 53 entsprechend den Ergebnissen der elektronischen Auktion.

Öffentliche Auftraggeber dürfen elektronische Auktionen nicht missbräuchlich oder dergestalt durchführen, dass der Wettbewerb ausgeschaltet, eingeschränkt oder verfälscht wird, oder dergestalt, dass der Auftragsgegenstand, wie er im Zuge der Veröffentlichung der Bekanntmachung ausgeschrieben und in den Verdingungsunterlagen definiert worden ist, verändert wird.

Artikel 55

Ungewöhnlich niedrige Angebote

(1) Erwecken im Fall eines bestimmten Auftrags Angebote den Eindruck, im Verhältnis zur Leistung ungewöhnlich niedrig zu sein, so muss der öffentliche Auftraggeber vor Ablehnung dieser Angebote schriftlich Aufklärung über die Einzelposten des Angebots verlangen, wo er dies für angezeigt hält.

Die betreffenden Erläuterungen können insbesondere Folgendes betreffen:

a) die Wirtschaftlichkeit des Bauverfahrens, des Fertigungsverfahrens oder der Erbringung der Dienstleistung,

b) die gewählten technischen Lösungen und/oder alle außergewöhnlich günstigen Bedingungen, über die der Bieter bei der Durchführung der Bauleistungen, der Lieferung der Waren oder der Erbringung der Dienstleistung verfügt,

c) die Originalität der Bauleistungen, der Lieferungen oder der Dienstleistungen wie vom Bieter angeboten,

d) die Einhaltung der Vorschriften über Arbeitsschutz und Arbeitsbedingungen, die am Ort der Leistungserbringung gelten,

e) die etwaige Gewährung einer staatlichen Beihilfe an den Bieter.

(2) Der öffentliche Auftraggeber prüft - in Rücksprache mit dem Bieter - die betreffende Zusammensetzung und berücksichtigt dabei die gelieferten Nachweise.

(3) Stellt der öffentliche Auftraggeber fest, dass ein Angebot ungewöhnlich niedrig ist, weil der Bieter eine staatliche Beihilfe erhalten hat, so darf er das Angebot allein aus diesem Grund nur nach Rücksprache mit dem Bieter ablehnen, sofern dieser binnen einer von dem öffentlichen Auftraggeber festzulegenden ausreichenden Frist nicht nachweisen kann, dass die betreffende Beihilfe rechtmäßig gewährt wurde. Lehnt der öffentliche Auftraggeber ein Angebot unter diesen Umständen ab, so teilt er dies der Kommission mit.

TITEL III

VORSCHRIFTEN IM BEREICH ÖFFENTLICHER BAUKONZESSIONEN

KAPITEL I

Vorschriften für öffentliche Baukonzessionen

Artikel 56

Anwendungsbereich

Dieses Kapitel gilt für alle von öffentlichen Auftraggebern geschlossenen Verträge über öffentliche Baukonzessionen, sofern der Wert dieser Verträge mindestens 6 242 000 EUR beträgt.

Dieser Wert wird nach den für öffentliche Bauaufträge geltenden Regeln, wie sie in Artikel 9 festgelegt sind, berechnet.

Artikel 57

Ausschluss vom Anwendungsbereich

Dieser Titel findet keine Anwendung auf öffentliche Baukonzessionen,

a) die für öffentliche Bauaufträge gemäß den Artikeln 13, 14 oder 15 vergeben werden;

b) die von öffentlichen Auftraggebern, die eine oder mehrere Tätigkeiten gemäß den Artikeln 3 bis 7 der Richtlinie 2004/17/EG zum Zwecke der Durchführung dieser Tätigkeiten vergeben werden.

Diese Richtlinie findet jedoch weiterhin auf öffentliche Baukonzessionen Anwendung, die von öffentlichen Auftraggebern, die eine oder mehrere der in Artikel 6 der Richtlinie 2004/17/EG genannten Tätigkeiten ausüben, für diese Tätigkeiten ausgeschrieben werden, solange der betreffende Mitgliedstaat die in Artikel 71 Absatz 1 Unterabsatz 2 der genannten Richtlinie vorgesehene Möglichkeit, deren Anwendung zu verschieben, in Anspruch nimmt.

Artikel 58

Veröffentlichung der Bekanntmachung betreffend öffentliche Baukonzessionen

(1) Ein öffentlicher Auftraggeber, der eine öffentliche Baukonzession vergeben will, teilt seine Absicht in einer Bekanntmachung mit.

(2) Die Bekanntmachungen betreffend öffentliche Baukonzessionen enthalten die in Anhang VII Teil C aufgeführten Informationen und gegebenenfalls jede andere vom öffentlichen Auftraggeber für sinnvoll erachtete Angabe gemäß den jeweiligen Mustern der Standardformulare, die von der Kommission nach dem in Artikel 77 Absatz 2 genannten Verfahren angenommen werden.

(3) Die Bekanntmachungen werden gemäß Artikel 36 Absätze 2 bis 8 veröffentlicht.

(4) Artikel 37 betreffend die Veröffentlichung der Bekanntmachungen gilt auch für öffentliche Baukonzessionen.

Artikel 59

Fristen

Vergeben die öffentlichen Auftraggeber eine öffentliche Baukonzession, so beträgt die Frist für die Bewerbung um die Konzession mindestens 52 Tage, gerechnet ab dem Tag der Absendung der Bekanntmachung, mit Ausnahme der Fälle des Artikels 38 Absatz 5.

Artikel 38 Absatz 7 findet Anwendung.

Artikel 60

Unteraufträge

Der öffentliche Auftraggeber kann

a) entweder vorschreiben, dass der Konzessionär einen Mindestsatz von 30 % des Gesamtwerts der Arbeiten, die Gegenstand der Baukonzession sind, an Dritte vergibt, wobei vorzusehen ist, dass die Bewerber diesen Prozentsatz erhöhen können; der Mindestsatz muss im Baukonzessionsvertrag angegeben werden;

b) oder die Konzessionsbewerber auffordern, in ihren Angeboten selbst anzugeben, welchen Prozentsatz - sofern ein solcher besteht - des Gesamtwertes der Arbeiten, die Gegenstand der Baukonzession sind, sie an Dritte vergeben wollen.

Artikel 61

Vergabe von Aufträgen für zusätzliche Arbeiten an den Konzessionär

Diese Richtlinie gilt nicht für zusätzliche Arbeiten, die weder im ursprünglichen Konzessionsentwurf noch im ursprünglichen Vertrag vorgesehen sind, die jedoch wegen eines unvorhergesehenen Ereignisses zur Ausführung der Bauleistungen in der beschriebenen Form erforderlich geworden sind und die der öffentliche Auftraggeber an den Konzessionär vergibt, sofern die Vergabe an den Wirtschaftsteilnehmer erfolgt, der die betreffende Bauleistung erbringt, und zwar

- wenn sich diese zusätzlichen Arbeiten in technischer und wirtschaftlicher Hinsicht nicht ohne wesentlichen Nachteil für die öffentlichen Auftraggeber vom ursprünglichen Auftrag trennen lassen oder

- wenn diese Arbeiten zwar von der Ausführung des ursprünglichen Auftrags getrennt werden können, aber für dessen Verbesserung unbedingt erforderlich sind.

Der Gesamtwert der vergebenen Aufträge für die zusätzlichen Arbeiten darf jedoch 50 % des Wertes für die ursprünglichen Arbeiten, die Gegenstand der Konzession sind, nicht überschreiten.

KAPITEL II

Vorschriften über Aufträge, die von öffentlichen Auftraggebern als Konzessionären vergeben werden

Artikel 62

Anwendbare Vorschriften

Ist der Konzessionär selbst öffentlicher Auftraggeber im Sinne des Artikels 1 Absatz 9, so muss er bei der Vergabe von Bauleistungen an Dritte die Vorschriften dieser Richtlinie über die Vergabe öffentlicher Bauaufträge beachten.

KAPITEL III

Vorschriften über Aufträge, die von Konzessionären vergeben werden, die nicht öffentliche Auftraggeber sind

Artikel 63

Vorschriften über die Veröffentlichung: Schwellenwerte und Ausnahmen

(1) Die Mitgliedstaaten tragen dafür Sorge, dass öffentliche Baukonzessionäre, die nicht öffentliche Auftraggeber sind, bei den von ihnen an Dritte vergebenen Aufträgen die in Artikel 64 enthaltenen Bekanntmachungsvorschriften anwenden, wenn der Auftragswert mindestens 6 242 000 EUR beträgt.

Eine Bekanntmachung ist nicht erforderlich bei Bauaufträgen, die die in Artikel 31 genannten Bedingungen erfüllen.

Der Wert der Aufträge wird gemäß den in Artikel 9 festgelegten Regelungen für öffentliche Bauaufträge berechnet.

(2) Unternehmen, die sich zusammengeschlossen haben, um die Konzession zu erhalten, sowie mit den betreffenden Unternehmen verbundene Unternehmen gelten nicht als Dritte.

Ein „verbundenes Unternehmen“ ist ein Unternehmen, auf das der Konzessionär unmittelbar oder mittelbar einen beherrschenden Einfluss ausüben kann, das seinerseits einen beherrschenden Einfluss auf den Konzessionär ausüben kann oder das ebenso wie der Konzessionär dem beherrschenden Einfluss eines dritten Unternehmens unterliegt, sei es durch Eigentum, finanzielle Beteiligung oder sonstige Bestimmungen, die die Tätigkeit der Unternehmen regeln. Ein beherrschender Einfluss wird vermutet, wenn ein Unternehmen unmittelbar oder mittelbar

a) die Mehrheit des gezeichneten Kapitals eines anderen Unternehmens besitzt oder

b) über die Mehrheit der mit den Anteilen eines anderen Unternehmens verbundenen Stimmrechte verfügt oder

c) mehr als die Hälfte der Mitglieder des Verwaltungs-, Leitungs- oder Aufsichtsorgans eines anderen Unternehmens bestellen kann.

Die vollständige Liste dieser Unternehmen ist der Bewerbung um eine Konzession beizufügen. Diese Liste ist auf den neuesten Stand zu bringen, falls sich später in den Beziehungen zwischen den Unternehmen Änderungen ergeben.

Artikel 64

Veröffentlichung der Bekanntmachung

(1) Öffentliche Baukonzessionäre, die nicht öffentliche Auftraggeber sind und einen Bauauftrag an Dritte vergeben wollen, teilen ihre Absicht in einer Bekanntmachung mit.

(2) Die Bekanntmachungen enthalten die in Anhang VII Teil C aufgeführten Informationen und gegebenenfalls jede andere vom öffentlichen Baukonzessionär für sinnvoll erachtete Angabe gemäß den jeweiligen Mustern der Standardformulare, die von der Kommission nach dem in Artikel 77 Absatz 2 genannten Verfahren angenommen werden.

(3) Die Bekanntmachungen werden gemäß Artikel 36 Absätze 2 bis 8 veröffentlicht.

(4) Artikel 37 betreffend die freiwillige Veröffentlichung von Bekanntmachungen ist ebenfalls anzuwenden.

Artikel 65

Fristen für den Eingang der Anträge auf Teilnahme und für den Eingang der Angebote

Bei der Vergabe von Bauaufträgen setzen öffentliche Baukonzessionäre, die nicht öffentliche Auftraggeber sind, die Frist für den Eingang der Anträge auf Teilnahme auf nicht weniger als 37 Tage, gerechnet ab dem Tag der Absendung der Bekanntmachung, und die Frist für den Eingang der Angebote auf nicht weniger als 40 Tage, gerechnet ab dem Tag der Absendung der Bekanntmachung oder der Aufforderung zur Einreichung eines Angebots, fest.

Artikel 38 Absätze 5, 6 und 7 findet Anwendung.

TITEL IV

VORSCHRIFTEN ÜBER WETTBEWERBE IM DIENSTLEISTUNGSBEREICH

Artikel 66

Allgemeine Bestimmungen

(1) Die auf die Durchführung eines Wettbewerbs anwendbaren Regeln müssen den Artikeln 66 bis 74 entsprechen und sind den an der Teilnahme am Wettbewerb Interessierten mitzuteilen.

(2) Die Zulassung zur Teilnahme an einem Wettbewerb darf nicht beschränkt werden

a) auf das Gebiet eines Mitgliedstaats oder einen Teil davon;

b) aufgrund der Tatsache, dass nach dem Recht des Mitgliedstaats, in dem der Wettbewerb organisiert wird, nur natürliche oder nur juristische Personen teilnehmen dürften.

Artikel 67

Anwendungsbereich

(1) Die Wettbewerbe werden gemäß diesem Titel durchgeführt, und zwar

a) von öffentlichen Auftraggebern, die zentrale Regierungsbehörden im Sinne des Anhangs IV sind, ab einem Schwellenwert von mindestens 162 000 EUR,

b) von öffentlichen Auftraggebern, die nicht zu den in Anhang IV genannten gehören, ab einem Schwellenwert von mindestens 249 000 EUR,

c) von allen öffentlichen Auftraggebern ab einem Schwellenwert von mindestens 249 000 EUR, wenn die Wettbewerbe die in Anhang II Teil A Kategorie 8 genannten Dienstleistungen, die in Kategorie 5 genannten Dienstleistungen im Fernmeldewesen, deren CPV-Positionen den CPC-Referenznummern 7524, 7525 und 7526 entsprechen, und/oder die in Anhang II Teil B genannten Dienstleistungen betreffen.

(2) Dieser Titel findet Anwendung auf

a) Wettbewerbe, die im Rahmen der Vergabe eines öffentlichen Dienstleistungsauftrags durchgeführt werden;

b) Wettbewerbe mit Preisgeldern oder Zahlungen an die Teilnehmer.

In den Fällen nach Buchstabe a ist der Schwellenwert der geschätzte Wert des öffentlichen Dienstleistungsauftrags ohne MwSt einschließlich etwaiger Preisgelder und/oder Zahlungen an die Teilnehmer.

In den Fällen nach Buchstabe b ist der Schwellenwert der Gesamtwert dieser Preisgelder und Zahlungen, einschließlich des geschätzten Wertes des öffentlichen Dienstleistungsauftrags ohne MwSt, der später nach Artikel 31 Absatz 3 vergeben werden könnte, sofern der öffentliche Auftraggeber eine derartige Vergabe in der Bekanntmachung des Wettbewerbs nicht ausschließt.

Artikel 68

Ausschluss vom Anwendungsbereich

Dieser Titel findet keine Anwendung auf

a) Wettbewerbe für Dienstleistungen im Sinne der Richtlinie 2004/17/EG, die von öffentlichen Auftraggebern, die eine oder mehrere Tätigkeiten gemäß den Artikeln 3 bis 7 der genannten Richtlinie ausüben, zum Zwecke der Ausübung dieser Tätigkeiten durchgeführt werden, und auf Wettbewerbe, die nicht unter die genannte Richtlinie fallen;

   Diese Richtlinie findet jedoch weiterhin auf Wettbewerbe für Dienstleistungen Anwendung, die von öffentlichen Auftraggebern, die eine oder mehrere der in Artikel 6 der Richtlinie 2004/17/EG genannten Tätigkeiten ausüben, für diese Tätigkeiten ausgeschrieben werden, solange der betreffende Mitgliedstaat die in Artikel 71 Absatz 1 Unterabsatz 2 der genannten Richtlinie vorgesehene Möglichkeit, deren Anwendung zu verschieben, in Anspruch nimmt.

b) Wettbewerbe, die in den in den Artikeln 13, 14 und 15 der vorliegenden Richtlinie genannten Fällen für öffentliche Dienstleistungsaufträge durchgeführt werden.

Artikel 69

Bekanntmachungen

(1) Öffentliche Auftraggeber, die einen Wettbewerb durchführen wollen, teilen ihre Absicht in einer Wettbewerbsbekanntmachung mit.

(2) Öffentliche Auftraggeber, die einen Wettbewerb durchgeführt haben, übermitteln eine Bekanntmachung über die Ergebnisse des Wettbewerbs gemäß Artikel 36 und müssen einen Nachweis über das Datum der Absendung vorlegen können.

Angaben über das Ergebnis des Wettbewerbs brauchen jedoch nicht veröffentlicht zu werden, wenn ihre Offenlegung den Gesetzesvollzug behindern, dem öffentlichen Interesse zuwiderlaufen oder die legitimen geschäftlichen Interessen öffentlicher oder privater Unternehmen schädigen oder den lauteren Wettbewerb zwischen den Dienstleistungserbringern beeinträchtigen würde.

(3) Artikel 37 betreffend die Bekanntmachungen findet auch auf Wettbewerbe Anwendung.

Artikel 70

Abfassen von Bekanntmachungen über Wettbewerbe und Modalitäten ihrer Veröffentlichung

(1) Die Bekanntmachungen gemäß Artikel 69 enthalten die in Anhang VII Teil D aufgeführten Informationen gemäß den jeweiligen Mustern der Standardformulare, die von der Kommission nach dem in Artikel 77 Absatz 2 genannten Verfahren beschlossen werden.

(2) Die Bekanntmachungen werden gemäß Artikel 36 Absätze 2 bis 8 veröffentlicht.

Artikel 71

Kommunikationsmittel

(1) Artikel 42 Absätze 1, 2 und 4 gilt für jede Übermittlung von Informationen über Wettbewerbe.

(2) Die Übermittlung, der Austausch und die Speicherung von Informationen erfolgen dergestalt, dass Vollständigkeit und Vertraulichkeit aller von den Teilnehmern des Wettbewerbs übermittelten Informationen gewährleistet sind und das Preisgericht vom Inhalt der Pläne und Entwürfe erst Kenntnis erhält, wenn die Frist für ihre Vorlage verstrichen ist.

(3) Für die Vorrichtungen, die für den elektronischen Empfang der Pläne und Entwürfe verwendet werden, gelten die folgenden Bestimmungen:

a) Die Informationen über die Spezifikationen, die für den elektronischen Empfang der Pläne und Entwürfe erforderlich sind, einschließlich der Verschlüsselung, müssen den interessierten Parteien zugänglich sein. Außerdem müssen die Vorrichtungen, die für den elektronischen Empfang der Pläne und Entwürfe verwendet werden, den Anforderungen des Anhangs X genügen;

b) die Mitgliedstaaten können Systeme der freiwilligen Akkreditierung, die zu einem verbesserten Angebot von Zertifizierungsdiensten für diese Vorrichtungen führen sollen, einführen oder beibehalten.

Artikel 72

Auswahl der Wettbewerbsteilnehmer

Bei Wettbewerben mit beschränkter Teilnehmerzahl legen die öffentlichen Auftraggeber eindeutige und nichtdiskriminierende Eignungskriterien fest. In jedem Fall muss die Zahl der Bewerber, die zur Teilnahme am Wettbewerb aufgefordert werden, ausreichen, um einen echten Wettbewerb zu gewährleisten.

Artikel 73

Zusammensetzung des Preisgerichts

Das Preisgericht darf nur aus natürlichen Personen bestehen, die von den Teilnehmern des Wettbewerbs unabhängig sind. Wird von den Wettbewerbsteilnehmern eine bestimmte berufliche Qualifikation verlangt, muss mindestens ein Drittel der Preisrichter über dieselbe oder eine gleichwertige Qualifikation verfügen.

Artikel 74

Entscheidungen des Preisgerichts

(1) Das Preisgericht ist in seinen Entscheidungen und Stellungnahmen unabhängig.

(2) Die von den Bewerbern vorgelegten Pläne und Entwürfe werden unter Wahrung der Anonymität und nur aufgrund der Kriterien, die in der Wettbewerbsbekanntmachung genannt sind, geprüft.

(3) Es erstellt über die Rangfolge der von ihm ausgewählten Projekte einen von den Preisrichtern zu unterzeichnenden Bericht, in dem auf die einzelnen Wettbewerbsarbeiten eingegangen wird und die Bemerkungen des Preisgerichts sowie gegebenenfalls noch zu klärende Fragen aufgeführt sind.

(4) Die Anonymität ist bis zur Stellungnahme oder zur Entscheidung des Preisgerichts zu wahren.

(5) Die Bewerber können bei Bedarf aufgefordert werden, zur Klärung bestimmter Aspekte der Wettbewerbsarbeiten Antworten auf Fragen zu erteilen, die das Preisgericht in seinem Protokoll festgehalten hat.

(6) Über den Dialog zwischen den Preisrichtern und den Bewerbern ist ein umfassendes Protokoll zu erstellen.

TITEL V

STATISTISCHE PFLICHTEN, DURCHFÜHRUNGSBEFUGNISSE UND SCHLUSSBESTIMMUNGEN

Artikel 75

Statistische Pflichten

Um eine Einschätzung der Ergebnisse der Anwendung dieser Richtlinie zu ermöglichen, übermitteln die Mitgliedstaaten der Kommission spätestens am 31. Oktober jeden Jahres eine statistische Aufstellung gemäß Artikel 76 der von den öffentlichen Auftraggebern im Vorjahr vergebenen Aufträge, und zwar getrennt nach öffentlichen Liefer-, Dienstleistungs- und Bauaufträgen.

Artikel 76

Inhalt der statistischen Aufstellung

(1) Für jeden in Anhang IV aufgeführten öffentlichen Auftraggeber enthält die statistische Aufstellung mindestens

a) die Anzahl und den Wert der vergebenen Aufträge im Sinne dieser Richtlinie;

b) die Anzahl und den Gesamtwert der Aufträge, die aufgrund der Ausnahmeregelung des Übereinkommens vergeben wurden.

Soweit möglich werden die Daten gemäß Unterabsatz 1 Buchstabe a aufgeschlüsselt:

a) nach den jeweiligen Vergabeverfahren,

b) und für jedes Verfahren nach den Bauleistungen gemäß der in Anhang I aufgeführten Einteilung, nach Waren und Dienstleistungen gemäß den in Anhang II aufgeführten Kategorien der CPV-Nomenklatur,

c) nach der Staatsangehörigkeit des Wirtschaftsteilnehmers, an den der Auftrag vergeben wurde.

Werden die Aufträge im Verhandlungsverfahren vergeben, so werden die Daten gemäß Unterabsatz 1 Buchstabe a auch nach den in den Artikeln 30 und 31 genannten Fallgruppen aufgeschlüsselt und enthalten die Anzahl und den Wert der vergebenen Aufträge nach Staatszugehörigkeit der erfolgreichen Bieter zu einem Mitgliedstaat oder einem Drittstaat.

(2) Für jede Kategorie von öffentlichen Auftraggebern, die nicht in Anhang IV genannt sind, enthält die statistische Aufstellung mindestens

a) die Anzahl und den Wert der vergebenen Aufträge, aufgeschlüsselt gemäß Absatz 1 Unterabsatz 2,

b) den Gesamtwert der Aufträge, die aufgrund der Ausnahmeregelung des Übereinkommens vergeben wurden.

(3) Die statistische Aufstellung enthält alle weiteren statistischen Informationen, die gemäß dem Übereinkommen verlangt werden.

Die in Unterabsatz 1 genannten Informationen werden nach dem in Artikel 77 Absatz 2 genannten Verfahren festgelegt.

Artikel 77

Beratender Ausschuss

(1) Die Kommission wird von dem Beratenden Ausschuss für öffentliches Auftragswesen, nachfolgend „Ausschuss" genannt, unterstützt, der mit Artikel 1 des Beschlusses 71/306/EWG [1] eingesetzt wurde.

(2) Wird auf diesen Absatz Bezug genommen, so gelten die Artikel 3 und 7 des Beschlusses 1999/468/EG unter Beachtung von dessen Artikel 8.

(3) Der Ausschuss gibt sich eine Geschäftsordnung.

Artikel 78

Neufestsetzung der Schwellenwerte

(1) Die Kommission überprüft die in Artikel 7 genannten Schwellenwerte alle zwei Jahre ab Inkrafttreten der Richtlinie und setzt diese, soweit erforderlich, nach dem in Artikel 77 Absatz 2 genannten Verfahren neu fest.

Die Berechnung dieser Schwellenwerte beruht auf dem durchschnittlichen Tageskurs des Euro ausgedrückt in SZR während der 24 Monate, die am letzten Augusttag enden, der der Neufestsetzung zum 1. Januar vorausgeht. Der so neu festgesetzte Schwellenwert wird, sofern erforderlich, auf volle Tausend Euro abgerundet, um die Einhaltung der geltenden Schwellenwerte zu gewährleisten, die in dem Übereinkommen vorgesehen sind und in SZR ausgedrückt werden.

(2) Anlässlich der in Absatz 1 genannten Neufestsetzung passt die Kommission nach dem in Artikel 77 Absatz 2 genannten Verfahren:

a) die Schwellenwerte in Artikel 8 Absatz 1 Buchstabe a, in Artikel 56 und in Artikel 63 Absatz 1 Unterabsatz 1 an die neu festgesetzten und für die öffentlichen Bauaufträge geltenden Schwellenwerte an;

b) die Schwellenwerte in Artikel 8 Absatz 1 Buchstabe b und in Artikel 67 Absatz 1 Buchstabe a an die neu festgesetzten Schwellenwerte an, die für öffentliche Dienstleistungsaufträge gelten, die von öffentlichen Auftraggebern des Anhangs IV vergeben werden;

c) die Schwellenwerte in Artikel 67 Absatz 1 Buchstaben b und c an den neu festgesetzten Schwellenwert an, der für Dienstleistungsaufträge gilt, die nicht von öffentlichen Auftraggebern des Anhangs IV vergeben werden.

(3) Der Gegenwert der gemäß Absatz 1 festgesetzten Schwellenwerte in den Währungen der Mitgliedstaaten, die nicht an der Währungsunion teilnehmen, wird grundsätzlich alle zwei Jahre ab dem 1. Januar 2004 überprüft. Die Berechnung dieses Gegenwertes beruht auf dem durchschnittlichen Tageskurs dieser Währungen in Euro in den 24 Monaten, die am letzten Augusttag enden, der der Neufestsetzung zum 1. Januar vorausgeht.

(4) Die in Absatz 1 genannten neu festgesetzten Schwellenwerte und ihr in Absatz 3 genannter Gegenwert in den Währungen der Mitgliedstaaten werden von der Kommission im Amtsblatt der Europäischen Union zu Beginn des Monats November, der auf die Neufestsetzung folgt, veröffentlicht.

Artikel 79

Änderungen

(1) Die Kommission kann nach dem in Artikel 77 Absatz 2 genannten Verfahren Folgendes ändern:

a) die technischen Modalitäten der in Artikel 78 Absatz 1 Unterabsatz 2 und Absatz 3 genannten Berechnungsmethoden;

[1] ABl. L 185 vom 16.8.1971, S. 15. Beschluss geändert durch Beschluss 77/63/EWG (ABl. L 13 vom 15.1.1977, S. 15).

b) die Modalitäten für Erstellung, Übermittlung, Eingang, Übersetzung, Erhebung und Verteilung der in den Artikeln 35, 58, 64 und 69 genannten Bekanntmachungen sowie der in Artikel 35 Absatz 4 Unterabsatz 4 sowie der in Artikel 75 und 76 genannten statistischen Aufstellungen;

c) die Modalitäten für die Bezugnahme auf bestimmte Positionen der CPV-Klassifikation in den Bekanntmachungen;

d) die in Anhang III genannten Verzeichnisse der Einrichtungen und Kategorien von Einrichtungen des öffentlichen Rechts, sofern aufgrund von Mitteilungen der Mitgliedstaaten die betreffenden Änderungen sich als notwendig erweisen;

e) die in Anhang IV enthaltenen Verzeichnisse der zentralen Regierungsbehörden, nach Maßgabe der Anpassungen, die notwendig sind, um dem Übereinkommen nachzukommen;

f) die Referenznummern der in Anhang I genannten Klassifikation, sofern der materielle Anwendungsbereich dieser Richtlinie davon unberührt bleibt, und die Modalitäten für die Bezugnahme in den Bekanntmachungen auf bestimmte Positionen dieser Klassifikation;

g) die Referenznummern der in Anhang II genannten Klassifikation, sofern der materielle Anwendungsbereich dieser Richtlinie davon unberührt bleibt, und die Modalitäten für die Bezugnahme auf bestimmte Positionen dieser Klassifikation in den Bekanntmachungen innerhalb der in den genannten Anhängen aufgeführten Dienstleistungskategorien;

h) die Modalitäten der Übermittlung und Veröffentlichung von Daten nach Anhang VIII aus Verwaltungsgründen oder wegen Anpassung an den technischen Fortschritt;

i) die Modalitäten und technischen Merkmale der Vorrichtungen für den elektronischen Empfang gemäß Anhang X Buchstaben a, f und g.

Artikel 80

Umsetzung

(1) Die Mitgliedstaaten erlassen die erforderlichen Rechts- und Verwaltungsvorschriften, um dieser Richtlinie spätestens am 31. Januar 2006 nachzukommen. Sie unterrichten die Kommission unverzüglich davon.

Bei Erlass dieser Vorschriften nehmen die Mitgliedstaaten in diesen selbst oder durch einen Hinweis bei der amtlichen Veröffentlichung auf diese Richtlinie Bezug. Die Mitgliedstaaten regeln die Einzelheiten dieser Bezugnahme.

(2) Die Mitgliedstaaten teilen der Kommission den Wortlaut der wichtigsten innerstaatlichen Rechtsvorschriften mit, die sie auf dem unter diese Richtlinie fallenden Gebiet erlassen.

Artikel 81

Kontrollmechanismen

Gemäß der Richtlinie 89/665/EWG des Rates vom 21. Dezember 1989 zur Koordinierung der Rechts- und Verwaltungsvorschriften für die Anwendung der Nachprüfungsverfahren im Rahmen der Vergabe öffentlicher Liefer- und Bauaufträge [1] stellen die Mitgliedstaaten die Anwendung der vorliegenden Richtlinie durch wirksame, zugängliche und transparente Mechanismen sicher.

Zu diesem Zweck können sie unter anderem eine unabhängige Stelle benennen oder einrichten.

Artikel 82

Aufhebungen

Die Richtlinie 92/50/EWG, mit Ausnahme ihres Artikels 41, und die Richtlinien 93/36/EWG und 93/37/EWG werden unbeschadet der Verpflichtungen der Mitgliedstaaten hinsichtlich der Umsetzungs- und Anwendungsfristen in Anhang XI mit Wirkung ab dem in Artikel 80 genannten Datum aufgehoben.

Bezugnahmen auf die aufgehobenen Richtlinien gelten als Bezugnahmen auf die vorliegende Richtlinie und sind nach Maßgabe der Entsprechungstabelle in Anhang XII zu lesen.

Artikel 83

Inkrafttreten

Diese Richtlinie tritt am Tag ihrer Veröffentlichung im *Amtsblatt der Europäischen Union* in Kraft.

[1] ABl. L 395 vom 30.12.1989, S. 33. Geändert durch die Richtlinie 92/50/EWG.

RICHTLINIEN

RICHTLINIE 2007/66/EG DES EUROPÄISCHEN PARLAMENTS UND DES RATES

vom 11. Dezember 2007

zur Änderung der Richtlinien 89/665/EWG und 92/13/EWG des Rates im Hinblick auf die Verbesserung der Wirksamkeit der Nachprüfungsverfahren bezüglich der Vergabe öffentlicher Aufträge

(Text von Bedeutung für den EWR)

DAS EUROPÄISCHE PARLAMENT UND DER RAT DER EUROPÄISCHEN UNION —

gestützt auf den Vertrag zur Gründung der Europäischen Gemeinschaft, insbesondere auf Artikel 95,

auf Vorschlag der Kommission,

nach Stellungnahme des Europäischen Wirtschafts- und Sozialausschusses [1],

nach Stellungnahme des Ausschusses der Regionen [2],

gemäß dem Verfahren des Artikels 251 des Vertrags [3],

in Erwägung nachstehender Gründe:

(1) Die Richtlinie 89/665/EWG des Rates vom 21. Dezember 1989 zur Koordinierung der Rechts- und Verwaltungsvorschriften für die Anwendung der Nachprüfungsverfahren im Rahmen der Vergabe öffentlicher Liefer- und Bauaufträge [4] und die Richtlinie 92/13/EWG des Rates vom 25. Februar 1992 zur Koordinierung der Rechts- und Verwaltungsvorschriften für die Anwendung der Gemeinschaftsvorschriften über die Auftragsvergabe durch Auftraggeber im Bereich der Wasser-, Energie- und Verkehrsversorgung sowie im Telekommunikationssektor [5] betreffen die Nachprüfungsverfahren in Bezug auf Aufträge, die von öffentlichen Auftraggebern im Sinne des Artikels 1 Absatz 9 der Richtlinie 2004/18/EG des Europäischen Parlaments und des Rates vom 31. März 2004 über die Koordinierung der Verfahren zur Vergabe öffentlicher Bauaufträge, Lieferaufträge und Dienstleistungsaufträge [6] und von Auftraggebern im Sinne des Artikels 2 der Richtlinie 2004/17/EG des Europäischen Parlaments und des Rates vom 31. März 2004 zur Koordinierung der Zuschlagserteilung durch Auftraggeber im Bereich der Wasser-, Energie- und Verkehrsversorgung sowie der Postdienste [7] vergeben werden. Die Richtlinien 89/665/EWG und 92/13/EWG sollen die wirksame Anwendung der Richtlinien 2004/18/EG und 2004/17/EG gewährleisten.

(2) Die Richtlinien 89/665/EWG und 92/13/EWG gelten daher nur für Aufträge, die in den Anwendungsbereich der Richtlinien 2004/18/EG und 2004/17/EG gemäß der Auslegung des Gerichtshofs der Europäischen Gemeinschaften fallen, und zwar unabhängig von dem gewählten Vergabeverfahren oder der jeweiligen Art des Aufrufs zum Wettbewerb, einschließlich der Wettbewerbe, Prüfungssysteme oder dynamischen Beschaffungssysteme. Nach der Rechtsprechung des Gerichtshofs sollten die Mitgliedstaaten dafür Sorge tragen, dass Entscheidungen der öffentlichen Auftraggeber und der Auftraggeber darüber, ob ein Auftrag in den persönlichen und sachlichen Anwendungsbereich der Richtlinien 2004/18/EG und 2004/17/EG fällt, wirksam und rasch nachgeprüft werden können.

(3) Die Anhörung der Beteiligten wie auch die Rechtsprechung des Gerichtshofs haben bei den gegenwärtigen Nachprüfungsverfahren in den Mitgliedstaaten einige Schwachstellen aufgedeckt. Aufgrund dieser Schwachstellen können die Verfahren der Richtlinien 89/665/EWG

[1] ABl. C 93 vom 27.4.2007, S. 16.
[2] ABl. C 146 vom 30.6.2007, S. 69.
[3] Stellungnahme des Europäischen Parlaments vom 21. Juni 2007 (noch nicht im Amtsblatt veröffentlicht) und Beschluss des Rates vom 15. November 2007.
[4] ABl. L 395 vom 30.12.1989, S. 33. Geändert durch die Richtlinie 92/50/EWG (ABl. L 209 vom 24.7.1992, S. 1).
[5] ABl. L 76 vom 23.3.1992, S. 14. Richtlinie zuletzt geändert durch die Richtlinie 2006/97/EG (ABl. L 363 vom 20.12.2006, S. 107).
[6] ABl. L 134 vom 30.4.2004, S. 114. Richtlinie zuletzt geändert durch die Richtlinie 2006/97/EG.
[7] ABl. L 134 vom 30.4.2004, S. 1. Richtlinie zuletzt geändert durch die Richtlinie 2006/97/EG.

und 92/13/EWG die Beachtung der Gemeinschaftsvorschriften nicht immer gewährleisten und insbesondere nicht in einem Stadium, in dem Verstöße noch beseitigt werden könnten. So sollten die mit diesen Richtlinien angestrebten Garantien im Hinblick auf Transparenz und Nichtdiskriminierung verstärkt werden, um zu gewährleisten, dass die positiven Effekte der Modernisierung und Vereinfachung der Vorschriften über das öffentliche Auftragswesen im Rahmen der Richtlinien 2004/18/EG und 2004/17/EG für die Gemeinschaft insgesamt voll zum Tragen kommen. Es ist daher angezeigt, die Richtlinien 89/665/EWG und 92/13/EWG so zu präzisieren und zu ergänzen, dass die vom Gemeinschaftsgesetzgeber angestrebten Ziele erreicht werden können.

(4) Zu den ermittelten Schwächen zählt insbesondere das Fehlen einer Frist, die eine wirksame Nachprüfung zwischen der Zuschlagsentscheidung und dem Abschluss des betreffenden Vertrags ermöglicht. Das führt zuweilen dazu, dass öffentliche Auftraggeber und Auftraggeber sehr rasch die Vertragsunterzeichnung vornehmen, um die Folgen einer strittigen Zuschlagsentscheidung unumkehrbar zu machen. Um diese Schwachstelle zu beseitigen, die einen wirksamen Rechtsschutz der betroffenen Bieter, nämlich derjenigen Bieter, die noch nicht endgültig ausgeschlossen wurden, ernstlich behindert, ist es erforderlich, eine Mindest-Stillhaltefrist vorzusehen, während der der Abschluss des betreffenden Vertrags ausgesetzt wird, und zwar unabhängig davon, ob der Vertragsschluss zum Zeitpunkt der Vertragsunterzeichnung erfolgt oder nicht.

(5) Die Dauer der Mindest-Stillhaltefrist sollte den verschiedenen Kommunikationsmitteln Rechnung tragen. Werden schnelle Kommunikationsmittel genutzt, kann eine kürzere Frist vorgesehen werden als beim Einsatz anderer Kommunikationsmittel. Diese Richtlinie sieht lediglich Mindest-Stillhaltefristen vor. Den Mitgliedstaaten steht es frei, längere Fristen als diese Mindestfristen einzuführen oder beizubehalten. Ebenso können die Mitgliedstaaten entscheiden, welche Frist gelten soll, wenn verschiedene Kommunikationsmittel gleichzeitig genutzt werden.

(6) Die Stillhaltefrist sollte den betroffenen Bietern genügend Zeit geben, um die Zuschlagsentscheidung zu prüfen und zu beurteilen, ob ein Nachprüfungsverfahren eingeleitet werden sollte. Gleichzeitig mit der Mitteilung der Zuschlagsentscheidung sollten den betroffenen Bietern die relevanten Informationen übermittelt werden, die für sie unerlässlich sind, um eine wirksame Nachprüfung zu beantragen. Gleiches gilt entsprechend auch für Bewerber, soweit der öffentliche Auftraggeber oder der Auftraggeber die Informationen über die Ablehnung ihrer Bewerbung nicht rechtzeitig zur Verfügung gestellt hat.

(7) Zu diesen einschlägigen Informationen zählen insbesondere — in zusammengefasster Form — die einschlägigen Gründe, die in Artikel 41 der Richtlinie 2004/18/EG und in Artikel 49 der Richtlinie 2004/17/EG vorgesehen sind. Da die Dauer der Stillhaltefrist in den Mitgliedstaaten unterschiedlich ist, ist es ferner wichtig, dass die betroffenen Bieter und Bewerber über die tatsächliche Frist informiert werden, innerhalb deren sie ein Nachprüfungsverfahren anstrengen können.

(8) Diese Art der Mindest-Stillhaltefrist soll nicht gelten, wenn die Richtlinie 2004/18/EG oder 2004/17/EG nicht die vorherige Veröffentlichung einer Bekanntmachung im *Amtsblatt der Europäischen Union* vorschreibt, insbesondere in Fällen äußerster Dringlichkeit gemäß Artikel 31 Absatz 1 Buchstabe c der Richtlinie 2004/18/EG bzw. Artikel 40 Absatz 3 Buchstabe d der Richtlinie 2004/17/EG. In diesen Fällen genügt es, wirksame Nachprüfungsverfahren nach dem Vertragsschluss vorzusehen. Ebenso ist eine Stillhaltefrist nicht erforderlich, wenn dem einzigen betroffenen Bieter auch der Zuschlag erteilt wird und wenn es keine betroffenen Bewerber gibt. In diesem Fall gibt es in dem Vergabeverfahren keine weitere Person mit einem Interesse daran, unterrichtet zu werden und eine Stillhaltefrist zu nutzen, die eine wirksame Nachprüfung ermöglicht.

(9) Außerdem könnten bei Aufträgen, die auf Rahmenvereinbarungen oder dynamischen Beschaffungssystemen beruhen, die mit diesen Vergabeverfahren angestrebten Effizienzgewinne durch eine obligatorische Stillhaltefrist beeinträchtigt werden. Die Mitgliedstaaten sollten daher statt der Einführung einer obligatorischen Stillhaltefrist die Unwirksamkeit als wirksame Sanktion gemäß Artikel 2d der Richtlinie 89/665/EWG und Artikel 2d der Richtlinie 92/13/EWG für Verstöße gegen Artikel 32 Absatz 4 Unterabsatz 2 zweiter Gedankenstrich und Artikel 33 Absätze 5 und 6 der Richtlinie 2004/18/EG sowie gegen Artikel 15 Absätze 5 und 6 der Richtlinie 2004/17/EG vorsehen können.

(10) In den Fällen nach Artikel 40 Absatz 3 Buchstabe i der Richtlinie 2004/17/EG ist für Aufträge, die auf Rahmenvereinbarungen beruhen, keine vorherige Veröffentlichung einer Bekanntmachung im *Amtsblatt der Europäischen Union* vorgeschrieben. In diesen Fällen sollte die Stillhaltefrist nicht obligatorisch sein.

(11) Wenn ein Mitgliedstaat verlangt, dass eine Person, die ein Nachprüfungsverfahren anstrengen will, den öffentlichen Auftraggeber oder den Auftraggeber darüber in Kenntnis setzt, so muss klargestellt werden, dass dies nicht die Stillhaltefrist oder etwaige andere Fristen zur Beantragung einer Nachprüfung beeinträchtigen darf. Wenn ein Mitgliedstaat verlangt, dass die betreffende Person zunächst eine Nachprüfung beim öffentlichen Auftraggeber oder beim Auftraggeber beantragt, sollte ferner dieser Person eine angemessene Mindestfrist zugestanden werden, die es ihr erlaubt, die zuständige Nachprüfungsstelle vor Abschluss des Vertrags anzurufen, wenn sie die Antwort oder das Ausbleiben einer Antwort des öffentlichen Auftraggebers oder des Auftraggebers anfechten möchte.

(12) Die Beantragung einer Nachprüfung kurz vor Ablauf der Mindest-Stillhaltefrist sollte nicht dazu führen, dass die für die Nachprüfungsverfahren zuständige Instanz nicht über die Mindestzeit verfügt, die für ein Handeln unerlässlich ist, insbesondere für die Verlängerung der Aussetzung des Vertragsschlusses. Daher ist eine eigenständige Mindest-Stillhaltefrist vorzusehen, die so lange dauern sollte, bis die Nachprüfungsstelle über den Antrag entschieden hat. Dabei sollte es der Nachprüfungsstelle unbenommen bleiben, vorher zu beurteilen, ob die Nachprüfung als solche zulässig ist. Die Mitgliedstaaten können bestimmen, dass diese Frist endet, entweder wenn die Nachprüfungsstelle eine Entscheidung über den Antrag auf vorläufige Maßnahmen, einschließlich einer weiteren Aussetzung des Vertragsschlusses, oder eine Entscheidung in der Hauptsache, insbesondere über den Antrag auf Aufhebung einer rechtswidrigen Entscheidung, getroffen hat.

(13) Um gegen die rechtswidrige freihändige Vergabe von Aufträgen vorzugehen, die der Gerichtshof als die schwerwiegendste Verletzung des Gemeinschaftsrechts im Bereich des öffentlichen Auftragswesens durch öffentliche Auftraggeber oder Auftraggeber bezeichnet hat, sollten wirksame, verhältnismäßige und abschreckende Sanktionen vorgesehen werden. Ein Vertrag, der aufgrund einer rechtswidrigen freihändigen Vergabe zustande gekommen ist, sollte daher grundsätzlich als unwirksam gelten. Die Unwirksamkeit sollte nicht automatisch gelten, sondern durch eine unabhängige Nachprüfungsstelle festgestellt werden oder auf der Entscheidung einer unabhängigen Nachprüfungsstelle beruhen.

(14) Die Unwirksamkeit ist das beste Mittel, um den Wettbewerb wiederherzustellen und neue Geschäftsmöglichkeiten für die Wirtschaftsteilnehmer zu schaffen, denen rechtswidrig Wettbewerbsmöglichkeiten vorenthalten wurden. Eine freihändige Vergabe im Sinne dieser Richtlinie sollte alle Auftragsvergaben ohne vorherige Veröffentlichung einer Bekanntmachung im *Amtsblatt der Europäischen Union* im Sinne der Richtlinie 2004/18/EG umfassen. Dies entspricht dem Verfahren ohne vorherigen Aufruf zum Wettbewerb im Sinne der Richtlinie 2004/17/EG.

(15) Mögliche Rechtfertigungen für eine freihändige Vergabe im Sinne dieser Richtlinie sind unter anderem die Ausnahmen in den Artikeln 10 bis 18 der Richtlinie 2004/18/EG, die Anwendung der Artikel 31, 61 oder 68 der Richtlinie 2004/18/EG, die Vergabe eines Dienstleistungsauftrags gemäß Artikel 21 der Richtlinie 2004/18/EG oder eine rechtmäßige Inhouse-Vergabe entsprechend der Auslegung des Gerichtshofs.

(16) Das Gleiche gilt für Aufträge, die die Bedingungen für eine Ausnahmeregelung oder für Sonderregelungen gemäß Artikel 5 Absatz 2, Artikel 18 bis 26, Artikel 29 und 30 oder Artikel 62 der Richtlinie 2004/17/EG erfüllen, im Falle der Anwendung von Artikel 40 Absatz 3 der Richtlinie 2004/17/EG oder für die Vergabe von Dienstleistungsaufträgen nach Artikel 32 der Richtlinie 2004/17/EG.

(17) Ein Nachprüfungsverfahren sollte zumindest jeder Person zur Verfügung stehen, die ein Interesse an einem bestimmten Auftrag hat oder hatte und der durch einen behaupteten Verstoß ein Schaden entstanden ist bzw. zu entstehen droht.

(18) Um schwere Verstöße gegen die obligatorische Stillhaltefrist und den automatischen Suspensiveffekt, die Voraussetzungen für eine wirksame Nachprüfung sind, zu vermeiden, sollten wirksame Sanktionen gelten. Verträge, deren Abschluss gegen die Stillhaltefrist oder den automatischen Suspensiveffekt verstößt, sollten daher grundsätzlich als unwirksam gelten, wenn sie mit Verstößen gegen die Richtlinie 2004/18/EG oder die Richtlinie 2004/17/EG einhergehen, soweit diese Verstöße die Aussichten des Bieters, der eine Nachprüfung beantragt, auf die Zuschlagserteilung beeinträchtigt haben.

(19) Bei anderen Verstößen gegen förmliche Anforderungen können die Mitgliedstaaten den Grundsatz der Unwirksamkeit als ungeeignet betrachten. In diesen Fällen sollten die Mitgliedstaaten die Möglichkeit haben, alternative Sanktionen vorzusehen. Alternative Sanktionen sollten auf die Verhängung von Geldbußen bzw. -strafen, die an eine von dem öffentlichen Auftraggeber oder dem Auftraggeber unabhängige Stelle zu zahlen sind, oder auf die Verkürzung der Laufzeit des Vertrags beschränkt sein. Es obliegt den Mitgliedstaaten, die Einzelheiten der alternativen Sanktionen und die Bestimmungen für ihre Anwendung festzulegen.

(20) Diese Richtlinie sollte die Anwendung schärferer Sanktionen nach innerstaatlichem Recht nicht ausschließen.

(21) Mit der Festlegung von Regeln durch die Mitgliedstaaten, die gewährleisten, dass ein Vertrag als unwirksam gilt, soll erreicht werden, dass die Rechte und Verpflichtungen der Parteien im Rahmen des Vertrags nicht mehr ausgeübt und nicht mehr durchgesetzt werden. Die Folgen, die sich dadurch ergeben, dass ein Vertrag als unwirksam gilt, sollten durch das einzelstaatliche Recht bestimmt werden. Die einzelstaatlichen Rechtsvorschriften können somit z. B. vorsehen, dass alle vertraglichen Verpflichtungen rückwirkend aufgehoben werden (ex tunc) oder dass umgekehrt die Wirkung der Aufhebung auf die Verpflichtungen beschränkt ist, die noch zu erfüllen sind (ex nunc). Dies sollte nicht dazu führen, dass strenge Sanktionen fehlen, wenn die Verpflichtungen im Rahmen eines Vertrags bereits vollständig oder fast vollständig erfüllt wurden. Für derartige Fälle sollten die Mitgliedstaaten auch alternative Sanktionen vorsehen, wobei zu berücksichtigen ist, in welchem Umfang ein Vertrag nach dem einzelstaatlichen Recht Gültigkeit behält. Gleichermaßen sind die Folgen bezüglich der möglichen Rückerstattung von gegebenenfalls gezahlten Beträgen sowie alle anderen Formen möglicher Rückerstattungen — einschließlich Rückerstattungen des Werts, falls eine Rückerstattung der Sache nicht möglich ist — durch einzelstaatliche Rechtsvorschriften zu regeln.

(22) Um zu gewährleisten, dass die Verhältnismäßigkeit der Sanktionen gewahrt bleibt, können die Mitgliedstaaten der für die Nachprüfungsverfahren zuständigen Stelle die Möglichkeit geben, den Vertrag nicht für unwirksam zu erklären oder einige oder alle zeitlichen Wirkungen des Vertrags anzuerkennen, wenn zwingende Gründe eines Allgemeininteresses dies in Ausnahmesituationen rechtfertigen. In diesen Fällen sollten stattdessen alternative Sanktionen zur Anwendung gelangen. Die von dem öffentlichen Auftraggeber oder dem Auftraggeber unabhängige Nachprüfungsstelle sollte alle relevanten Aspekte prüfen, um festzustellen, ob zwingende Gründe eines Allgemeininteresses es erfordern, dass die Wirkungen des Vertrags bestehen bleiben.

(23) In Ausnahmefällen ist die Anwendung des Verhandlungsverfahrens ohne Veröffentlichung einer Bekanntmachung im Sinne des Artikels 31 der Richtlinie 2004/18/EG oder des Artikels 40 Absatz 3 der Richtlinie 2004/17/EG unmittelbar nach der Aufhebung des Vertrags zulässig. In diesen Fällen könnte die Anwendung zwingender Gründe gerechtfertigt sein, wenn aus technischen oder anderen zwingenden Gründen die verbleibenden Vertragsverpflichtungen zu diesem Zeitpunkt nur von dem Wirtschaftsteilnehmer erfüllt werden können, dem der Auftrag erteilt wurde.

(24) Wirtschaftliche Interessen an der Wirksamkeit eines Vertrags dürfen nur als zwingende Gründe gelten, wenn die Unwirksamkeit in Ausnahmesituationen unverhältnismäßige Folgen hätte. Wirtschaftliche Interessen in unmittelbarem Zusammenhang mit dem betreffenden Auftrag sollten jedoch nicht als zwingende Gründe gelten.

(25) Die Notwendigkeit, für Rechtssicherheit hinsichtlich der Entscheidungen der öffentlichen Auftraggeber und der Auftraggeber zu sorgen, erfordert ferner die Festlegung einer angemessenen Mindest-Verjährungsfrist für Nachprüfungen, in denen die Unwirksamkeit eines Vertrags festgestellt werden kann.

(26) Um eine mögliche Rechtsunsicherheit im Zusammenhang mit der Unwirksamkeit zu vermeiden, sollten die Mitgliedstaaten eine Ausnahme von der Unwirksamkeit in den Fällen vorsehen, in denen der öffentliche Auftraggeber oder der Auftraggeber der Auffassung ist, dass die freihändige Vergabe eines Auftrags ohne vorherige Veröffentlichung einer Bekanntmachung im *Amtsblatt der Europäischen Union* nach den Richtlinien 2004/18/EG und 2004/17/EG zulässig ist und er eine Mindest-Stillhaltefrist angewendet hat, die eine wirksame Nachprüfung ermöglicht. Eine solche freiwillige Veröffentlichung, die eine Stillhaltefrist auslöst, bedeutet keine Ausdehnung von Verpflichtungen, die sich aus der Richtlinie 2004/18/EG oder der Richtlinie 2004/17/EG ergeben.

(27) Da diese Richtlinie die einzelstaatlichen Nachprüfungsverfahren stärkt, insbesondere in Fällen der rechtswidrigen freihändigen Vergabe, sollten die Wirtschaftsteilnehmer ermutigt werden, diese neuen Mechanismen zu nutzen. Aus Gründen der Rechtssicherheit ist die Geltendmachung der Unwirksamkeit eines Vertrags auf einen bestimmten Zeitraum beschränkt. Die Effektivität dieser Fristen sollte respektiert werden.

(28) Die Erhöhung der Wirksamkeit der einzelstaatlichen Nachprüfungsverfahren sollte die Betroffenen ermutigen, die Möglichkeiten der Nachprüfung vor Vertragsschluss im Wege der einstweiligen Verfügung stärker in Anspruch zu nehmen. Unter diesen Umständen sollte der Korrekturmechanismus auf die schweren Verstöße gegen das Gemeinschaftsrecht im Bereich des öffentlichen Auftragswesens ausgerichtet werden.

(29) Das in der Richtlinie 92/13/EWG vorgesehene freiwillige Bescheinigungsverfahren, das den Auftraggebern die Möglichkeit gibt, sich auf der Grundlage regelmäßiger Überprüfungen bescheinigen zu lassen, dass ihre Vergabeverfahren richtlinienkonform sind, ist praktisch nie in Anspruch genommen worden. Es kann daher seinen Zweck, Verstöße gegen das Gemeinschaftsrecht im Bereich des öffentlichen Auftragswesens in größerer Zahl zu verhindern, nicht erfüllen. Andererseits kann die den Mitgliedstaaten in der Richtlinie 92/13/EWG auferlegte Pflicht, dafür zu sorgen, dass für diese Prüfungen ständig akkreditierte Prüfer zur Verfügung stehen, Verwaltungskosten verursachen, die angesichts des fehlenden Interesses der Auftraggeber nicht mehr zu rechtfertigen sind. Deshalb ist es angezeigt, dieses Bescheinigungsverfahren abzuschaffen.

(30) Auch das in der Richtlinie 92/13/EWG vorgesehene Schlichtungsverfahren ist bei den Wirtschaftsteilnehmern nie auf echtes Interesse gestoßen. Dies ist zum einen darauf zurückzuführen, dass dieses Verfahren allein keine verbindlichen vorläufigen Maßnahmen ermöglicht, die einen rechtswidrigen Vertragsschluss rechtzeitig verhindern könnten, und zum anderen darauf, dass es nur schwer mit der Einhaltung der besonders kurzen Fristen für Nachprüfungen zwecks Verhängung vorläufiger Maßnahmen und Aufhebung rechtswidriger Entscheidungen zu vereinbaren ist. Außerdem ist die potenzielle Wirksamkeit des Schlichtungsverfahrens zusätzlich beeinträchtigt worden durch die Schwierigkeiten beim Erstellen einer vollständigen, hinreichend langen Liste unabhängiger Schlichter für jeden Mitgliedstaat, die jederzeit zur Verfügung stehen und Schlichtungsanträge sehr kurzfristig bearbeiten können. Deshalb ist es angezeigt, das Schlichtungsverfahren abzuschaffen.

(31) Die Kommission sollte ermächtigt werden, von den Mitgliedstaaten die Übermittlung von dem verfolgten Ziel angemessenen Informationen über das Funktionieren der innerstaatlichen Nachprüfungsverfahren zu verlangen; bei der Festlegung von Art und Umfang dieser Informationen sollte der Beratende Ausschuss für öffentliche Aufträge eingebunden werden. Allein diese Informationen ermöglichen es nämlich, nach einem längeren Anwendungszeitraum eine korrekte Bewertung der durch diese Richtlinie bewirkten Änderungen vorzunehmen.

(32) Die Kommission sollte die in den Mitgliedstaaten erzielten Fortschritte überprüfen und dem Europäischen Parlament und dem Rat spätesten drei Jahre nach Ablauf der Frist für die Umsetzung der Richtlinie über deren Wirksamkeit Bericht erstatten.

(33) Die zur Durchführung der Richtlinien 89/665/EWG und 92/13/EWG erforderlichen Maßnahmen sollten gemäß dem Beschluss 1999/468/EG des Rates vom 28. Juni 1999 zur Festlegung der Modalitäten für die Ausübung der der Kommission übertragenen Durchführungsbefugnisse [1] erlassen werden.

(34) Da das Ziel dieser Richtlinie, nämlich die Verbesserung der Wirksamkeit der Nachprüfungsverfahren bezüglich der Vergabe von Aufträgen, die in den Anwendungsbereich der Richtlinien 2004/18/EG und 2004/17/EG fallen, aus den oben genannten Gründen auf Ebene der Mitgliedstaaten nicht ausreichend verwirklicht werden kann und daher besser auf Gemeinschaftsebene zu verwirklichen ist, kann die Gemeinschaft im Einklang mit dem in Artikel 5 des Vertrags niedergelegten Subsidiaritätsprinzip tätig werden. Entsprechend dem in demselben Artikel genannten Grundsatz der Verhältnismäßigkeit geht diese Richtlinie bei gleichzeitiger Wahrung des Grundsatzes der Verfahrensautonomie der Mitgliedstaaten nicht über das für die Erreichung dieses Ziels erforderliche Maß hinaus.

(35) Gemäß Nummer 34 der Interinstitutionellen Vereinbarung „Bessere Rechtsetzung" [2] sollten die Mitgliedstaaten für ihre eigenen Zwecke und im Interesse der Gemeinschaft eigene Tabellen aufstellen, aus denen die Entsprechungen zwischen dieser Richtlinie und den Umsetzungsmaßnahmen zu entnehmen sind, und diese veröffentlichen.

(36) Diese Richtlinie steht im Einklang mit den Grundrechten und Grundsätzen, die insbesondere mit der Charta der Grundrechte der Europäischen Union anerkannt wurden. Sie soll namentlich die uneingeschränkte Achtung des Rechts auf einen wirksamen Rechtsbehelf und ein faires Verfahren nach Artikel 47 Absätze 1 und 2 der Charta sicherstellen.

(37) Die Richtlinien 89/665/EWG und 92/13/EWG sollten daher entsprechend geändert werden —

[1] ABl. L 184 vom 17.7.1999, S. 23. Geändert durch den Beschluss 2006/512/EG (ABl. L 200 vom 22.7.2006, S. 11).
[2] ABl. C 321 vom 31.12.2003, S. 1.

HABEN FOLGENDE RICHTLINIE ERLASSEN:

Artikel 1

Änderungen der Richtlinie 89/665/EWG

Die Richtlinie 89/665/EWG wird wie folgt geändert:

1. Die Artikel 1 und 2 erhalten folgende Fassung:

„*Artikel 1*

Anwendungsbereich und Zugang zu Nachprüfungsverfahren

(1) Diese Richtlinie gilt für Aufträge im Sinne der Richtlinie 2004/18/EG des Europäischen Parlaments und des Rates vom 31. März 2004 über die Koordinierung der Verfahren zur Vergabe öffentlicher Bauaufträge, Lieferaufträge und Dienstleistungsaufträge (*), sofern diese Aufträge nicht gemäß den Artikeln 10 bis 18 der genannten Richtlinie ausgeschlossen sind.

Aufträge im Sinne der vorliegenden Richtlinie umfassen öffentliche Aufträge, Rahmenvereinbarungen, öffentliche Baukonzessionen und dynamische Beschaffungssysteme.

Die Mitgliedstaaten ergreifen die erforderlichen Maßnahmen, um sicherzustellen, dass hinsichtlich der in den Anwendungsbereich der Richtlinie 2004/18/EG fallenden Aufträge die Entscheidungen der öffentlichen Auftraggeber wirksam und vor allem möglichst rasch nach Maßgabe der Artikel 2 bis 2f der vorliegenden Richtlinie auf Verstöße gegen das Gemeinschaftsrecht im Bereich des öffentlichen Auftragswesens oder gegen die einzelstaatlichen Vorschriften, die dieses Recht umsetzen, nachgeprüft werden können.

(2) Die Mitgliedstaaten stellen sicher, dass die in dieser Richtlinie getroffene Unterscheidung zwischen einzelstaatlichen Vorschriften zur Umsetzung des Gemeinschaftsrechts und den übrigen innerstaatlichen Bestimmungen nicht zu Diskriminierungen zwischen Unternehmen führt, die im Rahmen eines Verfahrens zur Vergabe eines öffentlichen Auftrags einen Schaden geltend machen könnten.

(3) Die Mitgliedstaaten stellen sicher, dass Nachprüfungsverfahren entsprechend den gegebenenfalls von den Mitgliedstaaten festzulegenden Bedingungen zumindest jeder Person zur Verfügung stehen, die ein Interesse an einem bestimmten Auftrag hat oder hatte und der durch einen behaupteten Verstoß ein Schaden entstanden ist bzw. zu entstehen droht.

(4) Die Mitgliedstaaten können verlangen, dass die Person, die ein Nachprüfungsverfahren anzustrengen beabsichtigt, den öffentlichen Auftraggeber über den behaupteten Verstoß und die beabsichtigte Nachprüfung unterrichtet, sofern die Stillhaltefrist nach Artikel 2a Absatz 2 oder andere Fristen für die Beantragung einer Nachprüfung nach Artikel 2c hiervon unberührt bleiben.

(5) Die Mitgliedstaaten können auch verlangen, dass die betreffende Person zunächst bei dem öffentlichen Auftraggeber eine Nachprüfung beantragt. In diesem Fall tragen die Mitgliedstaaten dafür Sorge, dass die Einreichung eines solchen Antrags einen unmittelbaren Suspensiveffekt auf den Vertragsschluss auslöst.

Die Mitgliedstaaten entscheiden über die geeigneten Kommunikationsmittel, einschließlich Fax oder elektronischer Mittel, die für die Beantragung der Nachprüfung gemäß Unterabsatz 1 zu verwenden sind.

Der Suspensiveffekt nach Unterabsatz 1 endet nicht vor Ablauf einer Frist von mindestens zehn Kalendertagen, gerechnet ab dem Tag, der auf den Tag folgt, an dem der öffentliche Auftraggeber eine Antwort abgesendet hat, falls sie per Fax oder auf elektronischem Weg abgesendet wird, oder, falls andere Kommunikationsmittel verwendet werden, nicht vor Ablauf einer Frist von entweder mindestens 15 Kalendertagen, gerechnet ab dem Tag, der auf den Tag folgt, an dem der öffentliche Auftraggeber eine Antwort abgesendet hat, oder mindestens zehn Kalendertagen, gerechnet ab dem Tag nach dem Eingang einer Antwort.

Artikel 2

Anforderungen an die Nachprüfungsverfahren

(1) Die Mitgliedstaaten stellen sicher, dass für die in Artikel 1 genannten Nachprüfungsverfahren die erforderlichen Befugnisse vorgesehen werden, damit

a) so schnell wie möglich im Wege der einstweiligen Verfügung vorläufige Maßnahmen ergriffen werden können, um den behaupteten Verstoß zu beseitigen oder weitere Schädigungen der betroffenen Interessen zu verhindern; dazu gehören auch Maßnahmen, um das Verfahren zur Vergabe eines öffentlichen Auftrags oder die Durchführung jeder sonstigen Entscheidung des öffentlichen Auftraggebers auszusetzen oder die Aussetzung zu veranlassen;

b) die Aufhebung rechtswidriger Entscheidungen, einschließlich der Streichung diskriminierender technischer, wirtschaftlicher oder finanzieller Spezifikationen in den Ausschreibungsdokumenten, den Verdingungsunterlagen oder in jedem sonstigen sich auf das betreffende Vergabeverfahren beziehenden Dokument vorgenommen oder veranlasst werden kann;

c) denjenigen, die durch den Verstoß geschädigt worden sind, Schadensersatz zuerkannt werden kann.

(2) Die in Absatz 1 und in den Artikeln 2d und 2e genannten Befugnisse können getrennt mehreren Stellen übertragen werden, die für das Nachprüfungsverfahren unter verschiedenen Gesichtspunkten zuständig sind.

(3) Wird eine gegenüber dem öffentlichen Auftraggeber unabhängige Stelle in erster Instanz mit der Nachprüfung einer Zuschlagsentscheidung befasst, so sorgen die Mitgliedstaaten dafür, dass der öffentliche Auftraggeber den Vertragsschluss nicht vornehmen kann, bevor die Nachprüfungsstelle eine Entscheidung über einen Antrag auf vorläufige Maßnahmen oder eine Entscheidung in der Hauptsache getroffen hat. Diese Aussetzung endet frühestens mit Ablauf der Stillhaltefrist nach Artikel 2a Absatz 2 und Artikel 2d Absätze 4 und 5.

(4) Außer in den Fällen nach Absatz 3 und Artikel 1 Absatz 5 haben die Nachprüfungsverfahren als solche nicht notwendigerweise einen automatischen Suspensiveffekt auf die betreffenden Vergabeverfahren.

(5) Die Mitgliedstaaten können vorsehen, dass die Nachprüfungsstelle die voraussehbaren Folgen der vorläufigen Maßnahmen im Hinblick auf alle möglicherweise geschädigten Interessen sowie das Interesse der Allgemeinheit berücksichtigen kann und dass sie beschließen kann, diese Maßnahmen nicht zu ergreifen, wenn deren nachteilige Folgen die damit verbundenen Vorteile überwiegen könnten.

Die Ablehnung der vorläufigen Maßnahmen beeinträchtigt nicht die sonstigen Rechte des Antragstellers.

(6) Die Mitgliedstaaten können vorsehen, dass bei Schadensersatzansprüchen, die auf die Rechtswidrigkeit einer Entscheidung gestützt werden, diese zunächst von einer mit den dafür erforderlichen Befugnissen ausgestatteten Stelle aufgehoben worden sein muss.

(7) Außer in den in den Artikeln 2d bis 2f genannten Fällen richten sich die Wirkungen der Ausübung der in Absatz 1 des vorliegenden Artikels genannten Befugnisse auf den nach der Zuschlagsentscheidung geschlossenen Vertrag nach dem einzelstaatlichen Recht.

Abgesehen von dem Fall, in dem eine Entscheidung vor Zuerkennung von Schadensersatz aufgehoben werden muss, kann ein Mitgliedstaat ferner vorsehen, dass nach dem Vertragsschluss in Übereinstimmung mit Artikel 1 Absatz 5, Absatz 3 des vorliegenden Artikels oder den Artikeln 2a bis 2f die Befugnisse der Nachprüfungsstelle darauf beschränkt werden, einer durch einen Verstoß geschädigten Person Schadensersatz zuzuerkennen.

(8) Die Mitgliedstaaten stellen sicher, dass die Entscheidungen der Nachprüfungsstellen wirksam durchgesetzt werden können.

(9) Eine Nachprüfungsstelle, die kein Gericht ist, muss ihre Entscheidung stets schriftlich begründen. Ferner ist in diesem Falle sicherzustellen, dass eine behauptete rechtswidrige Maßnahme der Nachprüfungsstelle oder ein behaupteter Verstoß bei der Ausübung der ihr übertragenen Befugnisse zum Gegenstand einer Klage oder einer Nachprüfung bei einer anderen von dem öffentlichen Auftraggeber und der Nachprüfungsstelle unabhängigen Stelle, die ein Gericht im Sinne des Artikels 234 des Vertrags ist, gemacht werden können.

Für die Ernennung und das Ende der Amtszeit der Mitglieder dieser unabhängigen Stelle gelten bezüglich der für ihre Ernennung zuständigen Behörde, der Dauer ihrer Amtszeit und ihrer Absetzbarkeit die gleichen Bedingungen wie für Richter. Zumindest der Vorsitzende der unabhängigen Stelle muss die juristischen und beruflichen Qualifikationen eines Richters besitzen. Die unabhängige Stelle trifft ihre Entscheidungen in einem Verfahren, in dem beide Seiten gehört werden; ihre Entscheidungen sind in der von den einzelnen Mitgliedstaaten jeweils zu bestimmenden Weise rechtsverbindlich.

(*) ABl. L 134 vom 30.4.2004, S. 114. Richtlinie zuletzt geändert durch die Richtlinie 2006/97/EG des Rates (ABl. L 363 vom 20.12.2006, S. 107).“

2. Folgende Artikel werden eingefügt:

„*Artikel 2a*

Stillhaltefrist

(1) Die Mitgliedstaaten legen nach Maßgabe der Mindestbedingungen in Absatz 2 und in Artikel 2c Fristen fest, die sicherstellen, dass die in Artikel 1 Absatz 3 genannten Personen gegen Zuschlagsentscheidungen der öffentlichen Auftraggeber wirksame Nachprüfungsverfahren anstrengen können.

(2) Der Vertragsabschluss im Anschluss an die Zuschlagsentscheidung für einen Auftrag, der in den Anwendungsbereich der Richtlinie 2004/18/EG fällt, darf nicht vor Ablauf einer Frist von mindestens zehn Kalendertagen erfolgen, gerechnet ab dem Tag, der auf den Tag folgt, an dem die Zuschlagsentscheidung an die betroffenen Bieter und Bewerber abgesendet wurde, falls sie per Fax oder auf elektronischem Weg abgesendet wird, oder, falls andere Kommunikationsmittel verwendet werden, nicht vor Ablauf einer Frist von entweder mindestens 15 Kalendertagen, gerechnet ab dem Tag, der auf den Tag folgt, an dem die Zuschlagsentscheidung an die betroffenen Bieter und Bewerber abgesendet wurde, oder mindestens zehn Kalendertagen, gerechnet ab dem Tag nach dem Eingang der Zuschlagsentscheidung.

Bieter gelten als betroffen, wenn sie noch nicht endgültig ausgeschlossen wurden. Ein Ausschluss ist endgültig, wenn er den betroffenen Bietern mitgeteilt wurde und entweder von einer unabhängigen Nachprüfungsstelle als rechtmäßig anerkannt wurde oder keinem Nachprüfungsverfahren mehr unterzogen werden kann.

Bewerber gelten als betroffen, wenn der öffentliche Auftraggeber ihnen keine Informationen über die Ablehnung ihrer Bewerbung zur Verfügung gestellt hat, bevor die Mitteilung über die Zuschlagsentscheidung an die betroffenen Bieter ergangen ist.

Der Mitteilung über die Zuschlagsentscheidung an jeden betroffenen Bieter und Bewerber wird Folgendes beigefügt:

— vorbehaltlich des Artikels 41 Absatz 3 der Richtlinie 2004/18/EG eine Zusammenfassung der einschlägigen Gründe gemäß Artikel 41 Absatz 2 der genannten Richtlinie und

— eine genaue Angabe der konkreten Stillhaltefrist, die gemäß den einzelstaatlichen Vorschriften zur Umsetzung dieses Absatzes anzuwenden ist.

Artikel 2b

Ausnahmen von der Stillhaltefrist

Die Mitgliedstaaten können vorsehen, dass die in Artikel 2a Absatz 2 genannten Fristen in folgenden Fällen nicht angewendet werden:

a) wenn nach der Richtlinie 2004/18/EG keine vorherige Veröffentlichung einer Bekanntmachung im *Amtsblatt der Europäischen Union* erforderlich ist;

b) wenn der einzige betroffene Bieter im Sinne des Artikels 2a Absatz 2 der Bieter ist, dem der Zuschlag erteilt wird, und wenn es keine betroffenen Bewerber gibt;

c) bei einem Auftrag, dem eine Rahmenvereinbarung gemäß Artikel 32 der Richtlinie 2004/18/EG zugrunde liegt, und bei einem Einzelauftrag, der auf einem dynamischen Beschaffungssystem gemäß Artikel 33 der genannten Richtlinie beruht.

Wird von dieser Ausnahmeregelung Gebrauch gemacht, so stellen die Mitgliedstaaten sicher, dass der Vertrag gemäß den Artikeln 2d und 2f der vorliegenden Richtlinie unwirksam ist, wenn

— ein Verstoß gegen Artikel 32 Absatz 4 Unterabsatz 2 zweiter Gedankenstrich oder gegen Artikel 33 Absätze 5 oder 6 der Richtlinie 2004/18/EG vorliegt und

— der geschätzte Auftragswert die in Artikel 7 der Richtlinie 2004/18/EG genannten Schwellenwerte erreicht oder diese übersteigt.

Artikel 2c

Fristen für die Beantragung einer Nachprüfung

Legt ein Mitgliedstaat fest, dass alle Nachprüfungsanträge gegen Entscheidungen eines öffentlichen Auftraggebers, die im Rahmen von oder im Zusammenhang mit einem Vergabeverfahren im Sinne der Richtlinie 2004/18/EG ergehen, vor Ablauf einer bestimmten Frist gestellt werden müssen, so beträgt diese Frist mindestens zehn Kalendertage, gerechnet ab dem Tag, der auf den Tag folgt, an dem die Entscheidung des öffentlichen Auftraggebers an den Bieter oder Bewerber abgesendet wurde, falls sie per Fax oder auf elektronischem Weg abgesendet wird, oder, falls andere Kommunikationsmittel verwendet werden, entweder mindestens 15 Kalendertage, gerechnet ab dem Tag, der auf den Tag folgt, an dem die Entscheidung des öffentlichen Auftraggebers an den Bieter oder Bewerber abgesendet wurde, oder mindestens zehn Kalendertage, gerechnet ab dem Tag nach dem Eingang der Entscheidung des öffentlichen Auftraggebers. Der Mitteilung der Entscheidung des öffentlichen Auftraggebers an jeden Bieter oder Bewerber wird eine Zusammenfassung der einschlägigen Gründe beigefügt. Wird ein Antrag auf Nachprüfung in Bezug auf die in Artikel 2 Absatz 1 Buchstabe b der vorliegenden Richtlinie genannten Entscheidungen eingereicht, die keiner besonderen Mitteilungspflicht unterliegen, so beträgt die Frist mindestens zehn Kalendertage, gerechnet ab dem Zeitpunkt der Veröffentlichung der betreffenden Entscheidung.

Artikel 2d

Unwirksamkeit

(1) Die Mitgliedstaaten tragen in folgenden Fällen dafür Sorge, dass ein Vertrag durch eine von dem öffentlichen Auftraggeber unabhängige Nachprüfungsstelle für unwirksam erklärt wird oder dass sich seine Unwirksamkeit aus der Entscheidung einer solchen Stelle ergibt,

a) falls der öffentliche Auftraggeber einen Auftrag ohne vorherige Veröffentlichung einer Bekanntmachung im *Amtsblatt der Europäischen Union* vergeben hat, ohne dass dies nach der Richtlinie 2004/18/EG zulässig ist,

b) bei einem Verstoß gegen Artikel 1 Absatz 5, Artikel 2 Absatz 3 oder Artikel 2a Absatz 2 der vorliegenden Richtlinie, falls dieser Verstoß dazu führt, dass der Bieter, der eine Nachprüfung beantragt, nicht mehr die Möglichkeit hat, vor Abschluss des Vertrags Rechtsschutz zu erlangen, und dieser Verstoß verbunden ist mit einem Verstoß gegen die Richtlinie 2004/18/EG, falls der letztgenannte Verstoß die Aussichten des Bieters, der eine Nachprüfung beantragt, auf die Erteilung des Zuschlags beeinträchtigt hat,

c) in Fällen gemäß Artikel 2b Buchstabe c Unterabsatz 2 der vorliegenden Richtlinie, falls die Mitgliedstaaten von der Ausnahmeregelung bezüglich der Stillhaltefrist für Aufträge, die auf Rahmenvereinbarungen oder dynamischen Beschaffungssystemen beruhen, Gebrauch gemacht haben.

(2) Die Folgen der Unwirksamkeit eines Vertrags richten sich nach einzelstaatlichem Recht.

Die einzelstaatlichen Rechtsvorschriften können somit vorsehen, dass alle vertraglichen Verpflichtungen rückwirkend aufgehoben werden oder dass die Wirkung der Aufhebung auf die Verpflichtungen beschränkt ist, die noch zu erfüllen sind. Im letzteren Fall tragen die Mitgliedstaaten dafür Sorge, dass auch alternative Sanktionen im Sinne des Artikels 2e Absatz 2 Anwendung finden.

(3) Die Mitgliedstaaten können vorsehen, dass die von dem öffentlichen Auftraggeber unabhängige Nachprüfungsstelle einen Vertrag nicht als unwirksam erachten kann, selbst wenn der Auftrag aus den in Absatz 1 genannten Gründen rechtswidrig vergeben wurde, wenn die Nachprüfungsstelle nach Prüfung aller einschlägigen Aspekte zu dem Schluss kommt, dass zwingende Gründe eines Allgemeininteresses es rechtfertigen, die Wirkung des Vertrags zu erhalten. In diesem Fall sehen die Mitgliedstaaten alternative Sanktionen im Sinne des Artikels 2e Absatz 2 vor, die stattdessen angewandt werden.

Wirtschaftliche Interessen an der Wirksamkeit eines Vertrags dürfen nur als zwingende Gründe gelten, wenn die Unwirksamkeit in Ausnahmesituationen unverhältnismäßige Folgen hätte.

Wirtschaftliche Interessen in unmittelbarem Zusammenhang mit dem betreffenden Vertrag dürfen jedoch nicht als zwingende Gründe eines Allgemeininteresses gelten. Zu den wirtschaftlichen Interessen in unmittelbarem Zusammenhang mit dem Vertrag gehören unter anderem die durch die Verzögerung bei der Ausführung des Vertrags verursachten Kosten, die durch die Einleitung eines neuen Vergabeverfahrens verursachten Kosten, die durch den Wechsel des Wirtschaftsteilnehmers, der den Vertrag ausführt, verursachten Kosten und die Kosten, die durch rechtliche Verpflichtungen aufgrund der Unwirksamkeit verursacht werden.

(4) Die Mitgliedstaaten sehen vor, dass Absatz 1 Buchstabe a nicht zur Anwendung kommt, wenn

— der öffentliche Auftraggeber der Ansicht ist, dass die Auftragsvergabe ohne vorherige Veröffentlichung einer Bekanntmachung im *Amtsblatt der Europäischen Union* gemäß der Richtlinie 2004/18/EG zulässig ist,

— der öffentliche Auftraggeber im *Amtsblatt der Europäischen Union* eine Bekanntmachung veröffentlicht hat, wie sie in Artikel 3a der vorliegenden Richtlinie beschrieben ist und mit der er seine Absicht bekundet, den Vertrag abzuschließen, und

— der Vertrag nicht vor Ablauf einer Frist von mindestens zehn Kalendertagen, gerechnet ab dem Tag nach der Veröffentlichung dieser Bekanntmachung, abgeschlossen wurde.

(5) Die Mitgliedstaaten sehen vor, dass Absatz 1 Buchstabe c nicht zur Anwendung kommt, wenn

— der öffentliche Auftraggeber der Ansicht ist, dass die Auftragsvergabe im Einklang mit Artikel 32 Absatz 4 Unterabsatz 2 zweiter Gedankenstrich oder Artikel 33 Absätze 5 und 6 der Richtlinie 2004/18/EG erfolgt,

— der öffentliche Auftraggeber eine Zuschlagsentscheidung mit einer Zusammenfassung der Gründe gemäß Artikel 2a Absatz 2 Unterabsatz 4 erster Gedankenstrich der vorliegenden Richtlinie an die betroffenen Bieter abgesendet hat und

— der Vertrag nicht vor Ablauf einer Frist von mindestens zehn Kalendertagen geschlossen wurde, gerechnet ab dem Tag, der auf den Tag folgt, an dem die Zuschlagsentscheidung an die betroffenen Bieter abgesendet wurde, falls sie per Fax oder auf elektronischem Weg abgesendet wird, oder, falls andere Kommunikationsmittel verwendet werden, nicht vor Ablauf einer Frist von entweder mindestens 15 Kalendertagen, gerechnet ab dem Tag, der auf den Tag folgt, an dem die Zuschlagsentscheidung an die betroffenen Bieter abgesendet wurde, oder mindestens zehn Kalendertagen, gerechnet ab dem Tag nach dem Eingang der Zuschlagsentscheidung.

Artikel 2e

Verstöße gegen diese Richtlinie und alternative Sanktionen

(1) Bei Verstößen gegen Artikel 1 Absatz 5, Artikel 2 Absatz 3 oder Artikel 2a Absatz 2, die nicht von Artikel 2d Absatz 1 Buchstabe b erfasst sind, sehen die Mitgliedstaaten die Unwirksamkeit gemäß Artikel 2d Absätze 1 bis 3 oder alternative Sanktionen vor. Die Mitgliedstaaten können vorsehen, dass die vom öffentlichen Auftraggeber unabhängige Nachprüfungsstelle nach Bewertung aller einschlägigen Aspekte entscheidet, ob der Vertrag als unwirksam erachtet oder alternative Sanktionen verhängt werden sollten.

(2) Die alternativen Sanktionen müssen wirksam, verhältnismäßig und abschreckend sein. Sie umfassen Folgendes:

— die Verhängung von Geldbußen bzw. -strafen gegen den öffentlichen Auftraggeber oder

— die Verkürzung der Laufzeit des Vertrags.

Die Mitgliedstaaten können der Nachprüfungsstelle einen weiten Ermessensspielraum einräumen, damit sie alle relevanten Faktoren berücksichtigen kann, einschließlich der Schwere des Verstoßes, des Verhaltens des öffentlichen Auftraggebers und — in den in Artikel 2d Absatz 2 genannten Fällen — des Umfangs, in dem der Vertrag seine Gültigkeit behält.

Die Zuerkennung von Schadensersatz stellt keine angemessene Sanktion im Sinne dieses Absatzes dar.

Artikel 2f

Fristen

(1) Die Mitgliedstaaten können vorsehen, dass eine Nachprüfung gemäß Artikel 2d Absatz 1 innerhalb der folgenden Fristen beantragt werden muss:

a) vor Ablauf von mindestens 30 Kalendertagen, gerechnet ab dem Tag, der auf den Tag folgt, an dem

— der öffentliche Auftraggeber eine Bekanntmachung über die Auftragsvergabe gemäß Artikel 35 Absatz 4 und den Artikeln 36 und 37 der Richtlinie 2004/18/EG veröffentlicht hat, sofern darin die Entscheidung des öffentlichen Auftraggebers begründet wird, einen Auftrag ohne vorherige Veröffentlichung einer Bekanntmachung im *Amtsblatt der Europäischen Union* zu vergeben, oder

— der öffentliche Auftraggeber die betroffenen Bieter und Bewerber über den Abschluss des Vertrags informiert hat, sofern diese Information eine Zusammenfassung der einschlägigen Gründe gemäß Artikel 41 Absatz 2 der Richtlinie 2004/18/EG enthält, vorbehaltlich des Artikels 41 Absatz 3 der genannten Richtlinie. Diese Option findet auch in den in Artikel 2b Buchstabe c der vorliegenden Richtlinie genannten Fällen Anwendung;

b) und in jedem Fall vor Ablauf einer Frist von mindestens sechs Monaten, gerechnet ab dem Tag, der auf den Tag folgt, an dem der Vertrag geschlossen wurde.

(2) In allen anderen Fällen, einschließlich der Beantragung einer Nachprüfung gemäß Artikel 2e Absatz 1, werden die Fristen für die Beantragung einer Nachprüfung vorbehaltlich des Artikels 2c durch das einzelstaatliche Recht geregelt."

3. Artikel 3 erhält folgende Fassung:

„Artikel 3

Korrekturmechanismus

(1) Die Kommission kann das in den Absätzen 2 bis 5 vorgesehene Verfahren anwenden, wenn sie vor Abschluss eines Vertrags zu der Auffassung gelangt, dass bei einem Vergabeverfahren, das in den Anwendungsbereich der Richtlinie 2004/18/EG fällt, ein schwerer Verstoß gegen das Gemeinschaftsrecht im Bereich des öffentlichen Auftragswesens vorliegt.

(2) Die Kommission teilt dem betroffenen Mitgliedstaat mit, aus welchen Gründen sie einen schweren Verstoß als gegeben ansieht, und fordert dessen Beseitigung durch geeignete Maßnahmen.

(3) Innerhalb von 21 Kalendertagen nach Eingang der in Absatz 2 genannten Mitteilung übermittelt der betroffene Mitgliedstaat der Kommission

a) die Bestätigung, dass der Verstoß beseitigt wurde, oder

b) eine Begründung dafür, weshalb der Verstoß nicht beseitigt wurde, oder

c) die Mitteilung, dass das betreffende Vergabeverfahren entweder auf Betreiben des öffentlichen Auftraggebers oder aber in Wahrnehmung der in Artikel 2 Absatz 1 Buchstabe a vorgesehenen Befugnisse ausgesetzt wurde.

(4) In einer gemäß Absatz 3 Buchstabe b übermittelten Begründung kann insbesondere geltend gemacht werden, dass der behauptete Verstoß bereits Gegenstand eines Gerichtsverfahrens oder eines anderen Verfahrens oder einer Nachprüfung nach Artikel 2 Absatz 9 ist. In diesem Fall unterrichtet der Mitgliedstaat die Kommission über den Ausgang dieser Verfahren, sobald dieser bekannt ist.

(5) Hat ein Mitgliedstaat gemäß Absatz 3 Buchstabe c mitgeteilt, dass ein Vergabeverfahren ausgesetzt wurde, so hat er die Beendigung der Aussetzung oder die Eröffnung eines neuen Vergabeverfahrens, das sich ganz oder teilweise auf das frühere Vergabeverfahren bezieht, der Kommission bekannt zu geben. In der neuen Mitteilung bestätigt der Mitgliedstaat entweder, dass der behauptete Verstoß beseitigt wurde, oder er gibt eine Begründung dafür, weshalb der Verstoß nicht beseitigt wurde."

4. Folgende Artikel werden eingefügt:

„Artikel 3a

Inhalt einer Bekanntmachung für die Zwecke der freiwilligen Ex-Ante-Transparenz

Die Bekanntmachung nach Artikel 2d Absatz 4 zweiter Gedankenstrich, deren Format von der Kommission nach dem in Artikel 3b Absatz 2 genannten Beratungsverfahren festgelegt wird, enthält folgende Angaben:

a) Name und Kontaktdaten des öffentlichen Auftraggebers,

b) Beschreibung des Vertragsgegenstands,

c) Begründung der Entscheidung des öffentlichen Auftraggebers, den Auftrag ohne vorherige Veröffentlichung einer Bekanntmachung im *Amtsblatt der Europäischen Union* zu vergeben,

d) Name und Kontaktdaten des Wirtschaftsteilnehmers, zu dessen Gunsten die Zuschlagsentscheidung getroffen wurde, und

e) gegebenenfalls jede andere vom öffentlichen Auftraggeber für sinnvoll erachtete Angabe.

Artikel 3b

Ausschussverfahren

(1) Die Kommission wird von dem Beratenden Ausschuss für öffentliche Aufträge (nachstehend ‚Ausschuss' genannt) unterstützt, der mit Artikel 1 des Beschlusses 71/306/EWG des Rates vom 26. Juli 1971 (*) eingesetzt wurde.

(2) Wird auf diesen Absatz Bezug genommen, so gelten die Artikel 3 und 7 des Beschlusses 1999/468/EG des Rates vom 28. Juni 1999 zur Festlegung der Modalitäten für die Ausübung der der Kommission übertragenen Durchführungsbefugnisse (**) unter Beachtung von dessen Artikel 8.

(*) ABl. L 185 vom 16.8.1971, S. 15. Geändert durch den Beschluss 77/63/EWG (ABl. L 13 vom 15.1.1977, S. 15).

(**) ABl. L 184 vom 17.7.1999, S. 23. Geändert durch den Beschluss 2006/512/EG (ABl. L 200 vom 22.7.2006, S. 11)."

5. Artikel 4 erhält folgende Fassung:

„*Artikel 4*

Durchführung

(1) Die Kommission kann in Konsultation mit dem Ausschuss die Mitgliedstaaten ersuchen, ihr Informationen über das Funktionieren der innerstaatlichen Nachprüfungsverfahren zu übermitteln.

(2) Die Mitgliedstaaten teilen der Kommission auf einer jährlichen Basis den Wortlaut aller Entscheidungen — zusammen mit entsprechenden Begründungen — mit, die ihre Nachprüfungsstellen gemäß Artikel 2d Absatz 3 getroffen haben."

6. Folgender Artikel wird eingefügt:

„*Artikel 4a*

Überprüfung

Die Kommission überprüft spätestens am 20. Dezember 2012 die Durchführung dieser Richtlinie und erstattet dem Europäischen Parlament und dem Rat über deren Wirksamkeit Bericht, insbesondere über die Wirksamkeit der alternativen Sanktionen und der Fristen."

Artikel 2

Änderungen der Richtlinie 92/13/EWG

Die Richtlinie 92/13/EWG wird wie folgt geändert:

1. Artikel 1 erhält folgende Fassung:

„*Artikel 1*

Anwendungsbereich und Zugang zu Nachprüfungsverfahren

(1) Diese Richtlinie gilt für Aufträge im Sinne der Richtlinie 2004/17/EG des Europäischen Parlaments und des Rates vom 31. März 2004 zur Koordinierung der Zuschlagserteilung durch Auftraggeber im Bereich der Wasser-, Energie- und Verkehrsversorgung sowie der Postdienste (*), sofern diese Aufträge nicht gemäß Artikel 5 Absatz 2, Artikel 18 bis 26, Artikel 29 und 30 oder Artikel 62 der genannten Richtlinie ausgeschlossen sind.

Aufträge im Sinne der vorliegenden Richtlinie umfassen Liefer-, Bau- und Dienstleistungsaufträge, Rahmenvereinbarungen und dynamische Beschaffungssysteme.

Die Mitgliedstaaten ergreifen die erforderlichen Maßnahmen, um sicherzustellen, dass hinsichtlich der in den Anwendungsbereich der Richtlinie 2004/17/EG fallenden Aufträge die Entscheidungen der Auftraggeber wirksam und vor allem möglichst rasch nach Maßgabe der Artikel 2 bis 2f der vorliegenden Richtlinie auf Verstöße gegen das Gemeinschaftsrecht im Bereich des Auftragswesens oder gegen die einzelstaatlichen Vorschriften, die dieses Recht umsetzen, nachgeprüft werden können.

(2) Die Mitgliedstaaten stellen sicher, dass die in dieser Richtlinie getroffene Unterscheidung zwischen einzelstaatlichen Vorschriften zur Umsetzung des Gemeinschaftsrechts und den übrigen innerstaatlichen Bestimmungen nicht zu Diskriminierungen zwischen Unternehmen führt, die im Rahmen eines Verfahrens zur Vergabe eines Auftrags einen Schaden geltend machen könnten.

(3) Die Mitgliedstaaten stellen sicher, dass Nachprüfungsverfahren entsprechend den gegebenenfalls von den Mitgliedstaaten festzulegenden Bedingungen zumindest jeder Person zur Verfügung stehen, die ein Interesse an einem bestimmten Auftrag hat oder hatte und der durch einen behaupteten Verstoß ein Schaden entstanden ist bzw. zu entstehen droht.

(4) Die Mitgliedstaaten können verlangen, dass die Person, die ein Nachprüfungsverfahren anzustrengen beabsichtigt, den Auftraggeber über den behaupteten Verstoß und die beabsichtigte Nachprüfung unterrichtet, sofern die Stillhaltefrist nach Artikel 2a Absatz 2 oder andere Fristen für die Einreichung eines Antrags auf Nachprüfung nach Artikel 2c hiervon unberührt bleiben.

(5) Die Mitgliedstaaten können verlangen, dass die betreffende Person zunächst beim Auftraggeber eine Nachprüfung beantragt. In diesem Fall tragen die Mitgliedstaaten dafür Sorge, dass die Einreichung eines solchen Antrags einen unmittelbaren Suspensiveffekt auf den Vertragsschluss auslöst.

Die Mitgliedstaaten entscheiden über die geeigneten Kommunikationsmittel, einschließlich Fax oder elektronischer Mittel, die für die Beantragung der Nachprüfung gemäß Unterabsatz 1 zu verwenden sind.

Der Suspensiveffekt nach Unterabsatz 1 endet nicht vor Ablauf einer Frist von mindestens zehn Kalendertagen, gerechnet ab dem Tag, der auf den Tag folgt, an dem der Auftraggeber eine Antwort abgesendet hat, falls diese per Fax oder auf elektronischem Weg abgesendet wird, oder, falls andere Kommunikationsmittel verwendet werden, nicht vor Ablauf einer Frist von entweder mindestens 15 Kalendertagen, gerechnet ab dem Tag, der auf den Tag folgt, an dem der Auftraggeber eine Antwort abgesendet hat, oder mindestens zehn Kalendertagen, gerechnet ab dem Tag nach dem Eingang einer Antwort.

(*) ABl. L 134 vom 30.4.2004, S. 1. Richtlinie zuletzt geändert durch die Richtlinie 2006/97/EG des Rates (ABl. L 363 vom 20.12.2006, S. 107)."

2. Artikel 2 wird wie folgt geändert:

a) Es wird die Überschrift „Anforderungen an die Nachprüfungsverfahren“ eingefügt.

b) Die Absätze 2 bis 4 erhalten folgende Fassung:

„(2) Die in Absatz 1 und in den Artikeln 2d und 2e genannten Befugnisse können getrennt mehreren Stellen übertragen werden, die für das Nachprüfungsverfahren unter verschiedenen Gesichtspunkten zuständig sind.

(3) Wird eine von dem Auftraggeber unabhängige Stelle in erster Instanz mit der Nachprüfung einer Zuschlagsentscheidung befasst, so sorgen die Mitgliedstaaten dafür, dass der Auftraggeber den Vertragsschluss nicht vornehmen kann, bevor die Nachprüfungsstelle eine Entscheidung über einen Antrag auf vorläufige Maßnahmen oder eine Entscheidung in der Hauptsache getroffen hat. Diese Aussetzung endet frühestens mit Ablauf der Stillhaltefrist nach Artikel 2a Absatz 2 und Artikel 2d Absätze 4 und 5.

(3a) Außer in den Fällen nach Absatz 3 und Artikel 1 Absatz 5 haben die Nachprüfungsverfahren als solche nicht notwendigerweise einen automatischen Suspensiveffekt auf die betreffenden Vergabeverfahren.

(4) Die Mitgliedstaaten können vorsehen, dass die Nachprüfungsstelle die voraussehbaren Folgen der vorläufigen Maßnahmen im Hinblick auf alle möglicherweise geschädigten Interessen sowie das Interesse der Allgemeinheit berücksichtigen kann und dass sie beschließen kann, diese Maßnahmen nicht zu ergreifen, wenn deren nachteilige Folgen die damit verbundenen Vorteile überwiegen könnten.

Die Ablehnung der vorläufigen Maßnahmen beeinträchtigt nicht die sonstigen Rechte des Antragstellers.“

c) Absatz 6 erhält folgende Fassung:

„(6) Außer in den in den Artikeln 2d bis 2f genannten Fällen richten sich die Wirkungen der Ausübung der in Absatz 1 des vorliegenden Artikels genannten Befugnisse auf den nach der Zuschlagsentscheidung geschlossenen Vertrag nach dem einzelstaatlichen Recht.

Abgesehen von dem Fall, in dem eine Entscheidung vor Zuerkennung von Schadensersatz aufgehoben werden muss, kann ein Mitgliedstaat ferner vorsehen, dass nach dem Vertragsschluss in Übereinstimmung mit Artikel 1 Absatz 5, Absatz 3 des vorliegenden Artikels oder den Artikeln 2a bis 2f die Befugnisse der Nachprüfungsstelle darauf beschränkt werden, einer durch einen Verstoß geschädigten Person Schadensersatz zuzuerkennen.“

d) In Absatz 9 Unterabsatz 1 werden die Worte „Gericht im Sinne des Artikels 177 des Vertrags“ durch die Worte „Gericht im Sinne des Artikels 234 des Vertrags“ ersetzt.

3. Es werden folgende Artikel eingefügt:

„Artikel 2a

Stillhaltefrist

(1) Die Mitgliedstaaten legen nach Maßgabe der Mindestbedingungen in Absatz 2 und in Artikel 2c Fristen fest, die sicherstellen, dass die in Artikel 1 Absatz 3 genannten Personen gegen Zuschlagsentscheidungen der Auftraggeber wirksame Nachprüfungsverfahren anstrengen können.

(2) Der Vertragsabschluss im Anschluss an die Zuschlagsentscheidung für einen Auftrag, der in den Anwendungsbereich der Richtlinie 2004/17/EG fällt, darf nicht vor Ablauf einer Frist von mindestens zehn Kalendertagen erfolgen, gerechnet ab dem Tag, der auf den Tag folgt, an dem die Zuschlagsentscheidung an die betroffenen Bieter und Bewerber abgesendet wurde, falls sie per Fax oder auf elektronischem Weg abgesendet wird, oder, falls andere Kommunikationsmittel verwendet werden, nicht vor Ablauf einer Frist von entweder mindestens 15 Kalendertagen, gerechnet ab dem Tag, der auf den Tag folgt, an dem die Zuschlagsentscheidung an die betroffenen Bieter und Bewerber abgesendet wurde, oder mindestens zehn Kalendertagen, gerechnet ab dem Tag nach dem Eingang der Zuschlagsentscheidung.

Bieter gelten als betroffen, wenn sie noch nicht endgültig ausgeschlossen wurden. Ein Ausschluss ist endgültig, wenn er den betroffenen Bietern mitgeteilt wurde und entweder von einer unabhängigen Nachprüfungsstelle als rechtmäßig anerkannt wurde oder keinem Nachprüfungsverfahren mehr unterzogen werden kann.

Bewerber gelten als betroffen, wenn der Auftraggeber ihnen keine Informationen über die Ablehnung ihrer Bewerbung zur Verfügung gestellt hat, bevor die Mitteilung über die Zuschlagsentscheidung an die betroffenen Bieter ergangen ist.

Der Mitteilung über die Zuschlagsentscheidung an jeden betroffenen Bieter und Bewerber wird Folgendes beigefügt:

— eine Zusammenfassung der einschlägigen Gründe gemäß Artikel 49 Absatz 2 der Richtlinie 2004/17/EG und

— eine genaue Angabe der konkreten Stillhaltefrist, die gemäß den einzelstaatlichen Vorschriften zur Umsetzung dieses Absatzes anzuwenden ist.

Artikel 2b

Ausnahmen von der Stillhaltefrist

Die Mitgliedstaaten können vorsehen, dass die in Artikel 2a Absatz 2 genannten Fristen in folgenden Fällen nicht angewendet werden:

a) wenn nach der Richtlinie 2004/17/EG keine vorherige Veröffentlichung einer Bekanntmachung im *Amtsblatt der Europäischen Union* erforderlich ist;

b) wenn der einzige betroffene Bieter im Sinne des Artikels 2a Absatz 2 der Bieter ist, dem der Zuschlag erteilt wird, und wenn es keine betroffenen Bewerber gibt;

c) bei Einzelaufträgen, die im Rahmen eines dynamischen Beschaffungssystems gemäß Artikel 15 der Richtlinie 2004/17/EG vergeben werden.

Wird von dieser Ausnahmeregelung Gebrauch gemacht, so stellen die Mitgliedstaaten sicher, dass der Vertrag gemäß den Artikeln 2d und 2f der vorliegenden Richtlinie unwirksam ist, wenn:

— ein Verstoß gegen Artikel 15 Absätze 5 oder 6 der Richtlinie 2004/17/EG vorliegt und

— der geschätzte Auftragswert die in Artikel 16 der Richtlinie 2004/17/EG genannten Schwellenwerte erreicht oder diese übersteigt.

Artikel 2c

Fristen für die Beantragung einer Nachprüfung

Legt ein Mitgliedstaat fest, dass alle Nachprüfungsanträge gegen Entscheidungen eines Auftraggebers, die im Rahmen von oder im Zusammenhang mit einem Vergabeverfahren im Sinne der Richtlinie 2004/17/EG ergehen, vor Ablauf einer bestimmten Frist gestellt werden müssen, so beträgt diese Frist mindestens zehn Kalendertage, gerechnet ab dem Tag, der auf den Tag folgt, an dem die Entscheidung des Auftraggebers an die betroffenen Bieter oder Bewerber abgesendet wurde, falls sie per Fax oder auf elektronischem Weg abgesendet wird, oder, falls andere Kommunikationsmittel verwendet werden, entweder mindestens 15 Kalendertage, gerechnet ab dem Tag, der auf den Tag folgt, an dem die Entscheidung des Auftraggebers an die betroffenen Bieter oder Bewerber abgesendet wurde, oder mindestens zehn Kalendertage, gerechnet ab dem Tag nach dem Eingang der Entscheidung des Auftraggebers. Der Mitteilung der Entscheidung des Auftraggebers an jeden Bieter oder Bewerber wird eine Zusammenfassung der einschlägigen Gründe beigefügt. Wird ein Antrag auf Nachprüfung in Bezug auf die in Artikel 2 Absatz 1 Buchstabe b der vorliegenden Richtlinie genannten Entscheidungen eingereicht, die keiner besonderen Mitteilungspflicht unterliegen, so beträgt die Frist mindestens zehn Kalendertage, gerechnet ab dem Zeitpunkt der Veröffentlichung der betreffenden Entscheidung.

Artikel 2d

Unwirksamkeit

(1) Die Mitgliedstaaten tragen in folgenden Fällen dafür Sorge, dass ein Vertrag durch eine von dem Auftraggeber unabhängige Nachprüfungsstelle für unwirksam erklärt wird oder dass sich seine Unwirksamkeit aus der Entscheidung einer solchen Stelle ergibt,

a) falls der Auftraggeber einen Auftrag ohne vorherige Veröffentlichung einer Bekanntmachung im *Amtsblatt der Europäischen Union* vergeben hat, ohne dass dies nach der Richtlinie 2004/17/EG zulässig ist,

b) bei einem Verstoß gegen Artikel 1 Absatz 5, Artikel 2 Absatz 3 oder Artikel 2a Absatz 2 der vorliegenden Richtlinie, falls dieser Verstoß dazu führt, dass der Bieter, der eine Nachprüfung beantragt, nicht mehr die Möglichkeit hat, vor Abschluss des Vertrags Rechtsschutz zu erlangen, und dieser Verstoß verbunden ist mit einem Verstoß gegen die Richtlinie 2004/17/EG, falls der letztgenannte Verstoß die Aussichten des Bieters, der eine Nachprüfung beantragt, auf die Erteilung des Zuschlags beeinträchtigt hat,

c) in Fällen gemäß Artikel 2b Buchstabe c Unterabsatz 2 der vorliegenden Richtlinie, falls die Mitgliedstaaten von der Ausnahmeregelung bezüglich der Stillhaltefrist für Aufträge, die auf dynamischen Beschaffungssystemen beruhen, Gebrauch gemacht haben.

(2) Die Folgen der Unwirksamkeit eines Vertrags richten sich nach einzelstaatlichem Recht.

Die einzelstaatlichen Rechtsvorschriften können vorsehen, dass alle vertraglichen Verpflichtungen rückwirkend aufgehoben werden oder dass die Wirkung der Aufhebung auf die Verpflichtungen beschränkt ist, die noch zu erfüllen sind. Im letzteren Fall tragen die Mitgliedstaaten dafür Sorge, dass auch alternative Sanktionen im Sinne des Artikels 2e Absatz 2 Anwendung finden.

(3) Die Mitgliedstaaten können vorsehen, dass die von dem Auftraggeber unabhängige Nachprüfungsstelle einen Vertrag nicht für unwirksam erachten kann, selbst wenn der Auftrag aus den in Absatz 1 genannten Gründen rechtswidrig vergeben wurde, wenn die Nachprüfungsstelle nach Prüfung aller einschlägigen Aspekte zu dem Schluss kommt, dass zwingende Gründe eines Allgemeininteresses es rechtfertigen, die Wirkung des Vertrags zu erhalten. In diesem Fall sehen die Mitgliedstaaten alternative Sanktionen im Sinne des Artikels 2e Absatz 2 vor, die stattdessen angewandt werden.

Wirtschaftliche Interessen an der Wirksamkeit eines Vertrags dürfen nur als zwingende Gründe gelten, wenn die Unwirksamkeit in Ausnahmesituationen unverhältnismäßige Folgen hätte.

Wirtschaftliche Interessen in unmittelbarem Zusammenhang mit dem betreffenden Vertrag dürfen jedoch nicht als zwingende Gründe eines Allgemeininteresses gelten. Zu den wirtschaftlichen Interessen in unmittelbarem Zusammenhang mit dem Vertrag gehören unter anderem die durch die Verzögerung bei der Ausführung des Vertrags verursachten Kosten, die durch die Einleitung eines neuen Vergabeverfahrens verursachten Kosten, die durch den Wechsel des Wirtschaftsteilnehmers, der den Vertrag ausführt, verursachten Kosten und die Kosten, die durch rechtliche Verpflichtungen aufgrund der Unwirksamkeit verursacht werden.

(4) Die Mitgliedstaaten sehen vor, dass Absatz 1 Buchstabe a nicht zur Anwendung kommt, wenn

— der Auftraggeber der Ansicht ist, dass die Auftragsvergabe ohne vorherige Veröffentlichung einer Bekanntmachung im *Amtsblatt der Europäischen Union* gemäß der Richtlinie 2004/17/EG zulässig ist,

— der Auftraggeber im *Amtsblatt der Europäischen Union* eine Bekanntmachung veröffentlicht hat, wie sie in Artikel 3a der vorliegenden Richtlinie beschrieben ist und mit der er seine Absicht bekundet, den Vertrag abzuschließen, und

— der Vertrag nicht vor Ablauf einer Frist von mindestens zehn Kalendertagen, gerechnet ab dem Tag nach der Veröffentlichung dieser Bekanntmachung, abgeschlossen wurde.

(5) Die Mitgliedstaaten sehen vor, dass Absatz 1 Buchstabe c nicht zur Anwendung kommt, wenn

— der Auftraggeber der Ansicht ist, dass die Auftragsvergabe im Einklang mit Artikel 15 Absätze 5 und 6 der Richtlinie 2004/17/EG erfolgt,

— der Auftraggeber eine Zuschlagsentscheidung mit einer Zusammenfassung der Gründe gemäß Artikel 2a Absatz 2 Unterabsatz 4 erster Gedankenstrich der vorliegenden Richtlinie an die betroffenen Bieter abgesendet hat und

— der Vertrag nicht vor Ablauf einer Frist von mindestens zehn Kalendertagen geschlossen wurde, gerechnet ab dem Tag, der auf den Tag folgt, an dem die Zuschlagsentscheidung an die betroffenen Bieter abgesendet wurde, falls sie per Fax oder auf elektronischem Weg abgesendet wird, oder, falls andere Kommunikationsmittel verwendet werden, nicht vor Ablauf einer Frist von entweder mindestens 15 Kalendertagen, gerechnet ab dem Tag, der auf den Tag folgt, an dem die Zuschlagsentscheidung an die betroffenen Bieter abgesendet wurde, oder mindestens zehn Kalendertagen, gerechnet ab dem Tag nach dem Eingang der Zuschlagsentscheidung.

Artikel 2e

Verstöße gegen diese Richtlinie und alternative Sanktionen

(1) Bei Verstößen gegen Artikel 1 Absatz 5, Artikel 2 Absatz 3 oder Artikel 2a Absatz 2, die nicht von Artikel 2d Absatz 1 Buchstabe b erfasst sind, sehen die Mitgliedstaaten die Unwirksamkeit gemäß Artikel 2d Absätze 1 bis 3 oder alternative Sanktionen vor. Die Mitgliedstaaten können vorsehen, dass die vom Auftraggeber unabhängige Nachprüfungsstelle nach Bewertung aller einschlägigen Aspekte entscheidet, ob der Vertrag als unwirksam erachtet werden sollte oder ob alternative Sanktionen verhängt werden sollten.

(2) Die alternativen Sanktionen müssen wirksam, verhältnismäßig und abschreckend sein. Sie umfassen Folgendes:

— die Verhängung von Geldbußen bzw. -strafen gegen den Auftraggeber; oder

— die Verkürzung der Laufzeit des Vertrags.

Die Mitgliedstaaten können der Nachprüfungsstelle einen weiten Ermessensspielraum einräumen, damit sie alle relevanten Faktoren berücksichtigen kann, einschließlich der Schwere des Verstoßes, des Verhaltens des Auftraggebers und — in den in Artikel 2d Absatz 2 genannten Fällen — des Umfangs, in dem der Vertrag seine Gültigkeit behält.

Die Zuerkennung von Schadensersatz stellt keine angemessene Sanktion im Sinne dieses Absatzes dar.

Artikel 2f

Fristen

(1) Die Mitgliedstaaten können vorsehen, dass eine Nachprüfung gemäß Artikel 2d Absatz 1 innerhalb der folgenden Fristen beantragt werden muss:

a) vor Ablauf von mindestens 30 Kalendertagen, gerechnet ab dem Tag, der auf den Tag folgt, an dem

— der Auftraggeber eine Bekanntmachung über die Auftragsvergabe gemäß Artikel 43 und 44 der Richtlinie 2004/17/EG veröffentlicht hat, sofern darin die Entscheidung des Auftraggebers begründet wird, einen Auftrag ohne vorherige Veröffentlichung einer Bekanntmachung im *Amtsblatt der Europäischen Union* zu vergeben, oder

— der Auftraggeber die betroffenen Bieter und Bewerber über den Abschluss des Vertrags informiert hat, sofern diese Information eine Zusammenfassung der einschlägigen Gründe gemäß Artikel 49 Absatz 2 der Richtlinie 2004/17/EG enthält. Diese Option findet auch in den in Artikel 2b Buchstabe c der vorliegenden Richtlinie genannten Fällen Anwendung;

b) und in jedem Fall vor Ablauf einer Frist von mindestens sechs Monaten, gerechnet ab dem Tag, der auf den Tag folgt, an dem der Vertrag geschlossen wurde.

(2) In allen anderen Fällen, einschließlich der Beantragung einer Nachprüfung gemäß Artikel 2e Absatz 1, werden die Fristen für die Beantragung einer Nachprüfung vorbehaltlich des Artikels 2c durch das einzelstaatliche Recht geregelt."

4. Die Artikel 3 bis 7 erhalten folgende Fassung:

„*Artikel 3a*

Inhalt einer Bekanntmachung für die Zwecke der freiwilligen Ex-Ante-Transparenz

Die Bekanntmachung nach Artikel 2d Absatz 4 zweiter Gedankenstrich, deren Format von der Kommission nach dem in Artikel 3b Absatz 2 genannten Beratungsverfahren festgelegt wird, enthält folgende Angaben:

a) Name und Kontaktdaten des Auftraggebers,

b) Beschreibung des Vertragsgegenstands,

c) Begründung der Entscheidung des Auftraggebers, den Auftrag ohne vorherige Veröffentlichung einer Bekanntmachung im *Amtsblatt der Europäischen Union* zu vergeben,

d) Name und Kontaktdaten des Wirtschaftsteilnehmers, zu dessen Gunsten die Zuschlagsentscheidung getroffen wurde, und

e) gegebenenfalls jede andere vom Auftraggeber für sinnvoll erachtete Angabe.

Artikel 3b

Ausschussverfahren

(1) Die Kommission wird von dem Beratenden Ausschuss für öffentliche Aufträge (nachstehend ‚Ausschuss' genannt) unterstützt, der mit Artikel 1 des Beschlusses 71/306/EWG des Rates vom 26. Juli 1971 (*) eingesetzt wurde.

(2) Wird auf diesen Absatz Bezug genommen, so gelten die Artikel 3 und 7 des Beschlusses 1999/468/EG des Rates vom 28. Juni 1999 zur Festlegung der Modalitäten für die Ausübung der der Kommission übertragenen Durchführungsbefugnisse (**) unter Beachtung von dessen Artikel 8.

(*) ABl. L 185 vom 16.8.1971, S. 15. Geändert durch den Beschluss 77/63/EWG (ABl. L 13 vom 15.1.1977, S. 15).

(**) ABl. L 184 vom 17.7.1999, S. 23. Geändert durch den Beschluss 2006/512/EG (ABl. L 200 vom 22.7.2006, S. 11)."

5. Artikel 8 erhält folgende Fassung:

„*Artikel 8*

Korrekturmechanismus

(1) Die Kommission kann das in den Absätzen 2 bis 5 vorgesehene Verfahren anwenden, wenn sie vor Abschluss eines Vertrags zu der Auffassung gelangt, dass bei einem Vergabeverfahren, das in den Anwendungsbereich der Richtlinie 2004/17/EG fällt, oder im Zusammenhang mit Artikel 27 Buchstabe a der genannten Richtlinie im Falle eines Auftraggebers, auf den diese Bestimmung Anwendung findet, ein schwerer Verstoß gegen das Gemeinschaftsrecht im Bereich des Auftragswesen vorliegt.

(2) Die Kommission teilt dem betroffenen Mitgliedstaat mit, aus welchen Gründen sie einen schweren Verstoß als gegeben ansieht, und fordert dessen Beseitigung durch geeignete Maßnahmen.

(3) Innerhalb von 21 Kalendertagen nach Eingang der in Absatz 2 genannten Mitteilung übermittelt der betroffene Mitgliedstaat der Kommission

a) die Bestätigung, dass der Verstoß beseitigt wurde, oder

b) eine Begründung dafür, weshalb der Verstoß nicht beseitigt wurde, oder

c) die Mitteilung, dass das betreffende Vergabeverfahren entweder auf Betreiben des Auftraggebers oder aber in Wahrnehmung der in Artikel 2 Absatz 1 Buchstabe a vorgesehenen Befugnisse ausgesetzt wurde.

(4) In einer gemäß Absatz 3 Buchstabe b übermittelten Begründung kann insbesondere geltend gemacht werden, dass der behauptete Verstoß bereits Gegenstand eines Gerichtsverfahrens oder einer Nachprüfung nach Artikel 2 Absatz 9 ist. In diesem Fall unterrichtet der Mitgliedstaat die Kommission über den Ausgang dieser Verfahren, sobald dieser bekannt ist.

(5) Hat ein Mitgliedstaat gemäß Absatz 3 Buchstabe c mitgeteilt, dass ein Vergabeverfahren ausgesetzt wurde, so hat er die Beendigung der Aussetzung oder die Eröffnung eines neuen Vergabeverfahrens, das sich ganz oder teilweise auf das frühere Vergabeverfahren bezieht, der Kommission bekannt zu geben. In der neuen Mitteilung bestätigt der Mitgliedstaat entweder, dass der behauptete Verstoß beseitigt wurde, oder er gibt eine Begründung dafür, weshalb der Verstoß nicht beseitigt wurde."

6. Die Artikel 9 bis 12 erhalten folgende Fassung:

„*Artikel 12*

Durchführung

(1) Die Kommission kann in Konsultation mit dem Ausschuss die Mitgliedstaaten ersuchen, ihr Informationen über das Funktionieren der innerstaatlichen Nachprüfungsverfahren zu übermitteln.

(2) Die Mitgliedstaaten teilen der Kommission auf einer jährlichen Basis den Wortlaut aller Entscheidungen — zusammen mit entsprechenden Begründungen — mit, die ihre Nachprüfungsstellen gemäß Artikel 2d Absatz 3 getroffen haben.

Artikel 12a

Überprüfung

Die Kommission überprüft spätestens am 20. Dezember 2012 die Durchführung dieser Richtlinie und erstattet dem Europäischen Parlament und dem Rat über deren Wirksamkeit Bericht, insbesondere über die Wirksamkeit der alternativen Sanktionen und der Fristen."

7. Der Anhang wird gestrichen.

Artikel 3

Umsetzung

(1) Die Mitgliedstaaten setzen die Rechts- und Verwaltungsvorschriften in Kraft, die erforderlich sind, um dieser Richtlinie spätestens am 20. Dezember 2009 nachzukommen. Sie teilen der Kommission unverzüglich den Wortlaut dieser Vorschriften mit.

Wenn die Mitgliedstaaten diese Vorschriften erlassen, nehmen sie in den Vorschriften selbst oder durch einen Hinweis bei der amtlichen Veröffentlichung auf diese Richtlinie Bezug. Die Mitgliedstaaten regeln die Einzelheiten der Bezugnahme.

(2) Die Mitgliedstaaten teilen der Kommission den Wortlaut der wichtigsten innerstaatlichen Rechtsvorschriften mit, die sie auf dem unter diese Richtlinie fallenden Gebiet erlassen.

Artikel 4

Inkrafttreten

Diese Richtlinie tritt am zwanzigsten Tag nach ihrer Veröffentlichung im *Amtsblatt der Europäischen Union* in Kraft.

Artikel 5

Adressaten

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Der Präsident	*Der Präsident*
H.-G. PÖTTERING	M. LOBO ANTUNES

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BUYING SOCIAL:
A GUIDE TO TAKING ACCOUNT OF SOCIAL CONSIDERATIONS IN PUBLIC PROCUREMENT

Important notice

Although the information in this Guide has been carefully checked, the European Commission accepts no liability with regard to the specific cases mentioned in it.

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INTRODUCTION

Socially responsible public procurement (SRPP) is about setting an example and influencing the market-place. By promoting SRPP, public authorities can give companies real incentives to develop socially responsible management. By purchasing wisely, public authorities can promote employment opportunities, decent work, social inclusion, accessibility, design for all, ethical trade, and seek to achieve wider compliance with social standards. For some products, works and services, the impact can be particularly significant, as public purchasers command a large share of the market (e.g. in construction, business services, IT and so on). In general, public authorities are major consumers in Europe, spending some 17% of the EU's gross domestic product (a sum equivalent to half the GDP of Germany). Therefore, by using their purchasing power to opt for goods and services that also deliver good social outcomes, they can make a major contribution to sustainable development.

The legal basis for public procurement in the European Union is provided by Directives 2004/17/EC[1] and 2004/18/EC[2] (the 'Procurement Directives')[3], which offer scope for taking account of social considerations, provided in particular they are linked to the subject-matter of the contract[4] and are proportionate to its requirements and as long as the principles of value for money and equal access for all EU suppliers are observed.

This subject has been developed over the years by Court of Justice of the European Union (**CJEU**) case-law, by a European Commission Communication in 2001[5] and by a study published by the Commission in 2003 on diversity and equality in public procurement (http://ec.europa.eu/employment_social/fundamental_rights/public/arc_en.htm#Leaflets).

The purpose of this Guide is (a) to raise contracting authorities' awareness of the potential benefits of SRPP and (b) to explain in a practical way the opportunities offered by the existing EU legal framework for public authorities to take into account social considerations in their public procurement, thus paying attention not only to price but also to the best value for money. When drafting this Guide, the Commission widely consulted public authorities in the Member States and many other interested parties and stakeholders.

This Guide has been produced chiefly for public authorities, but also in the hope that it will inspire private-sector purchasers too.

For practical reasons, this Guide follows the procurement procedure step by step.

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1 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (hereafter the "**Directive 2004/17/EC**")**;**

2 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts(hereafter the '**Directive 2004/18/EC**');.

3 The Procurement Directives are based on the principles of the Treaty and "*in particular the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency*". The provisions of the Procurement Directives should be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty (see Recital 2 of Directive 2004/18/EC and Recital 9 of Directive 2004/17/EC);

4 Or, alternatively, with performance of the contract, in cases where social considerations are included in the contract performance clauses.

5 COM(2001) 566 on the EU law applicable to public procurement and the possibilities for integrating social considerations into public procurement.

I. BUYING SOCIAL: KEY ISSUES

1. Socially responsible public procurement (SRPP): a definition

1.1 'SRPP' means procurement operations that take into account one or more of the following social considerations: employment opportunities, decent work, compliance with social and labour rights, social inclusion (including persons with disabilities), equal opportunities, accessibility design for all, taking account of sustainability criteria, including ethical trade issues[6] and wider voluntary compliance with corporate social responsibility (CSR), while observing the principles enshrined in the Treaty for the European Union (TFEU) and the Procurement Directives. SRPP can be a powerful tool both for advancing sustainable development and for achieving the EU's (and Member States') social objectives. SRPP covers a wide spectrum of social considerations, which may be taken into account by contracting authorities at the appropriate stage of the procurement procedure. Social considerations can be combined with green considerations in an integrated approach to sustainability in public procurement[7].

1.2 To support their social policies, contracting authorities have many ways of taking account of social considerations in public procurement. A **non-exhaustive list of examples** of social considerations potentially relevant to public procurement, **subject to compliance with the Procurement Directives and the fundamental principles of the TFEU, is set out below. However, many social considerations, depending on their nature, can be included only at certain stages of the procurement procedure[8]. In addition, contracting authorities should decide case by case which social considerations are relevant to their procurement, depending on the subject-matter of their contract and on their objectives.** The following social considerations could be relevant for procurement:

- Promoting *'employment opportunities'*, for example:

  - promotion of youth employment;

  - promotion of gender balance[9] (e.g. work/life balance, fighting against sectoral and occupational segregation, etc.);

  - promotion of employment opportunities for the long-term unemployed and for older workers;

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6 For further details, see Section 4 of Chapter IV ('Social labels and the implications for ethical trade').

7 As regards green considerations in public procurement, see Commission Communication COM(2008) 400/2 'Public procurement for a better environment' (http://ec.europa.eu/environment/gpp/pdf/com_2008_400.pdf) and the Commission services' document 'Buying Green — Handbook on Green Public Procurement' (http://ec.europa.eu/environment/gpp/guideline_en.htm). However, the Handbook on Green Public Procurement was published in 2004 and does not take into account the developments in EU law since then.

8 For example, social considerations regarding labour conditions are generally more appropriate to be included in the contract performance clauses, as in general they do not qualify as technical specifications or selection criteria, within the meaning of the Procurement Directives. On the other hand, it is generally more appropriate to include accessibility considerations in the technical specifications.

9 The concept of gender balance covers not only the under-representation of women in certain sectors, but also the under-representation of men in "feminised" sectors such as childcare and basic school education.

- diversity policies and employment opportunities for persons from disadvantaged groups (e.g. migrant workers, ethnic minorities, religious minorities, people with low educational attainment, etc.);

- promotion of employment opportunities for people with disabilities, including through inclusive and accessible work environments.

- Promoting *'decent work'*[10]:

This universally endorsed concept is based on the conviction that people have the right to productive employment in conditions of freedom, equity, security and human dignity. Four equally important and interdependent items make up the Decent Work Agenda: the right to productive and freely chosen work, fundamental principles and rights at work, employment providing a decent income and social protection and social dialogue. Gender equality and non-discrimination are considered cross-cutting issues on the Decent Work Agenda. In the context of SRPP, a number of issues can play an important role, such as:

  - compliance with core labour standards[11];
  - decent pay;
  - occupational health and safety;
  - social dialogue;
  - access to training;
  - gender equality and non-discrimination;
  - access to basic social protection.

- Promoting compliance with *'social and labour rights'*, such as:
  - compliance with national laws and collective agreements that comply with EU law;
  - compliance with the principle of equal treatment between women and men, including the principle of equal pay for work of equal value, and promotion of gender equality;
  - compliance with occupational health and safety laws;

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[10] European Commission, COM(2006) 249 of 24 May 2006, p. 2: 'Combining economic competitiveness and social justice in this way is at the heart of the European model of development. Playing an active part in promoting decent work forms an integral part of the European Social Agenda and of the EU's efforts to promote its values and share its experience and its model of integrated economic and social development.' See also the renewed commitment to the decent work agenda in the Commission Staff Working Document 'Report on the EU contribution to the promotion of decent work in the world', SEC(2008) 2184, based on COM(2008) 412 final.

[11] ILO core labour standards ban forced labour (Conventions 29 and 105) and child labour (Conventions 138 and 182) and establish the right to freedom of association and collective bargaining (Conventions 87 and 98) and to non-discrimination in terms of employment and occupation (Conventions 100 and 111). The legal bases for the Core Labour Standards are the eight above-mentioned core ILO Conventions that have been ratified by all 27 EU Member States.

– fighting discrimination on other grounds (age, disability, race, religion and belief, sexual orientation, etc.) and creating equal opportunities.

- Supporting *'social inclusion'* and promoting social economy organisations, such as:

  – equal access to procurement opportunities for firms owned by or employing persons from ethnic/minority groups - cooperatives, social enterprises and non-profit organisations, for example;

  – promoting supportive employment for persons with disabilities, including on the open labour market.

- Promoting *'accessibility and design for all'*[12], such as:

  – mandatory provisions in technical specifications to secure access for persons with disabilities to, for example, public services, public buildings, public transport, public information and ICT goods and services, including web-based applications. The key issue is to buy goods and services that are accessible to all.

- Taking into account *'ethical trade'*[13] issues, such as:

  – the possibility, under certain conditions[14], to take into account ethical trade issues in tender specifications and conditions of contracts.

- Seeking to achieve wider voluntary commitment to *'corporate social responsibility'* (CSR), i.e. companies acting voluntarily and going beyond the law to pursue environmental and social objectives in their daily business, such as:

  – working with contractors to enhance commitment to CSR values.

- Protecting against *human rights* abuse and encouraging respect for human rights.

- Promoting *'SMEs'* in so far as they can be connected with the considerations set out above:

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12 The UN Convention on Rights of Persons with Disabilities recognises accessibility as one of the general principles enshrined in Article 3 (the "Convention"). Furthermore, Article 9 of the Convention sets out the obligations of States Parties to ensure access to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. Furthermore, the Convention also calls for measures to implement 'universal design'. In Europe this concept is often known as 'design for all'.
The Convention has been signed by a significant number of UN members (including the European Community and all the Member States) and is currently being ratified by the signatories. In August 2008 the Commission submitted two proposals for Council decisions to conclude the UN Convention and its Optional Protocol. On 26 November 2009 the Council adopted a Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities: http://register.consilium.europa.eu/pdf/en/09/st15/st15540.en09.pdf.

13 Taking ethical trade considerations into account in public procurement was addressed in Communication COM(2009) 215 of 5 May 2009 'Contributing to sustainable development: The role of *Fair Trade* and non-governmental trade-related sustainability assurance schemes.'

14 For these conditions, see Chapter IVA on 'Defining the Requirements of the Contract', in particular Section 4 ('Social labels and the implications for ethical trade').

– provisions giving SMEs greater access to public procurement by reducing the cost and/or burden of participating in SRPP opportunities. This can be achieved, for example, by ensuring, where possible, that the size of the contract is not an obstacle in itself to participation by SMEs, by giving sufficient time to prepare bids, by ensuring payment on time, by setting proportionate qualification and economic requirements, etc.;

– equal opportunities by making subcontracting opportunities more visible.

The status of these social policy objectives differs markedly both in EU law and in different Member States. For example, in some sectors there are mandatory provisions regarding accessibility that go beyond the requirements of EU law in some Member States, but not in others.

2. The potential benefits of SRPP

2.1 Assisting compliance with social and labour law, including related national and international policy commitments/agendas

SRPP can contribute to enhancing compliance with national or international commitments to social development goals, as there is growing concern in many countries that traditional mechanisms for encouraging social justice and social cohesion are not adequate. SRPP can illustrate how social and economic considerations can be mutually reinforcing.

2.2 Stimulating socially conscious markets

SRPP can contribute to developing a market in socially beneficial products by expanding existing markets or creating new markets for goods and services that support achievement of social objectives and serve as a model for other consumers by offering them standards and information. Indeed, social public procurement can help create a level playing field in Europe and economies of scale. Market innovation can be stimulated, as can competition at European level, through for example, purchasing information technologies that are accessible for persons with disabilities, which will bring better and more affordable such products onto the market.

2.3 Demonstrating socially responsive governance

SRPP can contribute to enhancing compliance with community values and needs, as it responds to the growing public demand for governments to be socially responsible in their actions. For instance, by making sure that a social service contract takes into account the needs of all the users (such as including persons with disabilities or persons from different ethnic backgrounds), a contracting authority can meet the needs of the diverse community it serves.

2.4 Stimulating integration

Public intervention is sometimes desirable to encourage integration of significant groups in society (for example, people with disabilities, small businesses, women or minorities) in key market activities in order for an effective market to develop.

2.5 Ensuring more effective public expenditure

The volume of public procurement and the limits placed on direct social intervention by budgetary stringency could make procurement an attractive area for promoting social inclusion.

3. SRPP and the EU social model

3.1 One of the major benefits of SRPP, as already seen, is that it can be used by public authorities to further the European social model. The European social model is a vision of society that combines sustainable economic growth with improved living and working conditions. This has been seen to involve creation of a successful economy in which a particular set of social standards are progressively achieved: good-quality jobs, equal opportunities, non-discrimination, social protection for all, social inclusion, social dialogue, high-quality industrial relations and involvement of individuals in the decisions that affect them. These standards are not only intrinsically important but are also crucial factors in promoting best value for money and innovation.

3.2 Social standards have come to play a central role in building Europe's economic strength, by developing what has been described by EU institutions as a 'unique social model'[15]. Economic progress and social cohesion have come to be regarded as complementary pillars of sustainable development and are both at the heart of the process of European integration.

3.3. There has been increasing emphasis in the EU on social rights and equality, particularly in the workplace. As sustainable development moved beyond environmental issues into social issues, social standards were increasingly identified as one factor in the growing movement for corporate social responsibility. Taking gender equality as an example, at both European and national levels gender equality has become increasingly 'mainstreamed', meaning that the gender perspective has been progressively integrated into every stage of institutional policies, processes and practices, from design to implementation, monitoring or evaluation.

4. The legal and policy approach to SRPP in the EU

4.1 Developing the social dimension of EU policies and legislation

Over the last twenty years, the EU has developed its social dimension to a significant degree, embodied in 2008 by the renewed Social Agenda[16]. The important thing about these developments is that SRPP can now increasingly further policy at EU level, including its interaction with international policy. In some areas the EU has adopted legislation ─ notably on gender equality and non-discrimination on grounds of race, age, sexual orientation, disability and religious and other beliefs, and also on health and safety at work, working time, working conditions and information and consultation. Based on a number of provisions in the TFEU, there is now extensive EU legislation dealing with equal treatment, as well as Community level promotion of working conditions. In addition to legislation, the EU is also developing its social dimension by other means, such as by promoting social dialogue, the open method of coordination for employment, social protection and social inclusion policies, along with financial support from the European Social Fund. Further raising of social standards is a key objective of the EU in several respects, particularly where social standards are also fundamental rights.

In addition, at different times over the last few years, some social partner organizations have produced handbooks for organizations and public authorities on awarding contracts in specific

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15 See, for example, the preface to the Communication on the Social Policy Agenda.

16 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Renewed social agenda: Opportunities, access and solidarity in 21st century Europe', COM(2008) 412 final of 2 July 2008.

sectors (catering, cleaning, private security and textiles), based on the legal framework applicable at the time of writing[17]. These sectoral handbooks are the result of independent work by social partners within the European social dialogue process and they highlight the importance of technical guidance on the use of SRPP in those specific sectors. The EU legal framework has evolved in the mean time and more comprehensive and up-to-date guidance is now needed in order to make sure that procurement practice fully complies with the current EU public procurement law. That is the aim of this Guide.

4.2 The legal and policy approach to SRPP in the EU

The European Commission developed a strategy for clarification of the scope of SRPP. In its interpretative Communication of 15th October 2001, the European Commission set out the possibilities offered by Community law to integrate social considerations into public procurement procedures.[18] The aim of this Communication was 'to clarify the range of possibilities under the existing Community legal framework for integrating social considerations into public procurement. It seeks in particular to provide a dynamic and positive interaction between economic, social and employment policies, which mutually reinforce one another.' Both before and after publication of the Communication, the CJEU further clarified those possibilities in a series of landmark cases[19].

The Procurement Directives adopted on 31 March 2004 consolidated the legal framework. They specifically mention ways of incorporating social considerations into technical specifications, selection criteria, award criteria and contract performance clauses. A new provision regarding workshops for workers with disabilities was introduced.

The Procurement Directives do not apply to all public contracts. Some contracting authorities have adopted SRPP policies that specifically apply to contracts that are not covered by the Procurement Directives (such as contracts below the thresholds for application of the Directives) or are only partly covered (such as contracts for services that exceed the thresholds for application of the Procurement Directives listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC).

This Guide focuses on taking account of social considerations in public contracts that are fully covered by the Procurement Directives. It does not address in detail the TFEU rules applicable to inclusion of social considerations in contracts that are not covered or are only partly covered by the Procurement Directives (such as those mentioned in the previous paragraph).

However, it should be added that, in the case of such contracts, contracting authorities remain free (without prejudice to the national legislation in the field) to take considerations of a social nature into account (or not) in their procurement procedures, provided they comply with the general rules and principles of TFEU. Indeed, CJEU case-law has confirmed that the internal market rules in **TFEU also apply to contracts falling outside the scope of the Procurement**

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[17] Catering: 'Guide to most economically advantageous offering in contract catering' (2006); Cleaning: 'Selecting best value — A manual for organisations awarding contracts for cleaning services' (2004); Private security: 'Selecting best value — A manual for organisations awarding contracts for private guarding services' (1999); Textiles: 'Public procurement awarding guide for the clothing-textile sector' (2005).

[18] Interpretative Communication of the Commission on the Community Law Applicable to Public Procurement and the Possibilities for Integrating Social Considerations into Public Procurement, COM (2001) 566 final, 15.10.2001.

[19] For example, CJEU judgments of 17 September 2002 in case C-513/99 (Concordia Bus) and of 4 December 2003 in case C-448/01 (Wienstrom).

Directives[20]. The CJEU has ruled that the TFEU principles of equal treatment and transparency, free movement of goods, freedom of establishment and freedom to provide services also apply to contracts under the thresholds set in the Procurement Directives.

Consequently, social considerations that are legally acceptable in procurement contracts fully covered by the Procurement Directives may, *a fortiori,* be included in procurement contracts not covered or only partly covered by the Directives.

4.3 Social services of general economic interest

This Guide does not specifically address the legal issues related to procurement of social services of general economic interest.

In November 2007 the Commission adopted a Communication on services of general interest, including social services of general interest[21], which highlights the importance of taking into account tailor-made qualitative criteria in the delivery of social services. It aims to provide practical guidance on application of the EU rules to these services. The Communication was accompanied by two Staff Working Papers replying to a series of questions relating to application of the rules on State aid and on public procurement to services of general interest[22]. Most of these questions were gathered during broad consultations in 2006-2007 on social services. To follow up the Communication, an interactive information service (IIS) was also set up in January 2008 to provide answers to other questions from citizens, public authorities and service-providers regarding application of the EU rules[23].

4.4 Small and medium-sized enterprises[24]

Several issues need to be taken into consideration when it comes to SMEs (whether profit or not-for-profit). One particularly important issue relates to the potential burdens[25] that adopting SRPP approaches could place on SMEs directly (if they are the main contractors) or indirectly (if they are subcontractors to whom SRPP obligations have been transferred by the main contractor). Public authorities contemplating introducing SRPP should be aware of these direct and indirect costs and should take them into account when deciding how or whether to incorporate social considerations[26] into their procurement operations. Contracting authorities also need to be aware that introduction of SRPP is unlikely to affect every SME in the same way. Some may be more able than others to reap the benefits of SRPP and seize opportunities to compete on the social standards aspects of the contract.

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20 See, for example, the CJEU judgment of 7 December 2000 in case C-324/98 (Teleaustria).

21 See Communication on 'Services of general interest, including social services of general interest: a new European commitment': COM(2007) 725 final of 20 November 2007.

22 http://ec.europa.eu/services_general_interest/faq_en.htm. The Staff Working Paper regarding application of public procurement rules to social services of general interest contains useful guidance about the application of public procurement rules to social services of general interest.

23 http://ec.europa.eu/services_general_interest/registration/form_en.html.

24 SMEs have been defined at EU level by Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises: http://ec.europa.eu/enterprise/enterprise_policy/sme_definition/index_en.htm.

25 For practical guidelines on how to make public procurement practices more friendly and accessible for small and medium-sized enterprises (SMEs) in general, see Commission Staff Working Document SEC(2008) 2193 'Code of best practices facilitating access by SMEs to public procurement contracts' available at: http://ec.europa.eu/internal_market/publicprocurement/docs/sme_code_of_best_practices_en.pdf.

26 Which must, of course, be linked to the subject-matter of the contract (or with performance of the contract, in cases where they are included in the contract performance clauses).

II. AN ORGANISATIONAL STRATEGY FOR BUYING SOCIAL

Public authorities that wish to achieve social objectives via SRPP will need to establish a strategy for implementing SRPP, focusing on their specific objectives.

1. Setting the objectives of socially responsible public procurement

Organisational strategies for SRPP may reflect the national, regional and/or local social priorities[27] and at the same time explicitly acknowledge the role that procurement plays in contributing to achieving them.

Example:

France: A 'Stratégie nationale du développement durable' was launched in 2003, followed by a 'Plan national d'action pour des achats publics durables' in 2007. The French government has engaged in major consultations with the social partners — the 'Grenelle de l'environnement' and 'Grenelle de l'insertion' – covering different measures with an impact on social integration, including public procurement. The aim is to build around the central idea of the 'État exemplaire', i.e. the State, and more generally all public entities, are expected to show the way forward to sustainable development.

2. Providing high-level political commitment and leadership for SRPP

Leadership is one of the keys to success for any SRPP strategy. This involves identifying the management structure and the (human and financial) resources necessary to carry out SRPP. SRPP needs leadership from the very top of the organisation and calls for political commitment and leadership through the management structures.

In principle, it should be fairly easy for all public authorities to take the political decision to buy social. Indeed, they should be encouraged to do so, as it will benefit not only society but also the contracting authority by improving its public image. In practice, a social purchasing policy does not normally require any structural changes on the part of the contracting authority.

[27] Obviously, this does not mean that contracting authorities could give preference to local, regional or national products in order to favour the local labour market.

Example:

UK: The Gender Duty imposed on public authorities came into force in April 2007 under the Equality Act (2006). This is a new legal tool with the potential to deliver significant progress on gender equality in the public sector, with some impact on the private sector too via their procurement.

The public-sector gender duty includes the requirement to ensure compliance with the Equal Pay Law. Gender equality schemes place an obligation on public authorities to adopt objectives that address the causes of the gender pay gap and consider ways of dealing with them, e.g. by changing recruitment methods, introducing flexible working and conducting equal pay reviews.

The gender duty has triggered initiatives in many parts of the public sector and reaches out to the terms of employment applied by private-sector contractors. To this end, procurement guidelines have been drafted to encourage the public sector to promote good practice on diversity and equal pay among contractors. Guidance on promoting gender equality in public-sector procurement was published in February 2006. This set out various positive measures public authorities should take to comply with the requirements of the gender duty in procurement functions. A code of practice for this Gender Equality Duty was published in 2007.

3. Measuring the risks and prioritising organisational spend categories to enhance social outcomes

Contracting authorities need to assess the social risks and impact of their purchasing activity and supply chain. This helps to focus their efforts on the most important spend categories and on those which can contribute to achieving their social targets.

Here are a few suggestions contracting authorities should consider when prioritising their approach to SRPP:

- Adopt a step-by-step approach. Start with a small range of products and services with a clear social impact or where socially responsible alternatives are easily available and not more expensive. For example, select products (e.g. vehicles) or services (e.g. cleaning) that have a high proportion of vulnerable workers (from ethnic minorities, persons with disabilities, etc.) or of female workers.

- Also start by making sure that contract specifications have no negative impact on social conditions (e.g. by assessing the impact of privatising delivery of services on vulnerable groups) or by reserving suitable procurement for sheltered workshops or sheltered employment programmes[28], taking into account their current production capacity.

[28] Based on Article 19 of Directive 2004/18/EC and Article 28 of Directive 2004/17/EC.

Example:

Sweden: To facilitate access to public procurement opportunities for SMEs, social-economy and voluntary organisations who work with socially disadvantaged groups, the Swedish Social Insurance Agency sometimes includes participation by these groups in its initial study on procurement, in order to take fuller account of their specific problems when drafting the tender documents.

To identify the risk of non-compliance with social standards, the Agency analyses the risks at the beginning of procurement. For example, in the case of procurement of cleaning services, the risk of non-compliance with legislation on working conditions is regarded as high.

- Focus initially on one or more social problems, such as fair wages or health and safety.

- Consider the availability and cost of socially superior alternatives and make sure they are in line with the applicable public procurement rules and principles. Are there more socially responsible ways of achieving the aims of the procurement strategy than the contracting authority has adopted? Will they meet the contracting authority's requirements and can it afford them? Consider what extra costs (if any) inclusion of social considerations could add and the potential effects of restricting competition.

- Consider the availability of data. Can the contracting authority find the social data it needs to establish a more socially responsible procurement strategy? How complicated will it be to decide what the contracting authority wants technically and to express it in a call for tenders?

- Consider the capacity of the contracting authority to put into action a workable, effective and efficient programme of action regarding SRPP.

- Consider alternative ways of delivering the social policy in question. Is delivering this social policy (partly) through public procurement an appropriate use of resources or is there a more effective way to deliver this policy, using other tools at the disposal of the contracting authority?

- Seek visibility. How visible will the socially responsible policy be to the public and to the staff? High-profile changes, like switching to sustainably produced/ethical trade coffee in the cafeteria, can help raise awareness of the policy and link it to other social projects.

- Consider the potential for future development. Socially responsible purchasing targeting services at an early stage of their development and marketing could be more successful than trying to change the social characteristics of mature sectors.

Examples:

France: The municipality of Angers designated an internal focal point (specialised legal advisor) for eco-responsible procurement in 2005, in charge of developing socially responsible public procurement practices with the objective of making them fully established practice in the procurement operations of the municipality. The advisor provided in-house training on sustainable procurement. Awareness-raising and tutoring was offered on both the technical and legal sides at the time of identifying needs, of preparing and launching the tender and of analysing and evaluating the offers received, in close cooperation with enterprises. As regards the social aspects, the municipality of Angers generally considers public works and services to be priority sectors, in particular construction of buildings, public roads and public parks and gardens.

UK: The Sustainable Procurement Task Force (SPTF) dealing with both social and environmental issues was set up in May 2005 and published its Action Plan in June 2006. The Action Plan presented the business case for sustainable procurement, recommended action across six broad areas and provided two tools that can help organisations to make progress: the Prioritisation Methodology and the Flexible Framework. The Prioritisation Methodology is a risk-based approach that helps organisations focus their efforts and resources appropriately. Instead of using just expenditure data, the method allows organisations to take account of the environmental and socio-economic risk, the potential that they have to influence suppliers and the actual scope to improve sustainability. The Flexible Framework is designed to help organisations understand the steps needed at organisational and process level to improve procurement practice and make sustainable procurement happen.

Putting an SRPP policy into practice will thus require strategic planning, i.e. setting priorities when choosing the contracts most suitable for SRPP. Some contracting authorities have chosen to adopt a coordinated and holistic approach to integrating social considerations.

4. Raising awareness of SRPP and involving key stakeholders

SRPP is of interest to a wide range of stakeholders, who need to be involved in the process of developing an SRPP approach in order to gain confidence in it and to build up commitment to achieving its objectives. Key stakeholders in SRPP include central, regional and local governments, potential suppliers or contractors, civil society, employers' organisations and trade unions. Workshops, seminars and conferences should be organised to gather views on the approach to SRPP. They should be organised at various stages of the development process, i.e. at the very start of the process when ideas are formulated, during drafting of the approach and towards the end when a final draft can be made available.

Finally, effective communication about the benefits of SRPP, good practice and success stories also play a key role in making progress. It is very important that all these stakeholders understand the nature of the challenge and their role. Better results will be achieved by means of an imaginative and committed partnership between purchasers and contractors.

Examples:

Sweden: The regional administration for South-West Sweden holds pre-bid meetings open to all potential bidders to explain any 'design-for-all' requirements included in the technical specifications.

UK: To come up with recommendations on how public-sector procurement in the UK could engage better with SMEs, HM Treasury and the Department for Business Enterprise and Regulatory Reform launched an on-line consultation on key questions exploring the barriers to SMEs bidding for contracts. The consultation was made available on a website and invited responses from procurers, stakeholder groups and suppliers. Subsequently, to implement the resulting recommendations, a stakeholder group has been established which keeps in regular contact with the project teams responsible for implementation and can provide comments on the approach to be taken.

Cooperation between purchasing authorities is another way of increasing access to social expertise and know-how and of communicating the policy to the outside world.

Example:

Denmark: SRPP is one of the topics covered in the market analysis carried out by National Procurement Ltd before each call for tenders. The organisation runs training programmes and workshops for all suppliers. It tries to make the tender documentation as simple as possible so that SMEs also have the resources to submit a bid. Framework contracts are often split into several lots (e.g. on a geographical basis), without infringing the thresholds set by the Procurement Directives[29], in order to give suppliers a chance to submit a bid.

5. Implementing the SRPP strategy

The SRPP strategy will need to give details of how SRPP will be implemented and of the steps which need to be taken to make progress. The strategy will need to take into consideration factors such as:

- the legal and regulatory framework;
- the institutional framework;
- the management structure;

[29] Article 9(3) of Directive 2004/18/EC and Article 16(2) of Directive 2004/17/EC.

- the availability of professional capacity and resources;
- a differentiated approach by sector, taking into account the particular characteristics of each field;
- the involvement of stakeholders.

As for how to implement the strategy, details will need to be given of responsibilities, targets with a realistic timescale for achieving them, the management structure for implementing them, the professional and financial resources needed, and measures to monitor and report on progress.

The steps that need to be taken could include setting up a social procurement task force, designing an action plan, including SRPP in policies and procedures, or developing simplified guidelines for budget-holders and procurement officers at all levels.

Capacity-building could involve training programmes for executives, managers and staff. It might also involve sharing good practice, making available the skills to implement SRPP, including SRPP skills in candidates' selection criteria, and making information on SRPP initiatives available at EU and/or government level.

The staff making the purchases should be given the legal, financial and social knowledge they need to decide to what extent and where social factors can or can best be introduced in the procurement procedure, whether they are set at the right level to get best value for money, and whether they match the social priorities of the contracting authority.

6. Measuring effective implementation

Measuring effective implementation of the SRPP strategy and its outcome involves setting up internal and external controls, which should assess outcomes against stated targets and standards of performance.

Internal measures need to be linked to existing reporting systems, which will have to be adapted in order to take into consideration SRPP objectives. They also need to be linked to internal audit procedures and could incorporate sanctions for non-compliance with SRPP objectives.

External measures should include independent auditing of SRPP performance. They could also include benchmarking against past performance or the performance of other organisations.

The outcome of audits of SRPP performance should be made available to the general public and should contribute to reviewing and updating policies, objectives and procedures for SRPP.

7. Overview of the procurement process

In taking account of the social considerations in public procurement, it is suggested that procurers act in relation to two main issues:

- getting the best value for money;

- acting fairly.

Best value for money: Contracting authorities are responsible for obtaining the best value for taxpayers' money for everything they procure. Best value for money does not necessarily mean accepting only the cheapest offer. It means the contracting authority has to secure the best deal within the parameters it sets. Best value for money could be defined as the optimum combination of whole-life cost and quality to meet the end-user's requirements. Value for money may also include social considerations.

Acting fairly: Acting fairly means following the principles of the internal market, which form the basis for the Procurement Directives and the national legislation based on them. The most important of these is the principle of equal treatment, which dictates that all competitors should have an equal opportunity to compete for the contract. To ensure this level playing field, the principle of transparency must also be applied.

- Examples of provisions applying the principle of equal treatment in the Procurement Directives are the time limits set for receipt of tenders and requests for participation, the common rules on technical specifications and the ban on discrimination against contractors from other Member States.

- Examples of application of the principle of transparency can be found in the different provisions on publication of notices and the obligation for contracting authorities to inform the tenderers concerned why their tenders were rejected.

7.1 The importance of legal advice

EC procurement rules stipulate how to handle the procurement process to safeguard the principles of fairness, non-discrimination and transparency. These rules permit taking account of sustainability and equal opportunity under certain conditions. Early expert legal advice on establishment of an SRPP action plan is likely to save difficulties later.

7.2 Preparing the procurement procedure

The preparatory stage of any procurement procedure is crucial, as each stage builds on those that have gone before. Therefore, before starting a tendering procedure, the contracting authority should set aside enough time to define the subject-matter of the contract and the means to be used to achieve the end result. The preparatory stage is also the best opportunity to identify which social considerations are relevant and appropriate to be taken into account in that particular procedure.

8. Stages of the procurement procedure and approaches to SRPP

Following the logic of this process, there are now at least four basic approaches to how social issues are currently addressed in public procurement.

The *first* arises when the purchaser decides to include social criteria in the subject matter of the contract itself and/or in the technical specifications that must be met by successful

contractors in a way that includes social criteria[30]. One example is specifying that computer equipment must comply with certain accessibility criteria.

In the *second* approach, bidders are prohibited, under certain conditions[31], from obtaining government contracts if they have been found guilty of previous wrongdoing in order to prevent public bodies contracting with bidders who have failed to achieve a particular standard of social behaviour.

The *third* approach attempts to persuade tenderers to commit to certain social standards and takes account of their success in doing so when it comes to awarding the contract. One form which this can take in practice is where the public body takes certain social issues into account in the award criteria[32].

The *fourth* approach focuses on the stage after the contract has been awarded. It requires whoever is awarded the contract to comply with certain conditions when carrying out the contract once it has been awarded[33]. This model requires all contractors to sign up to the same requirement, although there is no assessment of the ability of the contractor to comply with certain conditions.

These four basic approaches are not necessarily alternatives, but are frequently combined in the same public procurement procedure.

Example:

Spain: The Basque Country Government has issued an 'instruction' on incorporation of social, environmental and other public policy criteria in public procurement by its administration. This lays down which social and environmental criteria must be taken into account in all public procurement in the region and how.

Main goal of the instruction: To take account of social and environmental considerations (both of which are part of the sustainability approach) along with other aspects related to other public policies in public procurement by the administration and public entities in the Basque Country.

Assessment and monitoring: The Basque government departments for employment, social inclusion, social affairs and the environment periodically assess performance in contracting. The assessment includes the wording of the specifications, how they are applied in the award process and performance of the contract.

Technical specifications: The instruction recommends incorporating Accessibility and

30 The conditions under which social considerations can be taken into account in the subject-matter of the contract and/or the technical specifications are explained later in the sections 'Defining the subject-matter' and 'Defining the requirements of the contract'.

31 The conditions under which contracting authorities may (or, in some cases, are under an obligation to) exclude a tenderer from the procurement procedure are explained later in the section 'Exclusion criteria'.

32 The conditions under which social considerations can be taken into account as an award criterion are explained later in the section 'Awarding the contract'.

33 The conditions under which social considerations can be taken into account in the contract performance clauses are explained later in the section 'Contract performance'.

Design for All requirements in the technical specifications.

Award criteria: Whenever there is more than one award criterion, these criteria have to include that the products and services must be well-suited for people with disabilities (whenever this adaptation is above the legal mandatory minimum). Whenever disadvantaged groups are amongst the beneficiaries of the services defined in the subject-matter of the contract, the characteristics related to the fulfilment of their social needs will be included in the award criteria.

Contract performance clauses: The Instruction calls for the contract to include special performance clauses: environmental, social and related to other public policies. The aims of the special contract performance clauses are to protect the environment, health and safety, to promote employment of disadvantaged groups, to remove gender inequality from the labour market and to fight unemployment.

Examples of contract performance clauses in the Basque Country:

1. Labour inclusion of unemployed people that are difficult to employ: For this purpose, the instruction states that the staff performing the contract must include a set percentage of disadvantaged persons, such as unemployed people, people with disabilities, long-term unemployed women over 30, victims of household violence, persons with mental illness, unemployed single parents, immigrants unemployed for at least six months, long-term unemployed (more than one year) and unemployed young persons.

2. Employment quality and basic labour rights: The contractor must guarantee compliance with the ILO Core Labour Standards during performance of the contract in relation to the workers who make the products (the subject-matter of the contract) along the supply chain.

3. Health and safety in performance of contracts for building works and services.

Strategic development and prioritisation of SRPP initiatives —

IN A NUTSHELL

Identify national and local priorities relevant to SRPP.

Review organisations' procurement strategy and identify how SRPP links to overarching objectives and approaches. Identify how SRPP can help achieve these objectives and deliver value for money for the organisation.

Provide high-level political commitment and leadership for SRPP.

Identify the products and services the contracting authority procures that pose the greatest social risk and/or have the greatest capacity to enhance the social outcome.

Develop objectives and an action plan to address social issues in procurement.

Raise awareness of SRPP among stakeholders.

Ensure that procurement practices are open to bodies like small and medium-sized enterprises, social economy enterprises and the voluntary and community sector, whatever legal form they take.

III. IDENTIFYING THE NEEDS AND PLANNING PROCUREMENT

1. The importance of assessing actual needs

One crucial step that the contracting authority needs to take at this preparatory stage, even before defining the subject of the contract, is to assess its actual needs.

For example, the contracting authority might have decided that it needs to disseminate information to the public. Whenever possible, this should include a more socially inclusive solution, such as dissemination of information in accessible formats that can also be used by members of the public with disabilities.

This is the stage at which the public sector can best identify the social standards that procurement can help deliver. It requires those involved on the 'client side', from policy-makers to practitioners, to:

- actively seek out opportunities to promote social standards;
- ensure that the opportunities are linked to the subject-matter of the contract and are cost-effective;
- focus on the outcomes required;
- build in flexibility to accommodate changing requirements over the life of the project[34];
- identify the needs of all categories of users of the services, works or supplies to be procured.

Therefore, in order to be effective, the contracting authority should consider its needs in a functional manner, so as not to exclude any social effects.

2. Defining the subject-matter

Once the contracting authority has assessed its needs, it can determine more easily the subject-matter of the contract. The **'subject matter' of a contract is about the product, service or work the contracting authority wants to procure**. When defining the subject-matter of a contract, contracting authorities have great freedom to choose what they wish to procure, including goods or services that meet social standards, provided such social

[34] Provided such changes to the initial conditions of the procurement contract were envisaged in the initial tender contract or are justified by one of the circumstances listed in the Procurement Directives (in particular, Articles 31 and 61 of Directive 2004/18/EC relating to the award of additional supplies, services or works) and comply with any additional national rules that may exist on this issue.

standards are linked to the actual supplies, services or works to be purchased (which form the subject-matter of the contract).

Accessibility, for example, is often incorporated as a feature of the goods or services being purchased. Such purchases should be made without distorting the market, i.e. without limiting or hindering access to it. The process of determining what the subject-matter of the contract is will generally result in a basic description of the product, service or work, but can also take the form of a performance-based definition.

On the other hand, aspects that are not linked to the actual supplies, works or services the contracting authorities want to buy cannot be included in the subject-matter of the contract.

Examples:

Accessibility standards for persons with disabilities can be part of the subject-matter of a works contract for building a school, as they can be part of the description of the works the contracting authority wants to buy and linked to them.

- On the other hand, the labour conditions of the workers building the school cannot be part of the subject-matter of the contract, as they are not linked to the object of the contract, but only to the way in which the procurement contract will be performed. However, requirements relating to labour conditions could be included, under certain circumstances[35], in the contract performance clauses.
- In contracts for services, the contracting authority can specify in the subject-matter that the services provided must meet the needs of all categories of users, including the socially disadvantaged or excluded.

In principle, the contracting authority **is free to define the subject of the contract in any way that meets its needs**. Public procurement legislation is concerned not so much with what contracting authorities buy, but mainly with how they buy it. For that reason, neither of the Procurement Directives restricts the subject-matter of contracts as such.

However, **freedom to define the contract is not unlimited**. In some cases the choice of a specific product, service or work could distort the level playing-field in public procurement for companies throughout the EU. **There have to be some safeguards**. These safeguards lie, first of all, in the fact that the provisions of the TFEU on non-discrimination, freedom to provide services and free movement of goods apply in all cases and, therefore, also to public procurement contracts under the thresholds set in the Procurement Directives or to certain aspects of contracts which are not explicitly covered by these Directives.

In practice, this means that in all cases the contracting authority has to ensure that the contract will not affect access to its national market by other EU operators or operators from countries with equivalent rights[36]. For contracts covered by the Procurement Directives, the principle of

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35 All contract performance clauses, including those relating to labour conditions need in particular to be linked with the execution of the contract and, for transparency reasons, to be published in advance in the tender notice. For further details, see the section 'Rules governing contract performance clauses'.

36 For example, operators from countries that are bound by the WTO Government Procurement Agreement.

non-discrimination goes beyond nationality and requires strict equality of treatment between all candidates/tenderers in respect to all aspects of the procedure.

A second safeguard, considered in the next chapter, is that, in accordance with the public procurement rules, the technical specifications used to define the contract must not be worded in a discriminatory way and must be linked to the subject-matter of the contract.

In addition, existing EU legislation and national legislation that is compatible with EU law on social or other matters could well also limit or influence the freedom of choice over the subject-matter of the contract.

3. Increasing access to procurement opportunities

3.1 Improving access to procurement opportunities

However, some classes of tenderers may find it more difficult than others to gain access to the public procurement market (e.g. SMEs). Purchasers may address these difficulties, but are not permitted to prefer specific classes of tenderers. EU law permits positive action by purchasers, but not positive discrimination[37].

What's not permitted — examples

With the exception of the special provisions relating to sheltered workshops[38] and sheltered employment programmes, purchasers are not permitted to reserve performance of contracts for particular classes of firm, as that would breach the equal treatment requirements of EU law.

In the field of social services, however, it is possible, in exceptional cases when certain specific conditions are met, to reserve performance of certain contracts for non-profit operators[39]. This requires the existence of a national law regulating this particular activity and providing for restricted access to certain services for the benefit of non-profit operators. Nevertheless, any such national law would constitute a restriction of Articles 49 and 56 of the TFEU on freedom of establishment and the free movement of services and would have to be justified case by case. On the basis of the case-law of the CJEU, such a restriction could be justified, in particular, if it is necessary and proportionate for attainment of certain social objectives pursued by the national social welfare system.

The contracting authority cannot limit competition to bidders that already have an office within a certain geographical area, but the contract performance clauses may require the successful bidder to open a branch or office in a certain area, if this is justified for the purposes of successful performance of the contract (for instance, for coordinating a complex building contract on site).

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37 With the exception provided for in Article 28 of Directive 2004/17/EC and Article 19 of Directive 2004/18/EC which allow, under certain conditions, contracts to be reserved for sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes.

38 Which, due to their characteristics, might not be able to obtain contracts under normal conditions of competition (see Chapter III, Section 3.2, "*Set-asides for sheltered workshops*".

[39] See judgment of the Court of 17 June 1997 in case C-70/95 (Sodemare) [1997] ECR I-3395. See also the answer to question 2.7 in the Commission Staff Working Document 'Frequently asked questions concerning application of public procurement rules to social services of general interest', available at: //ec.europa.eu/services_general_interest/docs/sec_2007_1514_en.pdf.

Instead, the purpose is to guarantee a level playing field, so that purchasers offer under-represented businesses the same opportunities to compete for public contracts as other qualified suppliers. In this way, competition can be encouraged, drawing more companies into the tendering process. Various measures can be taken, within these limits:

- encouraging large organisations to address supplier diversity on a voluntary basis by providing equal opportunities to diverse suppliers as subcontractors and by promoting equality and diversity[40];

- stimulating participation by diverse suppliers by publishing a forward plan for major procurement activities, identifying large contracts that are due to be put out to tender over the next 12 months;

- organising 'meet the buyer' events open to all potential candidates in order to increase their awareness of the contracting authority's needs and policy priorities and thus improve the transparency and accessibility of the procurement process;

- developing business support programmes to improve the capacity of small and diverse suppliers and to provide guidance on the public procurement process.

Examples:

UK: The Greater London Authority (GLA) has adopted a policy of promoting greater diversity amongst its suppliers from the private sector. The purpose is to 'level the playing field', so that 'we offer under-represented businesses the same opportunities to compete for GLA group contracts as other qualified suppliers[41].' The GLA draws a distinction between positive action (which it adopts) and positive discrimination (which it rejects). The GLA Group has embarked on a review of its procurement procedures to remove barriers to SMEs and diverse suppliers competing for its contracts. Procurement procedures have been developed for large contracts to address supplier diversity by providing equal opportunities to diverse suppliers as subcontractors and by promoting equality and diversity. The GLA Group regularly monitors its expenditure with SMEs and other diverse businesses to identify trends and provide further input for activities to improve its procurement procedures.

A review of procurement procedures to identify the potential for SMEs to bid for contracts has commenced and existing suppliers have been asked for feedback on the GLA's procurement procedures to help identify action to make them more accessible.

In addition, via the London Development Agency (LDA), the GLA Group is actively linking its procurement procedures to business support programmes which improve the capability of small and diverse suppliers to bid for public-sector contracts. This process can improve businesses' chances of winning GLA Group contracts and give the GLA Group a more competitive base of suppliers bidding for work.

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40 However, given that positive discrimination is not permitted, contracting authorities cannot favour, at the award stage, tenderers that use a specific class of supplier or subcontractor (e.g. SMEs). Similarly, contracting authorities cannot require, in the contract performance clauses, that a certain percentage of the contractors' suppliers or subcontractors be SMEs or other specific classes.

41 ITC-ILO 'Study on the incorporation of social considerations in public procurement in the EU', 21 July 2008.

Ireland: The aim of InterTrade Ireland's Go-Tender Programme was 'to create cross-border business opportunities for SMEs in the all-island public procurement market through the provision of carefully targeted regional workshops'. The objectives of the Programme were to increase awareness amongst suppliers, particularly regarding cross-border contracts and to create cross-border opportunities for SMEs on the all-island public procurement market, provide knowledge for SMEs regarding the public-sector market throughout the island, develop the skills required to win public-sector work in both remits, and provide experienced one-to-one support in the process of bidding for work. Over the last three years presentations were made at 30 workshops attended by over 400 SME suppliers. Many of these suppliers went on to compete successfully for public-sector contracts in Ireland, Northern Ireland and across Europe.

- Subdividing contracts into lots clearly facilitates access by SMEs, both quantitatively (the size may correspond better to the production capacity of SMEs) and qualitatively (the content of the lots may correspond more closely to the specialities of SMEs). This is possible, provided contracts are not subdivided with the aim of avoiding application of the Procurement Directives[42].

Example:

France: In order to attract the widest possible competition, the general rule is to award contracts in the form of separate lots. However, contracting authorities are free to award global contracts if they consider that subdivision into lots would restrict competition or risk making performance of the contract technically difficult or expensive, or if the contracting authority is not in a position to coordinate performance of the contract.

3.2 Set-asides for sheltered workshops

The Procurement Directives[43] include, however, an explicit provision permitting Member States 'to reserve the right to participate in award procedures for public contracts' for sheltered workshops or 'provide for such contracts to be performed in the context of sheltered employment programmes'.

The explanation is that 'sheltered workshops and sheltered employment programmes contribute efficiently towards the integration or reintegration of people with disabilities in the labour market. However, such workshops might not be able to obtain contracts under normal conditions of competition[44].' Consequently, it is appropriate to allow Member States to grant

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42 Article 9(3) and (5) of Directive 2004/18/EC and Article 17(2) and (6) of Directive 2004/17/EC.

43 Article 28 of Directive 2004/17/EC and Article 19 of Directive 2004/18/EC refer to 'sheltered workshops' and 'sheltered employment programmes' 'where most of the employees concerned are handicapped persons'. Such entities may be known by different names in different Member States. It is to be noted that Article 28 of Directive 2004/17/EC and Article 19 of Directive 2004/18/EC cover **all similar entities (no matter what they are called)** provided (a) at least 50% of the staff employed are disabled persons and (b) they comply with the other conditions set by the above-mentioned articles.

44 Recital 28 of Directive 2004/18/EC and recital 39 of Directive 2004/17/EC.

preferences to enable such workshops to exist without having to compete with other economic operators.

Under the above-mentioned provisions of the Procurement Directives, such reservation is allowed only under certain conditions:

– any such reservation must be initiated by Member States by means of legislation and may not be adopted *ad hoc* by public bodies, in the absence of national legislation permitting such reservation;

– at least 50% of the employees of such sheltered workshops or sheltered employment programmes must be persons with disabilities;

– given the nature and seriousness of their disabilities, the employees concerned cannot carry out occupations under normal conditions.

Examples:

Germany: The Federal Decree of 10 May 2005 on contracts for workshops for the disabled requires Federal procurement agencies to reserve part of their budget for contracts which can be awarded to workshops for workers with disabilities. This might even involve large supply and services contracts. Participation is limited to workshops for workers with disabilities[45]. Nevertheless, these workshops have to compete in the award procedures and submit economically sound tenders. Moreover, contracting authorities have to meet the general transparency requirements of the Procurement Order. Many municipalities appear to have a procurement policy in favour of workers with disabilities. These workshops are often partly or fully owned by the municipalities which award the contracts.

France: Article L323-1 of the French *Code du travail* (Labour Code) requires private and public employers (with more than 25 employees) to give at least 6% of their jobs to disabled persons. Under Article L323-8 of the Code, employers, in particular procurement agencies, can partly fulfil this obligation by awarding contracts to companies supporting work for persons with disabilities. In the context of public procurement, this will consist of reserving certain contracts for entities where more than 50% of the staff employed are disabled persons in accordance with Article 19 of Directive 2004/18.

Where Member States avail themselves of these provisions, the contract notice must mention it and the scope of the preferences must be included in the prior information notices (PIN) and contract notices[46].

[45] The conditions under which contracting authorities may reserve contracts for workshops with disabilities are set out in Article 19 of Directive 2004/18/EC and Article 28 of Directive 2004/17/EC.

[46] Directive 2004/18/EC, Annex VII and Directive 2004/17/EC, Annex XIII: PIN and contract notices must indicate, where appropriate, 'whether the public contract is restricted to sheltered workshops or whether its execution is restricted to the framework of protected job programmes.'

Identifying the needs and planning procurement —

IN A NUTSHELL

In individual procurement procedures:

Identify the contracting authority's needs and express them appropriately.

Consider how, and to what extent, possible social policy objectives or obligations fit in with this procurement.

Apply the affordability and cost-effectiveness tests, including assessing the benefits and costs of using procurement to deliver social objectives.

Identify the subject-matter of the contract and to what extent the social objectives should or can be specified as part of the subject-matter of the contract.

Improve access to procurement opportunities by levelling the playing field, so that suppliers from under-represented businesses have the same opportunities to compete for public contracts as other qualified suppliers (provided this does not lead to 'positive discrimination').

Consider how best to communicate the contracting authority's policy to the outside world, ensuring optimum transparency for potential suppliers or service-providers and for the citizens the contracting authority is serving.

IV. THE CONTRACT

A) DEFINING THE REQUIREMENTS OF THE CONTRACT

1. Drawing up the technical specifications

Once the contracting authority has defined the subject of the contract, it has to translate this into detailed measurable technical specifications that can be applied directly in a public procurement procedure.

Technical specifications therefore have three functions:

- They describe the procurement requirements so that companies can decide whether they are interested. In this way, they determine the level of competition.
- They provide measurable requirements against which tenders can be evaluated.
- They constitute minimum compliance criteria. If they are not clear and correct, they will inevitably lead to unsuitable offers. Offers not complying with the technical specifications need to be rejected.

Under EU public procurement rules, the contracting authority can only evaluate or compare bidders' proposals against requirements in the technical specifications. Similarly, the contracting authority can only assess bidders' competence to deliver what is mentioned in the specifications. The specifications are issued early in the tendering process, which is why authorities have to get their requirements right first time.

Technical specifications must be **linked to the subject-matter of the contract**. Requirements that bear no relation to the product or the service itself, such as a requirement relating to the way in which an undertaking is managed, are not technical specifications within the meaning of the Procurement Directives. Thus requirements regarding, for instance, recruitment of staff from certain groups (disabled persons, women, etc.) would not qualify as technical specifications. Nor can a label relating to the 'social capacity' of an undertaking be considered a 'technical specification' within the meaning of the Procurement Directives.

In addition, the Procurement Directives stipulate that technical specifications must **not reduce competition**[47], must be **transparent**[48] and must **not discriminate** against possible contractors from outside the Member State of the contracting authority[49].

[47] Article 23(2) of Directive 2004/18/EC.
[48] Article 23(1) of Directive 2004/18/EC.
[49] Article 23(3) of Directive 2004/18/EC.

What's permitted — some examples

- Requiring, in a contract for works, measures to avoid accidents at work and specific conditions for storage of dangerous products in order to safeguard the health and safety of workers.

- Requiring compliance with certain ergonomic characteristics for products in order to ensure access for all categories of users, including disabled people[50].

What's not permitted — some examples

- Requiring an outsourced contact centre delivering online and telephone support (which could legitimately be provided from any location) to be located in a particular town.

- Issuing specifications for a housing management contract but then selecting bidders on the basis that they might also be able to purchase the houses in future, if the authority were to decide to privatise the housing.

2. Using performance-based or functional specifications

The Procurement Directives explicitly allow contracting authorities to choose between specifications based on technical standards or on performance/functional requirements[51]. A performance-based/functional approach usually allows greater scope for market creativity and, in some cases, will challenge the market to develop innovative technical solutions. If the contracting authority opts for this approach, it does not need to go into too much detail in the technical specifications.

Having the possibility to define technical specifications in terms of performance or functional requirements enables contracting authorities to seek innovative solutions better suited to their needs. For example, accessibility requirements of a product may be defined either by setting very detailed technical standards or by setting standards based on functional accessibility requirements. The second option can act as a stimulus for economic operators to propose innovative solutions in their tenders.

As the options available on the market concerning performance-based specifications can vary considerably, the contracting authority should make sure its specifications are clear enough to allow it to make a proper and justifiable evaluation.

There may be more scope to take account of social issues in larger or complex projects, but regardless of the size of the project, the specifications must be:

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[50] See Article 23 of Directive 2004/18/EC and Article 34 of Directive 2004/17/EC.

[51] Article 23(3) of Directive 2004/18/EC.

- specific about the outcomes and output required and encourage bidders to use their skills and experience to devise solutions;

- sufficiently broad to allow bidders to add value, but not so broad that they feel exposed to risks that are difficult to quantify and therefore inflate their prices;

- linked to the subject-matter of the contract, while taking account of appropriate policy goals, including cross-cutting policies and legal obligations, and of market soundings about what industry can supply.

3. Use of variants

Dialogue with potential bidders before finalising the specifications can help to identify opportunities to promote equal opportunities and sustainability. These discussions can establish the best scope for requirements so that they are commercially viable, by making sensible arrangements for allocating and managing risk. Comparing current services with what is provided elsewhere could also help. When using these techniques, care should be taken to avoid putting any particular supplier at an advantage.

Even after such market research, it is possible that the contracting authority still might not be sure how best to integrate social standards into specific technical specifications. If this is the case, it might be useful to ask potential bidders to submit socially responsible variants. This means that the contracting authority should establish a minimum set of technical specifications for the product it wants to purchase, which will apply to both the neutral offer and to its socially responsible variant. For the latter, the contracting authority will add a social dimension to the technical specifications[52].

When the bids are sent in, the contracting authority can then compare them all (both the neutral and the socially responsible bids) on the basis of the same set of award criteria. Hence, the contracting authority can use variants to support social standards by allowing comparison between standard solutions and social options (based on the same standard technical requirements). Companies are free to make offers based either on the standard solution or on the variant, unless indicated otherwise by the contracting authority.

Before the contracting authority can accept variants in a public procurement procedure[53], it needs to indicate in advance in the tender documents:

- that variants will be accepted;

- the minimum social specifications which the variants have to meet (e.g. better social performance);

- specific requirements for presenting variants in bids (such as requiring a separate envelope indicating the variant or indicating that a variant can be submitted only in combination with a neutral bid).

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[52] This social dimension must, of course, be linked to the subject-matter of the contract (meaning the actual supplies, services or works which the contracting authority wants to buy) and comply with all EU rules and principles applicable to technical specifications in public procurement.

[53] See Article 24 of Directive 2004/18/EC and Article 36 of Directive 2004/17/EC.

Purchasers who allow variants can compare the neutral offers with the socially responsible variants — on the basis of the same award criteria — and evaluate bidders' proposals for additional gains in achieving social standards and decide if these are affordable.

Example:

One example is procurement of catering services for a public administration, where the contracting authority could invite suppliers to present, in addition to the neutral (standard) offer, a variant which will include a social dimension (preparation of low-calorie, unsalted and kosher food in order to meet the medical or religious needs of all categories of users).

4. Social labels and the implications for ethical trade

A contracting authority might want to purchase goods which make a contribution to sustainable development (hereafter referred to as "ethical trade goods"). In this case, it can take appropriate considerations into account in the tender specifications, but it cannot require the products to bear a specific ethical trade label/certification[54], because this would limit access to the contract for products which are not certified but meet similar sustainable trade standards. This is a general principle that applies not only to ethical trade labels, but to all labels which require prior certification of the economic operators or of their products. Likewise, a contracting authority that wishes to purchase 'bio' products cannot require a specific eco-label, but can ask, in the tender documents, for compliance with specific criteria for biological agriculture.

(a) Sustainability requirements may be incorporated in the technical specifications of a public tender, provided these criteria are linked to the subject-matter of the contract in question[55] and ensure compliance with the other relevant EU public procurement rules[56] and with the principles of equal treatment and transparency.

A contracting authority that wants to purchase ethical trade goods can do so by defining the relevant sustainability criteria in its technical specifications for the goods. Once a contracting authority has decided on the subject-matter of the procurement contract (what generic type of products to buy), it is free to define the technical specifications of those products[57]. The requirements must, however, relate to the characteristics or performance of the products (e.g. recycled material) or the production process of the products (e.g. organically grown).

Requirements relating to the labour conditions of the workers involved in the production process of the supplies to be procured cannot be taken into account in the technical specifications, as they are not technical specifications within the meaning of the Procurement Directives. Under certain conditions, they may, however, be included in the contract performance clauses[58].

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54 For the purposes of this Guide, 'ethical trade label/certification' means any non-governmental trade-related sustainability assurance scheme (for example, Fair Trade, Fairtrade, Max Havelaar, Utz, Rainforest Alliance, etc.). For further details on Fair Trade and other trade-related sustainability assurance schemes, see Commission Communication COM(2009) 215 final of 5 May 2009 'Contributing to sustainable development: The role of *Fair Trade* and nongovernmental trade-related sustainability assurance schemes' available at: http://trade.ec.europa.eu/doclib/docs/2009/may/tradoc_143089.pdf.

55 In accordance with Article 53 of Directive 2004/18/EC and Article 55 of Directive 2004/17/EC.

56 For further details, see the section 'Defining the requirements of the contract'.

57 It being understood that technical specifications must be defined in a non-discriminatory way.

58 See paragraph (b) below on contract performance clauses in procurement of sustainability assurance goods along with the general section 'Rules governing contract performance clauses'.

Contracting authorities that intend to purchase ethical trade goods should not simply 'cut and paste' all the technical specifications for an ethical trade label/certification[59] into the technical specifications for their purchases nor, even less so, designate a specific ethical trade label or certification. Instead, they should look at each of the sub-criteria underlying the ethical trade label or certification and must use only those which are linked to the subject-matter of their purchase. Contracting authorities may stipulate which ethical trade labels/certifications are deemed to fulfil these criteria, but they must always also allow other means of proof. Bidders should have the choice to prove compliance with the requirements defined either by using appropriate ethical trade labels/certifications or by other means.

(b) Sustainability criteria (including social criteria) may also be incorporated **in the contract performance conditions**, provided they are linked to performance of the contract in question[60] (e.g. minimum salary and decent labour conditions for the workers involved in performance of the contract) and comply *mutatis mutandis* with the other requirements mentioned in paragraph (a) above and, more generally, with the conditions set out in the section of this Guide on 'Rules governing contract performance clauses'.

Examples:

If a contracting authority wants to buy ethical trade coffee or fruits, it can, for example, insert in the contract performance conditions of the procurement contract a clause requesting the supplier to pay the producers a price permitting them to cover their costs of sustainable production, such as decent salaries and labour conditions for the workers concerned, environmentally friendly production methods and improvements of the production process and working conditions..

Germany: City of Düsseldorf

Point 7.3 of the Public Procurement Order for the city of Düsseldorf in North Rhine-Westphalia (*Vergabeordnung für die Stadtverwaltung Düsseldorf)* on execution of contracts stipulates that: 'no products of exploitation of child labour are to be procured. Independent certification (for example, a Transfair seal or Rugmark seal) may prove this. If no such certification exists for the product in question, a declaration in the form of acceptance of the additional contract provisions for execution of the works and acceptance of the additional contract provisions of the Procurement Order for Supplies and Services Contracts is acceptable.'

[59] Because certain specifications of these ethical trade labels/certifications may not be linked to the subject-matter of the contract. Therefore inserting them in the tender specifications would be contrary to the principles of the Procurement Directives.

[60] Conditions included in the contract performance clauses do not necessarily need to be linked to the subject-matter of the contract, but only to performance of the contract.

5. Taking into account social concerns in production and process methods

What a product is made of, and how it is made, can play a significant part in its social impact. Under the Procurement Directives, production methods can be taken explicitly into account when defining the technical specifications[61].

Example:

Public works contracts may include in the technical specifications technical requirements aiming to avoid accidents on the construction site. Such measures (which could include, for example, signposting, conditions for storage of dangerous products or routes for transport of equipment) are part of the project which is put out to tender.

In a contract for procuring catering services for a hospital, in order to improve the well-being of patients, the contracting authority may require in the technical specifications that food should be prepared in accordance to certain methods that meet the diet and medical requirements of specific categories of patients.

However, since all technical specifications must be linked to the subject-matter of the contract, the contracting authority can only include social requirements which are also linked to the subject-matter of the contract.

6. Disability and technical specifications

The Procurement Directives[62] stipulate that technical specifications set out in the contract documentation should address the issue of accessibility of the works, supplies or services which are the subject of the contract. Article 23(1) of Directive 2004/18/EC states that 'Whenever possible … technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users.' As explained earlier, compulsory national requirements specified in relevant legislation for 'accessibility for all' must be reflected in the subject-matter of the contract. It is imperative that procurement managers are made aware of these specific national regulatory requirements on accessibility and design for all and that these are fully incorporated in the tender documents, primarily in the form of technical specifications.

Example:

Italy: The Stanca Law makes it compulsory that all public websites should be accessible. The Law lays down a set of requirements to be used in public procurement of websites. The 'Decree establishing Technical Rules for Law 4/2004' is made up mainly of annexes which contain the technical web accessibility requirements, the methodology for evaluation of websites and the requirements for accessible hardware and software. The primary sources of inspiration for these groups were the W3C's Web Accessibility Initiative and the positive experience with Section 508 of the US Rehabilitation Act. CNIPA (the National Centre for Informatics in Public Administration) is responsible for

[61] Annex VI to Directive 2004/18/EC and Annex XXI to Directive 2004/17/EC.
[62] Article 23(1) of Directive 2004/18/EC and Article 34(1) of Directive 2004/17/EC.

assessing high-impact public ICT procurement tenders to see that they also include the accessibility requirements agreed in the legislation. Law 4/2004 assigns responsibility for monitoring enforcement of the Law to the Presidency of the Council of Ministers (Department for Innovation and Technology) and to CNIPA. During 2006, fifteen major procurement projects (worth € 71 million) were assessed to evaluate or improve their compliance with the Laws on Accessibility. Most of these projects, carried out by 10 different central administrations, focused on websites and hardware procurement.

It is difficult for all contracting authorities to be experts in every social domain. It is important for contracting authorities to bear in mind that practices in some countries outside the EU could facilitate their work on developing accessibility standards. In the USA, Section 508 of the Rehabilitation Act requires Federal contracting authorities to use accessibility standards in their public procurement and this has had repercussions in various EU Member States as well and has influenced industrial practice. In the EU, the European Commission has issued two standardisation mandates to support European accessibility requirements for public procurement of products and services in the area of information and communication technologies (ICT)[63] and the built environment[64] respectively. The results of the first phase of Mandate 376 are available and identify a set of standards on accessibility along with various methods to assess conformity with those standards when purchasing ICT[65].

Defining the requirements of the contract in the technical specifications —

IN A NUTSHELL

Draw up clear and precise technical specifications. Make sure that specifications are linked to the subject-matter of the contract, reflect all appropriate social requirements and are transparent and non-discriminatory.

Build on the 'best practices' of other contracting authorities. Use networking as a way of obtaining and spreading information.

Use performance-based or functional specifications to encourage innovative socially responsible offers. Consider taking social concerns into account in production and process methods.

If you are uncertain about the actual existence, price or quality of socially responsible products or services, you may ask for socially responsible variants.

Where appropriate, consider reserving the contract for sheltered workshops or provide for the

63 European Commission, Standardisation Mandate to CEN, CENELEC and ETSI in support of European accessibility requirements for public procurement in the ICT domain, M/376 EN, 7 December 2005.

64 European Commission, Standardisation Mandate to CEN, CENELEC and ETSI in support of European accessibility requirements for public procurement in the built environment, M/420 EN, 21 December 2007.

65 European accessibility requirements for public procurement for products and services in the ICT domain (European Commission Mandate M 376, phase 1); CEN/BT WG 185 and CLC/BT WG 101-5, Report on 'Conformity assessment systems and schemes for accessibility requirements'.

contract to be performed in the context of sheltered employment programmes.

Make sure that all intended outcomes are included — they cannot be added later in the process.

B) SELECTING SUPPLIERS, SERVICE-PROVIDERS AND CONTRACTORS

Selection criteria focus on companies' ability to perform the contract they are tendering for. The Procurement Directives contain two sets of rules on selection: exclusion criteria and rules regarding technical and economic capacity.

1. Exclusion criteria

The Procurement Directives contain an exhaustive list of cases where the personal situation of a candidate or tenderer may lead to its exclusion from the procurement procedure[66]. Some of these shortcomings may be of a social nature. For instance, candidates or tenderers may be excluded:

– for failure to pay social contributions[67]; or

– where the economic operator 'has been convicted by a final judgment (which has the force of *res judicata* in accordance with the legal provisions of the country) of any offence affecting his professional conduct'[68] or 'has been guilty of grave professional misconduct (proven by any means which the contracting authorities can demonstrate)'[69], based on the concept of "grave professional misconduct" is defined in national legislation[70].;

[66] Article 45 of Directive 2004/18/EC and Articles 53(3) and 54(4) of Directive 2008/17/EC. In some particularly serious criminal cases, it may even be mandatory to exclude tenderers.

[67] Article 45(2)(e) of Directive 2004/18/EC.

[68] Article 45(2)(c) of Directive 2004/18/EC.

[69] Article 45(2)(d) of Directive 2004/18/EC.

[70] 'Grave professional misconduct' is not yet defined by European legislation or EU case-law. It is therefore up to the Member States to define this concept in their national legislation and to determine whether non-compliance with certain social obligations constitutes grave professional misconduct.

What's permitted — examples

- Exclusion of a tenderer who has been convicted by a judgment that has the force of *res judicata* for failure to comply with national legislation prohibiting clandestine employment, with national rules regarding health and safety at work or with national rules prohibiting discrimination on various grounds (race, gender, disability, age, sex, religious belief, etc.).
- Exclusion of a tenderer who has not introduced an equal opportunities policy, as required by the national legislation of the Member State where the contracting authority is established, provided that non-compliance with the legislation is classified as grave professional misconduct in the Member State in question.

What's <u>not</u> permitted — an example

- Exclusion of a potential tenderer on the basis of political or personal beliefs of the tenderer that don't relate to professional conduct.

2. Technical capacity[71]

The selection process enables the contracting authorities to assess candidates' ability to deliver the requirements specified in the contract. The Procurement Directives contain an exhaustive list of technical capacity selection criteria, which can be applied to justify the choice of candidates. Selection criteria differing from those set out in the Procurement Directives would therefore not comply with the Directives.

Example:
In the Beentjes case[72] the Court found that a condition calling for employing long-term unemployed bore no relation to checking tenderers' suitability on the basis of their economic and financial standing and their technical knowledge and ability (clause 28 of the judgment)[73].

In addition, selection criteria must be non-discriminatory, proportionate and linked to the subject-matter of the contract.

In order to establish such a link, social considerations may be included in the technical selection criteria **<u>only if</u>** the achievement of the contract requires specific 'know-how' in the social field. Depending on the subject-matter of the contract, the contracting authority may investigate different aspects of candidates' technical capacity:

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71 This Guide will not analyse the economic and financial standing selection criteria, given that in view of the nature of the references required in order to assess the economic and financial standing of tenderers, it is not possible to include social considerations in them.

72 CJEU judgment of 20 September 1988 in case 31/87.

73 However, a condition calling for employment of long-term unemployed could be inserted in the contract performance clauses, provided this in line with the EU rules applicable at the performance stage (for further details, see the section 'Contract performance').

- Does the tendering company employ or have access to personnel with the knowledge and experience required to deal with the social issues of the contract (e.g. the need to have trained personnel and specific management experience in a contract for a crèche or engineers and architects qualified in accessibility matters for constructing a public building)?

- Does the tendering company own or have access to the technical equipment necessary for social protection (e.g. the need to have equipment suitable for elderly persons in a contract to run a retirement home)?

- Does the tendering company have the relevant specialist technical facilities available to cover the social aspects (e.g. in a contract for purchase of computer hardware, including accessibility requirements for disabled persons)?

Evidence of the economic operators' technical abilities may be provided by one or more of the exhaustive means specified in the Directives[74], such as:

- evidence of previous contracts completed, indicating the technicians or technical bodies to be involved;

- a description of the technical facilities used and related measures taken by the contractor;

- the educational and professional qualifications of the contractor's personnel (these are especially important in contracts that can only achieve their social objectives subject to proper training of the personnel);

- details of the manpower of the service-provider and numbers of managerial staff;

- details of the proportion of the contract that may be subcontracted.

A balance must be struck between the need for the contracting authority to have sufficient proof that the contractor will have the capacity to perform the contract and the need to avoid placing excessive burdens on the contractors.

[74] Article 48 of Directive 2004/18/EC.

Selecting suppliers, contractors and service-providers —

IN A NUTSHELL

Consider potential contractors' ability to deliver the particular contract in question. Establish selection criteria based on the exhaustive list set out in the Procurement Directives.

Does the contract require social capability or capacity (e.g. particular skills, training or adequate equipment to deal with the social aspects of the contract)? If so, include social criteria to demonstrate technical capacity to perform the contract.

The assessment of technical capacity must relate to the candidate's ability to deliver the contract.

Where relevant, consider suppliers' track record for delivering on similar contracts in relation to required social standards. Consider the possibility of excluding tenderers if the conditions of the Procurement Directives permitting such exclusion are met.

C) AWARDING THE CONTRACT

1. General rules for drafting award criteria and on awarding contracts

Social award criteria may be applied, provided they[75]:

- are linked to the subject-matter of the contract;
- do not confer unrestricted freedom of choice on the contracting authority;
- are expressly mentioned in the contract notice and tender documents; and
- comply with the fundamental principles of EU law.

When the contracting authority evaluates the quality of tenders, it uses predetermined award criteria, published in advance, to decide which tender is the best. Under the Procurement Directives, the contracting authority has two options: it can either compare offers on the basis of price alone[76] or choose to award the contract to the ‘ most economically advantageous’ or best-value tender, which means that other award criteria will be taken into account in addition to the price.

Since the ‘most economically advantageous tender’ (MEAT) or best-value tender always combines two or more sub-criteria, these can include social criteria. Indeed, the non-exclusive list of examples in the Procurement Directives[77] allowing contracting authorities to determine the most economically advantageous tender include quality, price, technical merit, aesthetic and functional characteristics, social characteristics, running costs, cost-effectiveness, after-sales service, technical assistance, delivery date, delivery period and time to completion.

As the best offer will be determined on the basis of several different sub-criteria, the contracting authority can use several techniques for comparing and weighing up the different sub-criteria. These include matrix comparisons, relative weightings and ‘bonus/malus’ systems. It is the responsibility of contracting authorities to specify and publish the criteria for awarding the contract and the relative weighting given to each of those criteria in time for tenderers to be aware of them when preparing their tenders.

The individual criteria that will determine the most economically advantageous or best-value tender will need to be formulated in such a way that:

- They are linked to the subject-matter of the contract to be purchased (as described in the technical specifications).

  The technical specifications define the level of performance required (e.g. accessibility standards in the technical specifications). But the contracting authority can decide that any product/service performing better than the minimum level can be granted extra points at the award stage. For example, when a reference is made to a standard on accessibility, for example to the web as in the case of standard **UNE 139803**

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75 For further details of the conditions set out below, see the next section ‘Conditions applicable to award criteria in tender evaluation’ Please see also Recitals 1 and 2 of the Directive 2004/18/EC and Recitals 1 and 9 of the Directive 2004/17/EC;

76 For contracts awarded on the basis of the lowest price, the failure to take into account other award criteria (such as quality or social considerations) can to a certain extent be compensated by including high quality standards in the technical specifications for the contract (so that only offers complying with all the qualitative standards in the technical specifications will be taken into consideration at the award stage) or by including social considerations (depending on their nature) in the technical specifications (if such considerations are linked to the subject-matter of the contract) or in the contract performance clauses (if they are only linked to performance of the contract).

77 Recital 46 and Article 53 of Directive 2004/18/EC.

'Requisitos de accesibilidad para contenidos Web' (Spain), it is possible to comply at three levels — A, AA or AAA. Extra points could be given to the bid achieving the highest level.

- They allow the tenders to be assessed on the basis of their economic and qualitative criteria as a whole in order to determine which offers the best value for money[78]. In practice, this means that it is not necessary for each individual award criterion to give an economic advantage to the contracting authority, but that taken together the award criteria (i.e. economic plus social) must allow the authority to identify the bid offering the best value for money.

[78] See recital 46 of Directive 2004/18/EC and recital 55 of Directive 2004/17/EC.

What's permitted — examples

- In a contract for the procurement of care for persons with disabilities, the award criteria may take into account requirements relating to meeting the specific needs of each category of user (e.g. personalisation of the service depending on the age, gender or social difficulties of the users, etc.).

- In a contract for the procurement of recruitment tests and services for the public sector, the contracting authority can ask the tenderers to ensure that recruitment tests and services are designed and carried out in a way that ensures equal opportunities for all participants, irrespective of their age, gender and ethnic or religious background.

- In a contract for the procurement of software or hardware, an award criterion may be included that relates the number of points awarded to the levels of accessibility or specific accessibility features proposed for various groups of persons with disabilities. This includes, for example, whether the product or service is accessible for partially-sighted persons or blind people, for the hard of hearing or deaf, for persons with intellectual disabilities, or those with mobility and dexterity impairments, etc.

What's <u>not</u> permitted — examples

- Using award criteria relating to local purchases of equipment by the contractor (for example, in a contract for construction of a hospital) in order to stimulate creation of new jobs on the local market. First of all, any such criterion is not linked to the subject-matter of the contract (construction of the hospital). Secondly, this criterion is also discriminatory, because it gives tenderers that buy their equipment on the local market an undue advantage over other tenderers who buy from elsewhere.

- Using award criteria introduced at the last moment and not included in the tender documents.

- Using award criteria that may grant undue discretion to the contracting authority. For example, in a contract for IT equipment, an award criterion specifying that tenderers may receive between 1 and 20 points for the technical merits of the accessibility of the proposed products, without indicating the parameters or characteristics that the contracting authority will take into account to determine the exact number of points to be granted in each case, may give the contracting authority undue discretion for evaluation of the technical merits of the tenders.

1.1. Conditions applicable to award criteria in tender evaluation

The Procurement Directives explicitly allow social considerations to be included in award criteria. This legislation builds on CJEU case-law. The basic rule on social award criteria is derived from cases C-513/99 (Concordia Bus) and C-448/01 (Wienstrom) and from the

Procurement Directives, which specifically refer to this ruling in their first recital. All award criteria should meet the four conditions mentioned at the start of section C 1 above[79].

(a) Award criteria must be linked to the subject-matter of the contract

This is essential. It ensures that award criteria relate to the needs of the contracting authority, as defined in the subject-matter of the contract. In its judgment in the 'Wienstrom case'[80] the CJEU provided further information on how the link with the subject of the contract should be interpreted.

Examples:

Wienstrom case: In this case the CJEU ruled that in a tender for energy supply, a criterion relating solely to the amount of electricity produced from renewable sources in excess of the expected consumption of the contracting authority (which was the subject of the contract) could not be considered to be linked to the subject-matter of the contract. To establish such a link to the subject-matter of the contract, the criterion relating to the amount of electricity produced from renewable sources should have concerned only the electricity effectively supplied to the contracting authority.

Works contract: In the case of a contract incorporating social considerations, in a construction contract where the subject-matter of the contract consists of building a school, an award criterion based on how much money the contractor would transfer to the local community outside the contract is not legally permissible, as it would not be linked to the subject-matter of the contract.

(b) Award criteria must be specific and objectively quantifiable

The CJEU ruled that, based on its previous judgments, award criteria must never confer unrestricted freedom of choice on contracting authorities. They must restrict this freedom of choice by setting specific, product-related and measurable criteria or, as the CJEU put it, 'adequately specific and objectively quantifiable' criteria. The CJEU provided further clarification in the Wienstrom and Concordia Bus cases[81].

Examples:

The lack of clarity and objectivity of the award criteria in the Wienstrom case:

In the Wienstrom case the CJEU found that, in order to give tenderers equal

[79] CJEU judgment in case C-513/99. This judgement concerns environmental award criteria, but the same principles may be applied, *mutatis mutandis* to social award criteria in public procurement.

[80] CJEU judgment in case C-448/01.

[81] Both these cases concern environmental award criteria, but the principles deriving from these judgments may be applied *mutatis mutandis* to social award criteria.

opportunities when formulating the terms of their tenders, the contracting authority has to formulate its award criteria in such a way that 'all reasonably well-informed tenderers of normal diligence interpret them in the same way'[82]. Another aspect of the necessary clarity and measurability of the award criteria, as formulated by the CJEU, was that the contracting authority can only set criteria against which the information provided by the tenderers can actually be verified.

The specificity and measurability of the award criteria in the Concordia Bus case:

In the Concordia Bus case, before evaluation of the tenders, the Community of Helsinki had decided and published a system for awarding extra points for certain noise and emission levels[83]. The CJEU considered this system CJEU adequately specific and measurable.

(c) Award criteria must have been publicised previously

The Procurement Directives stipulate that contract notices must mention whether the contracting authority will award the contract on the basis of the 'lowest price' or the 'most economically advantageous tender'. The criteria used to identify the most economically advantageous tender must be mentioned in the notice or, at least, in the tender documents.

(d) Award criteria must comply with EU law (including the fundamental principles of the TFEU)

The last condition derived from the TFEU and the Procurement Directives is that award criteria must comply with all the fundamental principles of EU law.

The CJEU has explicitly stressed the importance of the principle of non-discrimination, which is the basis of other principles, such as the freedom to provide services and freedom of establishment. The issue of discrimination was expressly raised in the Concordia Bus case[84].

Example:

One of the objections of Concordia Bus was that the criteria set by the Community of Helsinki were discriminatory because the Community's own bus company HKL was the only company with gas-powered vehicles that could comply with the emission levels set. The CJEU ruled that the fact that one of a set of various award criteria imposed by the contracting authority could only be met by a small number of companies did not in itself make this discriminatory. Therefore, when determining whether there has been

82 In this case, the contracting authority did not determine the specific period for which the tenderers should state the amount that they could supply.

83 In this case, extra points were awarded, among other things, for 'use of buses with nitrogen oxide emissions below 4 g/kWh (+ 2.5 points/bus) or below 2 g/kWh (+ 3.5 points/bus) and with external noise levels below 77 dB (+1 point/bus)'.

84 CJEU judgment in case C-513/99.

discrimination, all the facts of the case must be taken into account.

1.2 The 'additional criterion'

In case C-225/98 the CJEU held that contracting authorities can award a contract on the basis of a condition related to eg combating unemployment, provided this condition is in line with all the fundamental principles of EU law, **but only where the authorities had to consider two or more equivalent tenders**. The Member State in question regarded this condition as **an additional, non-determining criterion** and considered it only after tenders had been compared on the basis of the other award criteria. Finally, the CJEU stated that application of the award criterion regarding combating unemployment must have no direct or indirect impact on those submitting bids from other EU Member States and must be explicitly mentioned in the contract notice, so that potential contractors were able to know that such a condition existed.

Therefore, a criterion regarding combating unemployment (and other criteria which are not linked to the subject-matter of the contract) can be taken into account at the award stage only as 'an additional criterion' in order to choose between two equivalent tenders. All other award criteria (other than the additional criterion) must be linked to the subject-matter of the contract, as the CJEU ruled in 2001 in the 'Wienstrom case'[85] (see above).

2. Dealing with 'abnormally low bids'

Under the Procurement Directives, if contracting authorities consider a tender to be abnormally low, they must ask for explanations before they can reject it. The Directives state that these explanations may also refer (amongst other factors) to compliance with the 'provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed'[86]. Thus, the Procurement Directives specifically link the issue of abnormally low tenders with the issues of employment protection and working conditions. Some practices, including ignoring working conditions that are legally required, may give rise to *unfair* competition.

Examples:

France: The Ville d'Angers noticed that in the cleaning sector workers have tough work schedules. Thus an offer which is economically extremely attractive because it proposes a lower number of workers than is appropriate to the surface area to be cleaned, based on average ratios, will be considered abnormally low and rejected if the bidder is unable to explain how he will be able to guarantee such a low price without infringing any applicable laws (such as laws regarding the maximum number of working hours per day).

The Procurement Directives set out the procedures that the contracting authority must adopt before rejecting a tender on the ground that it is abnormally low[87]. Each case should be treated

[85] CJEU judgment in case C-448/01.

[86] Article 55(1)(d) of Directive 2004/18/EC and Article 57(1)(d) of Directive 2004/17/EC.

[87] Article 55 of Directive 2004/18/EC and Article 57 of Directive 2004/17/EC.

on its merits; there should be no automatic exclusion; tenderers should have an opportunity to rebut the case against them; and the condition of non-discrimination must be complied with.

What's permitted — an example

A tenderer may be excluded if the enquiry carried out in accordance with the above-mentioned rules of the Procurement Directives[88] finds the tender abnormally low as a consequence of non-compliance by the tenderer with the applicable rules regarding employment protection, payment of social contributions or of additional working hours, safety at work or prohibition of clandestine employment.

What's <u>not</u> permitted — an example

The contracting authority may not impose complete and automatic exclusion of any tender that falls below a specified proportion (e.g. 80%) of the average price of all tenders received.

The contracting authority can ask in writing for details that it considers relevant to being able to assess an abnormally low bid. These can relate to employment protection and working conditions. This does not appear to be restricted to requesting such details from the tenderer alone. In the case of working conditions, for example, it might be appropriate to request information from trade unions. Where the contracting authority does obtain information from other sources, however, the Procurement Directives require the contracting authority to 'verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.' The practical rules regarding such verification by the contracting authority are governed by national law, it being understood that such rules must permit the tenderer to present his position.

If the enquiry finds that the offer appears abnormally low, the contracting authority may reject it (although the Procurement Directives place no obligation on it to do so). However, in Member States that have adopted legislation to this effect, contracting authorities can nevertheless be under an obligation to reject such tenders.

3. Debriefing unsuccessful bidders

The contracting authority must provide feedback to bidders once the contract has been awarded. This can be a useful opportunity to engage with unsuccessful bidders in general and concerning the policies of the contracting authority regarding social issues in particular. If the bidder was unsuccessful in part because of failure to meet social criteria, details can be given of what the bidder might do in order to be more successful in future.

[88] Article 55 of Directive 2004/18/EC and Article 57 of Directive 2004/17/EC.

Awarding the contract: tender evaluation —

IN A NUTSHELL

Establish award criteria: where the criterion of the 'most economically advantageous tender' is chosen, relevant social criteria may be inserted either as a benchmark to compare socially responsible offers with each other or as a way of introducing a social element and giving it a certain weighting.

Social (and also economic or environmental) award criteria must:

- be linked to the subject-matter of the contract;
- not confer unrestricted freedom of choice on the contracting authority;
- be expressly mentioned in the contract notice and tender documents;
- be consistent with EU law (including the fundamental principles of the TFEU: transparency, equal treatment and non-discrimination);
- help identify the bid offering the best value for money for the contracting authority; and
- be consistent with the relevant rules of the Procurement Directives.

Consider whether the bid is 'abnormally low' because the tenderer is breaching social standards.

D) CONTRACT PERFORMANCE

The first thing which must be said is that public procurement contracts must always be performed in compliance with all the mandatory rules which are applicable, including the social and health regulations. If, in addition, the contracting authority wishes a contractor to achieve additional social objectives[89], it can use contract performance clauses to this end.

Contract performance clauses set out how the contract should be performed. Social considerations may be included in the contract performance clauses, provided (i) they are linked to performance of the contract, (ii) they are published in the contract notice and (iii) they comply with EU law (including the general principles of the TFEU).

1. Rules governing contract performance clauses

Contract performance clauses are obligations which must be accepted by the successful tenderer and which relate to the performance of the contract. It is therefore sufficient, in principle, for tenderers to undertake, when submitting their bids, to meet such conditions if the contract is awarded to them. Bids from tenderers who have not accepted any such conditions would not comply with the contract documents and could not therefore be accepted[90]. However, the conditions of contract need not be met at the time of submitting the tender.

Writing the required social standards into the contract will make the public authority's expectations clear. A rigorous approach during the planning and tendering phases will make it easier to state these intentions in specific terms, which can influence performance management.

Although contract performance clauses should neither play a role in determining which tenderer gets the contract nor be disguised technical specifications, award criteria or selection criteria, it is permissible to set additional conditions of contract, which are separate from the specifications, selection criteria and award criteria[91]. These can include social and environmental conditions. So, if the contracting authority wishes a contractor to achieve social goals that are not related to the specifications, it can set additional conditions of contract. These relate to performance of the contract only.

Tenderers must prove that their bids meet the technical specifications, but proof of compliance with contract performance clauses should not be requested during the procurement procedure.

In addition, contract performance clauses must:

– <u>be linked to performance of the contract</u>

  This means that the contract performance clauses must be linked to the tasks which are necessary to produce the goods/provide the services/execute the works put out to

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89 i.e. objectives that go beyond those set by the applicable mandatory legislation and that do not relate to the technical specifications, the selection criteria or the award criteria.

90 The CJEU judgment of 22 June 1992 in case C-243/89 (Storebaelt) stated that a contracting authority must reject bids which do not comply with the tender conditions to avoid infringing the principle of equal treatment of tenderers, which lies at the heart of the Procurement Directives.

91 Beentjes case, CJEU judgment in case 31/87.

tender. A condition would not be linked to 'performance' of the contract if, for example:

- it requires the contractor to hire a set proportion of workers with disabilities on another contract[92] or would restrict what the contractor is allowed to do on another contract;

- it requires the contractor to contribute financially to eg building a centre for disadvantaged people;

- it requires the contractor in a works contract to provide crèche services for staff's children. Such services are not related to tasks necessary for the performance of the works. If the contracting authority wishes to procure such services, it should also put them out to tender.

– be published in the contract notice

Even though contract performance clauses are considered to be outside the procedure for awarding contracts, they still need to be set out clearly in the call for tenders. Tenderers should be aware of all the obligations laid down in the contract and be able to reflect this in their prices[93]. The winning bidder must honour the commitments made in his bid on meeting the conditions of contract.

– comply with EU law (including the fundamental principles of the TFEU)

For instance, the conditions of contract must not put at an unfair disadvantage potential contractors from another state or, more generally, lead to unequal treatment between potential bidders. It is equally important, however, that the conditions of contract also comply with EU law in general, including EU social law.

Finally, public procurement contracts should, in any event, be performed in compliance with all applicable rules, including social, labour and health regulations.

2. Examples of social considerations that may be included in the contract performance clauses

The recitals in Directive 2004/18/EC (with minor differences in Directive 2004/17/EC)[94] give examples of social considerations that may be included in contract performance clauses:

'They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment .... to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions[95] ... and to recruit more handicapped persons ....'

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92 However, a requirement to hire a set proportion of workers with disabilities for performance of the contract in question (and not for another contract) would be linked to performance of the contract in question.

93 Article 26 of Directive 2004/18/EC and Article 38 of Directive 2004/17/EC.

94 Recital 33 of Directive 2004/18/EC and recital 44 of Directive 2004/17/EC.

95 The basic ILO Conventions referred to in the Procurement Directives are the eight core ILO Conventions which have been ratified by all Member States (see footnote 11 for further details).

Contract performance clauses are generally the most appropriate stage of the procedure to include social considerations relating to employment and labour conditions of the workers involved in performance of the contract[96].

The Commission's interpretative Communication of 2001 states that 'Contracting authorities have a wide range of possibilities for determining the contractual clauses on social considerations' and lists 'some examples of additional specific conditions which a contracting authority might impose on the successful tenderer'. These are:

- 'The obligation to recruit unemployed persons, or to set up training programmes for the execution of the contract;
- The obligation to implement, during the execution of the contract, measures that are designed to promote equality between men and women or ethnic or racial diversity, or provide equal access to persons with disabilities;
- The obligation to comply, during the execution of the contract, with fundamental human rights (such as the prohibition of forced and child labour) guaranteed by the ILO core conventions, in so far as these provisions have not already been implemented in national law;
- The obligation to recruit, for the execution of the contract, a number of persons with disabilities over and above what is laid down by the national legislation in the Member State where the contract is executed or in the Member State of the successful tenderer.'

Public contracts for works and services, in which it is possible to lay down the manner in which the contract is to be performed, provide the best opportunity for a contracting authority to take account of social concerns in the contract performance clauses. It would appear more difficult to envisage contractual clauses relating to the manner in which supply contracts are performed, since imposition of clauses requiring changes to the organisation, structure or policy of an undertaking established on the territory of another Member State might be considered discriminatory or to constitute an unjustified restriction of trade.

[96] As pointed out in the previous sections, labour conditions of the workers involved in performance of the contract are not technical specifications or selection criteria within the meaning of the Procurement Directives. In addition, given that such social considerations are difficult to link to the subject-matter of the contract, it would generally not be possible to include them in the award criteria for the contract (except as an 'additional criterion' to make the difference between two equal tenders, as accepted by the CJEU in case C-225/98 and as explained in the section 'Awarding the contract').

Other examples:

Sweden: Construction contracts awarded by the National Road Administration contain a standard clause placing an obligation on the contractors to comply with certain (core ILO) conventions when performing contracts in Sweden. The same clause requires the contractor to comply with certain reporting requirements designed to verify that goods and products used in performance of the contract have been produced in a safe environment in accordance with the rules of the conventions mentioned. Goods found to be in conflict with this provision must be replaced at the contractor's expense. The contractor must ensure that subcontractors abide by the same obligations. A penalty is payable for any breach of these social obligations of the contractor.

UK: In 2004 Transport for London (TfL) put together a five-year £10 billion investment programme to fund large-scale construction projects in London, including an extension to the East London Line railway. Equality and inclusion were regarded as being at the heart of that programme and integral to procurement contracts. The East London Line Project (ELLP) was valued at £500 million for the main works and £350 million for the rolling stock and train servicing.

The strategy for the project set an objective of using the improved transport links to stimulate economic regeneration in areas surrounding the extension, which include some of the most deprived areas of London. These areas are home to a number of culturally and economically diverse communities, facing high levels of unemployment and social exclusion. There was also a need to foster positive community relations during the construction phase to minimise the impact of construction activity and create a positive environment for operation of the new railway. In the light of these circumstances, equality and inclusion were identified as two key social objectives. TfL therefore introduced a set of requirements for bidders to be implemented during the execution of the project: an equality policy for the project, a diversity training plan for staff working on the project and a supplier diversity plan (in order to ensure that diverse suppliers were able to bid for subcontracting opportunities arising from the project). These requirements were incorporated in the invitation to tender and in the conditions of contract.

Incorporation of social requirements into terms and conditions of contract should be balanced against the possibility, in practice, of monitoring compliance with these requirements during performance of the contract, in order not to add extra requirements which cannot (or will not) be monitored effectively. This implies contract management and compliance monitoring.

3. Compliance with national employment legal framework

Both Procurement Directives[97] make it clear that 'the laws, regulations and collective agreements, at both national and EU level, which are in force in the areas of employment conditions and safety at work apply during performance of a public contract, providing such rules, and the way they are applied, comply with EU law[98].'

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97 Recital 34 of Directive 2004/18/EC and recital 45 of Directive 2004/17/EC.

98 One example of such compliance with EU law is the need to comply with the requirements of Directive 96/71/EC, on posting of workers, in public procurement involving cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract.

Some examples of the way that Member States have approached this issue have been controversial internally in Member States. One example is the Rüffert case[99].

It must be pointed out that, although this judgment was rendered in the context of a public procurement contract, it has no implications for the possibilities offered by the Procurement Directives to take account of social considerations in public procurement. It only clarifies that social considerations (in public procurement) regarding posted workers must also comply with EU law, in particular with the Directive on the posting of workers[100].

Example:

Posted workers in the EU: the Rüffert case

The Law of Niedersachsen (the *Land* of Lower Saxony) on the award of public contracts stated, amongst other things, that public works contracts may be awarded only to contractors who undertake in writing to pay their employees at least the remuneration stipulated by the applicable (regional) collective agreement. The contractor must also undertake to impose the same obligation on subcontractors and to check that they comply with it. Non-compliance with that undertaking was triggering the payment of a contractual penalty.

The legality of these provisions was challenged before a regional German court in relation to the execution of a works contract between a German contracting authority and the company Objekt und Bauregie (O&B) to build the Göttingen-Rosdorf prison. The contracting authority had terminated the contract and sued O&B for payment of a contractual penalty, because it was found that the Polish subcontractor of O&B was paying its workers employed on the building site in Germany only 46.57% of the minimum wage stipulated by the applicable collective agreement.

Uncertain as to the lawfulness of the provision laying down a contractual penalty, the German regional court referred the issue to the CJEU for a preliminary ruling on interpretation of the EU law aspects relevant to this case.

The CJEU stated that the collective agreement had not been declared universally applicable (although Germany had a system for declaring collective agreements to be of universal application) and covered only part of the construction sector, since the relevant law making the 'Buildings and public works' collective agreement binding applied only to public contracts and not to private contracts. Therefore, the minimum wage provided for by the 'Buildings and public works' collective agreement was not set in accordance with one of the procedures laid down by Article 3 of Directive 96/71/EC concerning the posting of workers ("**Directive on the Posting of Workers**") [101].

In conclusion, the Court of Justice's judgment on the Rüffert case found the provisions in question incompatible with the Directive on Posting of Workers.

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99 CJEU judgment in case C-346/06 (Dirk Rüffert v. Land Niedersachsen).

100 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

101 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

The Procurement Directives provide that contracting authorities may address employment protection in the tendering process in two specific ways:

Firstly, contracting authorities may state in the contract documents where tenderers may obtain information on the obligations relating to employment protection and working conditions which are in force in the Member State, region or locality where the works are to be carried out or the service is to be provided[102].

Secondly, any contracting authority that supplies this information should request the tenderers to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection[103] and working conditions which are in force in the place where the works are to be carried out or the service is to be provided[104]. The purpose of this is linked to the fear that contractors might seek to reduce their levels of employment protection in order to be able to submit a lower bid.

4. Supply-chain management

Contracting authorities may also include in the contract performance clauses social considerations for subcontractors regarding, for example, prohibition of child and forced labour, health and safety requirements, minimum wage obligations, social security requirements and more generally decent work standards. Some contracting authorities have also begun to include clauses requiring subcontractors to comply with prohibitions on child and forced labour, in cases where the supply chain is likely to involve production or processing where these problems occur.

Example:

Ville de Paris: The clothing office of Paris city council has to provide clothing for its 29 000 employees. This office manages 300 000 articles of clothing and 300 orders per year. It has integrated social and environmental considerations into its purchasing procedures. In line with its social commitments, Paris city council asks its suppliers to sign a declaration committing themselves to respect certain fundamental rights at work (which include an explicit reference to the minimum age of workers), such as those defined by the International Labour Organisation, during performance of the contract. Paris city council also requires its suppliers to be subject to checks by an independent body designated by the city council and to implement any recommendations made as a result of these checks.

This has particular implications for dealings in and with countries outside the EU. For instance, public procurement authorities are increasingly concerned about the legality and sustainability of timber, especially when it is imported from third countries facing particular difficulties in this area. It is increasingly recognised that legal and sustainable forestry includes not only economic and environmental criteria, but also social criteria (such as decent wages and working, health and safety conditions, and respect for the tenure and use rights of local and indigenous communities).

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[102] Article 27(1) of Directive 2004/18/EC.

[103] Including that such provisions must comply with all relevant EU law.

[104] Article 27(2) of Directive 2004/18/EC.

When such requirements are also imposed on subcontractors, contracting authorities should ask the main contractor to provide proof of compliance, either by reference to specific certification schemes (where such schemes exist) or by any other reliable means[105].

For example, in the field of forestry, several certification schemes have been developed to provide independent verification that a timber source meets a certain standard of sustainability (including environmental and social criteria). Nevertheless, such schemes are not to be considered the exclusive means of proof for sustainable timber as other equivalent forms of evidence have to be accepted too.

5. Contract management and compliance monitoring

The performance management system will set the terms for assessing performance and taking action. This could mean rewarding contractors for good performance, addressing under-performance or working together to enhance delivery. Key performance indicators translate objectives into measurable targets and stipulate what would constitute an acceptable performance level. Monitoring arrangements should ensure that the right performance data are gathered and that they are analysed effectively. The payment conditions (which should be specified in the contract) provide the basis for ensuring that the contractor delivers to the required standard. They can provide financial disincentives for poor performance and incentives for exceeding baseline targets. These financial conditions must have been published in the contract notice.

The impetus for service improvement could come from poor key performance indicator results or from a sense that, while targets are being achieved, there is scope to do even better. Either way, the contractor and client should understand what is creating the current performance levels and agree on how to improve results. Persistent failure by the contractor should lead to invoking the breach of contract conditions, though any action taken must be reasonable. Equally, the analysis might lead to contractual variations, redesign of the service or innovation.

Example:

UK: To improve hospital catering services for the Northern Ireland Health Authority, the caterer contracted conducts an annual patient satisfaction survey and analyses the data by age, ethnic origin and gender. The Authority has also initiated an assessment of the meals service following press reports of malnutrition in geriatric wards. The combined evidence triggered contractual variations to improve the service to the geriatric ward by helping to feed patients.

A 'partnering culture' should underpin contract management. Clients and contractors can manage risks and achieve the best outcomes only with the aid of imaginative and committed teamwork. In general, the best contractors respond well in such relationships, voluntarily

[105] Contracting authorities should always permit contractors to submit alternative means of proof (such as certificates issued by a public authority or by third parties, third-party audit reports, copies of the employment contracts, copies of all relevant documents, evidence of monitoring visits, etc.). However, the contracting authority may require additional proof if the initial evidence submitted by the contractor appears (in the circumstances of the case) insufficient or unreliable.

taking on additional commitments, such as: basic skills programmes, environmental innovation, or supporting small firms along their supply chain.

Example:

France: Public institutions responsible for social inclusion have been instrumental in implementing the social clauses in procurement contracts, for example by providing facilitators helping successful bidders to manage the workforce involved in an insertion path, and can also act as certifiers of social compliance. For instance, the *Agglomération de Rouen* used money from the EU Social Fund to co-finance hiring a project manager responsible for implementation of the social insertion clauses in the different procurement contracts concluded. The Municipality of Arles chose to hire a specialised legal adviser to draft and manage procurement documents containing social clauses.

Contract conditions, contract management and contract monitoring —

IN A NUTSHELL

Contract performance clauses are generally the most appropriate stage of the procedure for including social considerations relating to employment and the labour conditions of the workers involved in performance of the contract.

Make sure the contract performance clauses are:

- linked to performance of the contract;
- consistent with achieving the best value for money;
- included in the tender documentation; and
- compatible with EU law (including the fundamental principles of the TFEU).

Ensure that compliance with the conditions of contract can be monitored effectively.

Work in partnership with the supplier to manage performance and maximise achievement of objectives and compliance with conditions of contract.

Maintain appropriate records on the performance of suppliers, contractors and service-providers.

Use variance clauses to envisage changes that may be required to the contract over time, provided these are compatible with the provisions of the Procurement Directives and with the principle of transparency.

Work with suppliers for continuous improvement — on a voluntary basis — and keep up to date with developments on the market generally. In particular, work with suppliers to facilitate compliance with the principles of decent work and corporate social responsibility all along the supply chain.

VERORDNUNG (EG) Nr. 2204/2002 DER KOMMISSION
vom 12. Dezember 2002
über die Anwendung der Artikel 87 und 88 EG-Vertrag auf Beschäftigungsbeihilfen

DIE KOMMISSION DER EUROPÄISCHEN GEMEINSCHAFTEN —

gestützt auf den Vertrag zur Gründung der Europäischen Gemeinschaft,

gestützt auf die Verordnung (EG) Nr. 994/98 des Rates vom 7. Mai 1998 über die Anwendung der Artikel 92 und 93 des Vertrags zur Gründung der Europäischen Gemeinschaft auf bestimmte Gruppen horizontaler Beihilfen [1], insbesondere auf Artikel 1 Absatz 1 Buchstabe a) Ziffer iv) und Buchstabe b),

nach Veröffentlichung des Verordnungsentwurfs [2],

nach Anhörung des Beratenden Ausschusses für staatliche Beihilfen,

in Erwägung nachstehender Gründe:

(1) Durch die Verordnung (EG) Nr. 994/98 wird die Kommission ermächtigt, gemäß Artikel 87 EG-Vertrag zu erklären, dass staatliche Beschäftigungsbeihilfen unter bestimmten Bedingungen mit dem Gemeinsamen Markt vereinbar sind und nicht der Anmeldungspflicht nach Artikel 88 Absatz 3 EG-Vertrag unterliegen.

(2) Die Verordnung (EG) Nr. 994/98 ermächtigt die Kommission ebenfalls dazu, gemäß Artikel 87 EG-Vertrag zu erklären, dass Beihilfen, die im Einklang mit der von der Kommission für jeden Mitgliedstaat zur Gewährung von Regionalbeihilfen genehmigten Fördergebietskarte stehen, mit dem Gemeinsamen Markt vereinbar sind und nicht der Anmeldungspflicht nach Artikel 88 Absatz 3 EG-Vertrag unterliegen.

(3) Die Kommission hat die Artikel 87 und 88 EG-Vertrag in zahlreichen Entscheidungen auf Beschäftigungsbeihilfen innerhalb und außerhalb von Fördergebieten angewandt und ihre diesbezügliche Politik mehrfach dargelegt: in den Leitlinien für Beschäftigungsbeihilfen [3], in der Mitteilung der Kommission betreffend Beihilfenüberwachung und Senkung der Arbeitskosten [4], in den Leitlinien für staatliche Beihilfen mit regionaler Zielsetzung [5] und in der Verordnung (EG) Nr. 70/2001 der Kommission vom 12. Januar 2001 über die Anwendung der Artikel 87 und 88 EG-Vertrag auf staatliche Beihilfen an kleine und mittlere Unternehmen [6]. Angesichts der umfangreichen Erfahrungen der Kommission mit der Anwendung dieser Bestimmungen ist es daher sinnvoll, dass diese im Interesse einer Verwaltungsvereinfachung, die jedoch ihre eigenen Kontrollmöglichkeiten nicht schwächt, von den ihr durch die Verordnung (EG) Nr. 994/98 verliehenen Befugnissen Gebrauch macht.

(4) Die Möglichkeit der Mitgliedstaaten, Beschäftigungsbeihilfen anzumelden, bleibt hiervon unberührt. Solche Anmeldungen werden von der Kommission in erster Linie anhand der Kriterien dieser Verordnung, der Verordnung (EG) Nr. 70/2001 oder gegebenenfalls anhand der einschlägigen Gemeinschaftsleitlinien oder -rahmen geprüft. Derartige Bestimmungen bestehen zur Zeit für den Seeverkehr. Mit dem Inkrafttreten der Verordnung werden die Leitlinien für Beschäftigungsbeihilfen [7] unanwendbar ebenso wie die Mitteilung betreffend Beihilfenüberwachung und Senkung der Arbeitskosten [8]. Anmeldungen, über die bei Inkrafttreten dieser Verordnung noch nicht abschließend entschieden wurde, werden anhand der neuen Verordnung gewürdigt. Im Falle von Beschäftigungsbeihilfen, die vor Inkrafttreten dieser Verordnung unter Verstoß gegen Artikel 88 Absatz 3 EG-Vertrag gewährt wurden, erscheint es sinnvoll, in Bezug auf die Anwendbarkeit dieser Verordnung eine Übergangsregelung zu schaffen.

(5) Die Förderung der Beschäftigung nimmt in der Wirtschafts- und Sozialpolitik der Gemeinschaft und ihrer Mitgliedstaaten eine Schlüsselposition ein. Die Gemeinschaft hat deshalb auch eine europäische Beschäftigungsstrategie entwickelt. In einigen Teilen der Gemeinschaft ist Arbeitslosigkeit nach wie vor ein ernstes Problem. Für bestimmte Gruppen von Arbeitnehmern gestaltet sich der Einstieg in den Arbeitsmarkt weiterhin besonders schwierig. Der Staat hat daher ein berechtigtes Interesse an der Durchführung von Maßnahmen, die Anreize für Unternehmen schaffen, neue Arbeitsplätze, vor allem für benachteiligte Arbeitnehmer, zu schaffen.

(6) Die Verordnung gilt nur für Beschäftigungsmaßnahmen, die die Voraussetzungen des Artikels 87 Absatz 1 EG-Vertrag erfüllen und somit staatliche Beihilfen darstellen. Eine Reihe beschäftigungswirksamer Maßnahmen stellen keine staatlichen Beihilfen im Sinne von Artikel 87 Absatz 1 EG-Vertrag dar, weil es sich um Beihilfen zugunsten einzelner Personen handelt, die nicht bestimmten Unternehmen oder bestimmten Produktionszweigen zugute kommen, weil sie den Handel zwischen Mitgliedstaaten nicht beeinträchtigen oder weil die Maßnahmen allgemeiner Natur sind und nicht durch die Begünstigung bestimmter Unternehmen oder Produktionszweige den Wettbewerb verfälschen oder zu verfälschen drohen. Derartige allgemeine Maßnahmen wie etwa die generelle Senkung der Steuern auf den Faktor Arbeit und der Sozialabgaben, die Förderung von Investitionen in allgemeine und berufliche Bildungsmaßnahmen oder die berufliche Orientierung und Beratung, allgemeine Unterstützungs- und Ausbildungsmaßnahmen für Erwerbslose oder arbeitsrechtliche Verbesserungen

[1] ABl. L 142 vom 14.5.1998, S. 1.
[2] ABl. C 88 vom 12.4.2002, S. 2.
[3] ABl. C 334 vom 12.12.1995, S. 4.
[4] ABl. C 1 vom 3.1.1997, S. 10.
[5] ABl. C 74 vom 10.3.1998, S. 9.
[6] ABl. L 10 vom 13.1.2001, S. 33.
[7] ABl. C 371 vom 23.12.2000, S. 12.
[8] ABl. C 218 vom 27.7.1996, S. 4.

werden daher nicht von der Verordnung erfasst. Das gilt auch für Maßnahmen, die nach allgemeiner Auffassung nicht alle Tatbestandsmerkmale des Artikels 87 Absatz 1 EG-Vertrag erfüllen und daher gemäß der Verordnung (EG) Nr. 69/2001 der Kommission vom 12. Januar 2001 über die Anwendung der Artikel 87 und 88 EG-Vertrag auf „De-minimis-Beihilfen" [1] von der Anmeldungspflicht nach Artikel 88 Absatz 3 EG-Vertrag ausgenommen sind.

(7) Mit dieser Verordnung sollen Beihilfen freigestellt werden, die eine Förderung der Beschäftigung im Sinne der europäischen Beschäftigungsstrategie und vor allem von benachteiligten Arbeitnehmergruppen bezwecken, ohne dass dadurch die Handelsbedingungen in einer Weise verändert werden, die dem gemeinsamen Interesse zuwiderläuft. Einem einzelnen Unternehmen gewährte Beschäftigungsbeihilfen können den Wettbewerb auf dem jeweiligen Markt ganz erheblich beeinflussen, weil dadurch dieses eine Unternehmen gegenüber anderen, die keine derartige Beihilfe erhalten haben, begünstigt wird. Außerdem dürften einem einzigen Unternehmen gewährte Beihilfen kaum auf den Arbeitsmarkt durchschlagen. Individuell gewährte Beschäftigungsbeihilfen sind daher auch künftig der Kommission zu melden. Die Freistellung beschränkt sich daher auf Beihilfen, die im Rahmen allgemeiner Regelungen gewährt werden.

(8) Freigestellt werden sollen sämtliche Beihilfen, die auf der Grundlage einer Beihilferegelung gewährt werden, die die einschlägigen Freistellungsvoraussetzungen dieser Verordnung erfüllt. Im Interesse einer wirksamen Überwachung und einer nicht zu Lasten der Kontrollmöglichkeiten der Kommission gehenden Verwaltungsvereinfachung sollten die Beihilferegelungen einen ausdrücklichen Verweis auf diese Verordnung enthalten.

(9) Für staatliche Beihilfen im Schiffbausektor und im Kohlebergbau, für die in den Verordnungen (EG) Nr. 1540/98 des Rates [2] bzw. (EG) Nr. 1407/2002 des Rates [3] gesonderte Vorschriften erlassen worden sind, sollte die Anmeldungspflicht bestehen bleiben.

(10) Auf Beihilfen im Bereich Verkehr sollte die Verordnung anwendbar sein. Da der Wettbewerb in diesem Sektor besondere Merkmale aufweist, sollte die Freistellung allerdings nicht für Beihilfen zur Schaffung neuer Arbeitsplätze gelten.

(11) Eine ablehnendere Haltung nimmt die Kommission konsequent gegenüber Beihilfen für einzelne Wirtschaftszweige ein, vor allem — aber nicht ausschließlich — sensible, d. h. unter Überkapazitäten leidende oder krisengeschüttelte Sektoren. Beihilferegelungen für bestimmte Wirtschaftszweige sollten daher nicht durch diese Verordnung von der Anmeldungspflicht ausgenommen werden.

(12) Um sicherzustellen, dass die Beihilfen angemessen und auf das notwendige Maß beschränkt sind, sollten die Schwellenwerte entsprechend der ständigen Praxis der Kommission in Form von Beihilfeintensitäten bezogen auf die verschiedenen förderfähigen Kosten und nicht in Form absoluter Höchstbeträge ausgedrückt werden.

(13) Ob eine Beihilfe nach dieser Verordnung mit dem Gemeinsamen Markt vereinbar ist, ist von der Beihilfeintensität bzw. dem als Subventionsäquivalent ausgedrückten Beihilfebetrag abhängig. Die Berechnung des Subventionsäquivalents einer in mehreren Tranchen oder in Form eines zinsgünstigen Darlehens gewährten Beihilfe erfolgt auf der Grundlage der zum Gewährungszeitpunkt geltenden marktüblichen Zinssätze. Im Interesse einer einheitlichen, transparenten und unkomplizierten Anwendung der Vorschriften über staatliche Beihilfen gelten für die Zwecke dieser Verordnung die Referenzzinssätze als die marktüblichen Zinssätze; bei zinsgünstigen Darlehen muss das Darlehen durch übliche Sicherheiten besichert und darf nicht mit ungewöhnlich hohen Risiken behaftet sein. Die Referenzzinssätze sind die von der Kommission in regelmäßigen Abständen anhand objektiver Kriterien ermittelten und im *Amtsblatt der Europäischen Gemeinschaften* sowie im Internet veröffentlichten Zinssätze.

(14) Da Unternehmen unterschiedlicher Größe nicht die gleichen Voraussetzungen aufweisen, sind für kleine und mittlere Unternehmen, die neue Arbeitsplätze schaffen, andere Beihilfehöchstintensitäten festzusetzen als für Großunternehmen. Um Abweichungen in der Auslegung zu vermeiden, die Anlass zu Wettbewerbsverfälschungen geben könnten, die Abstimmung der Maßnahmen der Gemeinschaft und der Mitgliedstaaten zu erleichtern und die Transparenz in Verfahrensfragen sowie die Rechtssicherheit zu erhöhen, sollte im Rahmen dieser Verordnung die Definition kleiner und mittlerer Unternehmen (KMU) der Empfehlung 96/280/EG der Kommission vom 3. April 1996 betreffend die Definition der kleinen und mittleren Unternehmen [4] verwendet werden. Diese Definition wird auch in der Verordnung (EG) Nr. 70/2001 verwendet.

(15) Nach den bisherigen Erfahrungen der Kommission sollten sich die Höchstintensitäten auf einem Niveau bewegen, bei dem die beiden Ziele einer minimalen Wettbewerbsverfälschung auf der einen und der Förderung der Beschäftigung auf der anderen Seite in einem angemessenen Verhältnis zueinander stehen. Aus Kohärenzgründen müssen sie den Schwellenwerten angepasst werden, die in den Leitlinien für staatliche Beihilfen mit regionaler Zielsetzung sowie in der Verordnung (EG) Nr. 70/2001 festgelegt sind. Danach darf die Höhe der Beschäftigungsbeihilfe anhand der im Rahmen von Investitionsvorhaben geschaffenen neuen Arbeitsplätze bemessen werden.

[1] ABl. L 10 vom 13.1.2001, S. 30.
[2] ABl. L 202 vom 18.7.1998, S. 1.
[3] ABl. L 205 vom 2.8.2002, S. 1.
[4] ABl. L 107 vom 30.4.1996, S. 4.

(16) Lohnkosten sind Teil der normalen Betriebskosten eines Unternehmens. Entscheidend ist daher, dass sich die Beihilfe positiv auf die Beschäftigung auswirkt und dem Unternehmen nicht nur dazu verhilft, Kosten einzusparen, die es ansonsten selber tragen müsste.

(17) Wenn Beschäftigungsbeihilfen nicht mit strikten Kontrollen und Beschränkungen einhergehen, kann dies zu negativen Begleiterscheinungen führen, wodurch ihre zunächst positive Wirkung auf den Arbeitsmarkt wieder aufgehoben wird. Wenn die Beihilfen zum Schutz von Unternehmen eingesetzt werden, die einem innergemeinschaftlichen Wettbewerb ausgesetzt sind, können für die Wettbewerbsfähigkeit der Industrie in der Gemeinschaft notwendige Anpassungen dadurch verzögert werden. Ohne strenge Kontrollen kann der Fall eintreten, dass Beschäftigungsbeihilfen überwiegend in Regionen gewährt werden, die ohnehin schon wohlhabend sind, was nicht dem Ziel des wirtschaftlichen und sozialen Zusammenhalts entspricht. Zur Senkung der Lohnkosten gewährte Beihilfen können im Binnenmarkt zur Umlenkung von Ressourcen und nichtstandortgebundenen Investitionen, zur Verlagerung der Arbeitslosigkeit von einem Land in ein anderes und zu Abwanderung führen und dadurch den innergemeinschaftlichen Wettbewerb verfälschen.

(18) Die Gewährung von Beihilfen zur Schaffung neuer Arbeitsplätze sollte davon abhängig gemacht werden, dass der neu geschaffene Arbeitsplatz für einen bestimmten Zeitraum erhalten bleibt. Der in dieser Verordnung festgesetzte Zeitraum sollte Vorrang vor dem in Ziffer 4.14 der Leitlinien für staatliche Beihilfen mit regionaler Zielsetzung genannten Fünfjahreszeitraum haben.

(19) Beihilfen zum Erhalt von Arbeitsplätzen, d. h. die finanzielle Unterstützung, die einem Unternehmen gewährt wird, damit es die Belegschaft nicht entlassen muss, sind mit Betriebsbeihilfen vergleichbar. Vorbehaltlich etwaiger sektorspezifischer Vorschriften, wie es sie z. B. für den Bereich des Seeverkehrs gibt, sollten sie daher nur unter ganz bestimmten Voraussetzungen und für eine befristete Zeit bewilligt werden. Diese Beihilfen sollten der Kommission weiterhin gemeldet werden und nicht durch diese Verordnung von der Anmeldungspflicht freigestellt werden. Beihilfen dieser Art können nur in ganz wenigen Fällen bewilligt werden, etwa dann, wenn sie gemäß Artikel 87 Absatz 2 Buchstabe b) EG-Vertrag zur Beseitigung von Schäden dienen, die durch Naturkatastrophen oder sonstige außergewöhnliche Ereignisse entstanden sind, wenn sie in Fördergebieten gemäß Artikel 87 Absatz 3 Buchstabe a) EG-Vertrag gewährt werden, in denen die Lebenshaltung außergewöhnlich niedrig ist oder eine erhebliche Unterbeschäftigung herrscht, oder wenn es sich um Gebiete in äußerster Randlage handelt, sofern sie die Voraussetzungen erfüllen, die in den Leitlinien für staatliche Beihilfen mit regionaler Zielsetzung an Betriebsbeihilfen geknüpft werden, und drittens, wenn sie im Rahmen der Rettung und Umstrukturierung eines Unternehmens in Schwierigkeiten in Übereinstimmung mit den einschlägigen Gemeinschaftsleitlinien gewährt werden ([1]).

(20) Eine besondere Art der Beihilfe ist die Beihilfe zugunsten von Arbeitgebern für die Umwandlung von befristeten oder Zeitarbeitsverträgen in unbefristete Arbeitsverträge. Solche Beihilfen sollten nicht durch diese Verordnung von der Anmeldungspflicht freigestellt werden und angemeldet werden, damit die Kommission prüfen kann, ob von ihnen eine positive Wirkung auf die Beschäftigungssituation ausgeht. Dabei sollte unter anderem sicher gestellt werden, dass beschäftigungswirksame Beihilfemaßnahmen dieser Art nicht gleichzeitig zur Schaffung eines Arbeitsplatzes und zur Umwandlung eines Beschäftigungsverhältnisses gewährt werden und dabei der Beihilfehöchstsatz für Erstinvestitionen oder für die Schaffung eines Arbeitsplatzes überschritten wird.

(21) Kleinen und mittleren Unternehmen fällt bei der Schaffung neuer Arbeitsplätze eine Schlüsselrolle zu. Gerade ihre Größe mag sie jedoch an Neueinstellungen hindern, weil diese gewisse Risiken mit sich bringen und zusätzlichen Verwaltungsaufwand bedeuten. Die Schaffung von Arbeitsplätzen kann auch zur wirtschaftlichen Entwicklung benachteiligter Regionen in der Gemeinschaft beitragen und dadurch einen höheren Grad an wirtschaftlichem und sozialem Zusammenhalt schaffen. In benachteiligten Regionen angesiedelte Unternehmen haben einen Standortnachteil. Kleine und mittlere Unternehmen sowie Unternehmen in Fördergebieten sollten daher Beihilfen zur Schaffung neuer Arbeitsplätze erhalten dürfen.

(22) Großunternehmen in nicht förderfähigen Gebieten haben keine besonderen Nachteile und ihre Lohnkosten sind Teil ihrer normalen Betriebsausgaben. Auch um den Anreiz zur Schaffung von Arbeitsplätzen speziell in KMU und in Fördergebieten nach Artikel 87 Absatz 3 Buchstaben a) und c) EG-Vertrag zu erhöhen, kommen Großunternehmen in Gebieten, die nicht unter die genannten Ausnahmebestimmungen fallen, für Beihilfen zur Schaffung von Arbeitsplätzen daher nicht in Betracht.

(23) Für bestimmte Gruppen von Arbeitnehmern ist es besonders schwer, eine Stelle zu finden, weil sie bei den Arbeitgebern als weniger leistungsfähig gelten. Diese geringere Leistungsfähigkeit wird entweder mit fehlender aktueller Berufserfahrung (beispielsweise von Jugendlichen oder Langzeitarbeitslosen) oder mit einer andauernden Behinderung in Verbindung gebracht. Die Gewährung von Beihilfen an Unternehmen speziell im

([1]) ABl. C 288 vom 9.10.1999, S. 2.

Hinblick auf die Einstellung dieser Personengruppen ist insofern gerechtfertigt, als dem Unternehmen wegen der geringeren Produktivität dieser Arbeitnehmer finanzielle Vorteile entgehen und auch die Arbeitnehmer von der Maßnahme profitieren, da sie ohne diese Anreize für die Arbeitgeber kaum auf dem Arbeitsmarkt Fuß fassen könnten. Beihilferegelungen zu diesem Zweck sollten daher unabhängig von der Größe und vom Standort des Beihilfeempfängers erlaubt sein.

(24) Welche Gruppen von Arbeitnehmern als benachteiligt gelten, bedarf der Definition; es sollte den Mitgliedstaaten jedoch unbenommen bleiben, Beihilfen zur Förderung der Einstellung anderer Personenkreise, die sie für benachteiligt halten, unter Vorbringung stichhaltiger Argumente anzumelden.

(25) Behinderte Arbeitnehmer, denen eine Erstanstellung vermittelt werden konnte, benötigen mitunter auch darüber hinaus noch Hilfe auf Dauer in Form eines beschützten Beschäftigungsverhältnisses. Speziell zu diesem Zweck geschaffene Beihilferegelungen sollten daher von der Anmeldungspflicht ausgenommen werden, sofern sich die Beihilfe nachweislich auf den Ausgleich der geringeren Produktivität der betreffenden Arbeitnehmer, der durch ihre Beschäftigung entstehenden Zusatzkosten oder der Kosten für die Einrichtung bzw. Beibehaltung eines beschützten Beschäftigungsverhältnisses beschränkt. Mit dieser Bedingung soll verhindert werden, dass die begünstigten Unternehmen auf Märkten, auf denen auch andere Unternehmen vertreten sind, zu einem Preis unterhalb des Wettbewerbsniveaus verkaufen.

(26) Die Kumulierung von Beihilfen für die Einstellung von benachteiligten oder behinderten Arbeitnehmern oder die weitere Unterstützung von behinderten Arbeitnehmern am Arbeitsplatz mit anderen Beihilfen zur Senkung der Lohnkosten sollte erlaubt sein, da es in diesen Fällen legitim ist, darauf hinzuwirken, dass diesem Personenkreis angehörende Arbeitnehmer vorrangig beschäftigt werden.

(27) Um sicherzustellen, dass es sich um eine notwendige Beihilfe handelt, die Beschäftigungsanreize schafft, gilt die Freistellung dann nicht, wenn der Beihilfeempfänger auch ohne Beihilfe unter Marktbedingungen neue Arbeitsplätze geschaffen oder Einstellungen vorgenommen hätte.

(28) Bei Kumulierung der Beschäftigungsbeihilfe in Bezug auf dieselben förderfähigen Kosten oder die mit der Schaffung eines Arbeitsplatzes verbundenen Investitionskosten mit anderen staatlichen Beihilfen, gleich, ob vom Staat, der Region oder der Gemeinde gewährt, sollte eine Freistellung nach dieser Verordnung nur dann erfolgen, wenn dabei die in dieser Verordnung oder den Gemeinschaftsbestimmungen über staatliche Investitionsbeihilfen, d. h. vor allem die in den Leitlinien für staatliche Beihilfen mit regionaler Zielsetzung und der Verordnung (EG) Nr. 70/2001, genannten Schwellenwerte nicht überschritten werden. Die einzige Ausnahme von dieser Regel sollten Beihilfen bilden, die benachteiligten oder behinderten Arbeitnehmern zu einem Arbeitsplatz verhelfen oder die fortlaufende Beschäftigung von Behinderten ermöglichen sollen.

(29) Beschäftigungsbeihilfen größeren Umfangs sollten vor ihrer Gewährung weiterhin von der Kommission einzeln geprüft werden. Auf Beihilfen zugunsten eines einzelnen Unternehmens oder einer einzelnen Einrichtung, die eine bestimmte Summe innerhalb eines bestimmten Zeitraums überschreiten, ist die vorliegende Gruppenfreistellungsverordnung daher nicht anwendbar, sondern es gilt weiterhin das Verfahren nach Artikel 88 Absatz 3 EG-Vertrag.

(30) Neben den nach dieser Verordnung freigestellten Beschäftigungsbeihilfen kann es noch andere Beihilfemaßnahmen geben, die ebenfalls die Förderung der Beschäftigung im Auge haben oder mit denen beschäftigungs- und arbeitsmarktrelevante Zielsetzungen verfolgt werden. Diese Maßnahmen sollten gemäß Artikel 88 Absatz 3 EG-Vertrag angemeldet werden.

(31) In Übereinstimmung mit dem WTO-Übereinkommen über Subventionen und Ausgleichsmaßnahmen sind Ausfuhrbeihilfen oder Beihilfen, die heimische Erzeugnisse gegenüber Importwaren begünstigen, vom Anwendungsbereich dieser Verordnung auszunehmen. Beihilfen dieser Art sind unvereinbar mit den internationalen Verpflichtungen der Gemeinschaft aus diesem Übereinkommen und sollten daher weder von der Anmeldungspflicht freigestellt noch im Fall ihrer Anmeldung genehmigt werden.

(32) Zum Zwecke der Transparenz und einer wirksamen Überwachung im Sinne von Artikel 3 der Verordnung (EG) Nr. 994/98 dürfte sich die Verwendung eines Standardvordrucks anbieten, mit dem die Mitgliedstaaten die Kommission in Kurzform über die Einführung einer Beihilferegelung gemäß dieser Verordnung unterrichten. Die betreffenden Angaben sollten anschließend im *Amtsblatt der Europäischen Gemeinschaften* veröffentlicht werden. Aus denselben Gründen sollten den Mitgliedstaaten auch Vorgaben in Bezug auf die Unterlagen gemacht werden, die sie über die nach dieser Verordnung freigestellten Beihilfen zur Verfügung halten müssen. Die Mitgliedstaaten sollten der Kommission einmal jährlich einen Bericht vorlegen. Die Kommission sollte festlegen, worüber der Bericht Auskunft geben soll. Kurzinformation und Jahresbericht sollten, um von den zuständigen Stellen leichter bearbeitet werden zu können, auch in EDV-gestützter Form vorzulegen sein, da die entsprechende Technologie inzwischen nahezu überall vorhanden ist.

(33) Aufgrund der bisherigen Erfahrungen der Kommission und der Tatsache, dass die Politik im Bereich der staatlichen Beihilfen im Allgemeinen in regelmäßigen Abständen neu überdacht werden muss, ist es angezeigt, die Geltungsdauer dieser Verordnung zu beschränken. Gemäß Artikel 4 Absatz 2 der Verordnung (EG) Nr. 994/98 ist es erforderlich, eine Übergangsregelung zu treffen, nach der nach dieser Verordnung bereits freigestellte Beihilferegelungen nach dem Außerkrafttreten der Verordnung für weitere sechs Monate freigestellt bleiben —

HAT FOLGENDE VERORDNUNG ERLASSEN:

Artikel 1

Anwendungsbereich

(1) Die vorliegende Verordnung gilt für Beihilferegelungen im Sinne von Artikel 87 Absatz 1 EG-Vertrag, die der Schaffung neuer Arbeitsplätze, der Einstellung benachteiligter und behinderter Arbeitnehmer oder der Deckung der durch die Beschäftigung von Behinderten entstehenden Zusatzkosten dienen.

(2) Diese Verordnung gilt für alle Wirtschaftszweige einschließlich der Herstellung, Verarbeitung und Vermarktung der in Anhang I des EG-Vertrags aufgeführten Erzeugnisse.

Sie gilt nicht für die Gewährung von Beihilfen im Kohlebergbau und im Schiffbausektor und auch nicht für Beihilfen im Verkehrssektor, soweit sie der Schaffung neuer Arbeitsplätze im Sinne von Artikel 4 dienen. Beihilfen dieser Art müssen der Kommission weiterhin gemäß Artikel 88 Absatz 3 EG-Vertrag gemeldet werden.

(3) Die Verordnung findet keine Anwendung auf

a) Beihilfen für exportbezogene Tätigkeiten, d. h. Beihilfen, die unmittelbar mit den ausgeführten Mengen, der Errichtung und dem Betrieb eines Vertriebsnetzes oder anderen laufenden Ausgaben einer Exporttätigkeit in Zusammenhang stehen,

b) Beihilfen, die von der Verwendung heimischer Erzeugnisse zu Lasten von Importwaren abhängig gemacht werden.

Artikel 2

Begriffsbestimmungen

Im Sinne dieser Verordnung bezeichnet der Ausdruck

a) „Beihilfe“: jede Maßnahme, die die Tatbestandsmerkmale von Artikel 87 Absatz 1 EG-Vertrag erfüllt;

b) „kleine und mittlere Unternehmen“: Unternehmen im Sinne von Anhang I der Verordnung (EG) Nr. 70/2001;

c) „Bruttobeihilfeintensität“: in Prozent der beihilfefähigen Kosten des Vorhabens ausgedrückte Höhe der Beihilfe. Alle eingesetzten Beträge sind Beträge vor Abzug der direkten Steuern. Wird die Beihilfe nicht als Zuschuss, sondern in anderer Form gewährt, bestimmt sich die Höhe der Beihilfe nach ihrem Subventionsäquivalent. In mehreren Tranchen gezahlte Beihilfen werden zum Zeitpunkt ihrer Bewilligung abgezinst. Der Zinssatz, der für die Abzinsung und die Berechnung der Beihilfeintensität bei einem zinsgünstigen Darlehen anzusetzen ist, ist der zum Zeitpunkt der Gewährung geltende Referenzsatz;

d) „Nettobeihilfeintensität“: in Prozent der beihilfefähigen Kosten des Projekts ausgedrückter Beihilfebetrag nach Steuern;

e) „Beschäftigtenzahl“: Zahl der jährlichen Arbeitseinheiten (JAE), d. h. Zahl der während eines Jahres vollzeitlich Beschäftigten, wobei Teilzeitarbeit und Saisonarbeit nach JAE-Bruchteilen bemessen werden;

f) „benachteiligte Arbeitnehmer“: alle Personengruppen, die ohne Unterstützung nur schwer auf dem Arbeitsmarkt Fuß fassen können, d. h. solche, die mindestens eines der nachstehenden Kriterien erfüllen:

i) Personen, die unter 25 Jahren sind oder deren Abschluss einer Vollzeit-Bildungsmaßnahme zwei Jahre zurückliegt und die bisher noch keine reguläre bezahlte Erstanstellung gefunden haben,

ii) Wanderarbeitnehmer, die zwecks Ausübung einer Tätigkeit ihren Wohnort in einen anderen Mitgliedstaat verlegen oder verlegt haben oder ihren Wohnort in der Gemeinschaft genommen haben,

iii) Mitglieder ethnischer Minderheiten in einem Mitgliedstaat, die eine Weiterentwicklung ihrer sprachlichen oder beruflichen Fertigkeiten oder ihres Berufsprofils benötigen, um ihre Aussichten auf eine dauerhafte Beschäftigung zu erhöhen,

iv) Personen, die nach mindestens zweijähriger Unterbrechung der Erwerbstätigkeit oder der Ausbildung wieder in das Erwerbsleben eintreten wollen, vor allem solche, die ihre Tätigkeit aufgegeben haben, wegen der Schwierigkeit ihre Erwerbstätigkeit und ihr Familienleben miteinander zu vereinbaren,

v) Alleinerziehende,

vi) Personen ohne Abitur oder einen vergleichbaren Abschluss, die erwerbslos sind oder vor der Entlassung stehen,

vii) Personen über 50, die erwerbslos sind oder vor der Entlassung stehen,

viii) Langzeitarbeitslose, d. h. Personen, die in den vorangegangenen 16 Monaten insgesamt 12 Monate bzw. im Fall von Jugendlichen unter 25 in den vorangegangenen acht Monaten insgesamt sechs Monate erwerbslos waren,

ix) nach nationalem Recht anerkannte ehemalige oder akute Suchtkranke,

x) Personen, die seit Beginn eines Aufenthalt in einer Strafvollzugsanstalt oder einer strafrechtlichen Maßnahme noch keine reguläre bezahlte Erstanstellung gefunden haben,

xi) Frauen in einer NUTS II-Region, in der die durchschnittliche Arbeitslosigkeit seit mindestens zwei Kalenderjahren 100 % des Gemeinschaftsdurchschnitts übersteigt und die Frauenarbeitslosigkeit während mindestens zwei der vergangenen drei Kalenderjahre um 150 % über der männlichen Erwerbslosenquote in der betreffenden Region gelegen ist;

g) „behinderte Arbeitnehmer“:

i) Personen, die nach nationalem Recht als Behinderte gelten, oder

ii) Personen mit einer anerkannten schweren körperlichen, geistigen oder seelischen Beeinträchtigung;

h) „beschütztes Beschäftigungsverhältnis“: ein Beschäftigungsverhältnis in einer Einrichtung, in der mindestens 50 % der Beschäftigten Behinderte sind, die nicht in der Lage sind, eine Anstellung auf dem freien Arbeitsmarkt zu finden;

i) „Lohnkosten“: die folgenden Kosten, die der Beihilfeempfänger für den fraglichen Arbeitsplatz tatsächlich zu zahlen hat:

   i) Bruttolohn (d. h. vor Steuern) plus

   ii) gesetzliche Sozialabgaben,

j) Arbeitsplatz, der „mit der Durchführung eines Investitionsvorhabens in Zusammenhang steht“: ein Arbeitsplatz, der die Tätigkeit betrifft, auf die sich die Investition bezieht, und der in den ersten drei Jahren nach Abschluss der Investition geschaffen wird. Während dieses Zeitraums werden auch diejenigen Arbeitsplätze erfasst, die im Anschluss an eine durch die Investition bewirkte höhere Kapazitätsauslastung geschaffen werden;

k) „materielle Investitionen“: Anlageinvestitionen im Zusammenhang mit der Gründung eines neuen oder der Erweiterung eines bestehenden Betriebes oder im Zusammenhang mit einem Produktwechsel oder der Änderung des Produktionsverfahrens in einem bestehenden Betrieb (Rationalisierung, Diversifizierung, Modernisierung). Als materielle Investition gilt auch eine Anlageinvestition in Form der Übernahme eines Betriebs, der geschlossen wurde oder ohne Übernahme geschlossen worden wäre;

l) „immaterielle Investitionen“: Investitionen in Technologietransfer durch Erwerb von Patentrechten, Lizenzen oder Know-how oder nichtpatentiertem technischen Wissen.

Artikel 3

Freistellungsvoraussetzungen

(1) Vorbehaltlich Artikel 9 sind Beihilferegelungen, die sämtliche Voraussetzungen dieser Verordnung erfüllen, im Sinne von Artikel 87 Absatz 3 EG-Vertrag mit dem Gemeinsamen Markt vereinbar und unterliegen nicht der Anmeldungspflicht nach Artikel 88 Absatz 3, sofern

a) die Beihilfen, die nach der jeweiligen Regelung gewährt werden könnten, ausnahmslos sämtliche Freistellungsvoraussetzungen dieser Verordnung erfüllen;

b) in der Regelung ausdrücklich auf diese Verordnung verwiesen wird, indem Titel und Fundstelle der Verordnung im *Amtsblatt der Europäischen Gemeinschaften* angegeben werden.

(2) Beihilfen, die auf der Grundlage der in Absatz 1 genannten Regelungen gewährt werden, sind im Sinne von Artikel 87 Absatz 3 EG-Vertrag mit dem Gemeinsamen Markt vereinbar und unterliegen nicht der Anmeldungspflicht nach Artikel 88 Absatz 3 EG-Vertrag, wenn sie alle Voraussetzungen dieser Verordnung erfüllen.

Artikel 4

Schaffung von Arbeitsplätzen

(1) Die Beihilferegelungen zur Schaffung von Arbeitsplätzen und die aufgrund dieser Regelungen gewährten Beihilfen müssen die Voraussetzungen der Absätze 2, 3 und 4 erfüllen.

(2) Bei der Schaffung von Arbeitsplätzen in Gebieten oder Wirtschaftszweigen, die zum Zeitpunkt der Gewährung der Beihilfe nicht die Voraussetzungen für die Gewährung von Regionalbeihilfe gemäß Artikel 87 Absatz 3 Buchstabe a) oder c) erfüllen, beträgt die maximal zulässige Bruttobeihilfeintensität:

a) 15 % bei kleinen Unternehmen,

b) 7,5 % bei mittleren Unternehmen.

(3) Bei der Schaffung von Arbeitsplätzen in Gebieten und Wirtschaftszweigen, die zum Zeitpunkt der Gewährung der Beihilfe die Voraussetzungen für die Gewährung von Regionalbeihilfe gemäß Artikel 87 Absatz 3 Buchstabe a) oder c) erfüllen, darf die Nettobeihilfeintensität die entsprechende Beihilfeobergrenze für regionale Investitionsbeihilfen nicht überschreiten, die sich nach den jeweiligen zum Zeitpunkt der Gewährung der Beihilfe geltenden und von der Kommission genehmigten nationalen Fördergebietskarten bestimmt; in diesem Zusammenhang ist u. a. der multisektorale Regionalbeihilferahmen für große Investitionsvorhaben heranzuziehen ([1]).

Sofern sich aus der Fördergebietskarte nichts anderes ergibt, gilt für kleine und mittlere Unternehmen ein Aufschlag von

a) 10 Prozentpunkten brutto in Fördergebieten im Sinne von Artikel 87 Absatz 3 Buchstabe c), wobei jedoch die Nettobeihilfeintensität insgesamt 30 % der beihilfefähigen Kosten nicht übersteigen darf, oder

b) 15 Prozentpunkten brutto in Fördergebieten im Sinne von Artikel 87 Absatz 3 Buchstabe a), wobei jedoch die Nettobeihilfeintensität insgesamt 75 % der beihilfefähigen Kosten nicht übersteigen darf.

Die erhöhten Beihilfeobergrenzen gelten nur, wenn die Eigenbeteiligung des begünstigten Unternehmens mindestens 25 % beträgt und die geförderten Beschäftigungsverhältnisse in diesen Fördergebieten verbleiben.

Werden Arbeitsplätze im Bereich der Herstellung, Verarbeitung und Vermarktung von in Anhang I des EG-Vertrags aufgeführten Waren in Gebieten geschaffen, die als benachteiligte Gebiete im Sinne der Verordnung (EG) Nr. 1257/1999 des Rates ([2]) gelten, sind ebenfalls die genannten erhöhten Beihilfeobergrenzen oder gegebenenfalls die nach der Verordnung (EG) Nr. 1257/1999 zulässigen erhöhten Beihilfeobergrenzen anwendbar.

(4) Die in den Absätzen 2 und 3 festgelegten Beihilfeobergrenzen verstehen sich als Prozentsatz der über einen Zeitraum von zwei Jahren anfallenden Lohnkosten für einen neu geschaffenen Arbeitsplatz, bei dem folgende Voraussetzungen erfüllt sind:

a) Sowohl in dem betroffenen Betrieb als auch in dem betroffenen Unternehmen muss durch den neu geschaffenen Arbeitsplatz ein Nettozuwachs an Beschäftigten im Verhältnis zur durchschnittlichen Beschäftigtenzahl in den vorangegangenen 12 Monaten geschaffen werden.

([1]) ABl. C 70 vom 19.3.2002, S. 8.
([2]) ABl. L 160 vom 26.6.1999, S. 80.

b) Der neu geschaffene Arbeitsplatz muss mindestens über einen Zeitraum von drei Jahren bzw. zwei Jahren im Fall von KMU erhalten bleiben.

c) Der neu geschaffene Arbeitsplatz darf nur mit Personen besetzt werden, die noch nie erwerbstätig waren, erwerbslos geworden sind oder vor der Entlassung stehen.

(5) Beihilfen, die aufgrund einer nach diesem Artikel freigestellten Beihilferegelung zum Zwecke der Schaffung von Arbeitsplätzen gewährt werden, dürfen mit Beihilfen zur Einstellung von benachteiligten oder behinderten Arbeitnehmern nach Maßgabe der Bestimmungen der Artikel 5 und 6 kumuliert werden.

Artikel 5

Einstellung benachteiligter oder behinderter Arbeitnehmer

(1) Beihilferegelungen, mit denen die Einstellung benachteiligter und behinderter Arbeitnehmer durch die Unternehmen gefördert werden soll, sowie alle auf der Grundlage solcher Regelungen gewährten Beihilfen müssen die Voraussetzungen der Absätze 2 und 3 erfüllen.

(2) Die Bruttobeihilfeintensität sämtlicher zur Beschäftigung benachteiligter oder behinderter Arbeitnehmer gewährter Beihilfen bemisst sich nach den Lohnkosten für die Beschäftigung des bzw. der betreffenden Arbeitnehmer während eines Jahres ab dem Zeitpunkt der Einstellung und darf 50 % für benachteiligte bzw. 60 % für behinderte Arbeitnehmer nicht übersteigen.

(3) Für Beihilfen dieser Art gelten folgende Voraussetzungen:

a) Sofern die Einstellung nicht zu einem Nettozuwachs an Beschäftigten in der jeweiligen Einrichtung führt, muss (müssen) die Stelle(n) im Anschluss an das freiwillige Ausscheiden, den Eintritt in den Ruhestand aus Altersgründen, die freiwillige Reduzierung der Arbeitszeit oder die rechtmäßige Entlassung eines Mitarbeiters wegen Fehlverhaltens und nicht infolge des Abbaus von Arbeitsplätzen frei geworden sein.

b) Außer bei rechtmäßiger Entlassung wegen Fehlverhaltens muss die frei werdende Stelle für mindestens 12 Monate dauerhaft besetzt werden.

Artikel 6

Mehrkosten bei Beschäftigung behinderter Arbeitnehmer

(1) Beihilferegelungen, mit denen die Beschäftigung behinderter Arbeitnehmer gefördert werden soll, sowie alle auf der Grundlage dieser Regelungen gewährten Beihilfen müssen die Voraussetzungen der Absätze 2 und 3 erfüllen.

(2) Die Beihilfen dürfen zusammen mit den nach Artikel 5 gewährten Beihilfen nicht über das Maß hinausgehen, das erforderlich ist, um eine etwaige behinderungsbedingte Verminderung der Leistungsfähigkeit des oder der Arbeitnehmer und die folgenden Kosten auszugleichen:

a) zusätzliche Kosten für die Schaffung von behindertengerechten Räumlichkeiten,

b) zusätzliche Kosten für die Abstellung oder Beschäftigung von Personal ausschließlich zum Zwecke der Unterstützung des oder der behinderten Arbeitnehmer,

c) zusätzliche Kosten für die Anschaffung von behindertengerechtem Arbeitsmaterial oder dessen Umrüstung,

die dem Beihilfeempfänger bei Beschäftigung eines nicht behinderten Arbeitnehmers nicht entstehen würden für die gesamte Beschäftigungsdauer des oder der Behinderten.

Handelt es sich um einen Beihilfeempfänger, der beschützte Beschäftigungsverhältnisse anbietet, kann die Beihilfe zusätzlich die Kosten für den Bau, Einbau oder Ausbau der betreffenden Einrichtung sowie die Verwaltungs- und Beförderungskosten, die aus der Einstellung behinderter Arbeitnehmer entstehen, ausgleichen, ohne diese Kosten jedoch zu übersteigen.

(3) In den nach diesem Artikel freigestellten Beihilferegelungen muss die Gewährung einer Beihilfe mit der Auflage verbunden werden, dass der Beihilfeempfänger Unterlagen aufbewahrt, anhand deren sich nachprüfen lässt, dass dieser Artikel sowie Artikel 8 Absatz 4 eingehalten werden.

Artikel 7

Erforderlichkeit der Beihilfe

(1) Die Freistellung von Beihilfen gemäß Artikel 4 gilt nur dann, wenn vor Schaffung des Arbeitsplatzes bzw. vor Einstellung des Arbeitnehmers

a) entweder von dem Beihilfeempfänger bei den zuständigen Behörden des Mitgliedstaates ein Beihilfeantrag gestellt wurde oder

b) in dem betreffenden Mitgliedstaat bereits objektiven Kriterien genügende Rechtsvorschriften existierten, die einen Rechtsanspruch auf Beihilfe begründeten, ohne dass es einer zusätzlichen Ermessensentscheidung der Behörden bedurfte.

(2) In Fällen, in denen die Schaffung des Arbeitsplatzes

a) mit der Durchführung eines materiellen oder immateriellen Investitionsvorhabens in Zusammenhang steht und

b) innerhalb von drei Jahren nach Abschluss des Investitionsvorhabens erfolgt,

kommt die Freistellung gemäß Artikel 4 nur dann zur Anwendung, wenn die Einreichung des in Absatz 1 Buchstabe a) genannten Antrags oder der Erlass der in Absatz 1 Buchstabe b) genannten Rechtsvorschriften vor Beginn des Investitionsvorhabens erfolgt.

Artikel 8

Kumulierung

(1) Die in den Artikeln 4, 5 und 6 genannten Beihilfeobergrenzen gelten unabhängig davon, ob die Schaffung des Arbeitsplatzes oder die Einstellung ausschließlich mit staatlichen Mitteln oder teilweise mit Gemeinschaftsmitteln gefördert wird.

(2) Beihilfen, die auf der Grundlage von nach Artikel 4 dieser Verordnung freigestellten Regelungen gewährt werden, dürfen in Bezug auf dieselben Lohnkosten nicht mit anderen staatlichen Beihilfen im Sinne von Artikel 87 Absatz 1 EG-Vertrag oder mit sonstigen Gemeinschaftsmitteln kumuliert werden, wenn die nach dieser Verordnung zulässige maximale Beihilfeintensität dadurch überschritten würde.

(3) Beihilfen auf der Grundlage von nach Artikel 4 dieser Verordnung freigestellten Regelungen dürfen nicht mit anderen Beihilfen im Sinne von Artikel 87 Absatz 1 EG-Vertrag oder mit anderen Gemeinschaftsmitteln kumuliert werden

a) in Bezug auf die Kosten einer Investition, mit der der geschaffene Arbeitsplatz in Zusammenhang steht und die zum Zeitpunkt der Schaffung des Arbeitsplatzes noch nicht abgeschlossen war oder in den der Schaffung des Arbeitsplatzes vorausgehenden drei Jahren abgeschlossen wurde,

b) in Bezug auf dieselben Lohnkosten oder andere im Rahmen derselben Investition stehende Arbeitsplätze,

wenn sich hieraus eine Beihilfeintensität ergibt, die über den Obergrenzen für Investitionsbeihilfen liegt, die sich aus den Leitlinien für staatliche Beihilfen mit regionaler Zielsetzung und der von der Kommission für die einzelnen Mitgliedstaaten genehmigten Fördergebietskarte ergeben, oder die die in der Verordnung (EG) Nr. 70/2001 festgesetzte Obergrenze überschreitet. In den besonderen Fällen, in denen diese Obergrenzen angepasst wurden, vor allem infolge der Anwendung sektorspezifischer Beihilfevorschriften oder aufgrund von Rahmenregelungen für große Investitionsprojekte, etwa des multisektoralen Regionalbeihilferahmens für große Investitionsvorhaben, sind für die Zwecke dieses Absatzes die angepassten Obergrenzen heranzuziehen.

(4) In Abweichung von den Absätzen 2 und 3 dürfen Beihilfen, die auf der Grundlage von nach Artikel 5 und 6 dieser Verordnung freigestellten Regelungen gewährt werden, in Bezug auf dieselben Kosten gegebenenfalls mit anderen staatlichen Beihilfen im Sinne von Artikel 87 Absatz 1 EG-Vertrag oder mit anderen Gemeinschaftsmitteln einschließlich Beihilfen, die aufgrund von nach Artikel 4 dieser Verordnung freigestellten Regelungen unter Beachtung der Absätze 2 und 3 gewährt werden, kumuliert werden, sofern dabei eine Bruttobeihilfeintensität von 100 % der während der Beschäftigung des oder der betreffenden Arbeitnehmer anfallenden Lohnkosten nicht überschritten wird.

Unterabsatz 1 gilt unbeschadet etwaiger niedrigerer, gemäß dem Gemeinschaftsrahmen für staatliche Forschungs- und Entwicklungsbeihilfen vorgesehener Beihilfeintensitäten [1].

Artikel 9

Der Anmeldungspflicht unterliegende Beihilfen

(1) Regelungen für einzelne Sektoren werden nicht nach dieser Verordnung freigestellt und müssen weiterhin gemäß Artikel 88 Absatz 3 EG-Vertrag angemeldet werden.

(2) Die Freistellung von der Anmeldungspflicht gilt nicht für Beihilfen an ein einzelnes Unternehmen oder einen Betrieb, deren Gesamtvolumen in einem Dreijahreszeitraum 15 Mio. EUR brutto übersteigt. Die Kommission prüft derartige Beihilfen, sofern sie nach einer ansonsten freigestellten Beihilferegelung gewährt werden, ausschließlich anhand der in dieser Verordnung geregelten Kriterien.

(3) Diese Verordnung lässt die Verpflichtung der Mitgliedstaaten unberührt, einzelne Beihilfen anzumelden, wenn sonstige Vorschriften über die Gewährung staatlicher Beihilfen dies erfordern. Dies gilt insbesondere für die Verpflichtung, Beihilfen zugunsten eines Unternehmens, das Umstrukturierungsbeihilfen im Sinne der Leitlinien der Gemeinschaft für staatliche Beihilfen zur Rettung und Umstrukturierung von Unternehmen in Schwierigkeiten erhält, anzumelden oder der Kommission hierüber Angaben zu machen, sowie für die Verpflichtung zur Anmeldung von Regionalbeihilfen für große Investitionsvorhaben im Rahmen des einschlägigen multisektoralen Regionalbeihilferahmens.

(4) Beihilferegelungen zur Förderung der Einstellung von Arbeitnehmerkategorien, die nicht als benachteiligt im Sinne von Artikel 2 Buchstabe f) gelten, müssen weiterhin gemäß Artikel 88 Absatz 3 EG-Vertrag angemeldet werden, es sei denn, sie sind nach Artikel 4 dieser Verordnung freigestellt. Bei der Anmeldung hat der Mitgliedstaat gegenüber der Kommission zu begründen, warum die betreffenden Arbeitnehmer benachteiligt sind. Insoweit gilt Artikel 5.

(5) Beihilfen zur Erhaltung von Arbeitsplätzen, d. h. die finanzielle Unterstützung, die einem Unternehmen gewährt wird, um die Entlassung von Arbeitnehmern zu verhindern, die ansonsten freigesetzt würden, unterliegen weiterhin der Anmeldungspflicht gemäß Artikel 88 Absatz 3 EG-Vertrag. Vorbehaltlich etwaiger Sondervorschriften für bestimmte Wirtschaftsbereiche dürfen Beihilfen dieser Art von der Kommission nur genehmigt werden, wenn sie gemäß Artikel 87 Absatz 2 Buchstabe b) EG-Vertrag der Beseitigung von Schäden dienen, die durch Naturkatastrophen oder sonstige außergewöhnliche Ereignisse entstanden sind, oder wenn sie in Förderregionen im Sinne von Artikel 87 Absatz 3 Buchstabe a) EG-Vertrag gewährt werden, in denen die Lebenshaltung außergewöhnlich niedrig ist oder eine erhebliche Unterbeschäftigung herrscht, sofern sie die Bedingungen erfüllen, die in den Leitlinien für staatliche Beihilfen mit regionaler Zielsetzung an Betriebsbeihilfen geknüpft werden.

(6) Beihilfen für die Umwandlung von befristeten oder Zeitarbeitsverträgen in unbefristete Beschäftigungsverhältnisse unterliegen weiterhin der Anmeldungspflicht gemäß Artikel 88 Absatz 3 EG-Vertrag.

(7) Beihilferegelungen zur Förderung der Arbeitsplatzteilung, zur Unterstützung von Erwerbstätigen mit Kindern und sonstige vergleichbare Maßnahmen, die die Beschäftigung fördern, aber nicht zu einem Nettozuwachs an Beschäftigten führen und nicht mit der Einstellung von benachteiligten bzw. der Einstellung oder Beschäftigung von behinderten Arbeitnehmern verbunden sind, müssen weiterhin gemäß Artikel 88 Absatz 3 EG-Vertrag angemeldet werden und werden von der Kommission gemäß Artikel 87 geprüft.

[1] ABl. C 45 vom 17.2.1996, S. 5.

(8) Sonstige Beihilfemaßnahmen, die beschäftigungs- und arbeitsmarktpolitische Zielsetzungen verfolgen, wie beispielsweise Maßnahmen zur Förderung eines vorzeitigen Ausscheidens aus dem Erwerbsleben, unterliegen ebenfalls weiterhin der Anmeldungspflicht gemäß Artikel 88 Absatz 3 EG-Vertrag und werden von der Kommission gemäß Artikel 87 geprüft.

(9) Die Anmeldungspflicht gemäß Artikel 88 Absatz 3 EG-Vertrag bleibt auch für einzelne, unabhängig von einer Beihilferegelung gewährte Beschäftigungsbeihilfen bestehen. Beihilfen dieser Art werden anhand der Bestimmungen dieser Verordnung geprüft und von der Kommission nur dann genehmigt, wenn sie im Einklang mit etwaigen Sondervorschriften für den Sektor stehen, in dem der Beihilfeempfänger tätig ist, und wenn nachgewiesen werden kann, dass die Vorteile für die Beschäftigung die Wettbewerbsnachteile auf dem betreffenden Markt überwiegen.

Artikel 10

Transparenz und Überwachung

(1) Die Mitgliedstaaten übermitteln der Kommission binnen 20 Arbeitstagen nach Erlass einer Beihilferegelung im Sinne dieser Verordnung eine Kurzbeschreibung der Maßnahme in der in Anhang I vorgegebenen Form, die im *Amtsblatt der Europäischen Gemeinschaften* veröffentlich wird. Die Kurzbeschreibung ist auf elektronischem Weg zu übermitteln.

(2) Die Mitgliedstaaten halten ausführliche Aufzeichnungen über die nach dieser Verordnung freigestellten Beihilferegelungen und die danach bewilligten Einzelbeihilfen zur Verfügung. Die Unterlagen müssen belegen, dass die in dieser Verordnung festgelegten Freistellungsvoraussetzungen erfüllt sind und dass es sich bei dem begünstigten Unternehmen um ein KMU handelt, sofern der Anspruch auf Beihilfe hiervon abhängt. Die Aufzeichnungen im Zusammenhang mit einer Beihilferegelung müssen während zehn Jahren vom Zeitpunkt der letzten auf der Grundlage dieser Regelung bewilligten Beihilfe an gerechnet zur Verfügung gehalten werden. Die Kommission kann von dem betreffenden Mitgliedstaat schriftlich alle Informationen anfordern, die ihrer Ansicht nach nötig sind, um zu beurteilen, ob die Voraussetzungen für eine Freistellung erfüllt sind.

(3) Die Mitgliedstaaten erstellen in EDV-gestützter Form in der in Anhang II vorgegebenen Form einen Jahresbericht über die Anwendung dieser Verordnung unabhängig davon, ob sich die Anwendung über ein ganzes Kalenderjahr oder nur Teile hiervon erstreckt. Der Bericht ist der Kommission spätestens drei Monate nach Ablauf des Berichtszeitraums zu übermitteln.

Artikel 11

Inkrafttreten, Geltungsdauer und Übergangsbestimmungen

(1) Diese Verordnung tritt am zwanzigsten Tag nach ihrer Veröffentlichung im *Amtsblatt der Europäischen Gemeinschaften* in Kraft

Sie gilt bis zum 31. Dezember 2006.

(2) Zum Zeitpunkt des Inkrafttretens dieser Verordnung anhängige Anmeldungen werden nach den Bestimmungen dieser Verordnung geprüft.

Vor Inkrafttreten dieser Verordnung ohne Genehmigung der Kommission unter Verstoß gegen Artikel 88 Absatz 3 EG-Vertrag eingeführte Beihilferegelungen sowie auf der Grundlage solcher Regelungen gewährte Beihilfen sind im Sinne von Artikel 87 Absatz 3 EG-Vertrag mit dem Gemeinsamen Markt vereinbar und werden durch diese Verordnung freigestellt, wenn sie die Voraussetzungen des Artikels 3 Absatz 1 Buchstabe a) und Absatz 2 erfüllen. Beihilfen, die diese Voraussetzungen nicht erfüllen, werden von der Kommission nach den einschlägigen Gemeinschaftsrahmen, Leitlinien, Mitteilungen und Bekanntmachungen geprüft.

(3) Nach Ablauf der Geltungsdauer dieser Verordnung bleiben die danach freigestellten Beihilferegelungen noch während einer Anpassungsfrist von sechs Monaten freigestellt.

Diese Verordnung ist in allen ihren Teilen verbindlich und gilt unmittelbar in jedem Mitgliedstaat.

Brüssel, den 12. Dezember 2002

Für die Kommission

Mario MONTI

Mitglied der Kommission

ANHANG I

Von den Mitgliedstaaten zu liefernde Kurzbeschreibung der nach der Verordnung (EG) Nr. 2204/2002 über die Anwendung der Artikel 87 und 88 EG-Vertrag auf Beschäftigungsbeihilfen gewährten staatlichen Beihilfen

(Per E-Mail an stateaidgreffe@cec.eu.int)

Nummer der Beihilfe:

Die Nummer wird von der GD Wettbewerb zugeteilt.

Mitgliedstaat:

Region:

Angabe der Region, wenn eine dezentrale Stelle die Beihilfe gewährt.

Bezeichnung der Regelung:

Titel der Beihilferegelung.

Rechtsgrundlage:

Vollständiger Titel der einzelstaatlichen Rechtsgrundlage und Angabe der Fundstelle.

Jährliches Beihilfevolumen:

Die Beträge sind in Euro oder gegebenenfalls in der Landeswährung anzugeben. Angabe der jährlich veranschlagten Gesamthaushaltsmittel oder des voraussichtlichen jährlichen Steuerausfalls für sämtliche in der Regelung enthaltenen Beihilfeelemente.

Bei der Leistung von Bürgschaften ist die (maximale) Höhe der besicherten Darlehen anzugeben.

Beihilfehöchstintensität für:

— Beihilfen nach Artikel 4: Schaffung von Arbeitsplätzen

— Beihilfen nach Artikel 5: Einstellung benachteiligter und behinderter Arbeitnehmer

— Beihilfen nach Artikel 6: Mehrkosten für die Beschäftigung Behinderter

Angabe der Höchstintensitäten für die verschiedenen Arten von Beihilfen (Beihilfen nach Artikel 4, nach Artikel 5 und nach Artikel 6 der Verordnung).

Inkrafttreten der Regelung:

Angabe des Zeitpunkts, ab dem Beihilfen nach der Regelung gewährt werden dürfen.

Laufzeit der Regelung:

Angabe des genauen Datums (Jahr und Monat), bis zu dem Beihilfen nach der Regelung gewährt werden dürfen.

Zweck der Beihilfen:

— Artikel 4: Schaffung von Arbeitsplätzen

— Artikel 5: Einstellung benachteiligter und behinderter Arbeitnehmer

— Artikel 6: Beschäftigung Behinderter

In erster Linie ist anzugeben, welchem der drei genannten Ziele die Maßnahme zuzuordnen ist. Darüber hinaus können an dieser Stelle auch Angaben zu weiteren (nachrangigen) Zielsetzungen gemacht werden.

Betroffene Wirtschaftssektoren:

— Sämtliche EG-Wirtschaftssektoren ([1])

— Die gesamte verarbeitende Industrie ([1])

— Das gesamte Dienstleistungsgewerbe ([1])

— Sonstige (bitte näher erläutern)

Zutreffendes bitte ankreuzen. Sektorspezifische Beihilferegelungen fallen nicht unter diese Verordnung und sind daher anmeldepflichtig.

Name und Anschrift der Bewilligungsbehörde:

Angabe der Telefonnummer und gegebenenfalls der E-Mail-Anschrift.

([1]) Schiffbau und andere Sektoren ausgenommen, für die Verordnungen und Richtlinien beihilferechtliche Sondervorschriften vorsehen.

Sonstige Auskünfte:

Wird die Regelung teilweise mit Gemeinschaftsmitteln finanziert, ist folgender Satz hinzuzufügen:

„Die Regelung wird teilweise mit Mitteln [Angabe der Quelle] finanziert."

Überschreitet die Laufzeit der Regelung die Geltungsdauer dieser Verordnung, ist folgender Satz hinzuzufügen:

„Nach Ablauf der Freistellungsverordnung am 31. Dezember 2006 gilt noch eine sechsmonatige Übergangsfrist."

ANHANG II

Form des der Kommission zu übermittelnden periodischen Berichts

Standardangaben für den Jahresbericht über Beihilferegelungen, die unter die gemäß Artikel 1 der Verordnung (EG) Nr. 994/98 erlassenen Gruppenfreistellungsverordnungen fallen

Die Berichte, die die Mitgliedstaaten der Kommission gemäß der aufgrund der Verordnung (EG) Nr. 994/98 erlassenen Gruppenfreistellungsverordnungen zu übermitteln haben, sind unter Verwendung nachstehender Standardangaben zu erstellen.

Sie sind per E-Mail an die folgende Anschrift zu senden:

stateaidgreffe@cec.eu.int.

Erforderliche Angaben für alle Beihilfereglungen, die unter die aufgrund von Artikel 1 der Verordnung (EG) Nr. 994/98 des Rates erlassenen Freistellungsverordnungen fallen

1. Bezeichnung und Nummer der Beihilferegelung.

2. Anwendbare Freistellungsverordnung der Kommission.

3. Ausgaben

   Die Ausgaben sind für alle in der Regelung angewandten Beihilfeelemente (z. B. Zuschuss, zinsgünstiges Darlehen, Bürgschaft) getrennt auszuweisen und in Euro bzw. gegebenenfalls in der jeweiligen Landeswährung anzugeben. Bei Steuervergünstigungen sind die jährlichen Einnahmeausfälle anzugeben. In Ermangelung genauer Zahlen kann es sich im letzteren Fall auch um Schätzwerte handeln.

   Die Zahlen betreffend die Ausgaben sollten wie folgt geliefert werden:

   Für das jeweilige Berichtsjahr ist aufgeschlüsselt nach den in der Regelung angewandten Beihilfeelementen (z. B. Zuschuss, zinsgünstiges Darlehen, Bürgschaft) Folgendes anzugeben:

3.1. Mittelbindungen, (geschätzter) Steuerausfall oder sonstige Einnahmeausfälle, Bürgschaftsleistungen usw. für alle neuen Förderprojekte. Bei Bürgschaftsregelungen ist die Gesamtsumme der neu ausgereichten Bürgschaften anzugeben.

3.2. Tatsächliche Zahlungen, (geschätzter) Steuerausfall oder sonstige Einnahmeausfälle, Bürgschaftsleistungen usw. für alle neuen und laufenden Förderprojekte. Bei Bürgschaftsregelungen ist Folgendes anzugeben: Gesamtgarantiesumme, Einnahmen aus Gebühren, Einnahmen aufgrund des Erlöschens der Bürgschaft, fällige Zahlungen infolge des Eintritts des Garantiefalls, laufendes Betriebsergebnis.

3.3. Zahl der neu bewilligten Beihilfen.

3.4. Geschätzte Zahl der infolge der neu gewährten Beihilfen geschaffenen Arbeitsplätze/eingestellten benachteiligten oder behinderten Arbeitnehmer/weiterbeschäftigten behinderten Arbeitnehmer (sofern zutreffend). Beihilfen für die Einstellung benachteiligter Arbeitnehmer sind nach den in Artikel 2 Buchstabe f) genannten Kategorien aufzuschlüsseln.

3.5.

3.6. Regionale Aufschlüsselung der unter 3.1 aufgeführten Ausgaben entweder nach Regionen der NUTS-II-Ebene [1] oder darunter oder nach Fördergebieten gemäß Artikel 87 Absatz 3 Buchstabe a), Buchstabe b) und Nicht-Fördergebieten.

3.7. Sektorale Aufschlüsselung der unter 3.1 aufgeführten Beträge nach Wirtschaftszweigen (ist mehr als nur ein Wirtschaftszweig betroffen, sind die Beträge anteilig auszuweisen):
   - — Kohlenbergbau.
   - — Verarbeitende Industrie:
     - — Stahl
     - — Schiffbau
     - — Kunstfaserindustrie
     - — Kfz-Industrie
     - — Sonstige.
   - — Dienstleistungen
     - — Verkehr
     - — Finanzdienstleistungen
     - — Sonstige.
   - — Sonstige Wirtschaftssektoren (bitte angeben).

4. Sonstige zweckdienliche Auskünfte und Bemerkungen.

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[1] NUTS-Systematik der Gebietseinheiten für die Statistik in der EG.

I

(Gesetzgebungsakte)

VERORDNUNGEN

VERORDNUNG (EU) Nr. 181/2011 DES EUROPÄISCHEN PARLAMENTS UND DES RATES

vom 16. Februar 2011

über die Fahrgastrechte im Kraftomnibusverkehr und zur Änderung der Verordnung (EG) Nr. 2006/2004

(Text von Bedeutung für den EWR)

DAS EUROPÄISCHE PARLAMENT UND DER RAT DER EUROPÄISCHEN UNION —

gestützt auf den Vertrag über die Arbeitsweise der Europäischen Union, insbesondere auf Artikel 91 Absatz 1,

auf Vorschlag der Europäischen Kommission,

nach Stellungnahme des Europäischen Wirtschafts- und Sozialausschusses [1],

nach Anhörung des Ausschusses der Regionen,

gemäß dem ordentlichen Gesetzgebungsverfahren, aufgrund des vom Vermittlungsausschuss am 24. Januar 2011 gebilligten gemeinsamen Entwurfs [2],

in Erwägung nachstehender Gründe:

(1) Die Maßnahmen der Union im Bereich des Kraftomnibusverkehrs sollten unter anderem darauf abzielen, überall ein hohes, dem Standard anderer Verkehrsträger vergleichbares Schutzniveau für die Fahrgäste sicherzustellen. Ferner sollte den allgemeinen Erfordernissen des Verbraucherschutzes in vollem Umfang Rechnung getragen werden.

(2) Da die Busfahrgäste im Beförderungsvertrag die schwächere Partei sind, sollte allen Fahrgästen ein Mindestmaß an Schutz gewährt werden.

(3) Die Maßnahmen der Union zur Verbesserung der Fahrgastrechte im Kraftomnibusverkehr sollten den Besonderheiten dieses überwiegend von kleinen und mittleren Unternehmen geprägten Sektors Rechnung tragen.

(4) Die Fahrgäste und zumindest diejenigen Personen, für die diese kraft Gesetzes unterhaltspflichtig waren oder zukünftig unterhaltspflichtig geworden wären, sollten nach Maßgabe der Richtlinie 2009/103/EG des Europäischen Parlaments und des Rates vom 16. September 2009 über die Kraftfahrzeug-Haftpflichtversicherung und die Kontrolle der entsprechenden Versicherungspflicht [3] im Falle eines aus der Nutzung des Kraftomnibusses resultierenden Unfalls angemessen geschützt sein.

(5) Bei der Bestimmung des nationalen Rechts, das für die Entschädigung bei Tod — einschließlich angemessener Kosten für die Bestattung — oder Körperverletzung oder bei Verlust oder Beschädigung von Gepäck infolge eines aus der Nutzung des Kraftomnibusses resultierenden Unfalls anwendbar ist, sollten die Verordnung (EG) Nr. 864/2007 des Europäischen Parlaments und des Rates vom 11. Juli 2007 über das auf außervertragliche Schuldverhältnisse anzuwendende Recht („Rom II") [4] und die Verordnung (EG) Nr. 593/2008 des Europäischen Parlaments und des Rates vom 17. Juni 2008 über das auf vertragliche Schuldverhältnisse anzuwendende Recht (Rom I) [5] berücksichtigt werden.

(6) Die Fahrgäste sollten — abgesehen von der in den anwendbaren nationalen Rechtsvorschriften vorgesehenen Entschädigung bei Tod oder Körperverletzung oder bei Verlust oder Beschädigung von Gepäck infolge eines aus der Nutzung des Kraftomnibusses resultierenden Unfalls — Anspruch auf Unterstützung in Bezug auf ihre unmittelbaren praktischen Bedürfnisse nach einem Unfall haben. Diese Unterstützung sollte erforderlichenfalls erste Hilfe, Unterbringung, Verpflegung, Kleidung und Beförderung umfassen.

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[1] ABl. C 317 vom 23.12.2009, S. 99.

[2] Standpunkt des Europäischen Parlaments vom 23. April 2009 (ABl. C 184 E vom 8.7.2010, S. 312), Standpunkt des Rates in erster Lesung vom 11. März 2010 (ABl. C 122 E vom 11.5.2010, S. 1), Standpunkt des Europäischen Parlaments vom 6. Juli 2010 (noch nicht im Amtsblatt veröffentlicht), Beschluss des Rates vom 31. Januar 2011 und legislative Entschließung des Europäischen Parlaments vom 15. Februar 2011 (noch nicht im Amtsblatt veröffentlicht).

[3] ABl. L 263 vom 7.10.2009, S. 11.

[4] ABl. L 199 vom 31.7.2007, S. 40.

[5] ABl. L 177 vom 4.7.2008, S. 6.

(7) Busverkehrsdienste sollten den Bürgern allgemein zugute kommen. Daher sollten behinderte Menschen und Personen mit eingeschränkter Mobilität unabhängig von der Ursache der Beeinträchtigung Busreisemöglichkeiten haben, die denen anderer Bürger vergleichbar sind. Behinderte Menschen und Personen mit eingeschränkter Mobilität haben das gleiche Recht auf Freizügigkeit, Entscheidungsfreiheit und Nichtdiskriminierung wie alle anderen Bürger.

(8) Um behinderten Menschen und Personen mit eingeschränkter Mobilität Busreisemöglichkeiten zu eröffnen, die denen anderer Bürger vergleichbar sind, sollten vor dem Hintergrund von Artikel 9 des Übereinkommens der Vereinten Nationen über die Rechte von Menschen mit Behinderungen Regeln für die Gleichstellung dieser Personen und für ihre Unterstützung während der Reise festgelegt werden. Die Beförderung dieser Personen sollte daher akzeptiert und nicht wegen ihrer Behinderung oder eingeschränkten Mobilität verweigert werden, abgesehen von bestimmten Ausnahmen, die aus Gründen der Sicherheit oder wegen der Fahrzeugkonstruktion oder der Infrastruktur gerechtfertigt sind. Im Rahmen der einschlägigen Rechtsvorschriften über den Schutz der Arbeitnehmer sollten behinderte Menschen und Personen mit eingeschränkter Mobilität Anspruch auf Hilfe an Busbahnhöfen und in den Fahrzeugen haben. Im Interesse der sozialen Integration sollten die Betroffenen diese Hilfe kostenlos erhalten. Die Beförderer sollten Zugangsbedingungen festlegen, vorzugsweise unter Verwendung des europäischen Normungssystems.

(9) Bei der Entscheidung über die Gestaltung neuer Busbahnhöfe und bei umfassenden Renovierungsarbeiten sollten die Busbahnhofbetreiber bemüht sein, den Bedürfnissen von behinderten Menschen und Personen mit eingeschränkter Mobilität entsprechend den Anforderungen einer Konzeption für alle Verwendungsarten („Design for all") Rechnung zu tragen. In jedem Fall sollten die Busbahnhofbetreiber Kontaktstellen angeben, bei denen die Betroffenen ihre Ankunft und ihren Bedarf an Hilfeleistung anmelden können.

(10) Entsprechend sollten Beförderer unbeschadet bestehender oder künftiger Rechtsvorschriften über technische Anforderungen für Kraftomnibusse bei der Entscheidung über die Ausrüstung neuer und neu einzurichtender Fahrzeuge solche Bedürfnisse, soweit möglich, berücksichtigen.

(11) Die Mitgliedstaaten sollten bemüht sein, die bestehende Infrastruktur zu verbessern, wo dies notwendig ist, um Beförderer in die Lage zu versetzen, den Zugang für behinderte Menschen oder Personen mit eingeschränkter Mobilität zu gewährleisten und geeignete Hilfestellungen anzubieten.

(12) Damit das Personal auf die Bedürfnisse von behinderten Menschen und Personen mit eingeschränkter Mobilität eingehen kann, sollte es angemessen geschult werden. Um die gegenseitige Anerkennung der nationalen Ausbildungsnachweise der Fahrer zu erleichtern, könnten Fahrer im Rahmen der Grundqualifikation und Weiterbildung im Sinne der Richtlinie 2003/59/EG des Europäischen Parlaments und des Rates vom 15. Juli 2003 über die Grundqualifikation und Weiterbildung der Fahrer bestimmter Kraftfahrzeuge für den Güter- oder Personenkraftverkehr [1] auch im Hinblick auf die Sensibilisierung für Behinderungen geschult werden. Damit sich die Einführung der Schulungsanforderungen mit den in jener Richtlinie vorgegebenen Fristen vereinbaren lässt, sollte für einen begrenzten Zeitraum eine Ausnahme gewährt werden können.

(13) Organisationen, die behinderte Menschen oder Personen mit eingeschränkter Mobilität vertreten, sollten bei der inhaltlichen Vorbereitung der Schulungen in Behindertenfragen konsultiert oder in diese Arbeit einbezogen werden.

(14) Zu den Rechten der Busfahrgäste sollte ein Anspruch auf Informationen über den Verkehrsdienst sowohl vor als auch während der Fahrt gehören. Alle wesentlichen Informationen für Busfahrgäste sollten auf Verlangen auch in alternativen, behinderten Menschen und Personen mit eingeschränkter Mobilität zugänglichen Formen bereitgestellt werden, wie zum Beispiel in großen Buchstaben, einfacher Sprache, Blindenschrift, mit Hilfe von Adaptionstechnik zugänglichen Mitteilungen in elektronischer Form oder als Tonbänder.

(15) Diese Verordnung sollte die Möglichkeiten der Beförderer, nach dem anwendbaren nationalen Recht Ausgleichsansprüche gegen andere Personen — auch Dritte — geltend zu machen, nicht einschränken.

(16) Die Unannehmlichkeiten, die den Fahrgästen durch Annullierung oder erhebliche Verspätung von Fahrten entstehen, sollten verringert werden. Deshalb sollten die Fahrgäste, die von einem Busbahnhof abreisen, in angemessener Weise betreut und in für alle Fahrgäste zugänglicher Form informiert werden. Sie sollten zudem die Möglichkeit haben, ihre Fahrt zu stornieren und sich den Fahrpreis erstatten zu lassen oder ihre Reise fortzusetzen oder eine Weiterreise mit geänderter Streckenführung zu annehmbaren Bedingungen in Anspruch zu nehmen. Versäumen die Beförderer die Leistung der notwendigen Hilfe, sollten die Fahrgäste Anspruch auf finanzielle Entschädigung haben.

(17) Die Beförderer sollten unter Beteiligung der interessierten Kreise, der Berufsverbände und der Verbände von Verbrauchern, Fahrgästen, behinderten Menschen und Personen mit eingeschränkter Mobilität zusammenarbeiten, um auf nationaler oder europäischer Ebene Vereinbarungen zu treffen. Diese Vereinbarungen sollten auf die Verbesserung der Information, Betreuung und Unterstützung der Fahrgäste bei Fahrtunterbrechung ausgerichtet sein, insbesondere bei großer Verspätung oder Fahrtannullierung, wobei besonders Fahrgäste mit besonderen Bedürfnissen wegen Behinderungen, eingeschränkter Mobilität, Krankheit, fortgeschrittenem Alter und Schwangerschaft sowie begleitende Fahrgäste und Fahrgäste, die mit Kleinkindern reisen, im Mittelpunkt stehen sollten. Nationale Durchsetzungsstellen sollten von diesen Vereinbarungen in Kenntnis gesetzt werden.

[1] ABl. L 226 vom 10.9.2003, S. 4.

(18) Diese Verordnung sollte die Rechte der Fahrgäste, die in der Richtlinie 90/314/EWG des Rates vom 13. Juni 1990 über Pauschalreisen [1] begründet sind, nicht berühren. Diese Verordnung sollte nicht in Fällen gelten, in denen eine Pauschalreise aus anderen Gründen als der Annullierung des Busverkehrsdienstes annulliert wird.

(19) Die Fahrgäste sollten umfassend über ihre Rechte nach dieser Verordnung informiert werden, damit sie diese Rechte auch tatsächlich wahrnehmen können.

(20) Die Fahrgäste sollten ihre Rechte durch geeignete Beschwerdeverfahren der Beförderer wahrnehmen können und indem sie gegebenenfalls Beschwerde bei den vom betreffenden Mitgliedstaat hierzu benannten Stellen erheben.

(21) Die Mitgliedstaaten sollten die Einhaltung dieser Verordnung sicherstellen und eine oder mehrere zuständige Stellen zur Wahrnehmung der Überwachungs- und Durchsetzungsaufgaben benennen. Das Recht der Fahrgäste, Forderungen nach nationalem Recht gerichtlich geltend zu machen, wird dadurch nicht berührt.

(22) Unter Berücksichtigung der von den Mitgliedstaaten festgelegten Beschwerdeverfahren sollte eine Beschwerde über die Hilfeleistung vorzugsweise an die Stelle bzw. Stellen gerichtet werden, die zur Durchsetzung dieser Verordnung in dem Mitgliedstaat benannt wurde(n), in dem der Abfahrtsort bzw. der Ankunftsort liegt.

(23) Die Mitgliedstaaten sollten für die Benutzung öffentlicher Verkehrsmittel und die Benutzung integrierter Informationen und integrierter Fahrscheine werben, um bestmögliche Ergebnisse hinsichtlich der Benutzung und der Interoperabilität der verschiedenen Verkehrsträger und Betreiber zu erzielen.

(24) Die Mitgliedstaaten sollten für Verstöße gegen diese Verordnung Sanktionen festlegen und deren Anwendung sicherstellen. Diese Sanktionen sollten wirksam, verhältnismäßig und abschreckend sein.

(25) Da das Ziel dieser Verordnung, nämlich zu gewährleisten, dass Busfahrgäste in allen Mitgliedstaaten Schutz und Unterstützung auf gleichwertigem Niveau genießen, auf Ebene der Mitgliedstaaten nicht ausreichend verwirklicht werden kann und daher wegen des Umfangs und der Wirkungen der Maßnahme besser auf Unionsebene zu verwirklichen ist, kann die Union im Einklang mit dem in Artikel 5 des Vertrags über die Europäische Union niedergelegten Subsidiaritätsprinzip tätig werden. Entsprechend dem in demselben Artikel genannten Grundsatz der Verhältnismäßigkeit geht diese Verordnung nicht über das zur Erreichung dieses Ziels erforderliche Maß hinaus.

(26) Diese Verordnung sollte die Richtlinie 95/46/EG des Europäischen Parlaments und des Rates vom 24. Oktober 1995 zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten und zum freien Datenverkehr [2] unberührt lassen.

(27) Die Durchsetzung dieser Verordnung sollte sich auf die Verordnung (EG) Nr. 2006/2004 des Europäischen Parlaments und des Rates vom 27. Oktober 2004 über die Zusammenarbeit zwischen den für die Durchsetzung der Verbraucherschutzgesetze zuständigen nationalen Behörden („Verordnung über die Zusammenarbeit im Verbraucherschutz“) [3] stützen. Daher sollte die genannte Verordnung entsprechend geändert werden.

(28) Die Verordnung steht im Einklang mit den Grundrechten und Grundsätzen, die insbesondere mit der in Artikel 6 des Vertrags über die Europäische Union genannten Charta der Grundrechte der Europäischen Union anerkannt wurden, wobei auch die Richtlinie 2000/43/EG des Rates vom 29. Juni 2000 zur Anwendung des Gleichbehandlungsgrundsatzes ohne Unterschied der Rasse oder der ethnischen Herkunft [4] sowie die Richtlinie 2004/113/EG des Rates vom 13. Dezember 2004 zur Verwirklichung des Grundsatzes der Gleichbehandlung von Männern und Frauen beim Zugang zu und bei der Versorgung mit Gütern und Dienstleistungen [5] zu berücksichtigen sind —

HABEN FOLGENDE VERORDNUNG ERLASSEN:

KAPITEL I

ALLGEMEINE BESTIMMUNGEN

Artikel 1

Gegenstand

Diese Verordnung enthält Vorschriften für den Kraftomnibusverkehr, die Folgendes betreffen:

a) das Verbot der Diskriminierung von Fahrgästen hinsichtlich der Beförderungsbedingungen der Beförderer;

b) die Rechte der Fahrgäste bei Tod oder Körperverletzung oder bei Verlust oder Beschädigung von Gepäck infolge von aus der Nutzung des Kraftomnibusses resultierenden Unfällen;

c) das Verbot der Diskriminierung und die obligatorische Unterstützung von behinderten Menschen und Personen mit eingeschränkter Mobilität;

d) die Rechte der Fahrgäste bei Annullierung und Verspätung;

e) die Informationen, die den Fahrgästen mindestens verfügbar zu machen sind;

f) den Umgang mit Beschwerden;

g) allgemeine Durchsetzungsvorschriften.

[1] ABl. L 158 vom 23.6.1990, S. 59.

[2] ABl. L 281 vom 23.11.1995, S. 31.

[3] ABl. L 364 vom 9.12.2004, S. 1.

[4] ABl. L 180 vom 19.7.2000, S. 22.

[5] ABl. L 373 vom 21.12.2004, S. 37.

Artikel 2

Geltungsbereich

(1) Diese Verordnung gilt für Fahrgäste von Linienverkehrsdiensten für nicht näher bestimmte Gruppen von Fahrgästen, bei denen der Abfahrts- oder der Ankunftsort des Fahrgastes im Hoheitsgebiet eines Mitgliedstaats liegt und bei denen die planmäßige Wegstrecke 250 km oder mehr beträgt.

(2) Bezüglich der Verkehrsdienste gemäß Absatz 1, bei denen die planmäßige Wegstrecke weniger als 250 km beträgt, gelten Artikel 4 Absatz 2, Artikel 9, Artikel 10 Absatz 1, Artikel 16 Absatz 1 Buchstabe b und Artikel 16 Absatz 2, Artikel 17 Absätze 1 und 2 sowie die Artikel 24 bis 28.

(3) Zudem gilt diese Verordnung mit Ausnahme der Artikel 9 bis 16, des Artikels 17 Absatz 3 und der Kapitel IV, V und VI für Passagiere von Gelegenheitsverkehrsdiensten, wenn der ursprüngliche Abfahrtsort oder der endgültige Ankunftsort des Fahrgastes im Hoheitsgebiet eines Mitgliedstaats liegt.

(4) Mit Ausnahme von Artikel 4 Absatz 2, Artikel 9, Artikel 10 Absatz 1, Artikel 16 Absatz 1 Buchstabe b und Artikel 16 Absatz 2, Artikel 17 Absätze 1 und 2 sowie Artikel 24 bis 28 kann ein Mitgliedstaat inländische Linienverkehrsdienste in transparenter und nichtdiskriminierender Weise von der Anwendung dieser Verordnung ausnehmen. Diese Ausnahmen können ab dem Beginn der Anwendung dieser Verordnung für einen Zeitraum von höchstens vier Jahren gewährt werden, der einmal verlängert werden kann.

(5) Ein Mitgliedstaat kann in transparenter und nichtdiskriminierender Weise für einen Zeitraum von höchstens vier Jahren ab dem Beginn der Anwendung dieser Verordnung bestimmte Linienverkehrsdienste von der Anwendung dieser Verordnung ausnehmen, weil ein erheblicher Teil dieser Linienverkehrsdienste, der mindestens einen planmäßigen Halt umfasst, außerhalb der Union betrieben wird. Diese Ausnahmen können einmal verlängert werden.

(6) Die Mitgliedstaaten setzen die Kommission von den Ausnahmen, die sie für einzelne Arten von Diensten gemäß den Absätzen 4 und 5 gewähren, in Kenntnis. Die Kommission ergreift die geeigneten Maßnahmen, wenn sie der Auffassung ist, dass eine solche Ausnahme nicht mit diesem Artikel im Einklang steht. Die Kommission legt dem Europäischen Parlament und dem Rat spätestens bis zum 8. März 2018 einen Bericht über die gemäß den Absätzen 4 und 5 gewährten Ausnahmen vor.

(7) Die Bestimmungen dieser Verordnung sind nicht als gegenläufig zu oder als Einführung zusätzlicher Anforderungen zu denen in bestehenden Rechtsvorschriften über die technischen Anforderungen für Kraftomnibusse oder Infrastruktur oder Einrichtungen an den Bushaltestellen und Busbahnhöfen auszulegen.

(8) Diese Verordnung berührt nicht die Fahrgastrechte nach der Richtlinie 90/314/EWG und gilt nicht für Fälle, in denen eine Pauschalreise gemäß der genannten Richtlinie aus anderen Gründen als der Annullierung eines Linienverkehrsdienstes annulliert wird.

Artikel 3

Begriffsbestimmungen

Im Sinne dieser Verordnung bezeichnet der Begriff

a) „Linienverkehrsdienste“ Dienste zur Beförderung von Fahrgästen mit Kraftomnibussen in festgelegten Abständen auf einer bestimmten Verkehrsstrecke, wobei Fahrgäste an vorher festgelegten Haltestellen aufgenommen oder abgesetzt werden;

b) „Gelegenheitsverkehrsdienste“ Verkehrsdienste, die nicht der Begriffsbestimmung der Linienverkehrsdienste entsprechen und deren Hauptmerkmal die Beförderung vorab gebildeter Fahrgastgruppen mit Kraftomnibussen auf Initiative eines Auftraggebers oder des Verkehrsunternehmers selbst ist;

c) „Beförderungsvertrag“ einen Vertrag zwischen einem Beförderer und einem Fahrgast über die Erbringung eines oder mehrerer Linien- oder Gelegenheitsverkehrsdienste;

d) „Fahrschein“ ein gültiges Dokument oder einen anderen Nachweis für einen Beförderungsvertrag;

e) „Beförderer“ eine natürliche oder juristische Person, die kein Reiseveranstalter, kein Reisevermittler und kein Fahrscheinverkäufer ist und die im Rahmen eines Linien- oder Gelegenheitsverkehrsdienstes Beförderungen für die allgemeine Öffentlichkeit anbietet;

f) „ausführender Beförderer“ eine andere natürliche oder juristische Person als den Beförderer, die die Beförderung tatsächlich ganz oder teilweise durchführt;

g) „Fahrscheinverkäufer“ jeden Vermittler, der im Namen eines Beförderers Beförderungsverträge schließt;

h) „Reisevermittler“ jeden Vermittler, der im Namen eines Fahrgasts Beförderungsverträge schließt;

i) „Reiseveranstalter“ einen Veranstalter oder Vermittler im Sinne des Artikels 2 Nummern 2 und 3 der Richtlinie 90/314/EWG, der kein Beförderer ist;

j) „behinderter Mensch“ oder „Person mit eingeschränkter Mobilität“ eine Person, deren Mobilität bei der Benutzung von Beförderungsmitteln wegen einer körperlichen (sensorischen oder motorischen, dauerhaften oder zeitweiligen) Behinderung, einer geistigen Behinderung oder Beeinträchtigung, wegen anderer Behinderungen oder aufgrund des Alters eingeschränkt ist und deren Zustand angemessene Unterstützung und eine Anpassung der für alle Fahrgäste bereitgestellten Dienstleistungen an ihre besonderen Bedürfnisse erfordert;

k) „Zugangsbedingungen“ die einschlägigen Normen, Leitlinien und Informationen betreffend die Zugänglichkeit von Kraftomnibussen und/oder bestimmten Busbahnhöfen einschließlich ihrer Einrichtungen für behinderte Menschen oder Personen mit eingeschränkter Mobilität;

l) „Reservierung“ die Buchung eines Sitzplatzes in einem Kraftomnibus eines Linienverkehrsdienstes für eine bestimmte Abfahrtszeit;

m) „Busbahnhof“ einen mit Personal besetzten Busbahnhof, an dem ein Linienverkehrsdienst auf einer bestimmten Strecke planmäßig hält, um Fahrgäste aufzunehmen oder abzusetzen, und der mit Einrichtungen wie Abfertigungsschaltern, Warteräumen oder Fahrscheinschaltern ausgestattet ist;

n) „Bushaltestelle“ jede Stelle, die kein Busbahnhof ist und an der ein Linienverkehrsdienst auf einer bestimmten Strecke planmäßig hält, um Fahrgäste aufzunehmen oder abzusetzen;

o) „Busbahnhofbetreiber“ eine Stelle in einem Mitgliedstaat, die für den Betrieb eines bestimmten Busbahnhofs verantwortlich ist;

p) „Annullierung“ die Nichtdurchführung eines geplanten Linienverkehrsdienstes;

q) „Verspätung“ eine Differenz zwischen der planmäßigen Abfahrtszeit des Linienverkehrsdienstes gemäß dem veröffentlichten Fahrplan und dem Zeitpunkt seiner tatsächlichen Abfahrt.

Artikel 4

Fahrscheine und nichtdiskriminierende Beförderungsbedingungen

(1) Die Beförderer stellen dem Fahrgast einen Fahrschein aus, sofern nicht andere Dokumente den Beförderungsanspruch begründen. Ein Fahrschein kann in elektronischer Form ausgestellt werden.

(2) Unbeschadet der Sozialtarife werden die von Beförderern angewandten Vertragsbedingungen und Tarife der Allgemeinheit ohne jegliche unmittelbare oder mittelbare Diskriminierung aufgrund der Staatsangehörigkeit des Endkunden oder des Ortes der Niederlassung des Beförderers oder Fahrscheinverkäufers in der Union angeboten.

Artikel 5

Andere ausführende Parteien

(1) Wurde die Erfüllung der Verpflichtungen nach dieser Verordnung einem ausführenden Beförderer, einem Fahrscheinverkäufer oder einer anderen Person übertragen, so haftet der Beförderer, Reisevermittler, Reiseveranstalter oder Busbahnhofbetreiber, der diese Verpflichtungen übertragen hat, dennoch für Handlungen und Unterlassungen dieser ausführenden Partei.

(2) Außerdem unterliegt die Partei, der der Beförderer, Reisevermittler, Reiseveranstalter oder Busbahnhofbetreiber die Erfüllung einer Verpflichtung übertragen hat, in Bezug auf die ihr übertragene Verpflichtung den Bestimmungen dieser Verordnung.

Artikel 6

Ausschluss des Rechtsverzichts und der Rechtsbeschränkung

(1) Die Verpflichtungen gegenüber den Fahrgästen gemäß dieser Verordnung dürfen nicht eingeschränkt oder aufgehoben werden, insbesondere nicht durch abweichende oder einschränkende Bestimmungen im Beförderungsvertrag.

(2) Die Beförderer können Vertragsbedingungen anbieten, die für den Fahrgast günstiger sind als die in dieser Verordnung festgelegten Bedingungen.

KAPITEL II

ENTSCHÄDIGUNG UND HILFELEISTUNG BEI UNFÄLLEN

Artikel 7

Tod oder Körperverletzung von Fahrgästen und Verlust oder Beschädigung von Gepäck

(1) Die Fahrgäste haben gemäß den geltenden nationalen Rechtsvorschriften Anspruch auf Entschädigung bei Tod — einschließlich angemessener Kosten für die Bestattung — oder Körperverletzung sowie bei Verlust oder Beschädigung von Gepäck bei aus der Nutzung des Kraftomnibusses resultierenden Unfällen. Beim Tod eines Fahrgasts gilt dieses Recht mindestens für Personen, für die der Fahrgast kraft Gesetzes unterhaltspflichtig war oder zukünftig unterhaltspflichtig geworden wäre.

(2) Die Höhe der Entschädigung wird gemäß den geltenden nationalen Rechtsvorschriften berechnet. Darin vorgesehene Höchstgrenzen für die Entschädigung bei Tod oder Körperverletzung sowie bei Verlust oder Beschädigung von Gepäck dürfen pro Schadensfall nicht weniger betragen als

a) 220 000 EUR je Fahrgast;

b) 1 200 EUR je Gepäckstück. Die Entschädigung im Falle einer Beschädigung von Rollstühlen und anderen Mobilitätshilfen oder Hilfsgeräten entspricht stets dem Wiederbeschaffungswert oder den Reparaturkosten der verloren gegangenen oder beschädigten Ausrüstung.

Artikel 8

Unmittelbare praktische Bedürfnisse von Fahrgästen

Bei aus der Nutzung des Kraftomnibusses resultierenden Unfällen leistet der Beförderer angemessene und verhältnismäßige Hilfe im Hinblick auf die unmittelbaren praktischen Bedürfnisse der Fahrgäste nach dem Unfall. Diese Hilfe umfasst erforderlichenfalls Unterbringung, Verpflegung, Kleidung, Beförderung und die Bereitstellung erster Hilfe. Hilfeleistung stellt in keinem Fall eine Haftungsanerkennung dar.

Der Beförderer kann die Gesamtkosten der Unterbringung je Fahrgast auf 80 EUR pro Nacht und auf höchstens zwei Nächte beschränken.

KAPITEL III

RECHTE VON BEHINDERTEN MENSCHEN UND PERSONEN MIT EINGESCHRÄNKTER MOBILITÄT

Artikel 9

Anspruch auf Beförderung

(1) Beförderer, Reisevermittler und Reiseveranstalter dürfen sich nicht allein aufgrund der Behinderung oder der eingeschränkten Mobilität einer Person weigern, eine Reservierung vorzunehmen, einen Fahrschein auszustellen oder auf sonstige Weise zur Verfügung zu stellen oder die Person an Bord des Fahrzeugs zu nehmen.

(2) Reservierungen und Fahrscheine sind für behinderte Menschen und Personen mit eingeschränkter Mobilität ohne Aufpreis anzubieten.

Artikel 10

Ausnahmen und besondere Bedingungen

(1) Unbeschadet des Artikels 9 Absatz 1 können Beförderer, Reisevermittler und Reiseveranstalter sich aufgrund der Behinderung oder eingeschränkten Mobilität einer Person weigern, eine Reservierung vorzunehmen, einen Fahrschein auszustellen oder auf sonstige Weise zur Verfügung zu stellen oder die Person an Bord des Fahrzeugs zu nehmen,

a) um geltenden Sicherheitsanforderungen nachzukommen, die durch Vorschriften des internationalen Rechts, des Unionsrechts oder des nationalen Rechts festgelegt sind, oder um Gesundheits- und Sicherheitsanforderungen nachzukommen, die von den zuständigen Behörden erlassen wurden;

b) wenn es wegen der Bauart des Fahrzeugs oder der Infrastruktur, einschließlich der Busbahnhöfe und Bushaltestellen, physisch nicht möglich ist, den Einstieg, den Ausstieg oder die Beförderung des behinderten Menschen oder der Person mit eingeschränkter Mobilität auf sichere und operationell durchführbare Weise vorzunehmen.

(2) Weigert sich ein Beförderer, Reisevermittler oder Reiseveranstalter aus den in Absatz 1 angeführten Gründen, eine Reservierung vorzunehmen oder einen Fahrschein auszustellen oder auf sonstige Weise zur Verfügung zu stellen, so unterrichtet er die betreffende Person über jede annehmbare Beförderungsalternative mit einem Dienst des Beförderers.

(3) Wird einer Person, die eine Reservierung oder einen Fahrschein besitzt und die Anforderungen des Artikels 14 Absatz 1 Buchstabe a erfüllt hat, die Beförderung aufgrund ihrer Behinderung oder eingeschränkten Mobilität dennoch verweigert, so wird dieser Person und allen Begleitpersonen im Sinne des Absatzes 4 des vorliegenden Artikels Folgendes zur Auswahl angeboten:

a) die Erstattung des Fahrpreises und gegebenenfalls zum frühest möglichen Zeitpunkt die kostenlose Rückfahrt zum ersten Ausgangspunkt wie im Beförderungsvertrag angegeben und

b) sofern machbar, die Fortsetzung der Fahrt oder die Weiterreise mit geänderter Streckenführung durch einen angemessenen alternativen Verkehrsdienst zum im Beförderungsvertrag angegebenen Bestimmungsort.

Der Anspruch auf Erstattung des für den Fahrschein entrichteten Entgelts wird nicht dadurch berührt, dass keine Meldung gemäß Artikel 14 Absatz 1 Buchstabe a erfolgt ist.

(4) Weigert sich ein Beförderer, Reisevermittler oder Reiseveranstalter aus den in Absatz 1 genannten Gründen aufgrund der Behinderung oder der eingeschränkten Mobilität einer Person, eine Buchung vorzunehmen, einen Fahrschein auszustellen oder auf sonstige Weise zur Verfügung zu stellen oder die Person an Bord des Fahrzeugs zu nehmen, so kann diese Person verlangen, von einer anderen Person ihrer Wahl begleitet zu werden, die in der Lage ist, die von dem behinderten Menschen oder der Person mit eingeschränkter Mobilität benötigte Hilfe zu leisten, damit die in Absatz 1 angeführten Gründe nicht mehr zutreffen.

Eine solche Begleitperson wird kostenlos befördert; sofern machbar, wird ihr ein Sitzplatz neben dem behinderten Menschen oder der Person mit eingeschränkter Mobilität zugewiesen.

(5) Machen Beförderer, Reisevermittler oder Reiseveranstalter von der Ausnahmeregelung nach Absatz 1 Gebrauch, so unterrichten sie den behinderten Menschen oder die Person mit eingeschränkter Mobilität unverzüglich — und auf Verlangen schriftlich innerhalb von fünf Arbeitstagen nach dem Antrag — über die entsprechenden Gründe.

Artikel 11

Zugänglichkeit und Information

(1) Die Beförderer und Busbahnhofbetreiber müssen über nicht diskriminierende Zugangsbedingungen für die Beförderung von behinderten Menschen und Personen mit eingeschränkter Mobilität verfügen oder solche — gegebenenfalls über ihre Organisationen — in Zusammenarbeit mit Interessenverbänden von behinderten Menschen oder Personen mit eingeschränkter Mobilität aufstellen.

(2) Die Beförderer und Busbahnhofbetreiber bringen der Öffentlichkeit die in Absatz 1 vorgesehenen Zugangsbedingungen – einschließlich den Text internationaler Rechtsvorschriften, Rechtsvorschriften der Union sowie einzelstaatlicher Rechtsvorschriften, die die Sicherheitsanforderungen festlegen, auf denen diese nicht diskriminierenden Zugangsbedingungen beruhen – physisch oder im Internet, auf Verlangen in zugänglicher Form, in denselben Sprachen zur Kenntnis, in denen Informationen in der Regel allen Fahrgästen zugänglich gemacht werden. Bei der Bereitstellung dieser Informationen wird den Bedürfnissen von behinderten Menschen und Personen mit eingeschränkter Mobilität besonders Rechnung getragen.

(3) Reiseveranstalter geben die in Absatz 1 vorgesehenen Zugangsbedingungen bekannt, die für Fahrten im Rahmen der von ihnen veranstalteten, verkauften oder zum Verkauf angebotenen Pauschalreisen gelten.

(4) Die Information über die Zugangsbedingungen nach den Absätzen 2 und 3 wird auf Verlangen des Fahrgasts physisch zur Verfügung gestellt.

(5) Beförderer, Reisevermittler und Reiseveranstalter gewährleisten, dass alle wesentlichen allgemeinen Informationen — einschließlich Online-Buchung und -Information — in Bezug auf die Fahrt und die Beförderungsbedingungen in einer für behinderte Menschen und Personen mit eingeschränkter Mobilität geeigneten und zugänglichen Form verfügbar sind. Auf Verlangen des Fahrgasts wird die Information physisch zur Verfügung gestellt.

Artikel 12

Benennung von Busbahnhöfen

Die Mitgliedstaaten benennen die Busbahnhöfe, an denen Hilfeleistung für behinderte Menschen und Personen mit eingeschränkter Mobilität vorzusehen ist. Die Mitgliedstaaten unterrichten die Kommission hierüber. Die Kommission macht eine Liste der benannten Busbahnhöfe über das Internet zugänglich.

Artikel 13

Anspruch auf Hilfeleistung an benannten Busbahnhöfen und an Bord von Kraftomnibussen

(1) Vorbehaltlich der Zugangsbedingungen gemäß Artikel 11 Absatz 1 bieten Beförderer und Busbahnhofbetreiber innerhalb ihres jeweiligen Zuständigkeitsbereichs behinderten Menschen und Personen mit eingeschränkter Mobilität an den von den Mitgliedstaaten benannten Busbahnhöfen kostenlos zumindest in dem in Anhang I Abschnitt a beschriebenen Umfang Hilfe an.

(2) Vorbehaltlich der Zugangsbedingungen gemäß Artikel 11 Absatz 1 bieten Beförderer behinderten Menschen und Personen mit eingeschränkter Mobilität in Kraftomnibussen kostenlos zumindest in dem in Anhang I Abschnitt b beschriebenen Umfang Hilfe an.

Artikel 14

Voraussetzungen für das Erbringen von Hilfeleistungen

(1) Beförderer und Busbahnhofbetreiber arbeiten zusammen, um behinderten Menschen und Personen mit eingeschränkter Mobilität unter der Voraussetzung Hilfe zu leisten, dass

a) der Hilfsbedarf dem Beförderer, Busbahnhofbetreiber, Reisevermittler oder Reiseveranstalter spätestens 36 Stunden vor dem Zeitpunkt, zu dem die Hilfeleistung benötigt wird, gemeldet wurde und

b) sich der Betreffende an der benannten Stelle einfindet, und zwar

   i) zu einem im Voraus vom Beförderer festgelegten Zeitpunkt, der höchstens 60 Minuten vor der veröffentlichten Abfahrtszeit liegt, es sei denn, eine kürzere Frist wird zwischen dem Beförderer und dem Fahrgast vereinbart, oder

   ii) falls keine Zeit angegeben wurde, spätestens 30 Minuten vor der veröffentlichten Abfahrtszeit.

(2) Zusätzlich zu Absatz 1 müssen behinderte Menschen oder Personen mit eingeschränkter Mobilität dem Beförderer, Reisevermittler oder Reiseveranstalter zum Zeitpunkt der Reservierung oder des Vorauskaufs des Fahrscheins spezifische Bedürfnisse bezüglich Sitzgelegenheiten melden, sofern die Bedürfnisse ihnen zu diesem Zeitpunkt bekannt sind.

(3) Beförderer, Busbahnhofbetreiber, Reisevermittler und Reiseveranstalter treffen alle erforderlichen Maßnahmen, um den Erhalt der Meldungen von Hilfsbedarf von behinderten Menschen und Personen mit eingeschränkter Mobilität zu erleichtern. Diese Verpflichtung gilt an allen benannten Busbahnhöfen und Verkaufsstellen, auch beim Vertrieb per Telefon und über das Internet.

(4) Ist keine Meldung gemäß Absatz 1 Buchstabe a oder Absatz 2 erfolgt, unternehmen die Beförderer, Busbahnhofbetreiber, Reisevermittler und Reiseveranstalter alle zumutbaren Anstrengungen, um zu gewährleisten, dass die Hilfeleistung derart erfolgt, dass behinderte Menschen oder Personen mit eingeschränkter Mobilität in abfahrende Verkehrsdienste einsteigen, zu Anschlussverkehrsdiensten umsteigen und aus ankommenden Verkehrsdiensten aussteigen können, für die sie einen Fahrschein erworben haben.

(5) Die Busbahnhofbetreiber legen innerhalb oder außerhalb des Busbahnhofs eine Anlaufstelle fest, an der behinderte Menschen oder Personen mit eingeschränkter Mobilität ihre Ankunft melden und um Hilfe ersuchen können. Diese Anlaufstelle muss klar ausgeschildert sein und in zugänglicher Form grundlegende Auskünfte über den Busbahnhof und die angebotene Hilfeleistung bieten.

Artikel 15

Mitteilungen an Dritte

Erhalten Reisevermittler oder Reiseveranstalter eine Meldung nach Artikel 14 Absatz 1 Buchstabe a, so leiten sie diese innerhalb ihrer normalen Bürozeiten so bald wie möglich an den Beförderer oder den Busbahnhofbetreiber weiter.

Artikel 16

Schulung

(1) Beförderer und gegebenenfalls Busbahnhofbetreiber legen Verfahren für Schulungen in Behindertenfragen einschließlich entsprechender Instruktionen fest und stellen sicher,

a) dass ihre Mitarbeiter, bei denen es sich nicht um Fahrer handelt, einschließlich der Mitarbeiter aller anderen ausführenden Parteien, die behinderten Menschen und Personen mit eingeschränkter Mobilität unmittelbar Hilfe leisten, eine Schulung oder Instruktionen gemäß Anhang II Abschnitte a und b erhalten haben; und

b) dass ihre Mitarbeiter einschließlich der Fahrer, die unmittelbar mit den Fahrgästen oder deren Belangen in Kontakt kommen, eine Schulung oder Instruktionen gemäß Anhang II Abschnitt a erhalten haben.

(2) Ein Mitgliedstaat kann für einen Zeitraum von höchstens fünf Jahren ab dem 1. März 2013 eine Ausnahme von der Anwendung des Absatzes 1 Buchstabe b in Bezug auf die Schulung der Fahrer gewähren.

Artikel 17

Entschädigung für Rollstühle und andere Mobilitätshilfen

(1) Beförderer und Busbahnhofbetreiber haften für von ihnen verursachte Verluste oder Beschädigungen von Rollstühlen und anderen Mobilitätshilfen oder Hilfsgeräten. Die Entschädigungspflicht trifft den Beförderer oder Busbahnhofbetreiber, der für diesen Verlust oder diese Beschädigung haftet.

(2) Die Entschädigung gemäß Absatz 1 muss dem Wiederbeschaffungswert oder den Reparaturkosten der verloren gegangenen oder beschädigten Ausrüstung oder Geräte entsprechen.

(3) Erforderlichenfalls wird jede Anstrengung unternommen, um rasch vorübergehenden Ersatz zu beschaffen. Die technischen und funktionellen Merkmale der Rollstühle und anderen Mobilitätshilfen oder Hilfsgeräte entsprechen nach Möglichkeit denjenigen der verloren gegangenen oder beschädigten Rollstühle und anderen Mobilitätshilfen oder Hilfsgeräte.

Artikel 18

Ausnahmen

(1) Unbeschadet von Artikel 2 Absatz 2 können die Mitgliedstaaten nationale Linienverkehrsdienste von der Anwendung aller oder einiger der Bestimmungen dieses Kapitels ausnehmen, sofern sie sicherstellen, dass das Schutzniveau für behinderte Menschen und Personen mit eingeschränkter Mobilität im Rahmen ihrer nationalen Rechtsvorschriften dem dieser Verordnung mindestens entspricht.

(2) Die Mitgliedstaaten setzen die Kommission von den gemäß Absatz 1 gewährten Ausnahmen in Kenntnis. Die Kommission ergreift geeignete Maßnahmen, wenn sie der Auffassung ist, dass eine solche Ausnahme nicht mit diesem Artikel im Einklang steht. Die Kommission legt dem Europäischen Parlament und dem Rat bis zum 2. März 2018 einen Bericht über die gemäß Absatz 1 gewährten Ausnahmen vor.

KAPITEL IV

FAHRGASTRECHTE BEI ANNULLIERUNG ODER VERSPÄTUNG

Artikel 19

Fortsetzung der Fahrt, Weiterreise mit geänderter Streckenführung und Fahrpreiserstattung

(1) Muss ein Beförderer vernünftigerweise davon ausgehen, dass die Abfahrt eines Linienverkehrsdienstes von einem Busbahnhof annulliert wird oder sich um mehr als 120 Minuten verzögert, oder im Fall einer Überbuchung bietet er den Fahrgästen unverzüglich Folgendes zur Auswahl an:

a) zum frühest möglichen Zeitpunkt Fortsetzung der Fahrt oder Weiterreise mit geänderter Streckenführung zum im Beförderungsvertrag festgelegten Zielort ohne Aufpreis und unter vergleichbaren Bedingungen wie im Beförderungsvertrag angegeben;

b) Erstattung des Fahrpreises und gegebenenfalls zum frühest möglichen Zeitpunkt kostenlose Rückfahrt mit dem Bus zum im Beförderungsvertrag festgelegten Abfahrtsort.

(2) Bietet der Beförderer dem Fahrgast nicht die in Absatz 1 genannte Auswahl an, so hat der Fahrgast zusätzlich zu der Erstattung des Fahrpreises nach Absatz 1 Buchstabe b einen Anspruch auf Entschädigung in Höhe von 50 % des Fahrpreises. Der Beförderer zahlt diesen Betrag innerhalb eines Monats nach Einreichung des Antrags auf Entschädigung.

(3) Wird der Kraftomnibus während der Fahrt betriebsunfähig, bietet der Beförderer entweder die Fortsetzung des Verkehrsdienstes mit einem anderen Fahrzeug von dem Ort, an dem sich das betriebsunfähige Fahrzeug befindet, oder die Beförderung von dem Ort, an dem sich das betriebsunfähige Fahrzeug befindet, zu einem geeigneten Wartepunkt oder Busbahnhof, von dem aus die Fortsetzung der Reise möglich ist, an.

(4) Wird ein Linienverkehrsdienst annulliert oder verzögert sich seine Abfahrt von einer Bushaltestelle um mehr als 120 Minuten, so haben die Fahrgäste Anspruch auf Fortsetzung der Fahrt oder Weiterreise mit geänderter Streckenführung oder auf Erstattung des Fahrpreises durch den Beförderer nach Absatz 1.

(5) Die in Absatz 1 Buchstabe b und Absatz 4 genannte Erstattung des Fahrpreises erfolgt binnen 14 Tagen, nachdem das Angebot gemacht worden oder der Erstattungsantrag eingegangen ist. Die Erstattung des vollen Fahrpreises in der entrichteten Höhe erfolgt für die nicht durchgeführten Teile der Fahrt sowie für bereits durchgeführte Teile, falls die Fahrt nach den ursprünglichen Reiseplänen des Fahrgastes zwecklos geworden ist. Die Kosten für Zeitfahrkarten werden anteilsmäßig erstattet. Die Erstattung erfolgt in Geld, es sei denn, der Fahrgast ist mit einer anderen Erstattungsform einverstanden.

Artikel 20

Informationen

(1) Bei Annullierung oder Verspätung der Abfahrt eines Linienverkehrsdienstes informiert der Beförderer oder gegebenenfalls der Busbahnhofbetreiber die Fahrgäste, die von einem Busbahnhof abfahren, so rasch wie möglich, jedoch spätestens 30 Minuten nach der fahrplanmäßigen Abfahrtszeit, über die Lage und, sobald diese Informationen vorliegen, über die voraussichtliche Abfahrtszeit.

(2) Versäumen Fahrgäste nach Maßgabe des Fahrplans aufgrund einer Annullierung oder Verspätung einen Anschluss an einen Verkehrsdienst, so unternimmt der Beförderer oder gegebenenfalls der Busbahnhofbetreiber alle zumutbaren Anstrengungen, um die betreffenden Fahrgäste über alternative Anschlüsse zu unterrichten.

(3) Der Beförderer oder gegebenenfalls der Busbahnhofbetreiber sorgt dafür, dass behinderte Menschen oder Personen mit eingeschränkter Mobilität die nach den Absätzen 1 und 2 vorgeschriebenen Informationen in zugänglicher Form erhalten.

(4) Sofern machbar, werden die in den Absätzen 1 und 2 geforderten Informationen allen Fahrgästen, auch denen, die von einer Bushaltestelle abreisen, innerhalb der in Absatz 1 genannten Frist auf elektronischem Wege bereitgestellt, falls der Fahrgast dies verlangt und dem Beförderer die erforderlichen Kontaktangaben zur Verfügung gestellt hat.

Artikel 21

Hilfeleistung bei Annullierung oder Verzögerung der Abfahrt

Bei Annullierung einer Fahrt sowie bei einer Verzögerung der Abfahrt von einem Busbahnhof von mehr als 90 Minuten bei Fahrten mit einer planmäßigen Dauer von über drei Stunden bietet der Beförderer den Fahrgästen kostenlos Folgendes an:

a) Imbisse, Mahlzeiten oder Erfrischungen in angemessenem Verhältnis zur Wartezeit oder Verspätung, sofern sie im Bus oder im Busbahnhof verfügbar oder in zumutbarer Weise zu beschaffen sind;

b) ein Hotelzimmer oder eine andere Unterbringungsmöglichkeit sowie Beistand bei der Organisation der Beförderung zwischen dem Busbahnhof und dem Ort der Unterbringung, sofern ein Aufenthalt von einer Nacht oder mehr erforderlich ist. Der Beförderer kann die Gesamtkosten der Unterbringung — ohne die Kosten der Beförderung zwischen dem Busbahnhof und der Unterkunft — je Fahrgast auf 80 EUR pro Nacht und auf höchstens zwei Nächte beschränken.

Bei der Anwendung dieses Artikels richtet der Beförderer besonderes Augenmerk auf die Bedürfnisse von behinderten Menschen und Personen mit eingeschränkter Mobilität und etwaigen Begleitpersonen.

Artikel 22

Weitergehende Ansprüche

Keine Bestimmung dieses Kapitels schließt das Recht der Fahrgäste aus, gemäß den nationalen Rechtsvorschriften vor nationalen Gerichten Ansprüche aufgrund von Nachteilen zu verfolgen, die sie wegen Annullierung oder Verspätung von Linienverkehrsdiensten erlitten haben.

Artikel 23

Ausnahmen

(1) Die Artikel 19 und 21 gelten nicht für Fahrgäste mit Fahrscheinen mit offenen Reisedaten, solange keine Abfahrtszeit festgelegt ist, mit Ausnahme von Fahrgästen, die eine Zeitfahrkarte besitzen.

(2) Artikel 21 Buchstabe b kommt nicht zur Anwendung, wenn der Beförderer nachweist, dass die Annullierung oder Verspätung durch widrige Wetterbedingungen oder schwere Naturkatastrophen, die den sicheren Betrieb des Busverkehrsdienstes beeinträchtigen, verursacht wurde.

KAPITEL V

ALLGEMEINE REGELN ZU INFORMATIONEN UND BESCHWERDEN

Artikel 24

Recht auf Reiseinformationen

Beförderer und Busbahnhofbetreiber sorgen innerhalb ihres jeweiligen Zuständigkeitsbereichs während der gesamten Fahrt für eine angemessene Information der Fahrgäste. Sofern machbar, wird diese Information auf Verlangen in zugänglicher Form bereitgestellt.

Artikel 25

Unterrichtung über Fahrgastrechte

(1) Beförderer und Busbahnhofbetreiber gewährleisten in ihrem jeweiligen Zuständigkeitsbereich, dass die Fahrgäste spätestens bei der Abfahrt geeignete und verständliche Informationen über ihre Rechte nach dieser Verordnung erhalten. Diese Informationen werden an den Busbahnhöfen und gegebenenfalls im Internet bereitgestellt. Behinderten Menschen oder Personen mit eingeschränkter Mobilität werden diese Informationen auf Verlangen in zugänglicher Form bereitgestellt, wenn dies machbar ist. Diese Informationen müssen die zur Kontaktaufnahme notwendigen Angaben zu der Durchsetzungsstelle oder den Durchsetzungsstellen umfassen, die von den Mitgliedstaaten gemäß Artikel 28 Absatz 1 benannt wurden.

(2) Um der Informationspflicht gemäß Absatz 1 nachzukommen, können die Beförderer und Busbahnhofbetreiber eine Zusammenfassung der Bestimmungen dieser Verordnung verwenden, die die Kommission in allen Amtssprachen der Organe der Europäischen Union erstellt und ihnen zur Verfügung stellt.

Artikel 26

Beschwerden

Die Beförderer errichten oder unterhalten ein System zur Bearbeitung von Beschwerden im Zusammenhang mit den in der vorliegenden Verordnung festgelegten Rechten und Pflichten.

Artikel 27

Einreichung von Beschwerden

Unbeschadet von Schadenersatzforderungen gemäß Artikel 7 muss ein Fahrgast, wenn er im Rahmen dieser Verordnung eine Beschwerde an den Beförderer richten will, diese innerhalb von drei Monaten nach der tatsächlichen oder geplanten Durchführung des Linienverkehrsdienstes einreichen. Der Beförderer muss dem Fahrgast innerhalb eines Monats nach Eingang der Beschwerde mitteilen, ob seiner Beschwerde stattgegeben wurde, ob sie abgelehnt wurde oder ob sie noch bearbeitet wird. Die Frist für die endgültige Beantwortung darf drei Monate ab Eingang der Beschwerde nicht überschreiten.

KAPITEL VI

DURCHSETZUNG UND NATIONALE DURCHSETZUNGSSTELLEN

Artikel 28

Nationale Durchsetzungsstellen

(1) Jeder Mitgliedstaat benennt eine oder mehrere neue oder bestehende Stellen, die für die Durchsetzung dieser Verordnung in Bezug auf Linienverkehrsdienste von in seinem Hoheitsgebiet gelegenen Orten und in Bezug auf Linienverkehrsdienste von einem Drittland zu diesen Orten zuständig sind. Jede dieser Stellen trifft die notwendigen Maßnahmen, um sicherzustellen, dass diese Verordnung eingehalten wird.

Jede Stelle muss in Aufbau, Finanzierungsentscheidungen, Rechtsstruktur und Entscheidungsfindung von den Beförderern, Reiseveranstaltern und Busbahnhofbetreibern unabhängig sein.

(2) Die Mitgliedstaaten unterrichten die Kommission über die gemäß diesem Artikel benannte Stelle oder benannten Stellen.

(3) Jeder Fahrgast kann bei der nach Absatz 1 benannten entsprechenden Stelle oder jeder anderen von einem Mitgliedstaat benannten entsprechenden Stelle gemäß den nationalen Rechtsvorschriften eine Beschwerde über einen mutmaßlichen Verstoß gegen diese Verordnung einreichen.

Ein Mitgliedstaat kann beschließen, dass der Fahrgast als ersten Schritt eine Beschwerde an den Beförderer zu richten hat; in diesem Fall dient die nationale Durchsetzungsstelle oder eine andere von dem Mitgliedstaat benannte geeignete Stelle als Beschwerdeinstanz für Beschwerden, für die keine Lösung gemäß Artikel 27 gefunden wurde.

Artikel 29

Berichterstattung über die Durchsetzung

Die gemäß Artikel 28 Absatz 1 benannten Durchsetzungsstellen veröffentlichen bis zum 1. Juni 2015 und danach alle zwei Jahre einen Bericht über ihre Tätigkeiten in den zwei vorangegangenen Kalenderjahren, der insbesondere eine Beschreibung der Maßnahmen, die zur Durchführung dieser Verordnung getroffen wurden, und Statistiken über Beschwerden und verhängte Sanktionen enthält.

Artikel 30

Zusammenarbeit der Durchsetzungsstellen

Die in Artikel 28 Absatz 1 genannten nationalen Durchsetzungsstellen tauschen, wann immer dies zweckmäßig ist, Informationen über ihre Arbeit, ihre Entscheidungsgrundsätze und ihre Entscheidungspraxis aus. Die Kommission unterstützt sie bei dieser Aufgabe.

Artikel 31

Sanktionen

Die Mitgliedstaaten legen die Sanktionen fest, die bei einem Verstoß gegen diese Verordnung zu verhängen sind, und treffen alle erforderlichen Maßnahmen, um deren Durchsetzung zu gewährleisten. Die Sanktionen müssen wirksam, verhältnismäßig und abschreckend sein. Die Mitgliedstaaten melden der Kommission diese Regeln und Maßnahmen bis zum 1. März 2013 und melden ihr unverzüglich alle späteren Änderungen.

KAPITEL VII

SCHLUSSBESTIMMUNGEN

Artikel 32

Bericht

Bis zum 2. März 2016 erstattet die Kommission dem Europäischen Parlament und dem Rat Bericht über die Anwendung und Wirkung dieser Verordnung. Dem Bericht sind erforderlichenfalls Gesetzgebungsvorschläge beizufügen, mit denen die Bestimmungen dieser Verordnung weiter ausgestaltet oder geändert werden sollen.

Artikel 33

Änderung der Verordnung (EG) Nr. 2006/2004

Im Anhang der Verordnung (EG) Nr. 2006/2004 wird die folgende Nummer angefügt:

„(19) Verordnung (EU) Nr. 181/2011 des Europäischen Parlaments und des Rates vom 16. Februar 2011 über die Fahrgastrechte im Kraftomnibusverkehr (*)

(*) ABl. L 55 vom 28.2.2011, S. 1.“

Artikel 34

Inkrafttreten

Diese Verordnung tritt am zwanzigsten Tag nach ihrer Veröffentlichung im *Amtsblatt der Europäischen Union* in Kraft.

Sie gilt ab dem 1. März 2013.

Diese Verordnung ist in allen ihren Teilen verbindlich und gilt unmittelbar in jedem Mitgliedstaat.

Geschehen zu Straßburg am 16. Februar 2011.

Im Namen des Europäischen Parlaments
Der Präsident
J. BUZEK

Im Namen des Rates
Der Präsident
MARTONYI J.

ANHANG I

HILFELEISTUNG FÜR BEHINDERTE MENSCHEN UND PERSONEN MIT EINGESCHRÄNKTER MOBILITÄT

a) **Hilfeleistung in benannten Busbahnhöfen**

Hilfeleistungen und Vorkehrungen, um behinderte Menschen oder Personen mit eingeschränkter Mobilität in die Lage zu versetzen,

— ihre Ankunft am Busbahnhof und ihren Bedarf an Hilfeleistungen bei angegebenen Kontaktstellen anzumelden;

— sich von der angegebenen Kontaktstelle zum Abfertigungsschalter, zum Wartesaal und zum Einstiegsbereich zu begeben;

— gegebenenfalls mithilfe von Lifts, Rollstühlen oder sonstigen benötigten Hilfen in das Fahrzeug zu gelangen;

— ihr Gepäck einzuladen;

— ihr Gepäck wieder in Besitz zu nehmen;

— aus dem Fahrzeug auszusteigen;

— einen anerkannten Begleithund im Bus mitzuführen;

— sich zum Sitzplatz zu begeben;

b) **Hilfeleistung im Fahrzeug**

Hilfeleistungen und Vorkehrungen, um behinderte Menschen oder Personen mit eingeschränkter Mobilität in die Lage zu versetzen,

— wesentliche Informationen über eine Fahrt auf Verlangen des Fahrgasts in zugänglicher Form zu erhalten;

— während der Fahrpausen in das Fahrzeug einzusteigen bzw. aus dem Fahrzeug auszusteigen, sofern anderes Personal als der Fahrer an Bord des Fahrzeugs ist.

ANHANG II

SCHULUNG IN BEHINDERTENFRAGEN

a) **Sensibilisierung für Behindertenfragen**

Die Schulung der unmittelbar mit den Fahrgästen in Kontakt kommenden Mitarbeiter umfasst Folgendes:

— Sensibilisierung für Behinderungen und angemessenes Verhalten gegenüber Passagieren mit körperlichen, sensorischen Behinderungen (Hör- und Sehbehinderungen), versteckten Behinderungen oder Lernbehinderungen, einschließlich der Unterscheidung der verschiedenen Fähigkeiten von Personen, deren Mobilität, Orientierungs- oder Kommunikationsvermögen eventuell eingeschränkt ist;

— Hindernisse, denen behinderte Menschen oder Personen mit eingeschränkter Mobilität gegenüberstehen, darunter Haltung von Mitmenschen, konkrete/physische und organisatorische Barrieren;

— anerkannte Begleithunde, unter Berücksichtigung der Rolle und der Bedürfnisse eines Begleithunds;

— Umgang mit unerwarteten Situationen;

— soziale Kompetenz und Möglichkeiten der Kommunikation mit Schwerhörigen und Gehörlosen sowie Personen mit Seh-, Sprech- und Lernbehinderungen;

— sorgfältiger Umgang mit Rollstühlen und anderen Mobilitätshilfen, zur Vermeidung von Beschädigungen (alle für die Gepäckabfertigung zuständigen Mitarbeiter, wenn solche vorhanden sind).

b) **Schulung im Hinblick auf die Hilfeleistung für behinderte Menschen**

Die Schulung der Mitarbeiter, die behinderten Menschen oder Personen mit eingeschränkter Mobilität unmittelbar Hilfe leisten, umfasst Folgendes:

— Hilfeleistung für Rollstuhlfahrer beim Umsetzen in den und aus dem Rollstuhl;

— Hilfeleistung für behinderte Menschen und Personen mit eingeschränkter Mobilität, die mit anerkannten Begleithunden reisen, unter Berücksichtigung der Rolle und der Bedürfnisse dieser Hunde;

— Techniken der Begleitung von Fahrgästen mit Sehbehinderungen sowie des Umgangs mit und der Beförderung von anerkannten Begleithunden;

— Arten von Hilfsmitteln für behinderte Menschen oder Personen mit eingeschränkter Mobilität und Umgang mit diesen Hilfsmitteln;

— Nutzung von Ein- und Ausstiegshilfen, Kenntnisse über angemessene Arten der Hilfeleistung beim Ein- und Aussteigen, die die Sicherheit und Würde von behinderten Menschen oder Personen mit eingeschränkter Mobilität wahren;

— Verständnis für die Notwendigkeit zuverlässiger und professioneller Hilfeleistung. Bewusstsein für das Gefühl der Verletzlichkeit, das bestimmte Fahrgäste mit Behinderungen wegen ihrer Abhängigkeit von der geleisteten Hilfe während der Reise möglicherweise empfinden;

— Kenntnisse in erster Hilfe.

I

(Gesetzgebungsakte)

VERORDNUNGEN

VERORDNUNG (EU) Nr. 1177/2010 DES EUROPÄISCHEN PARLAMENTS UND DES RATES

vom 24. November 2010

über die Fahrgastrechte im See- und Binnenschiffsverkehr und zur Änderung der Verordnung (EG) Nr. 2006/2004

(Text von Bedeutung für den EWR)

DAS EUROPÄISCHE PARLAMENT UND DER RAT DER EUROPÄISCHEN UNION —

gestützt auf den Vertrag über die Arbeitsweise der Europäischen Union, insbesondere auf Artikel 91 Absatz 1 und Artikel 100 Absatz 2,

auf Vorschlag der Europäischen Kommission,

nach Stellungnahme des Europäischen Wirtschafts- und Sozialausschusses [1],

nach Anhörung des Ausschusses der Regionen,

gemäß dem ordentlichen Gesetzgebungsverfahren [2],

in Erwägung nachstehender Gründe:

(1) Die Maßnahmen der Union im Bereich des See- und Binnenschiffsverkehrs sollten unter anderem darauf abzielen, ein hohes, dem Standard anderer Verkehrsträger vergleichbares Schutzniveau für die Fahrgäste sicherzustellen. Ferner sollte den allgemeinen Erfordernissen des Verbraucherschutzes in vollem Umfang Rechnung getragen werden.

(2) Da die Fahrgäste im See- und Binnenschiffsverkehr im Beförderungsvertrag die schwächere Partei sind, sollte allen Fahrgästen ein Mindestmaß an Schutz gewährt werden. Die Beförderer sollten in keiner Weise davon abgehalten werden, Vertragsbedingungen anzubieten, die für den Fahrgast günstiger sind als die in dieser Verordnung festgelegten Bedingungen. Genauso wenig wird mit dieser Verordnung das Ziel verfolgt, in gewerbliche Beziehungen zwischen Unternehmen („business-to-business"), die den Gütertransport betreffen, einzugreifen. Insbesondere sollten Vereinbarungen zwischen einem Kraftverkehrsunternehmer und einem Beförderer nicht als Beförderungsverträge im Sinne dieser Verordnung betrachtet werden, und sie sollten deshalb dem Kraftverkehrsunternehmer oder seinen Angestellten im Fall von Verspätungen keinen Anspruch auf Entschädigung nach dieser Verordnung einräumen.

(3) Der Schutz der Fahrgäste sollte sich nicht nur auf Personenverkehrsdienste zwischen Häfen im Hoheitsgebiet der Mitgliedstaaten erstrecken, sondern — unter Berücksichtigung des Risikos der Wettbewerbsverzerrung auf dem Personenbeförderungsmarkt — auch auf Personenverkehrsdienste zwischen solchen Häfen und Häfen außerhalb des Hoheitsgebiets der Mitgliedstaaten. Der Begriff „Beförderer aus der Union" sollte daher für die Zwecke dieser Verordnung so weit wie möglich ausgelegt werden, ohne dass dadurch jedoch andere Rechtsakte der Union berührt werden, etwa der Verordnung (EWG) Nr. 4056/86 des Rates vom 22. Dezember 1986 über die Einzelheiten der Anwendung der Artikel 85 und 86 des Vertrags auf den Seeverkehr [3] und der Verordnung (EWG) Nr. 3577/92 des Rates vom 7. Dezember 1992 zur Anwendung des Grundsatzes des freien Dienstleistungsverkehrs auf den Seeverkehr in den Mitgliedstaaten (Seekabotage) [4].

[1] ABl. C 317 vom 23.12.2009, S. 89.

[2] Standpunkt des Europäischen Parlaments vom 23. April 2009 (ABl. C 184 E vom 8.7.2010, S. 293), Standpunkt des Rates in erster Lesung vom 11. März 2010 (ABl. C 122 E vom 11.5.2010, S. 19), Standpunkt des Europäischen Parlaments vom 6. Juli 2010 (noch nicht im Amtsblatt veröffentlicht) und Beschluss des Rates vom 11. Oktober 2010.

[3] ABl. L 378 vom 31.12.1986, S. 4.

[4] ABl. L 364 vom 12.12.1992, S. 7.

(4) Der Binnenmarkt für Personenverkehrsdienste im See- und Binnenschiffsverkehr sollte allen Bürgern zugute kommen. Daher sollten behinderte Menschen und Personen mit eingeschränkter Mobilität — sei es aufgrund einer Behinderung, des Alters oder anderer Faktoren — ähnliche Möglichkeiten zur Nutzung von Personenverkehrsdiensten und Kreuzfahrten haben wie andere Bürger. Behinderte Menschen und Personen mit eingeschränkter Mobilität haben die gleichen Rechte in Bezug auf Freizügigkeit, Entscheidungsfreiheit und Nichtdiskriminierung wie alle anderen Bürger.

(5) Die Mitgliedstaaten sollten für die Benutzung öffentlicher Verkehrsmittel und die Benutzung integrierter Fahrscheine werben, um bestmögliche Ergebnisse hinsichtlich der Benutzung und der Interoperabilität der verschiedenen Verkehrsträger und Betreiber zu erzielen.

(6) Um behinderten Menschen und Personen mit eingeschränkter Mobilität Reisemöglichkeiten im See- und Binnenschiffsverkehr zu eröffnen, die denen anderer Bürger vergleichbar sind, sollten im Lichte des Artikels 9 des Übereinkommens der Vereinten Nationen über die Rechte von Menschen mit Behinderungen Regeln für die Nichtdiskriminierung der Betroffenen und deren Unterstützung bei Reisen erstellt werden. Die Beförderung dieser Personen sollte daher zugelassen und nicht verweigert werden, außer dies ist aus Gründen der Sicherheit, die durch die zuständigen Behörden festgelegt sind, gerechtfertigt. Sie sollten in Häfen und an Bord von Fahrgastschiffen Anspruch auf Hilfeleistungen haben. Im Interesse der sozialen Integration sollten die Betroffenen diese Hilfe kostenlos erhalten. Die Beförderer sollten Zugangsbedingungen festlegen, vorzugsweise unter Verwendung des europäischen Normungssystems.

(7) Bei der Entscheidung über die Gestaltung neuer Häfen und Abfertigungsgebäude und bei umfassenden Renovierungsarbeiten sollten die für diese Anlagen zuständigen Organe die Bedürfnisse von behinderten Menschen und Personen mit eingeschränkter Mobilität, insbesondere hinsichtlich der Zugänglichkeit, unter besonderer Beachtung der Anforderungen einer Konzeption für alle Verwendungsarten („Design for all") berücksichtigen. Beförderer sollten bei der Entscheidung über die Gestaltung neuer und neu überholter Fahrgastschiffe diese Bedürfnisse gemäß der Richtlinie 2006/87/EG des Europäischen Parlaments und des Rates vom 12. Dezember 2006 über die technischen Vorschriften für Binnenschiffe [1] und der Richtlinie 2009/45/EG des Europäischen Parlaments und des Rates vom 6. Mai 2009 über Sicherheitsvorschriften und -normen für Fahrgastschiffe [2] berücksichtigen.

(8) Die Hilfeleistung in den Häfen im Hoheitsgebiet eines Mitgliedstaats sollte behinderte Menschen und Personen mit eingeschränkter Mobilität u. a. in die Lage versetzen, von einem als solchen gekennzeichneten Ankunftsort im Hafen zu einem Fahrgastschiff und von einem Fahrgastschiff zu einem als solchen gekennzeichneten Abfahrtsort im Hafen zu gelangen sowie an und von Bord zu gehen.

(9) Bei der Organisation der Hilfeleistung für behinderte Menschen und Personen mit eingeschränkter Mobilität sowie der Schulung ihrer Mitarbeiter sollten die Beförderer mit Interessenverbänden von behinderten Menschen und von Personen mit eingeschränkter Mobilität zusammenarbeiten. Zu berücksichtigen sind dabei auch die einschlägigen Bestimmungen des Internationalen Übereinkommens und Kodex über Normen für die Ausbildung, die Erteilung von Befähigungszeugnissen und den Wachdienst von Seeleuten sowie der Empfehlung der Internationalen Seeschifffahrtsorganisation (IMO) für die Gestaltung und den Betrieb von Fahrgastschiffen entsprechend den Bedürfnissen älterer und behinderter Personen.

(10) Die Bestimmungen über das Einschiffen von behinderten Menschen oder Personen mit eingeschränkter Mobilität sollten unbeschadet der für das Einschiffen von Fahrgästen geltenden allgemeinen Regeln anwendbar sein, die in den geltenden internationalen, Unions- bzw. nationalen Regeln festgelegt sind.

(11) Bei den Rechtsakten der Union über Fahrgastrechte sollte der Bedarf von Fahrgästen, insbesondere derjenige von behinderten Menschen und Personen mit eingeschränkter Mobilität, an der Benutzung verschiedener Verkehrsträger und einem reibungslosen Übergang zwischen verschiedenen Verkehrsträgern berücksichtigt werden, sofern die anwendbaren Sicherheitsvorschriften für den Betrieb der Schiffe eingehalten werden können.

(12) Die Fahrgäste sollten bei Annullierung und bei Verspätung eines Personenverkehrsdienstes oder einer Kreuzfahrt angemessen unterrichtet werden. Diese Unterrichtung sollte es den Fahrgästen erleichtern, die notwendigen Vorkehrungen zu treffen und erforderlichenfalls Informationen über alternative Verbindungen zu erhalten.

(13) Die Unannehmlichkeiten, die den Fahrgästen durch Annullierung oder große Verspätung von Verkehrsdiensten entstehen, sollten verringert werden. Zu diesem Zweck sollten die Fahrgäste angemessen betreut werden und die Möglichkeit haben, ihre Reise zu stornieren und sich den Fahrpreis erstatten zu lassen oder eine anderweitige Beförderung zu annehmbaren Bedingungen zu erhalten. Eine angemessene Unterbringung der Fahrgäste braucht nicht unbedingt in Hotelzimmern bestehen, sondern kann auch jede andere geeignete Unterbringung sein, die verfügbar ist, wobei insbesondere die Umstände jedes Einzelfalls, die Fahrzeuge der Fahrgäste und die Merkmale des Schiffes entscheidend sind. Insofern und in hinreichend begründeten Fällen außergewöhnlicher und dringender Umstände sollten die Beförderer in der Lage sein, entsprechende verfügbare Einrichtungen in Zusammenarbeit mit den Zivilbehörden in vollem Umfang zu nutzen.

[1] ABl. L 389 vom 30.12.2006, S. 1.
[2] ABl. L 163 vom 25.6.2009, S. 1.

(14) Die Beförderer sollten bei Annullierung oder Verspätung eines Personenverkehrsdienstes Ausgleichszahlungen an die Fahrgäste in Höhe eines bestimmten Prozentsatzes des Fahrpreises gewährleisten, ausgenommen eine Annullierung oder Verspätung aufgrund von Wetterbedingungen, die den sicheren Betrieb des Schiffes beeinträchtigen, oder von außergewöhnlichen Umständen, die auch dann nicht hätten vermieden werden können, wenn alle zumutbare Maßnahmen getroffen worden wären.

(15) Die Beförderer sollten entsprechend den allgemein anerkannten Grundsätzen die Beweislast dafür tragen, dass die Annullierung oder Verspätung durch solche Wetterbedingungen oder außergewöhnliche Umstände verursacht wurde.

(16) Zu den Wetterbedingungen, die den sicheren Betrieb des Schiffes beeinträchtigen, sollten unter anderem, aber nicht nur, starker Wind, starker Seegang, starke Strömungen, schwieriger Eisgang, extrem hohe oder niedrige Wasserstände, Hurrikane, Tornados und Überschwemmungen zählen.

(17) Zu den außergewöhnlichen Umständen sollten unter anderem Naturkatastrophen, wie Brände und Erdbeben, Terroranschläge, Kriege und bewaffnete militärische und zivile Konflikte, Aufstände, militärische oder widerrechtliche Beschlagnahme, Arbeitskämpfe, die Verbringung von Kranken, Verletzten oder Toten an Land, Such- und Rettungseinsätze auf See oder Binnenwasserstraßen, für den Schutz der Umwelt erforderliche Maßnahmen, Entscheidungen von Verkehrsleitungsorganen oder Hafenbehörden und Entscheidungen der zuständigen Behörden bezüglich der öffentlichen Ordnung und Sicherheit sowie bei dringenden Verkehrsbedürfnissen zählen.

(18) Die Beförderer sollten unter Beteiligung der betreffenden Kreise, der Berufsverbände und der Verbände von Verbrauchern, Fahrgästen, behinderten Menschen und Personen mit eingeschränkter Mobilität zusammenarbeiten, um auf nationaler oder europäischer Ebene Vorkehrungen zur Verbesserung der Betreuung und Unterstützung der Fahrgäste bei Fahrtunterbrechung, insbesondere bei großen Verspätungen oder Annullierung der Fahrt, zu treffen. Nationale Durchsetzungsstellen sollten von diesen Vorkehrungen in Kenntnis gesetzt werden.

(19) Der Gerichtshof der Europäischen Union hat bereits entschieden, dass Probleme, die zu Annullierungen oder Verspätungen führen, nur insoweit unter den Begriff der „außergewöhnlichen Umstände" fallen können, als sie auf Vorkommnisse zurückgehen, die nicht Teil der normalen Ausübung der Tätigkeit des betroffenen Beförderers sind und von ihm tatsächlich nicht zu beherrschen sind. Es sollte darauf hingewiesen werden, dass Wetterbedingungen, die eine Gefahr für den sicheren Betrieb des Schiffes darstellen, tatsächlich nicht von dem Beförderer zu beherrschen sind.

(20) Diese Verordnung sollte die Rechte der Fahrgäste, die in der Richtlinie 90/314/EWG des Rates vom 13. Juni 1990 über Pauschalreisen [1] verankert sind, nicht berühren. Diese Verordnung sollte für Fälle, in denen eine Pauschalreise aus anderen Gründen als der Annullierung des Personenverkehrsdienstes oder der Kreuzfahrt annulliert wird, nicht gelten.

(21) Die Fahrgäste sollten umfassend in für jeden zugänglicher Form über ihre Rechte nach dieser Verordnung informiert werden, damit sie diese Rechte wirksam wahrnehmen können. Zu den Rechten der Fahrgäste sollte ein Anspruch auf Informationen über den Personenverkehrsdienst oder die Kreuzfahrt sowohl vor als auch während der Fahrt gehören. Alle wesentlichen Informationen für die Fahrgäste sollten auch in für behinderte Menschen und Personen mit eingeschränkter Mobilität zugänglichen Formen bereitgestellt werden, wobei es solche zugänglichen Formen den Fahrgästen ermöglichen sollten, Zugang zu derselben Information durch Verwendung von z. B. Text, Blindenschrift, Audio- oder Videoformaten und/oder elektronischen Formaten zu haben.

(22) Die Fahrgäste sollten ihre Rechte einerseits mittels geeigneter und zugänglicher Beschwerdeverfahren bei den Beförderern und den Terminalbetreibern innerhalb ihrer jeweiligen Zuständigkeitsbereiche wahrnehmen können und andererseits, indem sie gegebenenfalls Beschwerde bei der/den vom betreffenden Mitgliedstaat zu diesem Zweck benannten Stelle bzw. Stellen erheben. Die Beförderer und Terminalbetreiber sollten innerhalb einer festgelegten Frist auf Beschwerden der Fahrgäste reagieren, wobei das Ausbleiben einer Reaktion gegen sie verwendet werden könnte.

(23) Unter Berücksichtigung der von den Mitgliedstaaten festgelegten Beschwerdeverfahren sollte eine Beschwerde über Hilfeleistung in einem Hafen oder an Bord eines Schiffes vorzugsweise an die Stelle bzw. Stellen gerichtet werden, die zur Durchsetzung dieser Verordnung in dem Mitgliedstaat benannt wurden, in dem der Einschiffungshafen liegt bzw. — bei Personenverkehrsdiensten aus einem Drittland — in dem der Ausschiffungshafen liegt.

(24) Die Mitgliedstaaten sollten die Einhaltung dieser Verordnung sicherstellen sowie eine bzw. mehrere zuständige Stellen zur Wahrnehmung der entsprechenden Überwachungs- und Durchsetzungsaufgaben benennen. Dies sollte das Recht von Fahrgästen unberührt lassen, Regressforderungen nach nationalem Recht gerichtlich geltend zu machen.

(25) Die für die Durchsetzung dieser Verordnung benannten Durchsetzungsstellen sollten von gewerblichen Interessen unabhängig sein. Jeder Mitgliedstaat sollte zumindest eine Stelle benennen, die gegebenenfalls die Befugnis und Fähigkeit hat, einzelne Beschwerden zu untersuchen und eine

[1] ABl. L 158 vom 23.6.1990, S. 59.

Streitbeilegung zu erleichtern. Die Fahrgäste sollten Anspruch auf eine begründete Antwort der benannten Stelle innerhalb einer angemessenen Frist haben. Angesichts der Bedeutung verlässlicher Statistiken für die Durchsetzung dieser Verordnung sollten die von diesen Stellen vorbereiteten Berichte möglichst Statistiken über Beschwerden und ihr Ergebnis enthalten, insbesondere um eine kohärente Anwendung innerhalb der Union zu gewährleisten.

(26) Die Mitgliedstaaten sollten für Verstöße gegen diese Verordnung Sanktionen festlegen und deren Anwendung sicherstellen. Diese Sanktionen sollten wirksam, verhältnismäßig und abschreckend sein.

(27) Da die Ziele dieser Verordnung, nämlich ein hohes Maß an Schutz und Hilfe für Fahrgäste in allen Mitgliedstaaten sowie einheitliche Bedingungen für die Wirtschaftsteilnehmer im Binnenmarkt sicherzustellen, auf Ebene der Mitgliedstaaten nicht ausreichend verwirklicht werden können und daher wegen des Umfangs und der Wirkungen der Maßnahme besser auf Unionsebene zu verwirklichen sind, kann die Union im Einklang mit dem in Artikel 5 des Vertrags über die Europäische Union niedergelegten Subsidiaritätsprinzip tätig werden. Entsprechend dem in demselben Artikel genannten Grundsatz der Verhältnismäßigkeit geht diese Verordnung nicht über das zur Erreichung dieser Ziele erforderliche Maß hinaus.

(28) Die Durchsetzung dieser Verordnung sollte sich auf die Verordnung (EG) Nr. 2006/2004 des Europäischen Parlaments und des Rates vom 27. Oktober 2004 über die Zusammenarbeit zwischen den für die Durchsetzung der Verbraucherschutzgesetze zuständigen nationalen Behörden („Verordnung über die Zusammenarbeit im Verbraucherschutz“) [1] stützen. Daher sollte jene Verordnung entsprechend geändert werden.

(29) Die Richtlinie 95/46/EG des Europäischen Parlaments und des Rates vom 24. Oktober 1995 zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten und zum freien Datenverkehr [2] sollte strikt eingehalten und angewandt werden, um sicherzustellen, dass die Privatsphäre von natürlichen und juristischen Personen geschützt wird, dass die geforderten Angaben und Berichte sich auf die Erfüllung der in dieser Verordnung festgelegten Verpflichtungen beschränken und dass sie nicht zum Nachteil dieser Personen verwendet werden.

(30) Die Verordnung steht im Einklang mit den Grundrechten und Grundsätzen, die insbesondere mit der in Artikel 6 des Vertrags über die Europäische Union genannten Charta der Grundrechte der Europäischen Union anerkannt wurden —

HABEN FOLGENDE VERORDNUNG ERLASSEN:

[1] ABl. L 364 vom 9.12.2004, S. 1.
[2] ABl. L 281 vom 23.11.1995, S. 31.

KAPITEL I

ALLGEMEINE BESTIMMUNGEN

Artikel 1

Gegenstand

Diese Verordnung enthält Vorschriften für den See- und Binnenschiffsverkehr

a) zum Verbot der Diskriminierung von Fahrgästen hinsichtlich der von Beförderern angebotenen Beförderungsbedingungen;

b) zum Verbot der Diskriminierung und zur Unterstützung von behinderten Menschen und Personen mit eingeschränkter Mobilität;

c) zu den Rechten der Fahrgäste bei Annullierungen und bei Verspätungen;

d) zu den Informationen, die den Fahrgästen mindestens verfügbar zu machen sind;

e) zum Umgang mit Beschwerden;

f) mit allgemeinen Durchsetzungsbestimmungen.

Artikel 2

Geltungsbereich

(1) Diese Verordnung gilt für Fahrgäste, die

a) mit Personenverkehrsdiensten reisen, bei denen der Einschiffungshafen im Hoheitsgebiet eines Mitgliedstaats liegt;

b) mit Personenverkehrsdiensten reisen, bei denen der Einschiffungshafen nicht im Hoheitsgebiet eines Mitgliedstaats liegt und der Ausschiffungshafen im Hoheitsgebiet eines Mitgliedstaats liegt, sofern der Verkehrsdienst von einem Beförderer aus der Union gemäß der Definition des Artikels 3 Buchstabe e erbracht wird;

c) an einer Kreuzfahrt teilnehmen, bei der der Einschiffungshafen im Hoheitsgebiet eines Mitgliedstaats liegt. Für diese Fahrgäste gelten jedoch nicht Artikel 16 Absatz 2, die Artikel 18 und 19 sowie Artikel 20 Absätze 1 und 4.

(2) Diese Verordnung gilt nicht für Fahrgäste, die

a) mit Schiffen reisen, die für die Beförderung von maximal zwölf Fahrgästen zugelassen sind,

b) mit Schiffen reisen, deren für den Schiffsbetrieb verantwortliche Besatzung aus höchstens drei Personen besteht oder die im Personenverkehr eine Gesamtstrecke von weniger als 500 m (einfache Fahrt) zurücklegen,

c) an Ausflugs- und Besichtigungsfahrten teilnehmen, bei denen es sich nicht um Kreuzfahrten handelt, oder

d) mit Schiffen ohne Maschinenantrieb oder mit vor 1965 entworfenen und hauptsächlich mit den Originalwerkstoffen gebauten historischen Fahrgastschiffen im Original oder als Einzelnachbildung reisen, die für die Beförderung von maximal 36 Fahrgästen zugelassen sind.

(3) Die Mitgliedstaaten können während der ersten beiden Jahre ab 18. Dezember 2012 im Inlandsverkehr betriebene Seeschiffe mit einer Bruttoraumzahl von weniger als 300 t von der Anwendung dieser Verordnung ausnehmen, sofern die Fahrgastrechte gemäß dieser Verordnung nach den einzelstaatlichen Rechtsvorschriften angemessen gewährleistet sind.

(4) Die Mitgliedstaaten können Personenverkehrsdienste, die im Rahmen gemeinwirtschaftlicher Verpflichtungen, öffentlicher Dienstleistungsverträge oder integrierter Verkehrsdienste erbracht werden, von der Anwendung dieser Verordnung ausnehmen, sofern die Fahrgastrechte nach dieser Verordnung durch einzelstaatliche Rechtsvorschriften vergleichbar gewährleistet sind.

(5) Unbeschadet der Richtlinie 2006/87/EG und der Richtlinie 2009/45/EG sind die Bestimmungen dieser Verordnung nicht als technische Anforderungen auszulegen, die die Beförderer, Betreiber von Terminals oder andere Stellen dazu verpflichten, Schiffe, Infrastruktur, Häfen oder Hafenterminals zu ändern oder zu ersetzen.

Artikel 3

Definitionen

Für die Zwecke dieser Verordnung bezeichnet der Ausdruck

a) „behinderter Mensch“ oder „Person mit eingeschränkter Mobilität“ eine Person, deren Mobilität bei der Benutzung von Beförderungsmitteln wegen einer körperlichen (sensorischen oder motorischen, dauerhaften oder zeitweiligen) Behinderung, einer geistigen Behinderung oder Beeinträchtigung, wegen einer anderen Behinderung oder aufgrund des Alters eingeschränkt ist und deren Zustand angemessene Aufmerksamkeit und eine Anpassung der für alle Fahrgäste bereitgestellten Dienstleistungen an ihre besonderen Bedürfnisse erfordert;

b) „Hoheitsgebiet eines Mitgliedstaats“ ein Gebiet, auf das der Vertrag über die Arbeitsweise der Europäischen Union — wie in dessen Artikel 355 niedergelegt und unter den dort genannten Bedingungen — Anwendung findet;

c) „Zugangsbedingungen“ die einschlägigen Normen, Leitlinien und Informationen betreffend die Zugänglichkeit von Hafenterminals und Schiffen, einschließlich ihrer Einrichtungen für behinderte Menschen oder Personen mit eingeschränkter Mobilität;

d) „Beförderer“ eine natürliche oder juristische Person, die kein Reiseveranstalter, kein Reisevermittler und kein Fahrscheinverkäufer ist und Beförderung im Rahmen von Personenverkehrsdiensten oder Kreuzfahrten für die allgemeine Öffentlichkeit anbietet;

e) „Beförderer aus der Union“ einen Beförderer, der im Hoheitsgebiet eines Mitgliedstaats niedergelassen ist oder Beförderungen im Rahmen von Personenverkehrsdiensten in das oder aus dem Hoheitsgebiet eines Mitgliedstaats anbietet;

f) „Personenverkehrsdienst“ einen gewerblichen Verkehrsdienst zur Personenbeförderung auf See oder Binnenwasserstraßen nach einem veröffentlichten Fahrplan;

g) „integrierte Verkehrsdienste“ Beförderungsleistungen, die innerhalb eines festgelegten geografischen Gebiets im Verbund erbracht werden und für die ein Informationsdienst, eine Fahrausweisregelung und ein Fahrplan besteht;

h) „ausführender Beförderer“ eine andere Person als der Beförderer, welche die Beförderung ganz oder teilweise tatsächlich durchführt;

i) „Binnenwasserstraße“ ein natürliches oder künstliches schiffbares Binnengewässer oder System von miteinander verbundenen Binnengewässern, das für Beförderungszwecke genutzt wird, wie z. B. Seen, Flüsse oder Kanäle oder eine beliebige Kombination davon;

j) „Hafen“ einen Ort oder ein geografisches Gebiet, der/das so angelegt und eingerichtet ist, dass er/es Schiffe aufnehmen kann, die für das regelmäßige Ein- oder Ausschiffen von Fahrgästen genutzt werden können;

k) „Hafenterminal“ einen durch einen Beförderer oder Terminalbetreiber besetzten Terminal innerhalb eines Hafens mit Einrichtungen, wie z. B. Abfertigungs- und Ticketschaltern oder Wartebereichen, und Personal für das Ein- oder Ausschiffen von Fahrgästen, die mit einem Personenverkehrsdienst reisen oder eine Kreuzfahrt unternehmen;

l) „Schiff“ ein Schiff für den Verkehr auf See oder auf Binnenwasserstraßen;

m) „Beförderungsvertrag“ einen Vertrag zwischen einem Beförderer und einem Fahrgast über die Erbringung eines oder mehrerer Personenverkehrsdienste oder von Kreuzfahrten;

n) „Fahrschein“ ein gültiges Dokument oder einen anderen Nachweis für einen Beförderungsvertrag;

o) „Fahrscheinverkäufer“ jeden Vermittler, der für einen Beförderer Beförderungsverträge schließt;

p) „Reisevermittler“ jeden Vermittler, der im Namen eines Fahrgasts oder eines Reiseveranstalters Beförderungsverträge schließt;

q) „Reiseveranstalter“ einen Veranstalter oder Vermittler im Sinne von Artikel 2 Nummer 2 und 3 der Richtlinie 90/314/EWG, der kein Beförderer ist;

r) „Buchung“ die Reservierung einer bestimmten Abfahrt eines Personenverkehrsdienstes oder einer Kreuzfahrt;

s) „Terminalbetreiber“ eine private oder öffentliche Einrichtung im Hoheitsgebiet eines Mitgliedstaats, die für die Verwaltung und Leitung eines Hafenterminals zuständig ist;

t) „Kreuzfahrt“ einen Verkehrsdienst auf See oder Binnenwasserstraßen, der ausschließlich Vergnügungs- oder Freizeitzwecken dient, Unterbringung und andere Zusatzleistungen umfasst und einen Aufenthalt von mehr als zwei Übernachtungen an Bord beinhaltet;

u) „Schifffahrtsereignis“ Schiffbruch, Kentern, Zusammenstoß oder Strandung des Schiffes, Explosion oder Feuer im Schiff oder einen Mangel des Schiffes.

Artikel 4

Fahrscheine und nichtdiskriminierende Beförderungsbedingungen

(1) Die Beförderer stellen dem Fahrgast einen Fahrschein aus, sofern nicht andere Dokumente nach den einzelstaatlichen Rechtsvorschriften den Anspruch auf eine Beförderungsleistung begründen. Ein Fahrschein kann in elektronischer Form ausgestellt werden.

(2) Unbeschadet von Sozialtarifen werden die von Beförderern oder Fahrscheinverkäufern angewandten Vertragsbedingungen und Tarife der Allgemeinheit ohne jegliche unmittelbare oder mittelbare Diskriminierung aufgrund der Staatsangehörigkeit des Endkunden oder des Ortes der Niederlassung des Beförderers oder Fahrscheinverkäufers in der Union angeboten.

Artikel 5

Andere ausführende Parteien

(1) Wenn die Erfüllung der Verpflichtungen nach dieser Verordnung einem ausführenden Beförderer, einem Fahrscheinverkäufer oder einer anderen Person übertragen wurde, haftet der Beförderer, Reisevermittler, Reiseveranstalter oder Terminalbetreiber, der diese Verpflichtungen übertragen hat, dennoch für Handlungen und Unterlassungen dieser in Ausübung ihrer Verrichtungen handelnden ausführenden Partei.

(2) Zusätzlich zu den Bestimmungen des Absatzes 1 unterliegt die Partei, der der Beförderer, Reisevermittler, Reiseveranstalter oder Terminalbetreiber die Erfüllung einer Verpflichtung übertragen hat, in Bezug auf die ihr übertragene Verpflichtung den Bestimmungen dieser Verordnung einschließlich der Bestimmungen zur Haftung und zu Einreden.

Artikel 6

Ausschluss der Rechts- und Verpflichtungsbeschränkung

Die Rechte und Verpflichtungen gemäß dieser Verordnung dürfen nicht aufgehoben oder eingeschränkt werden, insbesondere nicht durch abweichende oder einschränkende Bestimmungen im Beförderungsvertrag.

KAPITEL II

RECHTE VON BEHINDERTEN MENSCHEN UND PERSONEN MIT EINGESCHRÄNKTER MOBILITÄT

Artikel 7

Recht auf Beförderung

(1) Beförderer, Reisevermittler sowie Reiseveranstalter dürfen sich nicht aufgrund der Behinderung oder der eingeschränkten Mobilität von Personen als solcher weigern, eine Buchung vorzunehmen, einen Fahrschein auszustellen oder auf sonstige Weise zur Verfügung zu stellen oder die Personen an Bord des Schiffes zu nehmen.

(2) Buchungen und Fahrscheine werden für behinderte Menschen und Personen mit eingeschränkter Mobilität ohne Aufpreis zu denselben Bedingungen angeboten, wie sie für alle anderen Fahrgäste gelten.

Artikel 8

Ausnahmen und besondere Bedingungen

(1) Abweichend von Artikel 7 Absatz 1 können Beförderer, Reisevermittler oder Reiseveranstalter sich weigern, für einen behinderten Menschen oder eine Person mit eingeschränkter Mobilität eine Buchung vorzunehmen, einen Fahrschein auszustellen oder auf sonstige Weise zur Verfügung zu stellen oder die Person an Bord des Schiffes zu nehmen,

a) um geltenden Sicherheitsanforderungen nachzukommen, die durch internationale oder nationale Rechtsvorschriften oder solche der Union festgelegt sind oder von den zuständigen Behörden erlassen wurden;

b) wenn es wegen der Bauart des Fahrgastschiffes oder der Infrastruktur und Einrichtung des Hafens, einschließlich der Hafenterminals, nicht möglich ist, das Einschiffen, das Ausschiffen oder die Beförderung dieser Person auf sichere oder operationell durchführbare Weise vorzunehmen.

(2) Weigert sich ein Beförderer, Reisevermittler oder Reiseveranstalter aus den in Absatz 1 angeführten Gründen, eine Buchung vorzunehmen oder einen Fahrschein auszustellen oder auf sonstige Weise zur Verfügung zu stellen, so unternimmt er alle zumutbaren Anstrengungen, der betreffenden Person eine annehmbare Beförderungsalternative mit einem Personenverkehrsdienst oder auf einer Kreuzfahrt des Beförderers anzubieten.

(3) Wird einem behinderten Menschen oder einer Person mit eingeschränkter Mobilität, der oder die eine Buchung oder einen Fahrschein besitzt und die in Artikel 11 Absatz 2 genannten Anforderungen erfüllt hat, die Einschiffung auf der Grundlage dieser Verordnung dennoch verweigert, so wird dieser Person und allen in Absatz 4 dieses Artikels genannten Begleitpersonen gemäß Anhang I der Anspruch auf Erstattung des Fahrpreises und auf eine anderweitige Beförderung zur Auswahl angeboten. Das Recht auf eine Rückfahrt oder anderweitige Beförderung ist davon abhängig, dass alle Sicherheitsanforderungen erfüllt sind.

(4) Sofern unbedingt notwendig, dürfen Beförderer, Reisevermittler oder Reiseveranstalter unter den in Absatz 1 festgelegten Bedingungen verlangen, dass ein behinderter Mensch oder eine Person mit eingeschränkter Mobilität von einer anderen Person begleitet wird, die in der Lage ist, die von dem behinderten Menschen oder der Person mit eingeschränkter Mobilität benötigte Hilfe zu leisten. Bei Personenverkehrsdiensten wird eine solche Begleitperson kostenlos befördert.

(5) Macht ein Beförderer, Reisevermittler oder Reiseveranstalter von den Bestimmungen der Absätze 1 oder 4 Gebrauch, so unterrichtet er den behinderten Menschen oder die Person mit eingeschränkter Mobilität unverzüglich über die spezifischen Gründe hierfür. Auf Antrag müssen diese Gründe dem behinderten Menschen oder der Person mit eingeschränkter Mobilität spätestens fünf Arbeitstage nach der Beantragung schriftlich mitgeteilt werden. Im Falle einer Weigerung nach Absatz 1 Buchstabe a ist auf die geltenden Sicherheitsanforderungen zu verweisen.

Artikel 9

Zugänglichkeit und Information

(1) Die Beförderer und Terminalbetreiber stellen — gegebenenfalls über ihre Organisationen — in Zusammenarbeit mit Interessenverbänden von behinderten Menschen oder Personen mit eingeschränkter Mobilität nichtdiskriminierende Zugangsbedingungen für die Beförderung von behinderten Menschen und Personen mit eingeschränkter Mobilität sowie Begleitpersonen auf bzw. halten diese vor. Die Zugangsbedingungen werden den nationalen Durchsetzungsstellen auf Antrag bekannt gegeben.

(2) Die Beförderer und Terminalbetreiber bringen der Öffentlichkeit die in Absatz 1 vorgesehenen Qualitätsstandards physisch oder im Internet auf Antrag in zugänglicher Form und in denselben Sprachen zur Kenntnis, in denen Informationen in der Regel allen Fahrgästen zugänglich gemacht werden. Dabei wird den Bedürfnissen von behinderten Menschen und von Personen mit eingeschränkter Mobilität besonders Rechnung getragen.

(3) Reiseveranstalter geben die in Absatz 1 vorgesehenen Zugangsbedingungen bekannt, die für die Fahrten im Rahmen der von ihnen veranstalteten, verkauften oder zum Verkauf angebotenen Pauschalreisen gelten.

(4) Beförderer, Reisevermittler und Reiseveranstalter gewährleisten, dass alle wesentlichen Informationen — einschließlich Online-Buchung und -Information — in Bezug auf die Beförderungsbedingungen, die Fahrt und die Zugangsbedingungen in einer für behinderte Menschen und Personen mit eingeschränkter Mobilität geeigneten und zugänglichen Form verfügbar sind. Hilfsbedürftige Personen erhalten eine Bestätigung der Hilfeleistungen in jeder verfügbaren Form, einschließlich auf elektronischem Wege oder über Dienste für Kurznachrichten (SMS).

Artikel 10

Anspruch auf Hilfeleistung in Häfen und an Bord von Schiffen

Vorbehaltlich der Zugangsbedingungen nach Artikel 9 Absatz 1 bieten die Beförderer und Terminalbetreiber innerhalb ihres jeweiligen Zuständigkeitsbereichs für behinderte Menschen und Personen mit eingeschränkter Mobilität in Häfen, einschließlich beim Ein- und Ausschiffen, und an Bord von Schiffen kostenlos die in den Anhängen II und III genannten Hilfeleistungen an. Diese Hilfeleistung wird, wenn möglich, an die individuellen Bedürfnisse von behinderten Menschen oder Personen mit eingeschränkter Mobilität angepasst.

Artikel 11

Voraussetzungen für das Erbringen von Hilfeleistungen

(1) Die Beförderer und Terminalbetreiber erbringen innerhalb ihres jeweiligen Zuständigkeitsbereichs für behinderte Menschen und Personen mit eingeschränkter Mobilität Hilfeleistungen gemäß Artikel 10, vorausgesetzt dass

a) der Hilfsbedarf einer Person in jeder verfügbaren Form, einschließlich auf elektronischem Wege oder per SMS, dem Beförderer oder Terminalbetreiber spätestens 48 Stunden vor dem Zeitpunkt, zu dem die Hilfeleistung benötigt wird, gemeldet wird, es sei denn, eine kürzere Frist wird zwischen dem Fahrgast und dem Beförderer oder Terminalbetreiber vereinbart, und

b) der behinderte Mensch oder die Person mit eingeschränkter Mobilität sich wie folgt in dem/der in Artikel 12 Absatz 3 genannten Hafen oder ausgewiesenen Anlaufstelle einfindet:

   i) zu einem vom Beförderer schriftlich angegebenen Zeitpunkt, der höchstens 60 Minuten vor der veröffentlichten Einschiffungszeit liegt, oder

   ii) falls keine Einschiffungszeit angegeben wurde, spätestens 60 Minuten vor der fahrplanmäßigen Abfahrtszeit, es sei denn, eine kürzere Frist wird zwischen dem Fahrgast und dem Beförderer oder Terminalbetreiber vereinbart.

(2) Zusätzlich zu den Bestimmungen des Absatzes 1 müssen behinderte Menschen und Personen mit eingeschränkter Mobilität dem Beförderer bei der Buchung oder beim Vorauskauf des Fahrscheins spezifische Bedürfnisse bezüglich Unterbringung, Sitzgelegenheiten oder beanspruchter Dienstleistungen oder die Tatsache, dass sie medizinisches Gerät mitführen müssen, melden, sofern die Bedürfnisse ihnen zu diesem Zeitpunkt bekannt sind.

(3) Die Meldung gemäß Absatz 1 Buchstabe a und Absatz 2 kann in jedem Fall bei dem Reisevermittler oder Reiseveranstalter, bei dem der Fahrschein erworben wurde, erfolgen. Im Falle einer Mehrfahrtenkarte ist eine einzige Meldung ausreichend, sofern geeignete Angaben zum Zeitplan für die nachfolgenden Fahrten gemacht werden. Der Fahrgast erhält eine Bestätigung, aus der sich ergibt, dass der Hilfsbedarf wie in Absatz 1 Buchstabe a und Absatz 2 vorgeschrieben gemeldet wurde.

(4) Ist keine Meldung gemäß Absatz 1 Buchstabe a und Absatz 2 erfolgt, so unternehmen die Beförderer und Terminalbetreiber dennoch alle zumutbaren Anstrengungen, um zu gewährleisten, dass die Hilfeleistung derart erfolgt, dass behinderte Menschen oder Personen mit eingeschränkter Mobilität einschiffen, ausschiffen und mit dem Schiff reisen können.

(5) Falls ein behinderter Mensch oder eine Person mit eingeschränkter Mobilität von einem anerkannten Begleithund begleitet wird, so ist der Hund zusammen mit dieser Person unterzubringen, sofern der Beförderer, Reisevermittler oder Reiseveranstalter eine Meldung gemäß den geltenden nationalen Bestimmungen über die Beförderung anerkannter Begleithunde an Bord von Fahrgastschiffen — sofern vorhanden — erhalten hat.

Artikel 12

Entgegennahme von Meldungen und Festlegung von Anlaufstellen

(1) Beförderer, Terminalbetreiber, Reisevermittler und Reiseveranstalter treffen alle erforderlichen Maßnahmen für die Beantragung von Mitteilungen und die Entgegennahme von Meldungen gemäß Artikel 11 Absatz 1 Buchstabe a und Artikel 11 Absatz 2. Diese Verpflichtung gilt an allen Verkaufsstellen, auch beim Vertrieb per Telefon und über das Internet.

(2) Erhalten Reisevermittler oder Reiseveranstalter die in Absatz 1 genannte Meldung, so leiten sie diese innerhalb ihrer normalen Bürozeiten unverzüglich an den Beförderer oder den Terminalbetreiber weiter.

(3) Die Beförderer und Terminalbetreiber legen innerhalb oder außerhalb des Hafenterminals eine Anlaufstelle fest, an der behinderte Menschen oder Personen mit eingeschränkter Mobilität ihre Ankunft melden und um Hilfe ersuchen können. Diese Anlaufstelle muss klar ausgeschildert sein und in zugänglicher Form grundlegende Auskünfte über den Hafenterminal und die angebotene Hilfeleistung bieten.

Artikel 13

Qualitätsstandards für Hilfeleistungen

(1) In Zusammenarbeit mit Interessenverbänden von behinderten Menschen und von Personen mit eingeschränkter Mobilität legen Terminalbetreiber und Beförderer, die Hafenterminals oder Personenverkehrsdienste mit insgesamt mehr als 100 000 gewerblichen Fahrgastbewegungen im vorangegangenen Kalenderjahr betreiben, innerhalb ihres jeweiligen Zuständigkeitsbereichs Qualitätsstandards für die Hilfeleistung gemäß den Anhängen II und III fest und ermitteln — gegebenenfalls über ihre Organisationen — den zur Einhaltung dieser Standards notwendigen Ressourcenaufwand.

(2) Bei der Festlegung der Qualitätsstandards ist den international anerkannten Konzepten und Verhaltenskodizes zur Erleichterung der Beförderung von behinderten Menschen oder Personen mit eingeschränkter Mobilität, insbesondere der Empfehlung der IMO für die Gestaltung und den Betrieb von Fahrgastschiffen entsprechend den Bedürfnissen älterer und behinderter Personen, in vollem Umfang Rechnung zu tragen.

(3) Die Beförderer und Terminalbetreiber bringen der Öffentlichkeit die in Absatz 1 vorgesehenen Qualitätsstandards physisch oder im Internet in zugänglicher Form in denselben Sprachen zur Kenntnis, in denen Informationen in der Regel allen Fahrgästen zugänglich gemacht werden.

Artikel 14

Unterweisung und Instruktionen

Unbeschadet des Internationalen Übereinkommens und Kodex über Normen für die Ausbildung, die Erteilung von Befähigungszeugnissen und den Wachdienst von Seeleuten und der im Rahmen der Revidierten Rheinschifffahrtsakte erlassenen Ausführungsverordnungen und des Übereinkommens über die Regelung der Schifffahrt auf der Donau entwickeln die Beförderer und gegebenenfalls die Terminalbetreiber Verfahren für die Unterweisung, einschließlich Instruktionen, für den Umgang mit behinderten Menschen, und stellen sicher, dass

a) ihre Mitarbeiter, einschließlich der Mitarbeiter aller anderen ausführenden Parteien, die behinderten Menschen und Personen mit eingeschränkter Mobilität unmittelbar Hilfe leisten, eine Unterweisung oder Instruktionen gemäß Anhang IV Teile A und B erhalten haben,

b) ihre Mitarbeiter, die sonst für die Buchung oder den Verkauf von Fahrscheinen oder für das Ein- und Ausschiffen zuständig sind, einschließlich der Mitarbeiter aller anderen ausführenden Parteien, eine Unterweisung oder Instruktionen gemäß Anhang IV Teil A erhalten haben, und

c) die in den Buchstaben a und b erwähnten Kategorien des Personals ihre Befähigung beispielsweise durch Instruktionen oder gegebenenfalls Schulungskurse zur Auffrischung beibehalten.

Artikel 15

Entschädigung für Mobilitätshilfen oder sonstige spezielle Ausrüstungen

(1) Die Beförderer und Terminalbetreiber haften für Schäden infolge des Verlusts oder der Beschädigung von Mobilitätshilfen oder sonstigen speziellen Ausrüstungen, die von behinderten Menschen oder Personen mit eingeschränkter Mobilität benutzt werden, wenn das Schadenereignis auf ein Verschulden oder Versäumnis des Beförderers oder des Terminalbetreibers zurückzuführen ist. Ein Verschulden oder Versäumnis des Beförderers wird bei einem durch ein Schifffahrtsereignis verursachten Schaden vermutet.

(2) Die Entschädigung gemäß Absatz 1 muss dem Wiederbeschaffungswert der betreffenden Ausrüstungen oder gegebenenfalls den Reparaturkosten entsprechen.

(3) Die Absätze 1 und 2 gelten nicht, falls Artikel 4 der Verordnung (EG) Nr. 392/2009 des Europäischen Parlaments und des Rates vom 23. April 2009 über die Unfallhaftung von Beförderern von Reisenden auf See [1] Anwendung findet.

(4) Es ist ferner jede Anstrengung zu unternehmen, um rasch zeitweiligen Ersatz, der eine geeignete Alternative darstellt, zu beschaffen.

[1] ABl. L 131 vom 28.5.2009, S. 24.

KAPITEL III

PFLICHTEN DER BEFÖRDERER UND TERMINALBETREIBER BEI REISEUNTERBRECHUNG

Artikel 16

Informationen bei annullierten oder verspäteten Abfahrten

(1) Bei Annullierung oder Verspätung einer Abfahrt eines Personenverkehrsdienstes oder einer Kreuzfahrt informiert der Beförderer oder gegebenenfalls der Terminalbetreiber die Fahrgäste, die von Hafenterminals abfahren, oder, wenn möglich, Fahrgäste, die von Häfen abfahren, so rasch wie möglich, jedoch spätestens 30 Minuten nach der fahrplanmäßigen Abfahrtszeit, über die Lage und, sobald diese Informationen vorliegen, über die voraussichtliche Abfahrtszeit und die voraussichtliche Ankunftszeit.

(2) Versäumen Fahrgäste aufgrund einer Annullierung oder Verspätung einen Anschluss an einen Verkehrsdienst, so unternimmt der Beförderer und gegebenenfalls der Terminalbetreiber alle zumutbaren Anstrengungen, um die betreffenden Fahrgäste über alternative Anschlüsse zu unterrichten.

(3) Der Beförderer oder gegebenenfalls der Terminalbetreiber sorgt dafür, dass behinderte Menschen oder Personen mit eingeschränkter Mobilität die nach den Absätzen 1 und 2 vorgeschriebenen Informationen in zugänglicher Form erhalten.

Artikel 17

Hilfeleistung bei Annullierung oder Verzögerung der Abfahrt

(1) Muss ein Beförderer vernünftigerweise davon ausgehen, dass die Abfahrt eines Personenverkehrsdienstes oder einer Kreuzfahrt annulliert wird oder sich um mehr als 90 Minuten über die fahrplanmäßige Abfahrtszeit hinaus verzögert, so sind den Fahrgästen in Hafenterminals kostenlos Imbisse, Mahlzeiten oder Erfrischungen in angemessenem Verhältnis zur Wartezeit anzubieten, sofern diese verfügbar oder in zumutbarer Weise zu beschaffen sind.

(2) Bei Annullierung oder Verspätung einer Abfahrt, die einen Aufenthalt von einer oder mehreren Nächten oder eine Verlängerung des von den Fahrgästen geplanten Aufenthalts notwendig machen, bietet der Beförderer, sofern dies praktisch durchführbar ist, den Fahrgästen in Hafenterminals zusätzlich zu den Imbissen, Mahlzeiten oder Erfrischungen gemäß Absatz 1 kostenlos eine angemessene Unterbringung an Bord oder an Land sowie die Beförderung zwischen dem Hafenterminal und der Unterkunft an. Der Beförderer kann die Gesamtkosten der Unterbringung an Land — ohne die Kosten der Beförderung zwischen dem Hafenterminal und der Unterkunft — auf 80 EUR je Fahrgast und Nacht für höchstens drei Nächte beschränken.

(3) Bei der Anwendung der Absätze 1 und 2 trägt der Beförderer den Bedürfnissen von behinderten Menschen und Personen mit eingeschränkter Mobilität und etwaigen Begleitpersonen besonders Rechnung.

Artikel 18

Anderweitige Beförderung und Fahrpreiserstattung bei annullierten oder verspäteten Abfahrten

(1) Muss ein Beförderer vernünftigerweise davon ausgehen, dass die Abfahrt eines Personenverkehrsdienstes von einem Hafenterminal annulliert wird oder sich um mehr als 90 Minuten verzögert, so bietet er den Fahrgästen unverzüglich Folgendes zur Auswahl:

a) zum frühestmöglichen Zeitpunkt und ohne Aufpreis anderweitige Beförderung zum im Beförderungsvertrag festgelegten Endziel unter vergleichbaren Bedingungen;

b) Erstattung des Fahrpreises und gegebenenfalls zum frühestmöglichen Zeitpunkt kostenlose Rückfahrt zum im Beförderungsvertrag festgelegten Abfahrtsort.

(2) Wird die Abfahrt eines Personenverkehrsdienstes von einem Hafen annulliert oder verzögert sie sich um mehr als 90 Minuten, so haben die Fahrgäste Anspruch auf eine solche anderweitige Beförderung oder Erstattung des Fahrpreises durch den Beförderer.

(3) Die in Absatz 1 Buchstabe b und Absatz 2 vorgesehene Erstattung des vollen Fahrpreises in der entrichteten Höhe für den Teil oder die Teile der Fahrt, die nicht durchgeführt wurden, sowie für bereits durchgeführte Teile, falls die Fahrt im Hinblick auf die ursprünglichen Reisepläne des Fahrgastes zwecklos geworden ist, erfolgt binnen sieben Tagen durch Barzahlung, elektronische Überweisung, Gutschrift oder Scheck. Mit Zustimmung des Fahrgasts kann die Erstattung des vollen Fahrpreises auch in Form von Gutscheinen und/oder anderen Dienstleistungen erfolgen, deren Wert der Höhe des entrichteten Preises entspricht, sofern deren Bedingungen, insbesondere bezüglich des Gültigkeitszeitraums und des Zielorts, flexibel sind.

Artikel 19

Entschädigung durch Fahrpreisnachlass bei verspäteter Ankunft

(1) Fahrgäste haben bei einer verspäteten Ankunft am Endziel gemäß dem Beförderungsvertrag Anspruch auf Entschädigung durch den Beförderer, ohne das Recht auf Beförderung zu verlieren. Die Entschädigung beträgt mindestens 25 % des Fahrpreises bei einer Verspätung von mindestens

a) einer Stunde bei einer planmäßigen Fahrtdauer von bis zu vier Stunden,

b) zwei Stunden bei einer planmäßigen Fahrtdauer von mehr als vier bis zu acht Stunden,

c) drei Stunden bei einer planmäßigen Fahrtdauer von mehr als acht bis zu 24 Stunden oder

d) sechs Stunden bei einer planmäßigen Fahrtdauer von mehr als 24 Stunden.

Beträgt die Verspätung mehr als das Doppelte der in den Buchstaben a bis d angegebenen Zeiten, so beträgt die Entschädigung 50 % des Fahrpreises.

(2) Fahrgäste, die eine Zeitfahrkarte besitzen und denen während der Gültigkeitsdauer ihrer Zeitfahrkarte wiederholt Verspätungen bei der Ankunft widerfahren, können eine angemessene Entschädigung gemäß den Entschädigungsbedingungen des Beförderers verlangen. In den Entschädigungsbedingungen werden die Kriterien zur Bestimmung der Verspätung bei der Ankunft und für die Berechnung der Entschädigung festgelegt.

(3) Die Entschädigung wird im Verhältnis zu dem Preis berechnet, den der Fahrgast für den verspäteten Personenverkehrsdienst tatsächlich entrichtet hat.

(4) Handelt es sich bei der Beförderung um eine Hin- und Rückfahrt, so wird die Entschädigung für eine entweder auf der Hin- oder auf der Rückfahrt aufgetretene Verspätung bei der Ankunft auf der Grundlage des halben Fahrpreises für diesen Personenverkehrsdienst berechnet.

(5) Die Zahlung der Entschädigung muss innerhalb eines Monats nach Einreichung des Antrags auf Entschädigung erfolgen. Die Entschädigung kann in Form von Gutscheinen und/oder anderen Leistungen erfolgen, sofern deren Bedingungen, insbesondere bezüglich des Gültigkeitszeitraums und des Zielorts, flexibel sind. Auf Verlangen des Fahrgastes erfolgt die Entschädigung in Form eines Geldbetrags.

(6) Der Entschädigungsbetrag darf nicht um Kosten der Finanztransaktion wie Gebühren, Telefonkosten oder Porti gekürzt werden. Die Beförderer dürfen Mindestbeträge festlegen, unterhalb deren keine Entschädigungszahlungen vorgenommen werden. Dieser Mindestbetrag darf höchstens 6 EUR betragen.

Artikel 20

Ausnahmen

(1) Die Artikel 17, 18 und 19 gelten nicht für Fahrgäste mit Fahrscheinen mit offenen Reisedaten, solange keine Abfahrtszeit festgelegt ist, mit Ausnahme von Fahrgästen, die eine Zeitfahrkarte besitzen.

(2) Die Artikel 17 und 19 kommen nicht zur Anwendung, wenn der Fahrgast vor dem Kauf des Fahrscheins über die Annullierung oder Verspätung informiert wird oder wenn die Annullierung oder Verspätung auf das Verschulden des Fahrgasts zurückgeht.

(3) Artikel 17 Absatz 2 kommt nicht zur Anwendung, wenn der Beförderer nachweist, dass die Annullierung oder Verspätung durch Wetterbedingungen, die den sicheren Betrieb des Schiffes beeinträchtigen, verursacht wurde.

(4) Artikel 19 kommt nicht zur Anwendung, wenn der Beförderer nachweist, dass die Annullierung oder Verspätung durch Wetterbedingungen, die den sicheren Betrieb des Schiffes beeinträchtigen, oder durch außergewöhnliche Umstände verursacht wurde, die die Erbringung des Personenverkehrsdienstes behindern und die auch dann nicht hätten vermieden werden können, wenn alle zumutbaren Maßnahmen getroffen worden wären.

Artikel 21

Weitergehende Ansprüche

Diese Verordnung hindert Fahrgäste nicht daran, vor nationalen Gerichten weitergehende Ansprüche gemäß den einzelstaatlichen Rechtsvorschriften aufgrund von Nachteilen zu verfolgen, die sie wegen Annullierung oder Verspätung von Verkehrsdiensten erlitten haben; dies gilt auch für Ansprüche nach der Richtlinie 90/314/EWG.

KAPITEL IV

ALLGEMEINE REGELN FÜR INFORMATIONEN UND BESCHWERDEN

Artikel 22

Recht auf Reiseinformationen

Die Beförderer und Terminalbetreiber sorgen innerhalb ihres jeweiligen Zuständigkeitsbereichs während der gesamten Fahrt für eine angemessene Information der Fahrgäste in für jeden zugänglicher Form und in denselben Sprachen, in denen Informationen in der Regel allen Fahrgästen zugänglich gemacht werden. Dabei wird den Bedürfnissen von behinderten Menschen und von Personen mit eingeschränkter Mobilität besonders Rechnung getragen.

Artikel 23

Unterrichtung über Fahrgastrechte

(1) Die Beförderer, die Terminalbetreiber und gegebenenfalls die Hafenbehörden stellen in ihrem jeweiligen Zuständigkeitsbereich sicher, dass Informationen über die Fahrgastrechte nach dieser Verordnung an Bord der Schiffe, in den Häfen, wenn möglich, und in den Hafenterminals öffentlich zugänglich sind. Die Informationen müssen soweit möglich in zugänglicher Form und in denselben Sprachen bereitgestellt werden, in denen Informationen in der Regel allen Fahrgästen zugänglich gemacht werden. Bei der Bereitstellung dieser Informationen wird den Bedürfnissen von behinderten Menschen und von Personen mit eingeschränkter Mobilität besonders Rechnung getragen.

(2) Um der in Absatz 1 genannten Informationspflicht nachzukommen, können die Beförderer, die Terminalbetreiber und gegebenenfalls die Hafenbehörden eine Zusammenfassung der Bestimmungen dieser Verordnung verwenden, die die Kommission in allen Amtssprachen der Europäischen Union erstellt und ihnen zur Verfügung stellt.

(3) Die Beförderer, die Terminalbetreiber und gegebenenfalls die Hafenbehörden erteilen den Fahrgästen auf den Schiffen, in den Häfen, wenn möglich, und in den Hafenterminals in angemessener Weise die notwendigen Angaben zur Kontaktaufnahme mit den Durchsetzungsstellen, die von dem betreffenden Mitgliedstaat gemäß Artikel 25 Absatz 1 benannt wurden.

Artikel 24

Beschwerden

(1) Die Beförderer und Terminalbetreiber errichten oder unterhalten ein zugängliches System zur Bearbeitung von Beschwerden im Zusammenhang mit den unter diese Verordnung fallenden Rechten und Pflichten.

(2) Will ein Fahrgast im Rahmen dieser Verordnung eine Beschwerde an den Beförderer oder den Terminalbetreiber richten, so muss er diese innerhalb von zwei Monaten nach der tatsächlichen oder geplanten Durchführung des Verkehrsdienstes einreichen. Der Beförderer oder Terminalbetreiber muss dem Fahrgast innerhalb eines Monats nach Eingang der Beschwerde mitteilen, ob seiner Beschwerde stattgegeben wurde, ob sie abgelehnt wurde oder ob sie noch bearbeitet wird. Die Frist für die endgültige Beantwortung darf zwei Monate ab Eingang der Beschwerde nicht überschreiten.

KAPITEL V

DURCHSETZUNG UND NATIONALE DURCHSETZUNGSSTELLEN

Artikel 25

Nationale Durchsetzungsstellen

(1) Jeder Mitgliedstaat benennt eine oder mehrere neue oder bestehende Stellen, die für die Durchsetzung dieser Verordnung in Bezug auf Personenverkehrsdienste und Kreuzfahrten von in seinem Hoheitsgebiet gelegenen Häfen und in Bezug auf Personenverkehrsdienste von einem Drittland zu diesen Häfen zuständig sind. Jede dieser Stellen trifft die notwendigen Maßnahmen, um sicherzustellen, dass diese Verordnung eingehalten wird.

Jede Stelle ist in Aufbau, Finanzierungsentscheidungen, Rechtsstruktur und Entscheidungsfindung von gewerblichen Interessen unabhängig.

(2) Die Mitgliedstaaten unterrichten die Kommission über die gemäß diesem Artikel benannte Stelle oder Stellen.

(3) Jeder Fahrgast kann bei der nach Absatz 1 benannten zuständigen Stelle oder jeder anderen von einem Mitgliedstaat benannten zuständigen Stelle gemäß den einzelstaatlichen Rechtsvorschriften eine Beschwerde über einen mutmaßlichen Verstoß gegen diese Verordnung einreichen. Die zuständige Stelle erteilt den Fahrgästen eine begründete Antwort auf ihre Beschwerde innerhalb einer angemessenen Frist.

Ein Mitgliedstaat kann beschließen,

a) dass der Fahrgast seine Beschwerde gemäß dieser Verordnung in einem ersten Schritt an den Beförderer oder Terminalbetreiber zu richten hat und/oder

b) dass die nationale Durchsetzungsstelle oder eine andere von dem Mitgliedstaat benannte zuständige Stelle als Beschwerdeinstanz für Beschwerden dient, für die keine Lösung gemäß Artikel 24 gefunden wurde.

(4) Mitgliedstaaten, die gemäß Artikel 2 Absatz 4 Ausnahmen für bestimmte Verkehrsdienste vorgesehen haben, gewährleisten das Bestehen eines vergleichbaren Mechanismus zur Durchsetzung der Fahrgastrechte.

Artikel 26

Berichterstattung über die Durchsetzung

Die gemäß Artikel 25 benannten Durchsetzungsstellen veröffentlichen am 1. Juni 2015 und danach alle zwei Jahre einen Bericht über ihre Tätigkeiten in den zwei vorangegangenen Kalenderjahren, der insbesondere eine Beschreibung der Maßnahmen, die zur Durchführung der Bestimmungen dieser Verordnung getroffen wurden, Einzelheiten zu verhängten Sanktionen und Statistiken über Beschwerden und verhängte Sanktionen enthält.

Artikel 27

Zusammenarbeit der Durchsetzungsstellen

Die in Artikel 25 Absatz 1 genannten nationalen Durchsetzungsstellen tauschen, soweit dies für eine kohärente Anwendung dieser Verordnung erforderlich ist, Informationen über ihre Arbeit, ihre Entscheidungsgrundsätze und ihre Entscheidungspraxis aus. Die Kommission unterstützt sie bei dieser Aufgabe.

Artikel 28

Sanktionen

Die Mitgliedstaaten legen die Sanktionen fest, die bei einem Verstoß gegen diese Verordnung zu verhängen sind, und treffen alle geeigneten Maßnahmen, um deren Durchsetzung zu gewährleisten. Die Sanktionen müssen wirksam, verhältnismäßig und abschreckend sein. Die Mitgliedstaaten melden der Kommission diese Regeln und Maßnahmen spätestens bis zum 18. Dezember 2012; sie melden ihr auch unverzüglich jede spätere sie betreffende Änderung.

KAPITEL VI

SCHLUSSBESTIMMUNGEN

Artikel 29

Bericht

Spätestens bis zum 19. Dezember 2015 erstattet die Kommission dem Europäischen Parlament und dem Rat Bericht über die Anwendung und Wirkung der Verordnung. Dem Bericht sind erforderlichenfalls Legislativvorschläge beizufügen, mit denen die Bestimmungen der Verordnung weiter ausgestaltet oder geändert werden sollen.

Artikel 30

Änderung der Verordnung (EG) Nr. 2006/2004

Im Anhang der Verordnung (EG) Nr. 2006/2004 wird folgende Nummer angefügt:

„18. Verordnung (EU) Nr. 1177/2010 des Europäischen Parlaments und des Rates vom 24. November 2010 über die Fahrgastrechte im See- und Binnenschiffsverkehr (*).

(*) ABl. L 334 vom 17. Dezember 2010, S. 1."

Artikel 31

Inkrafttreten

Diese Verordnung tritt am zwanzigsten Tag nach ihrer Veröffentlichung im *Amtsblatt der Europäischen Union* in Kraft.

Sie gilt ab dem 18. Dezember 2012.

Diese Verordnung ist in allen ihren Teilen verbindlich und gilt unmittelbar in jedem Mitgliedstaat.

Geschehen zu Straßburg am 24. November 2010.

Im Namen des Europäische Parlaments
Der Präsident
J. BUZEK

Im Namen des Rates
Der Präsident
O. CHASTEL

ANHANG I

RECHT VON BEHINDERTEN MENSCHEN UND PERSONEN MIT EINGESCHRÄNKTER MOBILITÄT AUF ERSTATTUNG ODER ANDERWEITIGE BEFÖRDERUNG GEMÄß ARTIKEL 8

1. Wird auf diesen Anhang Bezug genommen, so wird behinderten Menschen und Personen mit eingeschränkter Mobilität Folgendes zur Auswahl angeboten:

   a) — Erstattung des vollen Fahrpreises in der entrichteten Höhe für den Teil oder die Teile der Fahrt, die nicht durchgeführt wurden, sowie für bereits durchgeführte Teile, falls die Fahrt im Hinblick auf die ursprünglichen Reisepläne des Fahrgastes zwecklos geworden ist, binnen sieben Tagen durch Barzahlung, elektronische Überweisung, Gutschrift oder Scheck sowie gegebenenfalls

   — eine Rückfahrt zum ersten Abfahrtsort zum frühestmöglichen Zeitpunkt oder

   b) anderweitige Beförderung zum Endziel gemäß dem Beförderungsvertrag, ohne Aufpreis und unter vergleichbaren Bedingungen, zum frühestmöglichen Zeitpunkt oder

   c) anderweitige Beförderung zum Endziel gemäß dem Beförderungsvertrag, unter vergleichbaren Bedingungen, zu einem späteren Zeitpunkt nach Wunsch des Fahrgastes, vorbehaltlich verfügbarer Fahrscheine.

2. Nummer 1 Buchstabe a gilt auch für Fahrgäste, deren Fahrten Bestandteil einer Pauschalreise sind, mit Ausnahme des Anspruchs auf Erstattung, sofern dieser sich aus der Richtlinie 90/314/EWG ergibt.

3. Befinden sich an einem Ort, in einer Stadt oder Region mehrere Häfen und bietet ein Beförderer einem Fahrgast eine Fahrt zu einem anderen als dem in der ursprünglichen Buchung vorgesehenen Zielhafen an, so trägt der Beförderer die Kosten für die Beförderung des Fahrgastes von dem anderen Hafen entweder zu dem in der ursprünglichen Buchung vorgesehenen Zielhafen oder zu einem sonstigen nahe gelegenen, mit dem Fahrgast vereinbarten Zielort.

ANHANG II

HILFELEISTUNG IN HÄFEN, EINSCHLIEßLICH BEIM EIN- UND AUSSCHIFFEN, GEMÄß DEN ARTIKELN 10 UND 13

1. Hilfeleistungen und Vorkehrungen, um behinderten Menschen oder Personen mit eingeschränkter Mobilität in die Lage zu versetzen,

   — ihre Ankunft an einem Hafenterminal oder, wenn möglich, in einem Hafen und ihren Bedarf an Hilfeleistungen anzumelden;

   — von einem Eingang zu einem Abfertigungsschalter (sofern vorhanden) oder zum Schiff zu gelangen;

   — erforderlichenfalls die Abfertigung zu erledigen und das Gepäck aufzugeben;

   — vom Abfertigungsschalter, sofern vorhanden, durch die Ausreise- und Sicherheitskontrollstellen zum Schiff zu gelangen;

   — mithilfe von geeigneten Lifts, Rollstühlen oder sonstigen benötigten Hilfen an Bord des Schiffes zu gelangen;

   — von der Schiffstür an ihren Platz zu gelangen;

   — Gepäck im Schiff zu verstauen und wieder in Besitz zu nehmen;

   — von ihrem Sitz zur Schiffstür zu gelangen;

   — mithilfe von geeigneten Lifts, Rollstühlen oder sonstigen benötigten Hilfen das Schiff zu verlassen;

   — das Gepäck erforderlichenfalls wieder in Besitz zu nehmen und die Einreise- und Zollkontrollstellen zu passieren;

   — von der Gepäckhalle oder der Ausschiffungsstelle zu einem gekennzeichneten Ausgang zu gelangen;

   — erforderlichenfalls zu den Toiletten (falls vorhanden) zu gelangen.

2. Wird ein behinderter Mensch oder eine Person mit eingeschränkter Mobilität von einer Begleitperson unterstützt, so ist dieser Person auf Verlangen zu gestatten, im Hafen sowie beim Ein- und Ausschiffen die notwendige Hilfe zu leisten.

3. Abfertigung aller notwendigen Mobilitätshilfen wie elektrische Rollstühle.

4. Zeitweiliger Ersatz beschädigter oder verloren gegangener Mobilitätshilfen mit Hilfen, die eine geeignete Alternative darstellen.

5. Gegebenenfalls Abfertigung anerkannter Begleithunde an Land.

6. Mitteilung der für das Ein- und Ausschiffen benötigten Informationen in zugänglicher Form.

ANHANG III

HILFELEISTUNG AN BORD VON SCHIFFEN GEMÄß DEN ARTIKELN 10 UND 13

1. Beförderung anerkannter Begleithunde an Bord des Schiffes entsprechend den einzelstaatlichen Rechtsvorschriften.

2. Beförderung von medizinischem Gerät und der erforderlichen Mobilitätsausrüstung für den behinderten Menschen oder die Person mit eingeschränkter Mobilität, einschließlich elektrischer Rollstühle.

3. Mitteilung von wesentlichen Informationen über eine Strecke in zugänglicher Form.

4. Nach besten Kräften Bemühen um Sitzvergabe entsprechend den Bedürfnissen von behinderten Menschen oder Personen mit eingeschränkter Mobilität nach Maßgabe der Sicherheitsanforderungen und der Verfügbarkeit.

5. Erforderlichenfalls Hilfe beim Aufsuchen der Toiletten (falls vorhanden).

6. Wird ein behinderter Mensch oder eine Person mit eingeschränkter Mobilität von einer Begleitperson unterstützt, bemüht sich der Beförderer nach besten Kräften, dieser einen Sitzplatz bzw. eine Kabine neben dem behinderten Menschen oder der Person mit eingeschränkter Mobilität zuzuweisen.

ANHANG IV

UNTERWEISUNG, EINSCHLIEßLICH INSTRUKTIONEN, FÜR DEN UMGANG MIT BEHINDERTEN MENSCHEN GEMÄß ARTIKEL 14

A. Unterweisung, einschließlich Instruktionen, zur Sensibilisierung für den Umgang mit behinderten Menschen

Die Unterweisung, einschließlich Instruktionen, zur Sensibilisierung für den Umgang mit behinderten Menschen betrifft folgende Aspekte:

— Sensibilisierung und angemessenes Verhalten gegenüber Fahrgästen mit körperlichen Behinderungen, sensorischen Behinderungen (Hör- und Sehbehinderungen), versteckten Behinderungen oder Lernbehinderungen, einschließlich der Unterscheidung der verschiedenen Fähigkeiten von Personen, deren Mobilität, Orientierungs- oder Kommunikationsvermögen eventuell eingeschränkt ist;

— Hindernisse, denen behinderte Menschen und Personen mit eingeschränkter Mobilität gegenüberstehen, darunter die Haltung von Mitmenschen, konkrete/physische und organisatorische Barrieren;

— anerkannte Begleithunde, unter Berücksichtigung der Rolle und der Bedürfnisse eines Begleithunds;

— Umgang mit unerwarteten Situationen;

— soziale Kompetenz und Methoden der Kommunikation mit Schwerhörigen sowie Personen mit Seh-, Sprech- und Lernbehinderungen;

— allgemeine Kenntnis der IMO-Empfehlung für die Gestaltung und den Betrieb von Fahrgastschiffen entsprechend den Bedürfnissen älterer und behinderter Personen.

B. Unterweisung, einschließlich Instruktionen, für Hilfeleistungen für behinderte Menschen

Die Unterweisung, einschließlich Instruktionen, für Hilfeleistungen für behinderte Menschen betrifft folgende Aspekte:

— Hilfeleistung für Rollstuhlfahrer beim Umsetzen in den und aus dem Rollstuhl;

— Hilfeleistung für behinderte Menschen und Personen mit eingeschränkter Mobilität, die mit anerkannten Begleithunden reisen, unter Berücksichtigung der Rolle und der Bedürfnisse dieser Hunde;

— Techniken für die Begleitung von Fahrgästen mit Sehbehinderungen sowie für den Umgang mit und der Beförderung von anerkannten Begleithunden;

— Kenntnis der Arten von Hilfsmitteln für behinderte Menschen und Personen mit eingeschränkter Mobilität und des sorgfältigen Umgangs mit diesen Hilfsmitteln;

— Nutzung von Ein- und Ausstiegshilfen, Kenntnis der geeigneten Verfahren für die Hilfeleistung beim Ein- und Aussteigen, die die Sicherheit und Würde von behinderten Menschen und Personen mit eingeschränkter Mobilität wahren;

— Verständnis für die Notwendigkeit zuverlässiger und professioneller Hilfeleistung. Auch Bewusstsein für das Gefühl der Verletzlichkeit, das behinderte Menschen und Personen mit eingeschränkter Mobilität wegen ihrer Abhängigkeit von der geleisteten Hilfe während der Reise möglicherweise empfinden;

— Kenntnisse in erster Hilfe.

VERORDNUNG (EG) Nr. 1371/2007 DES EUROPÄISCHEN PARLAMENTS UND DES RATES

vom 23. Oktober 2007

über die Rechte und Pflichten der Fahrgäste im Eisenbahnverkehr

DAS EUROPÄISCHE PARLAMENT UND DER RAT DER EUROPÄISCHEN UNION —

gestützt auf den Vertrag zur Gründung der Europäischen Gemeinschaft, insbesondere auf Artikel 71 Absatz 1,

auf Vorschlag der Kommission,

nach Stellungnahme des Europäischen Wirtschafts- und Sozialausschusses [1],

nach Stellungnahme des Ausschusses der Regionen [2],

gemäß dem Verfahren des Artikels 251 des Vertrags, aufgrund des vom Vermittlungsausschuss am 31. Juli 2007 gebilligten gemeinsamen Entwurfs [3],

in Erwägung nachstehender Gründe:

(1) Im Rahmen der gemeinsamen Verkehrspolitik ist es wichtig, die Nutzerrechte der Fahrgäste im Eisenbahnverkehr zu schützen und die Qualität und Effektivität der Schienenpersonenverkehrsdienste zu verbessern, um dazu beizutragen, den Verkehrsanteil der Eisenbahn im Vergleich zu anderen Verkehrsträgern zu erhöhen.

(2) In der Mitteilung der Kommission „Verbraucherpolitische Strategie 2002-2006“ [4] ist das Ziel festgelegt, gemäß Artikel 153 Absatz 2 des Vertrags ein hohes Verbraucherschutzniveau im Bereich des Verkehrs zu erreichen.

(3) Da der Fahrgast die schwächere Partei eines Beförderungsvertrags ist, sollten seine Rechte in dieser Hinsicht geschützt werden.

(4) Zu den Rechten der Nutzer von Eisenbahnverkehrsdiensten gehört das Erhalten von Informationen über den Verkehrsdienst sowohl vor als auch während der Fahrt. Wann immer möglich, sollten Eisenbahnunternehmen und Fahrkartenverkäufer diese Informationen im Voraus und so schnell wie möglich bereitstellen.

(5) Ausführlichere Anforderungen für die Bereitstellung von Reiseinformationen werden in den Technischen Spezifikationen für die Interoperabilität (TSI) nach der Richtlinie 2001/16/EG des Europäischen Parlaments und des Rates vom 19. März 2001 über die Interoperabilität des konventionellen Eisenbahnsystems [5] festgelegt.

(6) Bei der Stärkung der Rechte der Fahrgäste im Eisenbahnverkehr sollte das bereits bestehende einschlägige internationale Regelwerk im Anhang A — Einheitliche Rechtsvorschriften für den Vertrag über die internationale Eisenbahnbeförderung von Personen und Gepäck (CIV) zum Übereinkommen über den internationalen Eisenbahnverkehr (COTIF) vom 9. Mai 1980, geändert durch das Protokoll vom 3. Juni 1999 betreffend die Änderung des Übereinkommens über den internationalen Eisenbahnverkehr vom 3. Juni 1999 (Protokoll 1999) — zugrunde gelegt werden. Es ist jedoch wünschenswert, den Anwendungsbereich dieser Verordnung auszuweiten und nicht nur die Fahrgäste im grenzüberschreitenden Eisenbahnverkehr, sondern auch die Fahrgäste im inländischen Eisenbahnverkehr zu schützen.

(7) Die Eisenbahnunternehmen sollten zusammenarbeiten, um den Fahrgästen im Eisenbahnverkehr das Umsteigen zwischen Betreibern dadurch zu erleichtern, dass — wann immer möglich — Durchgangsfahrkarten angeboten werden.

(8) Die Bereitstellung von Informationen und Fahrkarten für Fahrgäste im Eisenbahnverkehr sollte dadurch erleichtert werden, dass rechnergestützte Systeme an gemeinsamen Spezifikationen ausgerichtet werden.

(9) Die Weiterentwicklung der Reiseinformations- und Buchungssysteme sollte nach den TSI erfolgen.

(10) Schienenpersonenverkehrsdienste sollten den Bürgern allgemein zugute kommen. Daher sollten Personen mit Behinderungen und Personen mit eingeschränkter Mobilität unabhängig davon, ob die Ursache dafür eine Behinderung, das Alter oder andere Faktoren sind, Bahnreisemöglichkeiten haben, die denen anderer Bürger vergleichbar sind. Personen mit Behinderungen und Personen mit eingeschränkter Mobilität haben das gleiche Recht auf Freizügigkeit, Entscheidungsfreiheit und Nichtdiskriminierung wie alle anderen Bürger. Unter anderem sollte besonders darauf geachtet werden, dass Personen mit Behinderungen und Personen mit eingeschränkter Mobilität Informationen über die Zugänglichkeit von Eisenbahnverkehrsdiensten, über die Bedingungen für den Zugang zu den Fahrzeugen und über deren Ausstattung erhalten. Damit auch Fahrgäste mit eingeschränkter Sinneswahrnehmung bestmöglich über Verspätungen unterrichtet werden, sollten gegebenenfalls akustische und optische Systeme genutzt werden. Personen mit Behinderungen und Personen mit eingeschränkter Mobilität sollten die Möglichkeit haben, Fahrkarten im Zug ohne Aufpreis zu kaufen.

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[1] ABl. C 221 vom 8.9.2005, S. 8.

[2] ABl. C 71 vom 22.3.2005, S. 26.

[3] Stellungnahme des Europäischen Parlaments vom 28. September 2005 (ABl. C 227 E vom 21.9.2006, S. 490), Gemeinsamer Standpunkt des Rates vom 24. Juli 2006 (ABl. C 289 E vom 28.11.2006, S. 1), Standpunkt des Europäischen Parlaments vom 18. Januar 2007 (noch nicht im Amtsblatt veröffentlicht), Legislative Entschließung des Europäischen Parlaments vom 25. September 2007 und Beschluss des Rates vom 26. September 2007.

[4] ABl. C 137 vom 8.6.2002, S. 2.

[5] ABl. L 110 vom 20.4.2001, S. 1. Zuletzt geändert durch die Richtlinie 2007/32/EG der Kommission (ABl. L 141 vom 2.6.2007, S. 63).

(11) Eisenbahnunternehmen und Bahnhofsbetreiber sollten durch die Beachtung der TSI für Personen mit eingeschränkter Mobilität die Bedürfnisse von Personen mit Behinderungen und von Personen mit eingeschränkter Mobilität berücksichtigen, so dass entsprechend den für das öffentliche Auftragswesen geltenden Rechtsvorschriften der Gemeinschaft dafür gesorgt wird, dass die Zugänglichkeit zu allen baulichen Strukturen und zu allen Fahrzeugen durch die schrittweise Beseitigung physischer Hindernisse und funktioneller Behinderungen anlässlich der Anschaffung neuen Materials sowie der Durchführung von Bau- oder umfangreichen Renovierungsarbeiten gewährleistet ist.

(12) Eisenbahnunternehmen sollten die Pflicht haben, hinsichtlich ihrer Haftung gegenüber Fahrgästen im Eisenbahnverkehr bei Unfällen versichert zu sein oder gleichwertige Vorkehrungen zu treffen. Die Mindestversicherungssumme für Eisenbahnunternehmen sollte künftig überprüft werden.

(13) Die Stärkung der Rechte auf Entschädigung und Hilfeleistung bei Verspätungen, verpassten Anschlüssen oder Zugausfällen sollte auf dem Markt für Schienenpersonenverkehrsdienste zu größeren Anreizen zum Nutzen der Fahrgäste führen.

(14) Es ist wünschenswert, dass durch diese Verordnung ein System für die Entschädigung von Fahrgästen bei Verspätungen geschaffen wird, das mit der Haftung des Eisenbahnunternehmens verknüpft ist und auf der gleichen Grundlage beruht wie das internationale System, das im Rahmen des COTIF, insbesondere in dessen Anhang betreffend die Fahrgastrechte (CIV), besteht.

(15) Gewährt ein Mitgliedstaat Eisenbahnunternehmen eine Befreiung von dieser Verordnung, sollte er die Eisenbahnunternehmen anhalten, im Benehmen mit den Fahrgastverbänden Maßnahmen zur Entschädigung und Hilfeleistung bei größeren Störungen eines Schienenpersonenverkehrsdienstes zu treffen.

(16) Es ist auch wünschenswert, für Unfallopfer und ihre Angehörigen kurzfristige finanzielle Härten unmittelbar nach einem Unfall zu mildern.

(17) Im Interesse der Fahrgäste im Eisenbahnverkehr sollten im Einvernehmen mit den staatlichen Stellen geeignete Maßnahmen ergriffen werden, um die persönliche Sicherheit der Fahrgäste in den Bahnhöfen und in den Zügen zu gewährleisten.

(18) Die Fahrgäste im Eisenbahnverkehr sollten die Möglichkeit haben, hinsichtlich der durch diese Verordnung begründeten Rechte und Pflichten bei jedem beteiligten Eisenbahnunternehmen eine Beschwerde einzureichen, auf die ihnen innerhalb einer angemessenen Frist eine Antwort erteilt werden muss.

(19) Die Eisenbahnunternehmen sollten Qualitätsstandards für Schienenpersonenverkehrsdienste festlegen, anwenden und überwachen.

(20) Der Inhalt dieser Verordnung sollte im Hinblick auf die inflationsbezogene Anpassung der darin genannten Beträge sowie die Anforderungen an die Informationsbereitstellung und die Qualität der Verkehrsdienste im Lichte der Marktentwicklungen ebenso überprüft werden wie im Lichte der Auswirkungen der Verordnung auf die Qualität der Verkehrsdienste.

(21) Diese Verordnung sollte die Richtlinie 95/46/EG des Europäischen Parlaments und des Rates vom 24. Oktober 1995 zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten und zum freien Datenverkehr [1] unberührt lassen.

(22) Die Mitgliedstaaten sollten für Verstöße gegen diese Verordnung Sanktionen festlegen und die zu ihrer Anwendung erforderlichen Maßnahmen treffen. Die Sanktionen, zu denen auch die Zahlung einer Entschädigung an die betreffende Person gehören könnte, sollten wirksam, verhältnismäßig und abschreckend sein.

(23) Da die Ziele dieser Verordnung, nämlich die Entwicklung der Eisenbahnen der Gemeinschaft und die Einführung von Fahrgastrechten, auf Ebene der Mitgliedstaaten nicht ausreichend verwirklicht werden können und daher besser auf Gemeinschaftsebene zu verwirklichen sind, kann die Gemeinschaft im Einklang mit dem in Artikel 5 des Vertrags niedergelegten Subsidiaritätsprinzip tätig werden. Entsprechend dem in demselben Artikel genannten Grundsatz der Verhältnismäßigkeit geht diese Verordnung nicht über das für die Erreichung dieser Ziele erforderliche Maß hinaus.

(24) Es ist ein Ziel dieser Verordnung, die Schienenpersonenverkehrsdienste in der Gemeinschaft zu verbessern. Die Mitgliedstaaten sollten deshalb die Möglichkeit haben, Ausnahmen für Dienste in Gebieten zu gewähren, bei denen ein erheblicher Teil des Dienstes außerhalb der Gemeinschaft durchgeführt wird.

(25) In einigen Mitgliedstaaten könnte es für die Eisenbahnunternehmen mit Schwierigkeiten verbunden sein, sämtliche Bestimmungen dieser Verordnung ab ihrem Inkrafttreten anzuwenden. Die Mitgliedstaaten sollten deshalb die Möglichkeit haben, vorübergehende Ausnahmen von der Anwendung der Bestimmungen dieser Verordnung auf inländische Schienenpersonenverkehrsdienste im Fernverkehr zu gewähren. Die vorübergehende Ausnahme sollte sich jedoch weder auf die Bestimmungen dieser Verordnung erstrecken, die Personen mit Behinderungen und Personen mit eingeschränkter Mobilität den Zugang zu Bahnreisen gewähren, noch auf das Recht derjenigen, die Bahnfahrkarten kaufen wollen, dies ohne unangemessene Schwierigkeiten zu tun, noch auf die Bestimmungen über die Haftung der Eisenbahnunternehmen im Zusammenhang mit den Reisenden und ihrem Gepäck, das Erfordernis, dass die Unternehmen ausreichend versichert sein müssen, und das Erfordernis, dass diese Unternehmen geeignete Maßnahmen treffen, um die persönliche Sicherheit der Reisenden in Bahnhöfen und Zügen zu gewährleisten und Risiken zu steuern.

[1] ABl. L 281 vom 23.11.1995, S. 31. Geändert durch die Verordnung (EG) Nr. 1882/2003 (ABl. L 284 vom 31.10.2003, S. 1).

(26) Schienenpersonenverkehrsdienste des Stadtverkehrs, Vorortverkehrs oder Regionalverkehrs unterscheiden sich ihrer Art nach von Fernverkehrsdiensten. Die Mitgliedstaaten sollten deshalb die Möglichkeit haben, Ausnahmen von der Anwendung der Bestimmungen dieser Verordnung — mit Ausnahme einiger Bestimmungen, die für alle Schienenpersonenverkehrsdienste in der gesamten Gemeinschaft gelten sollten —, für Schienenpersonenverkehrsdienste des Stadtverkehrs, Vorortverkehrs oder Regionalverkehrs zu gewähren.

(27) Die zur Durchführung dieser Verordnung erforderlichen Maßnahmen sollten gemäß dem Beschluss 1999/468/EG des Rates vom 28. Juni 1999 zur Festlegung der Modalitäten für die Ausübung der der Kommission übertragenen Durchführungsbefugnisse [1] erlassen werden.

(28) Insbesondere sollte die Kommission die Befugnis erhalten, Durchführungsmaßnahmen zu erlassen. Da es sich hierbei um Maßnahmen von allgemeiner Tragweite handelt, die eine Änderung nicht wesentlicher Bestimmungen dieser Verordnung oder deren Ergänzung durch Hinzufügung neuer nicht wesentlicher Bestimmungen bewirken, sind diese Maßnahmen nach dem Regelungsverfahren mit Kontrolle des Artikels 5a des Beschlusses 1999/468/EG zu erlassen —

HAT FOLGENDE VERORDNUNG ERLASSEN:

KAPITEL I

ALLGEMEINES

Artikel 1

Gegenstand

Diese Verordnung enthält Vorschriften für

a) die von den Eisenbahnunternehmen bereitzustellenden Informationen, den Abschluss von Beförderungsverträgen, die Ausgabe von Fahrkarten und die Umsetzung eines rechnergestützten Informations- und Buchungssystems für den Eisenbahnverkehr,

b) die Haftung von Eisenbahnunternehmen und ihre Versicherungspflicht gegenüber den Fahrgästen und deren Gepäck,

c) die Pflichten von Eisenbahnunternehmen gegenüber den Fahrgästen bei Verspätungen,

d) den Schutz von und Hilfeleistungen für Personen mit Behinderungen und Personen mit eingeschränkter Mobilität,

e) die Festlegung und Überwachung von Dienstqualitätsnormen, das Risikomanagement für die persönliche Sicherheit der Fahrgäste und die Bearbeitung von Beschwerden, und

f) allgemeine Durchsetzungsvorschriften.

[1] ABl. L 184 vom 17.7.1999, S. 23. Geändert durch den Beschluss 2006/512/EG (ABl. L 200 vom 22.7.2006, S. 11).

Artikel 2

Anwendungsbereich

(1) Diese Verordnung gilt gemeinschaftsweit für alle Eisenbahnfahrten und -dienstleistungen, die von einem oder mehreren nach der Richtlinie 95/18/EG des Rates vom 19. Juni 1995 über die Erteilung von Genehmigungen an Eisenbahnunternehmen [2] genehmigten Eisenbahnunternehmen erbracht werden.

(2) Diese Verordnung gilt nicht für Eisenbahnunternehmen und Beförderungsleistungen, die keine Genehmigung gemäß der Richtlinie 95/18/EG besitzen.

(3) Mit dem Inkrafttreten dieser Verordnung gelten die Artikel 9, 11, 12 und 19, Artikel 20 Absatz 1 und Artikel 26 gemeinschaftsweit für alle Schienenpersonenverkehrsdienste.

(4) Mit Ausnahme der in Absatz 3 genannten Bestimmungen kann ein Mitgliedstaat in transparenter und nicht diskriminierender Weise für einen Zeitraum von höchstens fünf Jahren, der zweimal um höchstens fünf Jahre verlängert werden kann, eine Ausnahme von der Anwendung der Bestimmungen dieser Verordnung auf inländische Schienenpersonenverkehrsdienste gewähren.

(5) Mit Ausnahme der in Absatz 3 genannten Bestimmungen kann ein Mitgliedstaat Schienenpersonenverkehrsdienste des Stadtverkehrs, Vorortverkehrs und Regionalverkehrs von der Anwendung dieser Verordnung ausnehmen. Um zwischen Schienenpersonenverkehrsdiensten des Stadtverkehrs, Vorortverkehrs und Regionalverkehrs zu unterscheiden, wenden die Mitgliedstaaten die Definitionen an, die in der Richtlinie 91/440/EWG des Rates vom 29. Juli 1991 zur Entwicklung der Eisenbahnunternehmen der Gemeinschaft [3] vorgesehen sind. Bei der Anwendung dieser Definitionen stützen sich die Mitgliedstaaten auf folgende Kriterien: Entfernung, Häufigkeit der Verkehrsdienste, Anzahl der planmäßigen Halte, eingesetzte Fahrzeuge, Fahrkartenmodelle, Schwankungen der Anzahl der Fahrgäste bei Verkehrsdiensten innerhalb und außerhalb der Hauptverkehrszeiten, Zug-Codes und Fahrpläne.

(6) Ein Mitgliedstaat kann in transparenter und nicht diskriminierender Weise eine auf höchstens fünf Jahre befristete, aber verlängerbare Ausnahme von der Anwendung der Bestimmungen dieser Verordnung auf bestimmte Verkehrsdienste oder Fahrten gewähren, weil ein erheblicher Teil des Verkehrsdienstes, der mindestens einen planmäßigen Bahnhofshalt umfasst, außerhalb der Gemeinschaft betrieben wird.

(7) Die Mitgliedstaaten setzen die Kommission von den gemäß den Absätzen 4, 5 und 6 gewährten Ausnahmen in Kenntnis. Die Kommission ergreift die geeigneten Maßnahmen, wenn sie der Auffassung ist, dass eine solche Ausnahme nicht mit diesem Artikel im Einklang steht. Spätestens bis zum 3. Dezember 2014 legt die Kommission dem Europäischen Parlament und dem Rat einen Bericht über die gemäß den Absätzen 4, 5 und 6 gewährten Ausnahmen vor.

[2] ABl. L 143 vom 27.6.1995, S. 70. Zuletzt geändert durch die Richtlinie 2004/49/EG des Europäischen Parlaments und des Rates (ABl. L 164 vom 30.4.2004, S. 44).

[3] ABl. L 237 vom 24.8.1991, S. 25. Zuletzt geändert durch die Richtlinie 2006/103/EG (ABl. L 363 vom 20.12.2006, S. 344).

Artikel 3

Begriffsbestimmungen

Im Sinne dieser Verordnung bezeichnet der Ausdruck:

1. „Eisenbahnunternehmen“ ein Eisenbahnunternehmen im Sinne des Artikels 2 der Richtlinie 2001/14/EG [1] sowie jedes öffentlich-rechtliche oder private Unternehmen, dessen Tätigkeit im Erbringen von Eisenbahnverkehrsleistungen zur Beförderung von Gütern und/oder Personen besteht, wobei dieses Unternehmen die Traktion sicherstellen muss; dies schließt auch Unternehmen ein, die ausschließlich die Traktionsleistung erbringen;

2. „Beförderer“ das vertragliche Eisenbahnunternehmen, mit dem der Fahrgast den Beförderungsvertrag geschlossen hat, oder eine Reihe aufeinanderfolgender Eisenbahnunternehmen, die auf der Grundlage dieses Vertrags haften;

3. „ausführender Beförderer“ ein Eisenbahnunternehmen, das mit dem Fahrgast den Beförderungsvertrag nicht geschlossen hat, dem aber das vertragliche Eisenbahnunternehmen die Durchführung der Beförderung auf der Schiene ganz oder teilweise übertragen hat;

4. „Betreiber der Infrastruktur“ jede Einrichtung oder jedes Unternehmen gemäß Artikel 3 der Richtlinie 91/440/EWG, die bzw. das insbesondere für die Einrichtung und die Unterhaltung der Fahrwege der Eisenbahn oder von Teilen davon zuständig ist; dies kann auch den Betrieb der Steuerungs- und Sicherheitssysteme der Infrastruktur einschließen; mit den bei einem Netz oder einem Teilnetz wahrzunehmenden Aufgaben des Betreibers der Infrastruktur können verschiedene Einrichtungen oder Unternehmen betraut werden;

5. „Bahnhofsbetreiber“ eine Stelle in einem Mitgliedstaat, der die Verantwortung für die Leitung eines Bahnhofes übertragen wurde und bei der es sich um den Betreiber der Infrastruktur handeln kann;

6. „Reiseveranstalter“ einen Veranstalter oder Vermittler, der kein Eisenbahnunternehmen ist, im Sinne des Artikels 2 Nummern 2 und 3 der Richtlinie 90/314/EWG [2];

7. „Fahrkartenverkäufer“ jeden Vermittler von Eisenbahnverkehrsdiensten, der für ein Eisenbahnunternehmen oder für eigene Rechnung Beförderungsverträge schließt und Fahrkarten verkauft;

8. „Beförderungsvertrag“ einen Vertrag über die entgeltliche oder unentgeltliche Beförderung zwischen einem Eisenbahnunternehmen oder einem Fahrkartenverkäufer und dem Fahrgast über die Durchführung einer oder mehrerer Beförderungsleistungen;

9. „Buchung“ eine in Papierform oder elektronisch erteilte Beförderungsberechtigung aufgrund einer zuvor bestätigten personenbezogenen Beförderungsvereinbarung;

10. „Durchgangsfahrkarte“ eine oder mehrere Fahrkarten, die einen Beförderungsvertrag für aufeinanderfolgende durch ein oder mehrere Eisenbahnunternehmen erbrachte Eisenbahnverkehrsdienste belegen;

11. „inländischer Schienenpersonenverkehrsdienst“ einen Schienenpersonenverkehrsdienst, bei dem keine Grenze eines Mitgliedstaats überschritten wird;

12. „Verspätung“ die Zeitdifferenz zwischen der planmäßigen Ankunftszeit des Fahrgasts gemäß dem veröffentlichten Fahrplan und dem Zeitpunkt seiner tatsächlichen oder erwarteten Ankunft;

13. „Zeitfahrkarte“ eine für eine unbegrenzte Anzahl von Fahrten gültige Fahrkarte, die es dem berechtigten Inhaber erlaubt, auf einer bestimmten Strecke oder in einem bestimmten Netz während eines festgelegten Zeitraums mit der Eisenbahn zu reisen;

14. „rechnergestütztes Informations- und Buchungssystem für den Eisenbahnverkehr“ ein rechnergestütztes System, das Informationen über alle von Eisenbahnunternehmen angebotenen Eisenbahnverkehrsdienste enthält; zu den im System gespeicherten Informationen über Personenverkehrsdienste gehören

    a) die Fahrpläne der Personenverkehrsdienste;

    b) die Verfügbarkeit von Plätzen auf Personenverkehrsdiensten;

    c) die Tarife und Sonderbedingungen;

    d) die Zugänglichkeit der Züge für Personen mit Behinderungen und Personen mit eingeschränkter Mobilität;

    e) die Möglichkeiten zur Vornahme von Buchungen oder zur Ausstellung von Fahrkarten oder Durchgangsfahrkarten, soweit einige oder alle dieser Möglichkeiten Benutzern zur Verfügung gestellt werden;

15. „Person mit Behinderungen“ oder „Person mit eingeschränkter Mobilität“ eine Person, deren Mobilität bei der Benutzung von Beförderungsmitteln wegen einer körperlichen (sensorischen oder motorischen, dauerhaften oder zeitweiligen) Behinderung, einer geistigen Behinderung oder Beeinträchtigung, wegen anderer Behinderungen oder aufgrund des Alters eingeschränkt ist und deren Zustand angemessene Unterstützung und eine Anpassung der für alle Fahrgäste bereitgestellten Dienstleistungen an die besonderen Bedürfnisse dieser Person erfordert;

16. „Allgemeine Beförderungsbedingungen“ die in Form von Allgemeinen Geschäftsbedingungen oder Tarifen in jedem Mitgliedstaat rechtsgültigen Bedingungen des Beförderers, die mit Abschluss des Beförderungsvertrages dessen Bestandteil geworden sind;

17. „Fahrzeug“ Kraftfahrzeuge oder Anhänger, die aus Anlass einer Personenbeförderung befördert werden.

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[1] Richtlinie 2001/14/EG des Europäischen Parlaments und des Rates vom 26. Februar 2001 über die Zuweisung von Fahrwegkapazität der Eisenbahn und die Erhebung von Entgelten für die Nutzung von Eisenbahninfrastruktur (ABl. L 75 vom 15.3.2001, S. 29). Zuletzt geändert durch die Richtlinie 2004/49/EG.

[2] Richtlinie 90/314/EWG des Rates vom 13. Juni 1990 über Pauschalreisen (ABl. L 158 vom 23.6.1990, S. 59).

KAPITEL II

BEFÖRDERUNGSVERTRAG, INFORMATIONEN UND FAHRKARTEN

Artikel 4

Beförderungsvertrag

Vorbehaltlich der Bestimmungen dieses Kapitels unterliegen der Abschluss und die Ausführung eines Beförderungsvertrags sowie die Bereitstellung von Informationen und Fahrkarten den Bestimmungen in Anhang I Titel II und III.

Artikel 5

Fahrräder

Die Eisenbahnunternehmen ermöglichen den Fahrgästen die Mitnahme von Fahrrädern im Zug, gegebenenfalls gegen Entgelt, wenn sie leicht zu handhaben sind, dies den betreffenden Schienenverkehrsdienst nicht beeinträchtigt und in den Fahrzeugen möglich ist.

Artikel 6

Ausschluss des Rechtsverzichts und der Rechtsbeschränkung

(1) Die Verpflichtungen gegenüber Fahrgästen gemäß dieser Verordnung dürfen — insbesondere durch abweichende oder einschränkende Bestimmungen im Beförderungsvertrag — nicht eingeschränkt oder ausgeschlossen werden.

(2) Die Eisenbahnunternehmen können Vertragsbedingungen anbieten, die für den Fahrgast günstiger sind als die in dieser Verordnung festgelegten Bedingungen.

Artikel 7

Informationspflicht betreffend die Einstellung von Schienenverkehrsdiensten

Eisenbahnunternehmen oder gegebenenfalls die für einen gemeinwirtschaftlichen Vertrag zuständigen Behörden veröffentlichen Beschlüsse über die Einstellung von Schienenverkehrsdiensten auf angemessenem Wege vor deren Umsetzung.

Artikel 8

Reiseinformationen

(1) Unbeschadet des Artikels 10 erteilen die Eisenbahnunternehmen und die Fahrkartenverkäufer, die für ein oder mehrere Eisenbahnunternehmen Beförderungsverträge anbieten, dem Fahrgast auf Anfrage mindestens die in Anhang II Teil I genannten Informationen zu den Fahrten, für die das betreffende Eisenbahnunternehmen einen Beförderungsvertrag anbietet. Fahrkartenverkäufer, die für eigene Rechnung Beförderungsverträge anbieten, und Reiseveranstalter erteilen diese Informationen, soweit sie verfügbar sind.

(2) Die Eisenbahnunternehmen erteilen dem Fahrgast während der Fahrt mindestens die in Anhang II Teil II genannten Informationen.

(3) Die Informationen nach den Absätzen 1 und 2 sind in der am besten geeigneten Form zu erteilen. Dabei wird den Bedürfnissen von Menschen mit einer Gehör- und/oder Sehbeeinträchtigung besondere Aufmerksamkeit gewidmet.

Artikel 9

Verfügbarkeit von Fahrkarten, Durchgangsfahrkarten und Buchungen

(1) Die Eisenbahnunternehmen und die Fahrkartenverkäufer bieten, soweit verfügbar, Fahrkarten, Durchgangsfahrkarten und Buchungen an.

(2) Unbeschadet des Absatzes 4 bieten die Eisenbahnunternehmen dem Fahrgast über mindestens einen der folgenden Vertriebswege Fahrkarten an:

a) an Fahrkartenschaltern oder Fahrkartenautomaten,

b) über das Telefon, das Internet oder jede andere in weitem Umfang verfügbare Informationstechnik,

c) in den Zügen.

(3) Unbeschadet der Absätze 4 und 5 bieten die Eisenbahnunternehmen für im Rahmen gemeinwirtschaftlicher Verträge geleistete Verkehrsdienste über mindestens einen der folgenden Vertriebswege Fahrkarten an:

a) an Fahrkartenschaltern oder Fahrkartenautomaten,

b) in den Zügen.

(4) Die Eisenbahnunternehmen bieten die Möglichkeit an, Fahrkarten für den jeweiligen Verkehrsdienst im Zug zu erhalten, sofern dies nicht aus Gründen der Sicherheit, der Betrugsbekämpfung, der Reservierungspflicht oder aus vertretbaren kommerziellen Gründen eingeschränkt oder abgelehnt wird.

(5) Ist im Abfahrtsbahnhof kein Fahrkartenschalter oder Fahrkartenautomat vorhanden, so werden die Fahrgäste im Bahnhof unterrichtet über

a) die Möglichkeit, telefonisch, über das Internet oder im Zug eine Fahrkarte zu erwerben, und über die dafür geltenden Verfahren,

b) den nächsten Bahnhof oder sonstigen Ort, an dem Fahrkartenschalter und/oder Fahrkartenautomaten zur Verfügung stehen.

Artikel 10

Reiseinformations- und Buchungssysteme

(1) Zur Erteilung von Informationen und zur Ausgabe von Fahrkarten gemäß dieser Verordnung nutzen die Eisenbahnunternehmen und die Fahrkartenverkäufer das rechnergestützte Informations- und Buchungssystem für den Eisenbahnverkehr, das nach den in diesem Artikel genannten Verfahren eingerichtet wird.

(2) Die Technischen Spezifikationen für die Interoperabilität (TSI) gemäß der Richtlinie 2001/16/EG werden für die Zwecke dieser Verordnung angewendet.

(3) Die Kommission erlässt bis zum 3. Dezember 2010 auf Vorschlag der Europäischen Eisenbahnagentur die TSI zu den Telematikanwendungen für Fahrgäste. Diese TSI ermöglichen die Erteilung der in Anhang II genannten Informationen und die Ausgabe von Fahrkarten gemäß dieser Verordnung.

(4) Die Eisenbahnunternehmen passen ihr rechnergestütztes Informations- und Buchungssystem für den Eisenbahnverkehr gemäß den in den TSI dargelegten Erfordernissen entsprechend einem in den TSI enthaltenen Einführungsplan an.

(5) Vorbehaltlich der Richtlinie 95/46/EG dürfen die Eisenbahnunternehmen und die Fahrkartenverkäufer keine personenbezogenen Informationen über Einzelbuchungen an andere Eisenbahnunternehmen und/oder Fahrkartenverkäufer weitergeben.

KAPITEL III

HAFTUNG VON EISENBAHNUNTERNEHMEN FÜR FAHRGÄSTE UND DEREN GEPÄCK

Artikel 11

Haftung für Fahrgäste und Gepäck

Vorbehaltlich der Bestimmungen dieses Kapitels und unbeschadet geltender nationaler Rechtsvorschriften, die Fahrgästen weitergehenden Schadensersatz gewähren, ist die Haftung von Eisenbahnunternehmen in Bezug auf Fahrgäste und deren Gepäck in Anhang I Titel IV Kapitel I, III und IV sowie Titel VI und Titel VII geregelt.

Artikel 12

Versicherung

(1) Die in Artikel 9 der Richtlinie 95/18/EG festgelegte Pflicht bezüglich der Haftung für Fahrgäste ist als Pflicht eines Eisenbahnunternehmens zu verstehen, ausreichend versichert zu sein oder gleichwertige Vorkehrungen getroffen zu haben, um seine Haftung aufgrund dieser Verordnung zu decken.

(2) Die Kommission legt dem Europäischen Parlament und dem Rat bis zum3. Dezember 2010 einen Bericht über die Festsetzung einer Mindestversicherungssumme für Eisenbahnunternehmen vor. Diesem Bericht werden gegebenenfalls geeignete Vorschläge oder Empfehlungen beigefügt.

Artikel 13

Vorschuss

(1) Wird ein Fahrgast getötet oder verletzt, so zahlt das gemäß Anhang I Artikel 26 Absatz 5 haftende Eisenbahnunternehmen unverzüglich, spätestens jedoch fünfzehn Tage nach der Feststellung der Identität der entschädigungsberechtigten natürlichen Person einen Vorschuss zur Deckung der unmittelbaren wirtschaftlichen Bedürfnisse, und zwar im Verhältnis zur Schwere des erlittenen Schadens.

(2) Unbeschadet des Absatzes 1 beläuft sich dieser Vorschuss im Todesfall auf einen Betrag von mindestens 21 000 EUR je Fahrgast.

(3) Der Vorschuss stellt keine Haftungsanerkennung dar und kann mit später auf der Grundlage dieser Verordnung gezahlten Beträgen verrechnet werden; er kann jedoch nur in den Fällen, in denen der Schaden durch Vorsatz oder Fahrlässigkeit des Fahrgasts verursacht wurde, oder in denen die Person, die den Vorschuss erhalten hat, keinen Entschädigungsanspruch hatte, zurückgefordert werden.

Artikel 14

Bestreiten der Haftung

Selbst wenn das Eisenbahnunternehmen bestreitet, für Personenschäden, die einem von ihm beförderten Fahrgast entstanden sind, zu haften, unternimmt es alle zumutbaren Bemühungen zur Unterstützung eines Fahrgastes, der gegenüber Dritten Schadensersatzansprüche geltend macht.

KAPITEL IV

VERSPÄTUNGEN, VERPASSTE ANSCHLÜSSE UND ZUGAUSFÄLLE

Artikel 15

Haftung für Verspätungen, verpasste Anschlüsse und Zugausfälle

Vorbehaltlich der Bestimmungen dieses Kapitels ist die Haftung der Eisenbahnunternehmen für Verspätungen, verpasste Anschlüsse und Zugausfälle in Anhang I Titel IV Kapitel II geregelt.

Artikel 16

Erstattung oder Weiterreise mit geänderter Streckenführung

Muss vernünftigerweise davon ausgegangen werden, dass bei Ankunft am Zielort gemäß Beförderungsvertrag die Verspätung mehr als 60 Minuten betragen wird, so hat der Fahrgast unverzüglich die Wahl zwischen

a) der Erstattung des vollen Fahrpreises unter den Bedingungen, zu denen er entrichtet wurde, für den Teil oder die Teile der Fahrt, die nicht durchgeführt wurden, und für den Teil oder die Teile, die bereits durchgeführt wurden, wenn die Fahrt nach den ursprünglichen Reiseplänen des Fahrgasts sinnlos geworden ist, gegebenenfalls zusammen mit einer Rückfahrt zum ersten Ausgangspunkt bei nächster Gelegenheit. Die Erstattung erfolgt unter denselben Bedingungen wie die Entschädigung nach Artikel 17;

b) der Fortsetzung der Fahrt oder der Weiterreise mit geänderter Streckenführung unter vergleichbaren Beförderungsbedingungen bis zum Zielort bei nächster Gelegenheit; oder

c) der Fortsetzung der Fahrt oder der Weiterreise mit geänderter Streckenführung unter vergleichbaren Beförderungsbedingungen bis zum Zielort zu einem späteren Zeitpunkt nach Wahl des Fahrgasts.

Artikel 17

Fahrpreisentschädigung

(1) Ohne das Recht auf Beförderung zu verlieren, kann ein Fahrgast bei Verspätungen vom Eisenbahnunternehmen eine Fahrpreisentschädigung verlangen, wenn er zwischen dem auf der Fahrkarte angegebenen Abfahrts- und Zielort eine Verspätung erleidet, für die keine Fahrpreiserstattung nach Artikel 16 erfolgt ist. Die Mindestentschädigung bei Verspätungen beträgt

a) 25 % des Preises der Fahrkarte bei einer Verspätung von 60 bis 119 Minuten;

b) 50 % des Preises der Fahrkarte ab einer Verspätung von 120 Minuten.

Fahrgäste, die eine Zeitfahrkarte besitzen und denen während der Gültigkeitsdauer ihrer Zeitfahrkarte wiederholt Verspätungen oder Zugausfälle widerfahren, können angemessene Entschädigung gemäß den Entschädigungsbedingungen des Eisenbahnunternehmens verlangen. In den Entschädigungsbedingungen werden die Kriterien zur Bestimmung der Verspätung und für die Berechnung der Entschädigung festgelegt.

Die Entschädigung für eine Verspätung wird im Verhältnis zu dem Preis berechnet, den der Fahrgast für den verspäteten Verkehrsdienst tatsächlich entrichtet hat.

Wurde der Beförderungsvertrag für eine Hin- und Rückfahrt abgeschlossen, so wird die Entschädigung für eine entweder auf der Hin- oder auf der Rückfahrt aufgetretene Verspätung auf der Grundlage des halben entrichteten Fahrpreises berechnet. In gleicher Weise wird der Preis für einen verspäteten Verkehrsdienst, der im Rahmen eines sonstigen Beförderungsvertrags mit mehreren aufeinanderfolgenden Teilstrecken angeboten wird, anteilig zum vollen Preis berechnet.

Verspätungen, für die das Eisenbahnunternehmen nachweisen kann, dass sie außerhalb des räumlichen Geltungsbereichs des Vertrags zur Gründung der Europäischen Gemeinschaft eingetreten sind, werden bei der Berechnung der Verspätungsdauer nicht berücksichtigt.

(2) Die Zahlung der Entschädigung erfolgt innerhalb von einem Monat nach Einreichung des Antrags auf Entschädigung. Die Entschädigung kann in Form von Gutscheinen und/oder anderen Leistungen erfolgen, sofern deren Bedingungen (insbesondere bezüglich des Gültigkeitszeitraums und des Zielorts) flexibel sind. Die Entschädigung erfolgt auf Wunsch des Fahrgasts in Form eines Geldbetrags.

(3) Der Entschädigungsbetrag darf nicht um Kosten der Finanztransaktion wie Gebühren, Telefonkosten oder Porti gekürzt werden. Die Eisenbahnunternehmen dürfen Mindestbeträge festlegen, unterhalb deren keine Entschädigungszahlungen vorgenommen werden. Dieser Mindestbetrag darf höchstens 4 EUR betragen.

(4) Der Fahrgast hat keinen Anspruch auf Entschädigung, wenn er bereits vor dem Kauf der Fahrkarte über eine Verspätung informiert wurde oder wenn bei seiner Ankunft am Zielort eine Verspätung aufgrund der Fortsetzung der Reise mit einem anderen Verkehrsdienst oder mit geänderter Streckenführung weniger als 60 Minuten beträgt.

Artikel 18

Hilfeleistung

(1) Bei einer Verspätung bei der Abfahrt oder der Ankunft sind die Fahrgäste durch das Eisenbahnunternehmen oder den Bahnhofsbetreiber über die Situation und die geschätzte Abfahrts- und Ankunftszeit zu unterrichten, sobald diese Informationen zur Verfügung stehen.

(2) Bei einer Verspätung nach Absatz 1 von mehr als 60 Minuten ist den Fahrgästen Folgendes kostenlos anzubieten:

a) Mahlzeiten und Erfrischungen in angemessenem Verhältnis zur Wartezeit, sofern sie im Zug oder im Bahnhof verfügbar oder vernünftigerweise lieferbar sind;

b) die Unterbringung in einem Hotel oder einer anderweitigen Unterkunft und die Beförderung zwischen dem Bahnhof und der Unterkunft in Fällen, in denen ein Aufenthalt von einer oder mehreren Nächten notwendig wird oder ein zusätzlicher Aufenthalt notwendig wird, sofern dies praktisch durchführbar ist;

c) ist der Zug auf der Strecke blockiert, die Beförderung vom Zug zum Bahnhof, zu einem alternativen Abfahrtsort oder zum Zielort des Verkehrsdienstes, sofern dies praktisch durchführbar ist.

(3) Besteht keine Möglichkeit zur Fortsetzung eines Verkehrsdienstes mehr, so organisiert das Eisenbahnunternehmen so rasch wie möglich einen alternativen Beförderungsdienst für die Fahrgäste.

(4) Die Eisenbahnunternehmen haben auf Anfrage des Fahrgasts auf der Fahrkarte im jeweiligen Fall zu bestätigen, dass der Verkehrsdienst verspätet war, zum Verpassen eines Anschlusses geführt hat oder ausgefallen ist.

(5) Bei der Anwendung der Absätze 1, 2 und 3 richten die Eisenbahnunternehmen besonderes Augenmerk auf die Bedürfnisse von Personen mit Behinderungen und Personen mit eingeschränkter Mobilität sowie etwaigen Begleitpersonen.

KAPITEL V

PERSONEN MIT BEHINDERUNGEN UND PERSONEN MIT EINGESCHRÄNKTER MOBILITÄT

Artikel 19

Anspruch auf Beförderung

(1) Die Eisenbahnunternehmen und die Bahnhofsbetreiber stellen unter aktiver Beteiligung der Vertretungsorganisationen von Personen mit Behinderungen und Personen mit eingeschränkter Mobilität nicht diskriminierende Zugangsregeln für die Beförderung von Personen mit Behinderungen und Personen mit eingeschränkter Mobilität auf.

(2) Buchungen und Fahrkarten werden für Personen mit Behinderungen und Personen mit eingeschränkter Mobilität ohne Aufpreis angeboten. Ein Eisenbahnunternehmen, Fahrkartenverkäufer oder Reiseveranstalter darf sich nicht weigern, eine Buchung einer Person mit einer Behinderung oder einer Person mit eingeschränkter Mobilität zu akzeptieren oder ihr eine Fahrkarte auszustellen, oder verlangen, dass sie von einer anderen Person begleitet wird, es sei denn, dies ist unbedingt erforderlich, um den in Absatz 1 genannten Zugangsregeln nachzukommen.

Artikel 20

Information von Personen mit Behinderungen und Personen mit eingeschränkter Mobilität

(1) Auf Anfrage informieren die Eisenbahnunternehmen, die Fahrkatenverkäufer oder die Reiseveranstalter Personen mit Behinderungen und Personen mit eingeschränkter Mobilität über die Zugänglichkeit der Eisenbahnverkehrsdienste und die Bedingungen für den Zugang zu den Fahrzeugen gemäß den in Artikel 19 Absatz 1 genannten Zugangsregeln und informieren die Personen mit Behinderungen oder die Personen mit eingeschränkter Mobilität über die Ausstattung der Fahrzeuge.

(2) Macht ein Eisenbahnunternehmen, Fahrkartenverkäufer und/oder Reiseveranstalter von der Ausnahmeregelung nach Artikel 19 Absatz 2 Gebrauch, so informiert es/er die betroffene Person mit einer Behinderung oder Person mit eingeschränkter Mobilität auf Anfrage innerhalb von fünf Werktagen nach der Ablehnung einer Buchung oder der Ausstellung eines Fahrscheins oder der Auflage, von einer anderen Person begleitet zu werden, schriftlich über die entsprechenden Gründe.

Artikel 21

Zugänglichkeit

(1) Die Eisenbahnunternehmen und Bahnhofsbetreiber sorgen durch Einhaltung der TSI für Personen mit eingeschränkter Mobilität dafür, dass die Bahnhöfe, die Bahnsteige, die Fahrzeuge und andere Einrichtungen für Personen mit Behinderungen und Personen mit eingeschränkter Mobilität zugänglich sind.

(2) Ist ein Zug oder ein Bahnhof nicht mit Personal ausgestattet, bemühen sich die Eisenbahnunternehmen und die Bahnhofsbetreiber nach besten Kräften, Personen mit Behinderungen und Personen mit eingeschränkter Mobilität die Fahrt mit dem Zug zu ermöglichen.

Artikel 22

Hilfeleistung an Bahnhöfen

(1) Unbeschadet der Zugangsregeln nach Artikel 19 Absatz 1 hat der Bahnhofsbetreiber bei Abfahrt, Umsteigen oder Ankunft einer Person mit einer Behinderung oder einer Person mit eingeschränkter Mobilität in einem mit Personal ausgestatteten Bahnhof für kostenlose Hilfeleistung in einer Weise zu sorgen, dass die Person in den abfahrenden Verkehrsdienst einsteigen, zum Anschlussverkehrsdienst umsteigen und aus dem ankommenden Verkehrsdienst aussteigen kann, für den sie eine Fahrkarte erworben hat.

(2) Die Mitgliedstaaten können für Personen, die einen Verkehrsdienst nutzen, der Gegenstand eines im Einklang mit dem Gemeinschaftsrecht geschlossenen gemeinwirtschaftlichen Vertrags ist, eine Ausnahme von Absatz 1 vorsehen, sofern die zuständige Behörde alternative Einrichtungen geschaffen oder Regelungen getroffen hat, die eine gleichwertige oder bessere Zugangsmöglichkeit zu den Beförderungsdiensten sicherstellen.

(3) In einem nicht mit Personal ausgestatteten Bahnhof stellen das Eisenbahnunternehmen und der Bahnhofsbetreiber sicher, dass unter Beachtung der in Artikel 19 Absatz 1 genannten Zugangsregeln leicht zugängliche Informationen über die nächstgelegenen mit Personal ausgestatteten Bahnhöfe und über direkt verfügbare Hilfeleistungen für Personen mit Behinderungen oder Personen mit eingeschränkter Mobilität angezeigt werden.

Artikel 23

Hilfeleistung im Zug

Unbeschadet der Zugangsregeln nach Artikel 19 Absatz 1 haben Eisenbahnunternehmen Personen mit Behinderungen und Personen mit eingeschränkter Mobilität im Zug und während des Ein- und Aussteigens kostenlos Hilfe zu leisten.

Für die Zwecke dieses Artikels gelten als Hilfeleistung im Zug die Bemühungen um Hilfe nach besten Kräften, die einer Person mit einer Behinderung oder einer Person mit eingeschränkter Mobilität geleistet wird, damit diese im Zug Zugang zu denselben Dienstleistungen hat wie die anderen Fahrgäste, wenn die Person aufgrund ihrer Behinderung oder der Einschränkung ihrer Mobilität nicht in der Lage ist, diese Dienstleistung ohne fremde Hilfe und gefahrlos in Anspruch zu nehmen.

Artikel 24

Voraussetzungen für das Erbringen von Hilfeleistungen

Die Eisenbahnunternehmen, Bahnhofsbetreiber, Fahrkartenverkäufer und Reiseveranstalter arbeiten nach Maßgabe der Artikel 22 und 23 und der nachstehenden Buchstaben bei der Hilfeleistung für Personen mit Behinderungen und Personen mit eingeschränkter Mobilität zusammen:

a) Die Hilfeleistung wird unter der Voraussetzung erbracht, dass der Hilfsbedarf einer Person dem Eisenbahnunternehmen, dem Bahnhofsbetreiber oder dem Fahrkartenverkäufer oder dem Reiseveranstalter, bei dem die Fahrkarte erworben wurde, spätestens 48 Stunden vor dem Zeitpunkt, zu dem die Hilfeleistung benötigt wird, gemeldet wurde. Im Falle einer Mehrfahrtenkarte ist eine einzige Meldung ausreichend, sofern geeignete Informationen über den Zeitplan für die nachfolgenden Fahrten vorgelegt werden.

b) Die Eisenbahnunternehmen, Bahnhofsbetreiber, Fahrkartenverkäufer oder Reiseveranstalter ergreifen alle erforderlichen Maßnahmen, um Meldungen des Hilfsbedarfs entgegennehmen zu können.

c) Ist keine Meldung nach Buchstabe a erfolgt, so bemühen sich das Eisenbahnunternehmen und der Bahnhofsbetreiber nach besten Kräften, die Hilfeleistung so zu erbringen, dass die Person mit einer Behinderung oder die Person mit eingeschränkter Mobilität ihre Reise durchführen kann.

d) Unbeschadet der Zuständigkeiten anderer Einrichtungen für Bereiche, die außerhalb des Bahnhofsgeländes liegen, legt der Bahnhofsbetreiber oder eine andere befugte Person Punkte innerhalb und außerhalb des Bahnhofs fest, an denen Personen mit Behinderungen und Personen mit eingeschränkter Mobilität ihre Ankunft am Bahnhof melden und gegebenenfalls Hilfe anfordern können.

e) Eine Hilfeleistung wird dann erbracht, wenn die Person mit einer Behinderung oder die Person mit eingeschränkter Mobilität sich zu dem von dem die Hilfeleistung erbringenden Eisenbahnunternehmen oder Bahnhofsbetreiber festgelegten Zeitpunkt an dem festgelegten Ort einfindet. Der festgelegte Zeitpunkt darf höchstens 60 Minuten vor der fahrplanmäßigen Abfahrtzeit oder vor dem Zeitpunkt liegen, zu dem alle Fahrgäste ersucht werden, anwesend zu sein. Wenn kein Zeitpunkt festgelegt wurde, zu dem die Person mit einer Behinderung oder die Person mit eingeschränkter Mobilität sich einfinden soll, hat sich diese spätestens 30 Minuten vor der fahrplanmäßigen Abfahrtzeit oder vor dem Zeitpunkt, zu dem alle Fahrgäste ersucht werden, anwesend zu sein, an dem festgelegten Ort einzufinden.

Artikel 25

Entschädigung für Mobilitätshilfen oder sonstige spezielle Ausrüstungen

Haftet das Eisenbahnunternehmen für den vollständigen oder teilweisen Verlust oder die Beschädigung von Mobilitätshilfen oder sonstigen speziellen Ausrüstungen, die von Personen mit Behinderungen oder Personen mit eingeschränkter Mobilität verwendet werden, so gilt keine Haftungsobergrenze.

KAPITEL VI

SICHERHEIT, BESCHWERDEN UND QUALITÄT DER VERKEHRSDIENSTE

Artikel 26

Persönliche Sicherheit der Fahrgäste

Im Einvernehmen mit den staatlichen Stellen ergreifen das Eisenbahnunternehmen, der Betreiber der Infrastruktur und der Bahnhofsbetreiber in ihrem jeweiligen Zuständigkeitsbereich geeignete Maßnahmen, um die persönliche Sicherheit der Fahrgäste in den Bahnhöfen und in den Zügen zu gewährleisten und Risikomanagement zu betreiben, und passen diese Maßnahmen an das von den staatlichen Stellen festgelegte Sicherheitsniveau an. Sie arbeiten zusammen und tauschen Informationen über bewährte Verfahren zur Verhinderung von Handlungen aus, die das Sicherheitsniveau beeinträchtigen können.

Artikel 27

Beschwerden

(1) Die Eisenbahnunternehmen richten ein Verfahren zur Beschwerdebearbeitung im Zusammenhang mit den in dieser Verordnung festgelegten Rechten und Pflichten ein. Sie machen den Fahrgästen in weitem Umfang bekannt, wie diese mit der Beschwerdestelle in Verbindung treten können und welche Sprachen ihre Arbeitssprachen sind.

(2) Der Fahrgast kann seine Beschwerde bei jedem beteiligten Eisenbahnunternehmen einreichen. Der Adressat der Beschwerde gibt innerhalb eines Monats eine mit Gründen versehene Antwort oder teilt — in begründeten Fällen — dem Fahrgast mit, wann innerhalb eines Zeitraums von höchstens drei Monaten ab dem Tag, an dem die Beschwerde vorgebracht wurde, mit einer Antwort zu rechnen ist.

(3) Das Eisenbahnunternehmen veröffentlicht in seinem in Artikel 28 genannten jährlichen Geschäftsbericht die Zahl und die Art der eingegangenen und der bearbeiteten Beschwerden, die Beantwortungsdauer und durchgeführte Abhilfemaßnahmen.

Artikel 28

Dienstqualitätsnormen

(1) Die Eisenbahnunternehmen legen Dienstqualitätsnormen fest und wenden ein Qualitätsmanagementsystem zur Aufrechterhaltung der Dienstqualität an. Die Dienstqualitätsnormen haben mindestens die in Anhang III aufgeführten Bereiche abzudecken.

(2) Die Eisenbahnunternehmen überwachen die eigene Leistung anhand der Dienstqualitätsnormen. Die Eisenbahnunternehmen veröffentlichen jährlich zusammen mit ihrem Geschäftsbericht einen Bericht über die erreichte Dienstqualität. Die Berichte über die Dienstqualität sind auf den Internetseiten der Eisenbahnunternehmen zu veröffentlichen. Sie werden ferner über die Internetseite der Europäischen Eisenbahnagentur zugänglich gemacht.

KAPITEL VII

INFORMATION UND DURCHSETZUNG

Artikel 29

Information der Fahrgäste über ihre Rechte

(1) Beim Verkauf von Eisenbahnfahrkarten informieren Eisenbahnunternehmen, Bahnhofsbetreiber und Reiseveranstalter die Fahrgäste über ihre aus dieser Verordnung erwachsenden Rechte und Pflichten. Um dieser Informationspflicht nachzukommen, können die Eisenbahnunternehmen, Bahnhofsbetreiber und Reiseveranstalter eine Zusammenfassung der Bestimmungen dieser Verordnung verwenden, die die Kommission in allen Amtssprachen der Organe der Europäischen Union erstellt und ihnen zur Verfügung stellt.

(2) Eisenbahnunternehmen und Bahnhofsbetreiber unterrichten die Fahrgäste im Bahnhof und im Zug angemessen über die Kontaktdaten der gemäß Artikel 30 von den Mitgliedstaaten benannten Stelle oder Stellen.

Artikel 30

Durchsetzung

(1) Jeder Mitgliedstaat benennt eine oder mehrere für die Durchsetzung dieser Verordnung zuständige Stellen. Jede dieser Stellen ergreift die notwendigen Maßnahmen, um sicherzustellen, dass die Rechte der Fahrgäste gewahrt werden.

Jede Stelle ist in Aufbau, Finanzierung, Rechtsstruktur und Entscheidungsfindung von den Betreibern der Infrastruktur, den Entgelt erhebenden Stellen, den Zuweisungsstellen und den Eisenbahnunternehmen unabhängig.

Die Mitgliedstaaten teilen der Kommission die gemäß diesem Absatz benannte Stelle oder benannten Stellen und ihre jeweiligen Zuständigkeiten mit.

(2) Jeder Fahrgast kann bei der geeigneten nach Absatz 1 benannten Stelle oder jeder anderen geeigneten von einem Mitgliedstaat benannten Stelle Beschwerde über einen mutmaßlichen Verstoß gegen diese Verordnung einreichen.

Artikel 31

Zusammenarbeit der Durchsetzungsstellen

Die in Artikel 30 genannten Durchsetzungsstellen tauschen Informationen über ihre Arbeit und Entscheidungsgrundsätze und -praktiken aus, um die Entscheidungsgrundsätze gemeinschaftsweit zu koordinieren. Die Kommission unterstützt sie bei dieser Aufgabe.

KAPITEL VIII

SCHLUSSBESTIMMUNGEN

Artikel 32

Sanktionen

Die Mitgliedstaaten legen für Verstöße gegen diese Verordnung Sanktionen fest und treffen die zu ihrer Anwendung erforderlichen Maßnahmen. Die Sanktionen müssen wirksam, verhältnismäßig und abschreckend sein. Die Mitgliedstaaten teilen der Kommission diese Vorschriften und Maßnahmen bis zum 3. Juni 2010 mit und melden ihr spätere Änderungen unverzüglich.

Artikel 33

Anhänge

Die Maßnahmen zur Änderung nicht wesentlicher Bestimmungen dieser Verordnung durch Änderung der Anhänge dieser Verordnung, mit Ausnahme des Anhangs I, werden nach dem in Artikel 35 Absatz 2 genannten Regelungsverfahren mit Kontrolle erlassen.

Artikel 34

Änderungsbestimmungen

(1) Die zur Durchführung der Artikel 2, 10 und 12 erforderlichen Maßnahmen zur Änderung nicht wesentlicher Bestimmungen dieser Verordnung durch Ergänzung werden nach dem in Artikel 35 Absatz 2 genannten Regelungsverfahren mit Kontrolle erlassen.

(2) Die Maßnahmen zur Änderung nicht wesentlicher Bestimmungen dieser Verordnung durch inflationsbezogene Anpassung der in ihr genannten Beträge, mit Ausnahme der Beträge in Anhang I, werden nach dem in Artikel 35 Absatz 2 genannten Regelungsverfahren mit Kontrolle erlassen.

Artikel 35

Ausschussverfahren

(1) Die Kommission wird von dem in Artikel 11a der Richtlinie 91/440/EWG eingesetzten Ausschuss unterstützt.

(2) Wird auf diesen Absatz Bezug genommen, so gelten Artikel 5a Absätze 1 bis 4 und Artikel 7 des Beschlusses 1999/468/EG unter Beachtung von dessen Artikel 8.

Artikel 36

Berichterstattung

Die Kommission erstattet dem Europäischen Parlament und dem Rat bis zum 3. Dezember 2012 über die Durchführung der Verordnung und deren Ergebnis, insbesondere bezüglich der Dienstqualitätsnormen, Bericht.

Dem Bericht werden die gemäß dieser Verordnung sowie gemäß Artikel 10b der Richtlinie 91/440/EWG erteilten Informationen zugrunde gelegt. Erforderlichenfalls werden dem Bericht geeignete Vorschläge beigefügt.

Artikel 37

Inkrafttreten

Diese Verordnung tritt 24 Monate nach ihrer Veröffentlichung im *Amtsblatt der Europäischen Union* in Kraft.

Diese Verordnung ist in allen ihren Teilen verbindlich und gilt unmittelbar in jedem Mitgliedstaat.

Geschehen zu Straßburg am 23. Oktober 2007.

Im Namen des Europäischen Parlaments
Der Präsident
H.-G. PÖTTERING

Im Namen des Rates
Der Präsident
M. LOBO ANTUNES

ANHANG I

Auszug aus den einheitlichen Rechtsvorschriften für den Vertrag über die internationale Eisenbahnbeförderung von Personen und Gepäck (CIV)

Anhang A

zum Übereinkommen über den internationalen Eisenbahnverkehr (COTIF) vom 9. Mai 1980, geändert durch das Protokoll vom 3. Juni 1999 betreffend die Änderung des Übereinkommens über den internationalen Eisenbahnverkehr

TITEL II

ABSCHLUSS UND AUSFÜHRUNG DES BEFÖRDERUNGSVERTRAGES

Artikel 6

Beförderungsvertrag

(1) Durch den Beförderungsvertrag wird der Beförderer verpflichtet, den Reisenden sowie gegebenenfalls Reisegepäck und Fahrzeuge zum Bestimmungsort zu befördern und das Reisegepäck und die Fahrzeuge am Bestimmungsort auszuliefern.

(2) Der Beförderungsvertrag ist in einem oder mehreren Beförderungsausweisen festzuhalten, die dem Reisenden auszuhändigen sind. Unbeschadet des Artikels 9 berührt jedoch das Fehlen, die Mangelhaftigkeit oder der Verlust des Beförderungsausweises weder den Bestand noch die Gültigkeit des Vertrags, der weiterhin diesen Einheitlichen Rechtsvorschriften unterliegt.

(3) Der Beförderungsausweis dient bis zum Beweis des Gegenteils als Nachweis für den Abschluss und den Inhalt des Beförderungsvertrages.

Artikel 7

Beförderungsausweis

(1) Die Allgemeinen Beförderungsbedingungen bestimmen Form und Inhalt der Beförderungsausweise sowie die Sprache und die Schriftzeichen, die beim Druck und beim Ausfüllen zu verwenden sind.

(2) In den Beförderungsausweis sind mindestens einzutragen:

a) der Beförderer oder die Beförderer;

b) die Angabe, dass die Beförderung auch bei einer gegenteiligen Abmachung diesen Einheitlichen Rechtsvorschriften unterliegt; dies kann durch die Abkürzung CIV geschehen;

c) jede andere Angabe, die notwendig ist, Abschluss und Inhalt des Beförderungsvertrages zu beweisen, und die es dem Reisenden erlaubt, die Rechte aus diesem Vertrag geltend zu machen.

(3) Der Reisende hat sich bei der Entgegennahme des Beförderungsausweises zu vergewissern, ob dieser seinen Angaben gemäß ausgestellt ist.

(4) Der Beförderungsausweis ist übertragbar, wenn er nicht auf den Namen lautet und die Reise noch nicht angetreten ist.

(5) Der Beförderungsausweis kann auch in elektronischen Datenaufzeichnungen bestehen, die in lesbare Schriftzeichen umwandelbar sind. Die zur Aufzeichnung und Verarbeitung der Daten verwendeten Verfahren müssen, insbesondere hinsichtlich der Beweiskraft des verkörperten Beförderungsausweises, funktional gleichwertig sein.

Artikel 8

Zahlung und Erstattung des Beförderungspreises

(1) Soweit zwischen dem Reisenden und dem Beförderer nichts anderes vereinbart ist, ist der Beförderungspreis im Voraus zu zahlen.

(2) Die Allgemeinen Beförderungsbedingungen legen die Bedingungen fest, unter denen ein Beförderungspreis zu erstatten ist.

Artikel 9

Berechtigung zur Fahrt. Ausschluss von der Beförderung

(1) Der Reisende muss vom Beginn der Reise an mit einem gültigen Beförderungsausweis versehen sein und ihn bei der Prüfung der Beförderungsausweise vorzeigen. Die Allgemeinen Beförderungsbedingungen können vorsehen,

a) dass ein Reisender, der keinen gültigen Beförderungsausweis vorzeigt, außer dem Beförderungspreis einen Zuschlag zu zahlen hat;

b) dass ein Reisender, der die sofortige Zahlung des Beförderungspreises oder des Zuschlages verweigert, von der Beförderung ausgeschlossen werden kann;

c) ob und unter welchen Bedingungen ein Zuschlag zu erstatten ist.

(2) Die Allgemeinen Beförderungsbedingungen können vorsehen, dass Reisende, die

a) eine Gefahr für die Sicherheit und Ordnung des Betriebes oder für die Sicherheit der Mitreisenden darstellen,

b) die Mitreisenden in unzumutbarer Weise belästigen,

von der Beförderung ausgeschlossen sind oder unterwegs davon ausgeschlossen werden können, und dass diese Personen keinen Anspruch auf Erstattung des Beförderungspreises und der Gepäckfracht haben.

Artikel 10

Erfüllung verwaltungsbehördlicher Vorschriften

Der Reisende hat die zoll- oder sonstigen verwaltungsbehördlichen Vorschriften zu erfüllen.

Artikel 11

Ausfall und Verspätung eines Zuges. Anschlussversäumnis

Der Beförderer hat gegebenenfalls den Ausfall des Zuges oder das Versäumnis des Anschlusses auf dem Beförderungsausweis zu bescheinigen.

TITEL III

BEFÖRDERUNG VON HANDGEPÄCK, TIEREN, REISEGEPÄCK UND FAHRZEUGEN

Kapitel I

Gemeinsame Bestimmungen

Artikel 12

Zugelassene Gegenstände und Tiere

(1) Der Reisende darf leicht tragbare Gegenstände (Handgepäck) und lebende Tiere gemäß den Allgemeinen Beförderungsbedingungen mitnehmen. Der Reisende darf darüber hinaus sperrige Gegenstände gemäß den besonderen Bestimmungen in den Allgemeinen Beförderungsbedingungen mitnehmen. Gegenstände und Tiere, die andere Reisende behindern oder belästigen oder Schäden verursachen können, dürfen nicht mitgenommen werden.

(2) Der Reisende kann Gegenstände und Tiere gemäß den Allgemeinen Beförderungsbedingungen als Reisegepäck aufgeben.

(3) Der Beförderer kann aus Anlass einer Personenbeförderung Fahrzeuge gemäß den besonderen Bestimmungen in den Allgemeinen Beförderungsbedingungen zur Beförderung zulassen.

(4) Die Beförderung gefährlicher Güter als Handgepäck, Reisegepäck sowie in oder auf Fahrzeugen, die gemäß diesem Titel auf der Schiene befördert werden, ist nur gemäß der Ordnung für die internationale Eisenbahnbeförderung gefährlicher Güter (RID) zugelassen.

Artikel 13

Nachprüfung

(1) Der Beförderer ist berechtigt, bei begründeter Vermutung einer Nichtbeachtung der Beförderungsbedingungen nachzuprüfen, ob die beförderten Gegenstände (Handgepäck, Reisegepäck, Fahrzeuge einschließlich Ladung) und Tiere den Beförderungsbedingungen entsprechen, wenn es die Gesetze und Vorschriften des Staates, in dem die Nachprüfung stattfinden soll, nicht verbieten. Der Reisende ist einzuladen, der Nachprüfung beizuwohnen. Erscheint er nicht oder ist er nicht zu erreichen, so hat der Beförderer zwei unabhängige Zeugen beizuziehen.

(2) Wird festgestellt, dass die Beförderungsbedingungen nicht beachtet wurden, so kann der Beförderer vom Reisenden die Zahlung der Kosten der Nachprüfung verlangen.

Artikel 14

Erfüllung verwaltungsbehördlicher Vorschriften

Bei der Beförderung von Gegenständen (Handgepäck, Reisegepäck, Fahrzeuge einschließlich Ladung) und Tieren aus Anlass seiner Beförderung hat der Reisende die zoll- oder sonstigen verwaltungsbehördlichen Vorschriften zu erfüllen. Er hat der Untersuchung dieser Gegenstände beizuwohnen, soweit die Gesetze und Vorschriften jedes Staates keine Ausnahme vorsehen.

Kapitel II

Handgepäck und Tiere

Artikel 15

Beaufsichtigung

Das Handgepäck und mitgenommene Tiere sind vom Reisenden zu beaufsichtigen.

Kapitel III

Reisegepäck

Artikel 16

Gepäckaufgabe

(1) Die vertraglichen Pflichten bei der Beförderung von Reisegepäck sind in einem Gepäckschein festzuhalten, der dem Reisenden auszuhändigen ist.

(2) Unbeschadet des Artikels 22 berührt das Fehlen, die Mangelhaftigkeit oder der Verlust des Gepäckscheins weder den Bestand noch die Gültigkeit der Vereinbarungen über die Beförderung des Reisegepäcks, die weiterhin diesen Einheitlichen Rechtsvorschriften unterliegen.

(3) Der Gepäckschein dient bis zum Beweis des Gegenteils als Nachweis für die Aufgabe des Reisegepäcks und die Bedingungen seiner Beförderung.

(4) Es wird bis zum Beweis des Gegenteils vermutet, dass das Reisegepäck bei der Übernahme durch den Beförderer äußerlich in gutem Zustande war und dass die Anzahl und die Masse der Gepäckstücke mit den Angaben im Gepäckschein übereinstimmten.

Artikel 17

Gepäckschein

(1) Die Allgemeinen Beförderungsbedingungen legen Form und Inhalt des Gepäckscheins sowie die Sprache und die Schriftzeichen, die beim Druck und beim Ausfüllen zu verwenden sind, fest. Artikel 7 Absatz 5 gilt entsprechend.

(2) In den Gepäckschein sind mindestens einzutragen:

a) der Beförderer oder die Beförderer;

b) die Angabe, dass die Beförderung auch bei einer gegenteiligen Abmachung diesen Einheitlichen Rechtsvorschriften unterliegt; dies kann durch die Abkürzung CIV geschehen;

c) jede andere Angabe, die notwendig ist, die vertraglichen Pflichten bei der Beförderung des Reisegepäcks zu beweisen, und die es dem Reisenden erlaubt, die Rechte aus dem Beförderungsvertrag geltend zu machen.

(3) Der Reisende hat sich bei der Entgegennahme des Gepäckscheins zu vergewissern, ob dieser seinen Angaben gemäß ausgestellt ist.

Artikel 18

Abfertigung und Beförderung

(1) Soweit die Allgemeinen Beförderungsbedingungen keine Ausnahme vorsehen, wird Reisegepäck nur gegen Vorzeigen eines mindestens bis zum Bestimmungsort des Reisegepäcks gültigen Beförderungsausweises abgefertigt. Im Übrigen erfolgt die Abfertigung des Reisegepäcks nach den am Aufgabeort geltenden Vorschriften.

(2) Lassen die Allgemeinen Beförderungsbedingungen die Annahme von Reisegepäck zur Beförderung ohne Vorzeigen eines Beförderungsausweises zu, so gelten hinsichtlich des Reisegepäcks die Bestimmungen dieser Einheitlichen Rechtsvorschriften über die Rechte und Pflichten des Reisenden sinngemäß für den Absender von Reisegepäck.

(3) Der Beförderer kann das Reisegepäck mit einem anderen Zug oder mit einem anderen Beförderungsmittel und über einen anderen Weg befördern, als sie vom Reisenden benutzt werden.

Artikel 19

Zahlung der Gepäckfracht

Ist zwischen dem Reisenden und dem Beförderer nichts anderes vereinbart, ist die Gepäckfracht bei der Aufgabe zu zahlen.

Artikel 20

Kennzeichnung des Reisegepäcks

Der Reisende hat auf jedem Gepäckstück, an gut sichtbarer Stelle, haltbar und deutlich anzugeben:

a) seinen Namen und seine Anschrift,

b) den Bestimmungsort.

Artikel 21

Verfügungsrecht über das Reisegepäck

(1) Wenn es die Umstände gestatten und keine zoll- oder sonstigen verwaltungsbehördlichen Vorschriften entgegenstehen, kann der Reisende gegen Rückgabe des Gepäckscheins und, wenn es die Allgemeinen Beförderungsbedingungen vorsehen, gegen Vorzeigen des Beförderungsausweises die Rückgabe des Gepäcks am Aufgabeort verlangen.

(2) Die Allgemeinen Beförderungsbedingungen können andere Bestimmungen betreffend das Verfügungsrecht vorsehen, insbesondere die Änderung des Bestimmungsortes und allfällige damit zusammenhängende Kostenfolgen für den Reisenden.

Artikel 22

Auslieferung

(1) Das Reisegepäck wird gegen Rückgabe des Gepäckscheins und gegen Zahlung der gegebenenfalls die Sendung belastenden Kosten ausgeliefert.

Der Beförderer ist berechtigt, aber nicht verpflichtet, nachzuprüfen, ob der Inhaber des Gepäckscheins berechtigt ist, das Reisegepäck in Empfang zu nehmen.

(2) Der Auslieferung an den Inhaber des Gepäckscheins stehen gleich eine gemäß den am Bestimmungsort geltenden Vorschriften erfolgte

a) Übergabe des Reisegepäcks an die Zoll- oder Steuerverwaltung in deren Abfertigungs- oder Lagerräumen, wenn diese nicht unter der Obhut des Beförderers stehen,

b) Übergabe von lebenden Tieren an einen Dritten zur Verwahrung.

(3) Der Inhaber des Gepäckscheins kann am Bestimmungsort die Auslieferung des Reisegepäcks verlangen, sobald die vereinbarte und die gegebenenfalls zur Abfertigung durch die Zoll- oder sonstigen Verwaltungsbehörden erforderliche Zeit abgelaufen ist.

(4) Wird der Gepäckschein nicht zurückgegeben, so braucht der Beförderer das Reisegepäck nur demjenigen auszuliefern, der seine Berechtigung nachweist; bei unzureichendem Nachweis kann der Beförderer eine Sicherheitsleistung verlangen.

(5) Das Reisegepäck ist an dem Bestimmungsort auszuliefern, nach dem es abgefertigt worden ist.

(6) Der Inhaber des Gepäckscheins, dem das Reisegepäck nicht ausgeliefert wird, kann verlangen, dass ihm auf dem Gepäckschein Tag und Stunde bescheinigt werden, zu denen er die Auslieferung gemäß Absatz 3 verlangt hat.

(7) Leistet der Beförderer dem Verlangen des Berechtigten, das Reisegepäck in seiner Gegenwart nachzuprüfen, um einen von ihm behaupteten Schaden festzustellen, nicht Folge, so kann der Berechtigte die Annahme des Reisegepäcks verweigern.

(8) Im Übrigen erfolgt die Auslieferung des Reisegepäcks gemäß den am Bestimmungsort geltenden Vorschriften.

Kapitel IV

Fahrzeuge

Artikel 23

Beförderungsbedingungen

Die besonderen Bestimmungen über die Beförderung von Fahrzeugen in den Allgemeinen Beförderungsbedingungen legen insbesondere die Bedingungen für die Annahme zur Beförderung, die Abfertigung, das Verladen und die Beförderung, das Entladen und die Auslieferung sowie die Verpflichtungen des Reisenden fest.

Artikel 24

Beförderungsschein

(1) Die vertraglichen Pflichten bei der Beförderung von Fahrzeugen sind in einem Beförderungsschein festzuhalten, der dem Reisenden auszuhändigen ist. Der Beförderungsschein kann Teil des Beförderungsausweises des Reisenden sein.

(2) Die besonderen Bestimmungen über die Beförderung von Fahrzeugen in den Allgemeinen Beförderungsbedingungen legen Form und Inhalt des Beförderungsscheins sowie die Sprache und die Schriftzeichen, die beim Druck und beim Ausfüllen zu verwenden sind, fest. Artikel 7 Absatz 5 gilt entsprechend.

(3) In den Beförderungsschein sind mindestens einzutragen:

a) der Beförderer oder die Beförderer;

b) die Angabe, dass die Beförderung auch bei einer gegenteiligen Abmachung diesen Einheitlichen Rechtsvorschriften unterliegt; dies kann durch die Abkürzung CIV geschehen;

c) jede andere Angabe, die notwendig ist, die vertraglichen Pflichten bei der Beförderung der Fahrzeuge zu beweisen, und die es dem Reisenden erlaubt, die Rechte aus dem Beförderungsvertrag geltend zu machen.

(4) Der Reisende hat sich bei der Entgegennahme des Beförderungsscheins zu vergewissern, ob dieser seinen Angaben gemäß ausgestellt ist.

Artikel 25

Anwendbares Recht

Vorbehaltlich der Bestimmungen dieses Kapitels gelten für Fahrzeuge die Bestimmungen des Kapitels III über die Beförderung von Reisegepäck.

TITEL IV

HAFTUNG DES BEFÖRDERERS

Kapitel I

Haftung bei Tötung und Verletzung von Reisenden

Artikel 26

Haftungsgrund

(1) Der Beförderer haftet für den Schaden, der dadurch entsteht, dass der Reisende durch einen Unfall im Zusammenhang mit dem Eisenbahnbetrieb während seines Aufenthaltes in den Eisenbahnwagen oder beim Ein- oder Aussteigen getötet, verletzt oder sonst in seiner körperlichen oder in seiner geistigen Gesundheit beeinträchtigt wird, unabhängig davon, welche Eisenbahninfrastruktur benutzt wird.

(2) Der Beförderer ist von dieser Haftung befreit,

a) wenn der Unfall durch außerhalb des Eisenbahnbetriebes liegende Umstände verursacht worden ist und der Beförderer diese Umstände trotz Anwendung der nach Lage des Falles gebotenen Sorgfalt nicht vermeiden und deren Folgen nicht abwenden konnte;

b) soweit der Unfall auf ein Verschulden des Reisenden zurückzuführen ist;

c) wenn der Unfall auf das Verhalten eines Dritten zurückzuführen ist und der Beförderer dieses Verhalten trotz Anwendung der nach Lage des Falles gebotenen Sorgfalt nicht vermeiden und dessen Folgen nicht abwenden konnte; ein anderes Unternehmen, das dieselbe Eisenbahninfrastruktur benutzt, gilt nicht als Dritter; Rückgriffsrechte bleiben unberührt.

(3) Ist der Unfall auf das Verhalten eines Dritten zurückzuführen und ist der Beförderer gleichwohl von seiner Haftung nicht gemäß Absatz 2 Buchstabe c ganz befreit, so haftet er unter den Beschränkungen dieser Einheitlichen Rechtsvorschriften voll, unbeschadet eines etwaigen Rückgriffsrechtes gegen den Dritten.

(4) Eine etwaige Haftung des Beförderers in den in Absatz 1 nicht vorgesehenen Fällen wird durch diese Einheitlichen Rechtsvorschriften nicht berührt.

(5) Wird eine Beförderung, die Gegenstand eines einzigen Beförderungsvertrages ist, von aufeinanderfolgenden Beförderern ausgeführt, so haftet bei Tötung und Verletzung von Reisenden derjenige Beförderer, der die Beförderungsleistung, bei der sich der Unfall ereignet hat, gemäß Beförderungsvertrag zu erbringen hatte. Wurde diese Beförderungsleistung nicht vom Beförderer, sondern von einem ausführenden Beförderer erbracht, haften beide als Gesamtschuldner nach diesen Einheitlichen Rechtsvorschriften.

Artikel 27

Schadensersatz bei Tötung

(1) Bei Tötung des Reisenden umfasst der Schadensersatz:

a) die infolge des Todes des Reisenden entstandenen notwendigen Kosten, insbesondere für die Überführung und die Bestattung;

b) bei nicht sofortigem Eintritt des Todes den in Artikel 28 vorgesehenen Schadensersatz.

(2) Haben durch den Tod des Reisenden Personen, denen gegenüber er kraft Gesetzes unterhaltspflichtig war oder zukünftig unterhaltspflichtig geworden wäre, den Versorger verloren, so ist auch für diesen Verlust Ersatz zu leisten. Der Schadensersatzanspruch von Personen, denen der Reisende ohne gesetzliche Verpflichtung Unterhalt gewährt hat, richtet sich nach Landesrecht.

Artikel 28

Schadensersatz bei Verletzung

Bei Verletzung oder sonstiger Beeinträchtigung der körperlichen oder der geistigen Gesundheit des Reisenden umfasst der Schadensersatz:

a) die notwendigen Kosten, insbesondere für Heilung und Pflege sowie für die Beförderung;

b) den Vermögensnachteil, den der Reisende durch gänzliche oder teilweise Arbeitsunfähigkeit oder durch eine Vermehrung seiner Bedürfnisse erleidet.

Artikel 29

Ersatz anderer Personenschäden

Ob und inwieweit der Beförderer bei Personenschäden für andere als die in Artikel 27 und 28 vorgesehenen Schäden Ersatz zu leisten hat, richtet sich nach Landesrecht.

Artikel 30

Form und Höhe des Schadensersatz bei Tötung und Verletzung

(1) Der in Artikel 27 Absatz 2 und in Artikel 28 Buchstabe b vorgesehene Schadensersatz ist in Form eines Kapitalbetrages zu leisten. Ist jedoch nach Landesrecht die Zuerkennung einer Rente zulässig, so wird der Schadensersatz in dieser Form geleistet, wenn der verletzte Reisende oder die gemäß Artikel 27 Absatz 2 Anspruchsberechtigten die Zahlung einer Rente verlangen.

(2) Die Höhe des gemäß Absatz 1 zu leistenden Schadensersatzes richtet sich nach Landesrecht. Es gilt jedoch bei Anwendung dieser Einheitlichen Rechtsvorschriften für jeden Reisenden eine Höchstgrenze von 175 000 Rechnungseinheiten für den Kapitalbetrag oder eine diesem Betrag entsprechende Jahresrente, sofern das Landesrecht eine niedrigere Höchstgrenze vorsieht.

Artikel 31

Andere Beförderungsmittel

(1) Die Bestimmungen über die Haftung bei Tötung und Verletzung von Reisenden sind, vorbehaltlich des Absatzes 2, nicht auf Schäden anzuwenden, die während einer Beförderung entstehen, die gemäß Beförderungsvertrag nicht auf der Schiene erfolgt.

(2) Werden jedoch Eisenbahnwagen auf einem Fährschiff befördert, so sind die Bestimmungen über die Haftung bei Tötung und Verletzung von Reisenden auf die durch Artikel 26 Absatz 1 und Artikel 33 Absatz 1 erfassten Schäden anzuwenden, die der Reisende durch Unfall im Zusammenhang mit dem Eisenbahnbetrieb während seines Aufenthaltes in diesen Wagen, beim Einsteigen in die Wagen oder beim Aussteigen aus den Wagen erleidet.

(3) Wenn der Eisenbahnbetrieb infolge außerordentlicher Umstände vorübergehend unterbrochen ist und die Reisenden mit einem anderen Beförderungsmittel befördert werden, haftet der Beförderer gemäß diesen Einheitlichen Rechtsvorschriften.

Kapitel II

Haftung bei Nichteinhaltung des Fahrplans

Artikel 32

Haftung bei Ausfall, Verspätung und Anschlussversäumnis

(1) Der Beförderer haftet dem Reisenden für den Schaden, der dadurch entsteht, dass die Reise wegen Ausfall, Verspätung oder Versäumnis des Anschlusses nicht am selben Tag fortgesetzt werden kann oder dass unter den gegebenen Umständen eine Fortsetzung am selben Tag nicht zumutbar ist. Der Schadensersatz umfasst die dem Reisenden im Zusammenhang mit der Übernachtung und mit der Benachrichtigung der ihn erwartenden Personen entstandenen angemessenen Kosten.

(2) Der Beförderer ist von dieser Haftung befreit, wenn der Ausfall, die Verspätung oder das Anschlussversäumnis auf eine der folgenden Ursachen zurückzuführen ist:

a) außerhalb des Eisenbahnbetriebes liegende Umstände, die der Beförderer trotz Anwendung der nach Lage des Falles gebotenen Sorgfalt nicht vermeiden und deren Folgen er nicht abwenden konnte,

b) Verschulden des Reisenden oder

c) Verhalten eines Dritten, das der Beförderer trotz Anwendung der nach Lage des Falles gebotenen Sorgfalt nicht vermeiden und dessen Folgen er nicht abwenden konnte; ein anderes Unternehmen, das dieselbe Eisenbahninfrastruktur benutzt, gilt nicht als Dritter; Rückgriffsrechte bleiben unberührt.

(3) Ob und inwieweit der Beförderer für andere als die in Absatz 1 vorgesehenen Schäden Ersatz zu leisten hat, richtet sich nach Landesrecht. Artikel 44 bleibt unberührt.

Kapitel III

Haftung für Handgepäck, Tiere, Reisegepäck und Fahrzeuge

ABSCHNITT 1

Handgepäck und Tiere

Artikel 33

Haftung

(1) Bei Tötung und Verletzung von Reisenden haftet der Beförderer auch für den Schaden, der durch gänzlichen oder teilweisen Verlust oder durch Beschädigung von Sachen entsteht, die der Reisende an sich trägt oder als Handgepäck mit sich führt; dies gilt auch für Tiere, die der Reisende mit sich führt. Artikel 26 findet entsprechende Anwendung.

(2) Im Übrigen haftet der Beförderer für Schäden wegen gänzlichen oder teilweisen Verlusts oder wegen Beschädigung von Sachen, Handgepäck oder Tieren, zu deren Beaufsichtigung der Reisende gemäß Artikel 15 verpflichtet ist, nur dann, wenn den Beförderer ein Verschulden trifft. Die übrigen Artikel des Titels IV, mit Ausnahme des Artikels 51, und der Titel VI finden in diesem Fall keine Anwendung.

Artikel 34

Beschränkung des Schadensersatzes bei Verlust oder Beschädigung von Sachen

Haftet der Beförderer gemäß Artikel 33 Absatz 1, so hat er Schadensersatz bis zu einer Höchstgrenze von 1 400 Rechnungseinheiten für jeden Reisenden zu leisten.

Artikel 35

Ausschluss der Haftung

Der Beförderer haftet dem Reisenden gegenüber nicht für den Schaden, der dadurch entsteht, dass der Reisende seinen Verpflichtungen gemäß den zoll- oder sonstigen verwaltungsbehördlichen Vorschriften nicht nachgekommen ist.

ABSCHNITT 2

Reisegepäck

Artikel 36

Haftungsgrund

(1) Der Beförderer haftet für den Schaden, der durch gänzlichen oder teilweisen Verlust oder durch Beschädigung des Reisegepäcks in der Zeit von der Übernahme durch den Beförderer bis zur Auslieferung sowie durch verspätete Auslieferung entsteht.

(2) Der Beförderer ist von dieser Haftung befreit, soweit der Verlust, die Beschädigung oder die verspätete Auslieferung durch ein Verschulden des Reisenden, eine nicht vom Beförderer verschuldete Anweisung des Reisenden, besondere Mängel des Reisegepäcks oder durch Umstände verursacht worden ist, welche der Beförderer nicht vermeiden und deren Folgen er nicht abwenden konnte.

(3) Der Beförderer ist von dieser Haftung befreit, soweit der Verlust oder die Beschädigung aus der mit einer oder mehreren der folgenden Tatsachen verbundenen besonderen Gefahr entstanden ist:

a) Fehlen oder Mängel der Verpackung;

b) natürliche Beschaffenheit des Reisegepäcks;

c) Aufgabe von Gegenständen als Reisegepäck, die von der Beförderung ausgeschlossen sind.

Artikel 37

Beweislast

(1) Der Beweis, dass der Verlust, die Beschädigung oder die verspätete Auslieferung durch eine der in Artikel 36 Absatz 2 erwähnten Tatsachen verursacht worden ist, obliegt dem Beförderer.

(2) Legt der Beförderer dar, dass der Verlust oder die Beschädigung nach den Umständen des Falles aus einer oder mehreren der in Artikel 36 Absatz 3 erwähnten besonderen Gefahren entstehen konnte, so wird vermutet, dass der Schaden daraus entstanden ist. Der Berechtigte hat jedoch das Recht, nachzuweisen, dass der Schaden nicht oder nicht ausschließlich aus einer dieser Gefahren entstanden ist.

Artikel 38

Aufeinanderfolgende Beförderer

Wird eine Beförderung, die Gegenstand eines einzigen Beförderungsvertrages ist, von mehreren aufeinanderfolgenden Beförderern durchgeführt, so tritt jeder Beförderer dadurch, dass er das Reisegepäck mit dem Gepäckschein oder das Fahrzeug mit dem Beförderungsschein übernimmt, hinsichtlich der Beförderung von Reisegepäck oder von Fahrzeugen in den Beförderungsvertrag nach Maßgabe des Gepäckscheins oder des Beförderungsscheins ein und übernimmt die sich daraus ergebenden Verpflichtungen. In diesem Falle haftet jeder Beförderer für die Ausführung der Beförderung auf der ganzen Strecke bis zur Auslieferung.

Artikel 39

Ausführender Beförderer

(1) Hat der Beförderer die Durchführung der Beförderung ganz oder teilweise einem ausführenden Beförderer übertragen, gleichviel, ob er aufgrund des Beförderungsvertrages dazu berechtigt war oder nicht, so bleibt der Beförderer dennoch für die gesamte Beförderung verantwortlich.

(2) Alle für die Haftung des Beförderers maßgeblichen Bestimmungen dieser Einheitlichen Rechtsvorschriften gelten auch für die Haftung des ausführenden Beförderers für die von ihm durchgeführte Beförderung. Artikel 48 und Artikel 52 sind anzuwenden, wenn ein Anspruch gegen die Bediensteten und anderen Personen, deren sich der ausführende Beförderer bei der Durchführung der Beförderung bedient, geltend gemacht wird.

(3) Eine besondere Vereinbarung, wonach der Beförderer Verpflichtungen übernimmt, die ihm nicht durch diese Einheitlichen Rechtsvorschriften auferlegt werden, oder auf Rechte verzichtet, die ihm durch diese Einheitlichen Rechtsvorschriften gewährt werden, berührt den ausführenden Beförderer nur, wenn er dem ausdrücklich schriftlich zugestimmt hat. Unabhängig davon, ob der ausführende Beförderer eine solche Zustimmung erklärt hat, bleibt der Beförderer an die sich aus einer solchen besonderen Vereinbarung ergebenden Verpflichtungen oder Verzichtserklärungen gebunden.

(4) Wenn und soweit sowohl der Beförderer als auch der ausführende Beförderer haften, haften sie als Gesamtschuldner.

(5) Der Gesamtbetrag der Entschädigung, der von dem Beförderer, dem ausführenden Beförderer sowie ihren Bediensteten und anderen Personen, deren sie sich bei der Durchführung der Beförderung bedienen, erlangt werden kann, übersteigt nicht die in diesen Einheitlichen Rechtsvorschriften vorgesehenen Höchstbeträge.

(6) Dieser Artikel lässt die Rechte des Beförderers und des ausführenden Beförderers, untereinander Rückgriff zu nehmen, unberührt.

Artikel 40

Vermutung für den Verlust

(1) Der Berechtigte kann ein Gepäckstück ohne weiteren Nachweis als verloren betrachten, wenn es nicht binnen 14 Tagen, nachdem seine Auslieferung gemäß Artikel 22 Absatz 3 verlangt wurde, ausgeliefert oder zu seiner Verfügung bereitgestellt worden ist.

(2) Wird ein für verloren gehaltenes Gepäckstück binnen einem Jahr nach dem Verlangen auf Auslieferung wieder aufgefunden, so hat der Beförderer den Berechtigten zu benachrichtigen, wenn seine Anschrift bekannt ist oder sich ermitteln lässt.

(3) Der Berechtigte kann binnen 30 Tagen nach Empfang der Nachricht gemäß Absatz 2 verlangen, dass ihm das Gepäckstück ausgeliefert wird. In diesem Fall hat er die Kosten für die Beförderung des Gepäckstückes vom Aufgabeort bis zum Ort zu zahlen, an dem das Gepäckstück ausgeliefert wird, und die erhaltene Entschädigung, gegebenenfalls abzüglich der in dieser Entschädigung enthaltenen Kosten, zurückzuzahlen. Er behält jedoch seine Ansprüche auf Entschädigung wegen verspäteter Auslieferung gemäß Artikel 43.

(4) Wird das wiederaufgefundene Gepäckstück nicht binnen der in Absatz 3 vorgesehenen Frist zurückverlangt oder wird es später als ein Jahr nach dem Verlangen auf Auslieferung wiederaufgefunden, so verfügt der Beförderer darüber gemäß den am Ort, an dem sich das Gepäckstück befindet, geltenden Gesetzen und Vorschriften.

Artikel 41

Entschädigung bei Verlust

(1) Bei gänzlichem oder teilweisem Verlust des Reisegepäcks hat der Beförderer ohne weiteren Schadensersatz zu zahlen:

a) wenn die Höhe des Schadens nachgewiesen ist, eine Entschädigung in dieser Höhe, die jedoch 80 Rechnungseinheiten je fehlendes Kilogramm Bruttomasse oder 1 200 Rechnungseinheiten je Gepäckstück nicht übersteigt;

b) wenn die Höhe des Schadens nicht nachgewiesen ist, eine Pauschalentschädigung von 20 Rechnungseinheiten je fehlendes Kilogramm Bruttomasse oder von 300 Rechnungseinheiten je Gepäckstück.

Die Art der Entschädigung, je fehlendes Kilogramm oder je Gepäckstück, wird in den Allgemeinen Beförderungsbedingungen festgelegt.

(2) Der Beförderer hat außerdem Gepäckfracht und sonstige im Zusammenhang mit der Beförderung des verlorenen Gepäckstückes gezahlte Beträge sowie bereits entrichtete Zölle und Verbrauchsabgaben zu erstatten.

Artikel 42

Entschädigung bei Beschädigung

(1) Bei Beschädigung des Reisegepäcks hat der Beförderer ohne weiteren Schadensersatz eine Entschädigung zu zahlen, die der Wertminderung des Reisegepäcks entspricht.

(2) Die Entschädigung übersteigt nicht,

a) wenn das gesamte Reisegepäck durch die Beschädigung entwertet ist, den Betrag, der bei gänzlichem Verlust zu zahlen wäre;

b) wenn nur ein Teil des Reisegepäcks durch die Beschädigung entwertet ist, den Betrag, der bei Verlust des entwerteten Teiles zu zahlen wäre.

Artikel 43

Entschädigung bei verspäteter Auslieferung

(1) Bei verspäteter Auslieferung des Reisegepäcks hat der Beförderer für je angefangene 24 Stunden seit dem Verlangen auf Auslieferung, höchstens aber für 14 Tage, zu zahlen:

a) wenn der Berechtigte nachweist, dass daraus ein Schaden, einschließlich einer Beschädigung, entstanden ist, eine Entschädigung in der Höhe des Schadens bis zu einem Höchstbetrag von 0,80 Rechnungseinheiten je Kilogramm Bruttomasse oder von 14 Rechnungseinheiten je Stück des verspätet ausgelieferten Reisegepäcks;

b) wenn der Berechtigte nicht nachweist, dass daraus ein Schaden entstanden ist, eine Pauschalentschädigung von 0,14 Rechnungseinheiten je Kilogramm Bruttomasse oder von 2,80 Rechnungseinheiten je Stück des verspätet ausgelieferten Reisegepäcks.

Die Art der Entschädigung, je Kilogramm oder je Gepäckstück, wird in den Allgemeinen Beförderungsbedingungen festgelegt.

(2) Bei gänzlichem Verlust des Reisegepäcks wird die Entschädigung gemäß Absatz 1 nicht neben der Entschädigung gemäß Artikel 41 geleistet.

(3) Bei teilweisem Verlust des Reisegepäcks wird die Entschädigung gemäß Absatz 1 für den nicht verlorenen Teil geleistet.

(4) Bei einer Beschädigung des Reisegepäcks, die nicht Folge der verspäteten Auslieferung ist, wird die Entschädigung gemäß Absatz 1 gegebenenfalls neben der Entschädigung gemäß Artikel 42 geleistet.

(5) In keinem Fall ist die Entschädigung gemäß Absatz 1 zuzüglich der Entschädigungen gemäß Artikel 41 und 42 insgesamt höher als die Entschädigung bei gänzlichem Verlust des Reisegepäcks.

ABSCHNITT 3

Fahrzeuge

Artikel 44

Entschädigung bei Verspätung

(1) Wird ein Fahrzeug aus einem vom Beförderer zu vertretenden Umstand verspätet verladen oder wird es verspätet ausgeliefert, so hat der Beförderer, wenn der Berechtigte nachweist, dass daraus ein Schaden entstanden ist, eine Entschädigung zu zahlen, deren Betrag den Beförderungspreis nicht übersteigt.

(2) Ergibt sich bei der Verladung aus einem vom Beförderer zu vertretenden Umstand eine Verspätung und verzichtet der Berechtigte deshalb auf die Durchführung des Beförderungsvertrages, so wird ihm der Beförderungspreis erstattet. Weist er nach, dass aus dieser Verspätung ein Schaden entstanden ist, so kann er außerdem eine Entschädigung verlangen, deren Betrag den Beförderungspreis nicht übersteigt.

Artikel 45

Entschädigung bei Verlust

Bei gänzlichem oder teilweisem Verlust eines Fahrzeugs wird die dem Berechtigten für den nachgewiesenen Schaden zu zahlende Entschädigung nach dem Zeitwert des Fahrzeugs berechnet. Sie beträgt höchstens 8 000 Rechnungseinheiten. Ein Anhänger gilt mit oder ohne Ladung als ein selbstständiges Fahrzeug.

Artikel 46

Haftung hinsichtlich anderer Gegenstände

(1) Hinsichtlich der im Fahrzeug untergebrachten Gegenstände oder der Gegenstände, die sich in Behältnissen (z. B. Gepäckbehältern oder Skiboxen) befinden, die fest am Fahrzeug angebracht sind, haftet der Beförderer nur für Schäden, die auf sein Verschulden zurückzuführen sind. Die Gesamtentschädigung beträgt höchstens 1 400 Rechnungseinheiten.

(2) Für Gegenstände, die außen am Fahrzeug befestigt sind, einschließlich der Behältnisse gemäß Absatz 1, haftet der Beförderer nur, wenn nachgewiesen wird, dass der Schaden auf eine Handlung oder Unterlassung des Beförderers zurückzuführen ist, die entweder in der Absicht, einen solchen Schaden herbeizuführen, oder leichtfertig und in dem Bewusstsein begangen wurde, dass ein solcher Schaden mit Wahrscheinlichkeit eintreten werde.

Artikel 47

Anwendbares Recht

Vorbehaltlich der Bestimmungen dieses Abschnitts gelten für Fahrzeuge die Bestimmungen des Abschnitts 2 über die Haftung für Reisegepäck.

Kapitel IV

Gemeinsame Bestimmungen

Artikel 48

Verlust des Rechtes auf Haftungsbeschränkung

Die in diesen Einheitlichen Rechtsvorschriften vorgesehenen Haftungsbeschränkungen sowie die Bestimmungen des Landesrechtes, die den Schadensersatz auf einen festen Betrag begrenzen, finden keine Anwendung, wenn nachgewiesen wird, dass der Schaden auf eine Handlung oder Unterlassung des Beförderers zurückzuführen ist, die entweder in der Absicht, einen solchen Schaden herbeizuführen, oder leichtfertig und in dem Bewusstsein begangen wurde, dass ein solcher Schaden mit Wahrscheinlichkeit eintreten werde.

Artikel 49

Umrechnung und Verzinsung

(1) Müssen bei der Berechnung der Entschädigung in ausländischer Währung ausgedrückte Beträge umgerechnet werden, so sind sie nach dem Kurs am Tag und am Ort der Zahlung der Entschädigung umzurechnen.

(2) Der Berechtigte kann auf die Entschädigung Zinsen in Höhe von fünf Prozent jährlich beanspruchen, und zwar vom Tag der Reklamation gemäß Artikel 55 oder, wenn keine Reklamation vorangegangen ist, vom Tag der Klageerhebung an.

(3) Für Entschädigungen gemäß Artikel 27 und 28 laufen jedoch die Zinsen erst von dem Tag an, an dem die für die Bemessung der Höhe der Entschädigung maßgebenden Umstände eingetreten sind, wenn dieser Tag später liegt als derjenige der Reklamation oder der Klageerhebung.

(4) Bei Reisegepäck können die Zinsen nur beansprucht werden, wenn die Entschädigung 16 Rechnungseinheiten je Gepäckschein übersteigt.

(5) Legt der Berechtigte dem Beförderer bei Reisegepäck die zur abschließenden Behandlung der Reklamation erforderlichen Belege nicht innerhalb einer ihm gestellten angemessenen Frist vor, so ist der Lauf der Zinsen vom Ablauf dieser Frist an bis zur Übergabe dieser Belege gehemmt.

Artikel 50

Haftung bei nuklearem Ereignis

Der Beförderer ist von der ihm gemäß diesen Einheitlichen Rechtsvorschriften obliegenden Haftung befreit, wenn der Schaden durch ein nukleares Ereignis verursacht worden ist und wenn gemäß den Gesetzen und Vorschriften eines Staates über die Haftung auf dem Gebiet der Kernenergie der Inhaber einer Kernanlage oder eine ihm gleichgestellte Person für diesen Schaden haftet.

Artikel 51

Personen, für die der Beförderer haftet

Der Beförderer haftet für seine Bediensteten und für andere Personen, deren er sich bei der Durchführung der Beförderung bedient, soweit diese Bediensteten und anderen Personen in Ausübung ihrer Verrichtungen handeln. Die Betreiber der Eisenbahninfrastruktur, auf der die Beförderung erfolgt, gelten als Personen, deren sich der Beförderer bei der Durchführung der Beförderung bedient.

Artikel 52

Sonstige Ansprüche

(1) In allen Fällen, auf die diese Einheitlichen Rechtsvorschriften Anwendung finden, kann gegen den Beförderer ein Anspruch auf Schadensersatz, auf welchem Rechtsgrund er auch beruht, nur unter den Voraussetzungen und Beschränkungen dieser Einheitlichen Rechtsvorschriften geltend gemacht werden.

(2) Das Gleiche gilt für Ansprüche gegen die Bediensteten und anderen Personen, für die der Beförderer gemäß Artikel 51 haftet.

TITEL V

HAFTUNG DES REISENDEN

Artikel 53

Besondere Haftungsgründe

Der Reisende haftet dem Beförderer für jeden Schaden,

a) der dadurch entsteht, dass er seinen Verpflichtungen nicht nachgekommen ist, die sich für ihn ergeben

   1. aus den Artikeln 10, 14 und 20,

   2. aus den besonderen Bestimmungen über die Beförderung von Fahrzeugen in den Allgemeinen Beförderungsbedingungen oder

   3. aus der Ordnung für die internationale Eisenbahnbeförderung gefährlicher Güter (RID), oder

b) der durch Gegenstände oder Tiere verursacht wird, die er mitnimmt,

sofern er nicht beweist, dass der Schaden auf Umstände zurückzuführen ist, die er trotz Anwendung der von einem gewissenhaften Reisenden geforderten Sorgfalt nicht vermeiden und deren Folgen er nicht abwenden konnte. Diese Bestimmung berührt nicht die Haftung des Beförderers nach Artikel 26 und 33 Absatz 1.

TITEL VI

GELTENDMACHUNG VON ANSPRÜCHEN

Artikel 54

Feststellung eines teilweisen Verlustes oder einer Beschädigung

(1) Wird ein teilweiser Verlust oder eine Beschädigung eines unter der Obhut des Beförderers beförderten Gegenstandes (Reisegepäck, Fahrzeug) vom Beförderer entdeckt oder vermutet oder vom Berechtigten behauptet, so hat der Beförderer je nach Art des Schadens den Zustand des Gegenstandes und, soweit möglich, das Ausmaß und die Ursache des Schadens sowie den Zeitpunkt seines Entstehens unverzüglich und, wenn möglich, in Gegenwart des Berechtigten in einer Tatbestandsaufnahme festzuhalten.

(2) Dem Berechtigten ist eine Abschrift der Tatbestandsaufnahme unentgeltlich auszuhändigen.

(3) Erkennt der Berechtigte die Feststellungen in der Tatbestandsaufnahme nicht an, so kann er verlangen, dass der Zustand des Reisegepäcks oder des Fahrzeugs sowie die Ursache und der Betrag des Schadens von einem durch die Parteien des Beförderungsvertrages oder ein Gericht bestellten Sachverständigen festgestellt werden. Das Verfahren richtet sich nach den Gesetzen und Vorschriften des Staates, in dem die Feststellung erfolgt.

Artikel 55

Reklamationen

(1) Reklamationen betreffend die Haftung des Beförderers bei Tötung und Verletzung von Reisenden sind schriftlich an den Beförderer zu richten, gegen den Ansprüche gerichtlich geltend gemacht werden können. Im Falle einer Beförderung, die Gegenstand eines einzigen Vertrags war und von aufeinanderfolgenden Beförderern ausgeführt wurde, können Reklamationen auch an den ersten oder letzten Beförderer sowie an den Beförderer gerichtet werden, der im Staat des Wohnsitzes oder des gewöhnlichen Aufenthaltes des Reisenden seine Hauptniederlassung oder die Zweigniederlassung oder Geschäftsstelle hat, durch die der Beförderungsvertrag geschlossen worden ist.

(2) Die anderen Reklamationen aus dem Beförderungsvertrag sind schriftlich an den in Artikel 56 Absätze 2 und 3 genannten Beförderer zu richten.

(3) Die Belege, die der Berechtigte der Reklamation beigeben will, sind im Original oder in Abschrift, auf Verlangen des Beförderers in gehörig beglaubigter Form, vorzulegen. Bei der Regelung der Reklamation kann der Beförderer die Rückgabe des Beförderungsausweises, des Gepäckscheins und des Beförderungsscheins verlangen.

Artikel 56

Beförderer, gegen die Ansprüche gerichtlich geltend gemacht werden können

(1) Schadensersatzansprüche aufgrund der Haftung des Beförderers bei Tötung und Verletzung von Reisenden können nur gegen einen gemäß Artikel 26 Absatz 5 haftbaren Beförderer gerichtlich geltend gemacht werden.

(2) Vorbehaltlich des Absatzes 4 können sonstige Ansprüche des Reisenden aufgrund des Beförderungsvertrages nur gegen den ersten, den letzten oder denjenigen Beförderer geltend gemacht werden, der den Teil der Beförderung ausgeführt hat, in dessen Verlauf die den Anspruch begründende Tatsache eingetreten ist.

(3) Ist bei Beförderungen durch aufeinanderfolgende Beförderer der zur Auslieferung verpflichtete Beförderer mit seiner Zustimmung im Gepäckschein oder im Beförderungsschein eingetragen, können Ansprüche gemäß Absatz 2 auch dann gegen ihn gerichtlich geltend gemacht werden, wenn er das Gepäck nicht erhalten oder das Fahrzeug nicht übernommen hat.

(4) Ansprüche auf Erstattung von Beträgen, die aufgrund des Beförderungsvertrages gezahlt worden sind, können gegen den Beförderer gerichtlich geltend gemacht werden, der den Betrag erhoben hat, oder gegen den Beförderer, zu dessen Gunsten der Betrag erhoben worden ist.

(5) Im Wege der Widerklage oder der Einrede können Ansprüche auch gegen einen anderen als die in den Absätzen 2 und 4 genannten Beförderer geltend gemacht werden, wenn sich die Klage auf denselben Beförderungsvertrag gründet.

(6) Soweit diese Einheitlichen Rechtsvorschriften auf den ausführenden Beförderer Anwendung finden, können die Ansprüche auch gegen ihn gerichtlich geltend gemacht werden.

(7) Hat der Kläger die Wahl unter mehreren Beförderern, so erlischt sein Wahlrecht, sobald die Klage gegen einen der Beförderer erhoben ist; dies gilt auch, wenn der Kläger die Wahl zwischen einem oder mehreren Beförderern und einem ausführenden Beförderer hat.

Artikel 58

Erlöschen der Ansprüche bei Tötung und Verletzung

(1) Alle Ansprüche des Berechtigten aufgrund der Haftung des Beförderers bei Tötung und Verletzung von Reisenden sind erloschen, wenn er den Unfall des Reisenden nicht spätestens zwölf Monate, nachdem er vom Schaden Kenntnis erlangt hat, einem der Beförderer anzeigt, bei denen die Reklamation gemäß Artikel 55 Absatz 1 eingereicht werden kann. Zeigt der Berechtigte dem Beförderer den Unfall mündlich an, so hat dieser ihm über die mündliche Anzeige eine Bestätigung auszustellen.

(2) Die Ansprüche erlöschen jedoch nicht, wenn

a) der Berechtigte innerhalb der in Absatz 1 vorgesehenen Frist eine Reklamation an einen der in Artikel 55 Absatz 1 genannten Beförderer gerichtet hat;

b) der haftbare Beförderer innerhalb der in Absatz 1 vorgesehenen Frist auf andere Weise vom Unfall des Reisenden Kenntnis erhalten hat;

c) infolge von Umständen, die dem Berechtigten nicht zuzurechnen sind, der Unfall nicht oder nicht rechtzeitig angezeigt worden ist;

d) der Berechtigte nachweist, dass der Unfall durch ein Verschulden des Beförderers verursacht worden ist.

Artikel 59

Erlöschen der Ansprüche bei Beförderung von Reisegepäck

(1) Mit der Annahme des Reisegepäcks durch den Berechtigten sind alle Ansprüche gegen den Beförderer aus dem Beförderungsvertrag bei teilweisem Verlust, Beschädigung oder verspäteter Auslieferung erloschen.

(2) Die Ansprüche erlöschen jedoch nicht:

a) bei teilweisem Verlust oder bei Beschädigung, wenn

   1. der Verlust oder die Beschädigung vor der Annahme des Reisegepäcks durch den Berechtigten gemäß Artikel 54 festgestellt worden ist;

   2. die Feststellung, die gemäß Artikel 54 hätte erfolgen müssen, nur durch Verschulden des Beförderers unterblieben ist;

b) bei äußerlich nicht erkennbarem Schaden, der erst nach der Annahme des Reisegepäcks durch den Berechtigten festgestellt worden ist, wenn er

   1. die Feststellung gemäß Artikel 54 sofort nach der Entdeckung des Schadens und spätestens drei Tage nach der Annahme des Reisegepäcks verlangt und

   2. außerdem beweist, dass der Schaden in der Zeit zwischen der Übernahme durch den Beförderer und der Auslieferung entstanden ist;

c) bei verspäteter Auslieferung, wenn der Berechtigte binnen 21 Tagen seine Rechte gegen einen der in Artikel 56 Absatz 3 genannten Beförderer geltend gemacht hat;

d) wenn der Berechtigte nachweist, dass der Schaden auf ein Verschulden des Beförderers zurückzuführen ist.

Artikel 60

Verjährung

(1) Schadensersatzansprüche aufgrund der Haftung des Beförderers bei Tötung und Verletzung von Reisenden verjähren:

a) Ansprüche des Reisenden: in drei Jahren, gerechnet vom ersten Tag nach dem Unfall;

b) Ansprüche der anderen Berechtigten: in drei Jahren, gerechnet vom ersten Tag nach dem Tod des Reisenden, spätestens aber in fünf Jahren, gerechnet vom ersten Tag nach dem Unfall.

(2) Andere Ansprüche aus dem Beförderungsvertrag verjähren in einem Jahr. Die Verjährungsfrist beträgt jedoch zwei Jahre bei Ansprüchen wegen eines Schadens, der auf eine Handlung oder Unterlassung zurückzuführen ist, die entweder in der Absicht, einen solchen Schaden herbeizuführen, oder leichtfertig und in dem Bewusstsein begangen wurde, dass ein solcher Schaden mit Wahrscheinlichkeit eintreten werde.

(3) Die Verjährung gemäß Absatz 2 beginnt bei Ansprüchen

a) auf Entschädigung wegen gänzlichen Verlustes mit dem vierzehnten Tag nach Ablauf der Frist gemäß Artikel 22 Absatz 3;

b) auf Entschädigung wegen teilweisen Verlustes, Beschädigung oder verspäteter Auslieferung mit dem Tag der Auslieferung;

c) in allen anderen die Beförderung des Reisenden betreffenden Fällen mit dem Tag des Ablaufes der Geltungsdauer des Beförderungsausweises.

Der als Beginn der Verjährung bezeichnete Tag ist in keinem Fall in der Frist inbegriffen.

(4) […]

(5) […]

(6) Im Übrigen gilt für die Hemmung und die Unterbrechung der Verjährung Landesrecht.

TITEL VII

BEZIEHUNGEN DER BEFÖRDERER UNTEREINANDER

Artikel 61

Aufteilung des Beförderungspreises

(1) Jeder Beförderer hat den beteiligten Beförderern den ihnen zukommenden Anteil am Beförderungspreis zu zahlen, den er erhoben hat oder hätte erheben müssen. Die Art und Weise der Zahlung wird durch Vereinbarungen zwischen den Beförderern geregelt.

(2) Artikel 6 Absatz 3, Artikel 16 Absatz 3 und Artikel 25 gelten auch für die Beziehungen zwischen aufeinanderfolgenden Beförderern.

Artikel 62

Rückgriffsrecht

(1) Hat ein Beförderer gemäß diesen Einheitlichen Rechtsvorschriften eine Entschädigung gezahlt, so steht ihm ein Rückgriffsrecht gegen die Beförderer, die an der Beförderung beteiligt gewesen sind, gemäß den folgenden Bestimmungen zu:

a) Der Beförderer, der den Schaden verursacht hat, haftet ausschließlich dafür;

b) haben mehrere Beförderer den Schaden verursacht, so haftet jeder für den von ihm verursachten Schaden; ist eine Zuordnung nicht möglich, so wird die Entschädigung unter den Beförderern gemäß Buchstabe c aufgeteilt;

c) kann nicht bewiesen werden, welcher der Beförderer den Schaden verursacht hat, wird die Entschädigung auf sämtliche Beförderer aufgeteilt, mit Ausnahme derjenigen, die beweisen, dass der Schaden nicht von ihnen verursacht worden ist; die Aufteilung erfolgt im Verhältnis der den Beförderern zustehenden Anteile am Beförderungspreis.

(2) Bei Zahlungsunfähigkeit eines dieser Beförderer wird der auf ihn entfallende, aber von ihm nicht gezahlte Anteil unter allen anderen Beförderern, die an der Beförderung beteiligt gewesen sind, im Verhältnis des ihnen zustehenden Anteils am Beförderungspreis aufgeteilt.

Artikel 63

Rückgriffsverfahren

(1) Ein Beförderer, gegen den gemäß Artikel 62 Rückgriff genommen wird, kann die Rechtmäßigkeit der durch den Rückgriff nehmenden Beförderer geleisteten Zahlung nicht bestreiten, wenn die Entschädigung gerichtlich festgesetzt worden ist, nachdem dem erstgenannten Beförderer durch gehörige Streitverkündung die Möglichkeit gegeben war, dem Rechtsstreit beizutreten. Das Gericht der Hauptsache bestimmt die Fristen für die Streitverkündung und für den Beitritt.

(2) Der Rückgriff nehmende Beförderer hat sämtliche Beförderer, mit denen er sich nicht gütlich geeinigt hat, mit ein und derselben Klage zu belangen; andernfalls erlischt das Rückgriffsrecht gegen die nicht belangten Beförderer.

(3) Das Gericht hat in ein und demselben Urteil über alle Rückgriffe, mit denen es befasst ist, zu entscheiden.

(4) Der Beförderer, der sein Rückgriffsrecht gerichtlich geltend machen will, kann seinen Anspruch vor dem zuständigen Gericht des Staates erheben, in dem einer der beteiligten Beförderer seine Hauptniederlassung oder die Zweigniederlassung oder Geschäftsstelle hat, durch die der Beförderungsvertrag geschlossen worden ist.

(5) Ist die Klage gegen mehrere Beförderer zu erheben, so hat der klagende Beförderer die Wahl unter den gemäß Absatz 4 zuständigen Gerichten.

(6) Rückgriffsverfahren dürfen nicht in das Entschädigungsverfahren einbezogen werden, das der aus dem Beförderungsvertrag Berechtigte angestrengt hat.

Artikel 64

Vereinbarungen über den Rückgriff

Den Beförderern steht es frei, untereinander Vereinbarungen zu treffen, die von den Artikeln 61 und 62 abweichen.

ANHANG II

VON EISENBAHNUNTERNEHMEN UND/ODER FAHRKARTENVERKÄUFERN ANZUGEBENDE MINDESTINFORMATIONEN

Teil I: Informationen vor Fahrtantritt

Allgemeine Vertragsbedingungen

Fahrpläne und Bedingungen der Fahrt mit der kürzesten Fahrtzeit

Fahrpläne und Bedingungen der Fahrt zum günstigsten Fahrpreis

Zugänglichkeit, Zugangsbedingungen und Verfügbarkeit von Einrichtungen für Personen mit Behinderungen und Personen mit eingeschränkter Mobilität im Zug

Zugänglichkeit und Zugangsbedingungen für Fahrgäste, die Fahrräder mitführen

Verfügbarkeit von Sitzen in Raucher- und Nichtraucherzonen, erster und zweiter Klasse sowie Liege- und Schlafwagen

Aktivitäten, die voraussichtlich zu Störungen oder Verspätungen von Verkehrsdiensten führen

Verfügbarkeit von Dienstleistungen im Zug

Verfahren zur Anzeige des Gepäckverlusts

Beschwerdeverfahren

Teil II: Informationen während der Fahrt

Dienstleistungen im Zug

Nächster Haltebahnhof

Verspätungen

Wichtigste Anschlussverbindungen

Sicherheit

ANHANG III

MINDESTNORMEN FÜR DIE QUALITÄT DER DIENSTE

Informationen und Fahrkarten

Pünktlichkeit der Verkehrsdienste, allgemeine Grundsätze für die Bewältigung von Betriebsstörungen

Zugausfälle

Sauberkeit des Fahrzeugmaterials und der Bahnhofseinrichtungen (Luftqualität in den Wagen, Hygiene der sanitären Einrichtungen usw.)

Befragung zur Kundenzufriedenheit

Beschwerdebearbeitung, Erstattungen und Ausgleichszahlungen bei Nichterfüllung der Dienstqualitätsnormen

Hilfeleistung für Personen mit Behinderungen und Personen mit eingeschränkter Mobilität

In this list, the items in blue are still proposals, the ones marked with a "+" are instruments implementing the main legislation.

Dans cette liste, les entrées en bleu sont encore à l'état de proposition, celles marquées avec un "+" sont des instruments qui mettent en œuvre la législation principale.

Bei den blau markierten Einträgen dieser Liste handelt es sich noch um Vorschlaege. Die Instrumente zur Politikumsetzung sind mit einem "+" gekennzeichnet.

List of secondary legislation relevant to "disability"

1) **Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation**

2) **Directive 2001/85/EC (relating to special provisions for vehicles used for the carriage of passengers comprising more than eight seats in addition to the driver's seat)**

3) **Directive 1999/5/EC (on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity)**

4) **Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data**

5) **Directive 95/16/EC of the European Parliament and of the Council of 29 June 1995 on the approximation of the laws of the Member States relating to lifts (OJ L 312, 7.9.1995, p.1)**

6) **Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment**

7) **Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air Text with EEA relevance. OJ L 204, 26.7.2006 p.1-9**

8) **Regulation of the European Parliament and of the Council on rail passengers' rights and obligations**

9) **Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)**

10) **Regulation (EC) N° 1177/2003 of the EP and Council of 16 June 2003 concerning Community statistics on income and living conditions (EU-SILC)**

+ Commission Regulation (EC) N° 1981/2003 of 21 October 2003 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards definitions and updated definitions.

+ Commission Regulation (EC) N° 1982/2003 of 21 October 2003 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards the sampling and tracing rules.

+ Commission Regulation (EC) N° 1983/2003 of 7 November 2003 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards the list of target primary variables.

+ Commission regulation (EC) N° 28/2004 of 5 January 2004 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards the detailed content of intermediate and final quality reports.

+ Regulation (EC) N° 1553/2005 of the EP and Council of 7 September 2005 amending Regulation (EC) N° 1177/2003 of the EP and Council of 16 June 2003 concerning Community statistics on income and living conditions (EU-SILC).

+ Commission Regulation (EC) N° 698/2006 of 5 May 2006 amending Commission Regulation (EC) N° 1981/2003 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards definitions and updated definitions.

11) **Council Regulation (EC) 577/98 of 9 March on the organisation of the Labour Force Sample Survey in the Community (LFS):**

+ **Commission Regulation (EC) N° 1571/98 of 20 July 1998 implementing Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community (OJ L 205, 22.7.98, p.40)**

+ Commission Regulation (EC) N° 1924/1999 of 8 September 1999 implementing Council Regulation (EC) 577/98 as regards the 2000 to 2002 programme of ad hoc modules to the LFS

+ **Commission Regulation (EC) N° 1566/2001 of 12 July 2001 implementing Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community concerning the specification of the 2002 ad hoc module on employment of disabled people** *

+ **Commission Regulation (EC) N° 1575/2000 of 19 July 2000 implementing Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community concerning the codification to be used for data transmission from 2001 onwards (OJ L 181, 20.7.2000, p.16)**

+ Commission Regulation (EC) N° 1626/2000 of 24 July 2000 implementing Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community as regards the 2001 to 2004 program of ad hoc modules to the labour force survey.

+ Regulation (EC) N° 1991/2002 of the EP and of the Council of 8 October 2002 amending Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community.

+ Regulation (EC) N° 2257/2003 of the EP and of the Council of 25 November 2003 amending Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community to adapt the list of survey characteristics.

+ **Commission Regulation (EC) N° 430/2005 of 15 March 2005 implementing Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community concerning the codification to be used for data transmission from 2006 onwards and the use of a sub-sample for collection of data on structural variables (OJ L 71, 17.3.2006, p.36).**

12) **Regulation (EC) No 458/2007 of the European Parliament and of the Council of 25 April 2007 on the European system of integrated social protection statistics (ESSPROS)**

13) **Proposal for a Regulation of the European Parliament and of the Council on Community statistics on public health and health and safety at work – COM(2007) 46 final**

14) **Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax**

15) **Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty**

16) **Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes" (as amended by "Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes")**

17) **Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)**

18) **Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors**

19) **Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts**

20) **Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medical product s for human use, as amended by Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 (OJ L 136, 30.4.2004, p.34)**

21) **Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ L 149, 11.6.2005, p. 22)**

22) **Directive 2003/24/EC of the European Parliament and of the Council of 14 April 2003 amending Council Directive 98/18/EC on safety rules and standards for passenger ships - OJ L 123, 17.5.2003, p. 18-21)**

23) **Directive 96/48/EC on the interoperability of the trans-European high-speed rail system (O J L 235, 17.09.1996, p. 6-24) as amended by Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 (O J L 164, 30.4.2004, p. 114-163)**

24) **Directive 2001/16/EC of the European Parliament and of the Council on the interoperability of the trans European conventional rail system (O J L 110, 20.04.2001, p. 1-27) -as amended by Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 (O J L 164, 30.4.2004, p. 114-163)**

25) **Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (Text with EEA relevance)(O J L 263, 9.10.2007, p 1)**

26) **Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Text with EEA relevance) (OJ L 332, 18.12.2007, p. 27)**

27) **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**

28) **Decision 1720/2006/EC of the European Parliament and of the Council of 15 November 2007 establishing an action programme in the field of lifelong learning**

29) **Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD)**

30) **Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("Framework Directive").**

31) **Council Decision 2005/600/EC of 12 July 2006 on guidelines for the employment policies of the Member States**

+ Council Decision 2006/544/EC of 18 July 2006 on guidelines for the employment policies of the Member States

32) **Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December2006on establishing a financing instrument for the promotion of democracy and human rights worldwide**

33) **Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society**

34) **Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use**

35) **Proposal for a Regulation of the European Parliament and of the Council concerning the production and development of statistics on education and lifelong learning – COM(2005)625 final.**

36) **Directive 97/67/EC of the European Parliament and of the Council of 15 December on common rules for the development of the internal market of Community postal services and the improvement of quality of services**(OJ L15 of 21.01.1998), page 14) as amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (OJ, L176 of 05.07.2002, page 21).

37) **Decision No 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007 -2013)**

38) **Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin**

39) **Decision 2119/98 of the European Parliament and of the Council of 24 September 1998 setting up a network for the epidemiological surveillance and control of communicable diseases in the Community**

40) **Directive 2004/23/EC of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissue and cells**

41) **Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood components and amending Directive 2001/83/EC**

I

(Veröffentlichungsbedürftige Rechtsakte)

VERORDNUNG (EG) Nr. 1107/2006 DES EUROPÄISCHEN PARLAMENTS UND DES RATES

vom 5. Juli 2006

über die Rechte von behinderten Flugreisenden und Flugreisenden mit eingeschränkter Mobilität

(Text von Bedeutung für den EWR)

DAS EUROPÄISCHE PARLAMENT UND DER RAT DER EUROPÄISCHEN UNION —

gestützt auf den Vertrag zur Gründung der Europäischen Gemeinschaft, insbesondere auf Artikel 80 Absatz 2,

auf Vorschlag der Kommission,

nach Stellungnahme des Europäischen Wirtschafts- und Sozialausschusses [1],

nach Anhörung des Ausschusses der Regionen,

gemäß dem Verfahren des Artikels 251 des Vertrags [2],

in Erwägung nachstehender Gründe:

(1) Der Binnenmarkt für Luftverkehrsdienste sollte den Bürgern im Allgemeinen zugute kommen. Daher sollten behinderte Menschen und Personen mit eingeschränkter Mobilität, unabhängig davon, ob die Ursache dafür Behinderung, Alter oder andere Faktoren sind, die gleichen Flugreisemöglichkeiten wie andere Bürger haben. Behinderte Menschen und Personen mit eingeschränkter Mobilität haben die gleichen Rechte wie andere Bürger auf Freizügigkeit, Wahlfreiheit und Nichtdiskriminierung. Dies gilt für Flugreisen wie für andere Lebensbereiche.

(2) Die Beförderung von behinderten Menschen und Personen mit eingeschränkter Mobilität sollte darum akzeptiert werden und außer aus den gesetzlich festgelegten Sicherheitsgründen nicht wegen ihrer Behinderung oder mangelnden Mobilität verweigert werden. Vor der Annahme einer Buchung von behinderten Menschen oder von Personen mit eingeschränkter Mobilität sollten Luftfahrtunternehmen, ihre Erfüllungsgehilfen und Reiseunternehmen sich im Rahmen des Möglichen nach besten Kräften bemühen, zu prüfen, ob ein begründeter Sicherheitsgrund besteht, der eine Mitnahme dieser Personen auf den entsprechenden Flügen verhindern würde.

(3) Diese Verordnung sollte andere Fluggastrechte nicht beeinträchtigen, wie sie im Gemeinschaftsrecht verankert sind, insbesondere in der Richtlinie 90/314/EWG des Rates vom 13. Juni 1990 über Pauschalreisen [3] und in der Verordnung (EG) Nr. 261/2004 des Europäischen Parlaments und des Rates vom 11. Februar 2004 über eine gemeinsame Regelung für Ausgleichs- und Unterstützungsleistungen für Fluggäste im Fall der Nichtbeförderung und bei Annullierung oder großer Verspätung von Flügen [4]. Falls in einem dieser Rechtsakte in Bezug auf dasselbe Ereignis das gleiche Recht auf Rückerstattung oder Umbuchung vorgesehen ist wie in dieser Verordnung, sollte die betroffene Person berechtigt sein, dieses Recht nach eigenem Ermessen nur einmal auszuüben.

(4) Damit behinderte Menschen und Personen mit eingeschränkter Mobilität vergleichbare Flugreisemöglichkeiten wie andere Bürger haben, sollte ihnen entsprechend ihren besonderen Bedürfnissen auf Flughäfen und an Bord von Luftfahrzeugen unter Einsatz des erforderlichen Personals und der notwendigen Ausstattung Hilfe gewährt werden. Im Interesse der sozialen Integration sollten die Betroffenen diese Hilfe ohne zusätzliche Kosten erhalten.

(5) Die Hilfeleistungen auf den Flughäfen, die in dem unter den Vertrag fallenden Hoheitsgebiet eines Mitgliedstaates liegen, sollten behinderte Menschen und Personen mit eingeschränkter Mobilität unter anderem in die Lage versetzen, von einem als solchen ausgewiesenen Ankunftsort auf dem Flughafen zu einem Luftfahrzeug und von dem Luftfahrzeug zu einem als solchen ausgewiesenen Abfahrtsort auf dem Flughafen zu gelangen, einschließlich an und von Bord zu gehen. Diese Orte sollten zumindest an den Haupteingängen der Abfertigungsgebäude, in Bereichen mit Abfertigungsschaltern, in Fernbahnhöfen, Stadtbahnhöfen und U-Bahnhöfen, an Bushaltestellen, an Taxiständen und anderen Haltepunkten sowie auf den Flughafenparkplätzen ausgewiesen werden. Die Hilfe sollte so organisiert sein, dass Unterbrechungen und Verzögerungen vermieden werden, wobei in der ganzen Gemeinschaft unabhängig vom Flughafen und Luftfahrtunternehmen ein hoher, gleichwertiger Standard gewährleistet sein sollte und die Mittel bestmöglich genutzt werden sollten.

[1] ABl. C 24 vom 31.1.2006, S. 12.

[2] Stellungnahme des Europäischen Parlaments vom 15. Dezember 2005 (noch nicht im Amtsblatt veröffentlicht) und Beschluss des Rates vom 9. Juni 2006.

[3] ABl. L 158 vom 23.6.1990, S. 59.

[4] ABl. L 46 vom 17.2.2004, S. 1.

(6) Um dies zu erreichen, sollte die Gewährleistung einer qualitativ hochwertigen Hilfeleistung auf Flughäfen einer zentralen Einrichtung obliegen. Da die Leitungsorgane von Flughäfen bei allen Dienstleistungen auf den Flughäfen eine zentrale Rolle spielen, sollte ihnen die Gesamtverantwortung übertragen werden.

(7) Die Leitungsorgane der Flughäfen können diese Hilfeleistung den behinderten Menschen und Personen mit eingeschränkter Mobilität selbst anbieten. Alternativ können die Leitungsorgane mit Blick auf die positive Rolle bestimmter Reise- und Luftfahrtunternehmen in der Vergangenheit unbeschadet der einschlägigen Regelungen des Gemeinschaftsrechts, einschließlich derjenigen zum öffentlichen Vergabeverfahren, mit Dritten Verträge über die Gewährung solcher Hilfeleistungen abschließen.

(8) Die Hilfeleistung sollte so finanziert werden, dass die Last gleichmäßig auf alle Fluggäste, die einen Flughafen benutzen, verteilt und eine Abschreckung vor der Beförderung von behinderten Menschen und Personen mit eingeschränkter Mobilität vermieden wird. Das wirksamste Mittel zur Finanzierung dürfte eine Umlage sein, die von jedem Luftfahrtunternehmen, das einen Flughafen benutzt, im Verhältnis zu der Zahl der von ihm zu oder von dem Flughafen beförderten Fluggäste erhoben wird.

(9) Die Umlage sollte gänzlich transparent festgelegt und angewandt werden, insbesondere um zu gewährleisten, dass die von einem Luftfahrtunternehmen erhobene Umlage gegenüber der Hilfeleistung für behinderte Menschen und Personen mit eingeschränkter Mobilität angemessen ist und diese Umlage nicht dazu dient, Aktivitäten des Leitungsorgans zu finanzieren, die nicht im Zusammenhang mit einer solchen Hilfeleistung stehen. Die Richtlinie 96/67/EG des Rates vom 15. Oktober 1996 über den Zugang zum Markt der Bodenabfertigungsdienste auf den Flughäfen der Gemeinschaft [1] und insbesondere die Bestimmungen zur Kontentrennung, sollten daher, soweit sie dieser Verordnung nicht widersprechen, angewandt werden.

(10) Bei der Organisation der Hilfeleistungen für behinderte Menschen und Personen mit eingeschränkter Mobilität und der Ausbildung ihres Personals sollten die Flughäfen und die Luftfahrtunternehmen das Dokument 30 Teil I Abschnitt 5 der Europäischen Zivilluftfahrtkonferenz (ECAC) und die dazugehörenden Anhänge, insbesondere den „Code of Good Conduct in Ground Handling for Persons with Reduced Mobility“ in dessen Anhang J in der bei Annahme dieser Verordnung geltenden Fassung, berücksichtigen.

(11) Bei der Entscheidung über die Gestaltung neuer Flughäfen und Abfertigungsgebäude und bei umfassenden Renovierungsarbeiten sollten die Leitungsorgane von Flughäfen so weit wie möglich die Bedürfnisse von behinderten Menschen und Personen mit eingeschränkter Mobilität berücksichtigen. Entsprechend sollten Luftfahrtunternehmen möglichst bei der Entscheidung über die Gestaltung neuer und neu einzurichtender Flugzeuge solche Bedürfnisse berücksichtigen.

(12) Die Richtlinie 95/46/EG des Europäischen Parlaments und des Rates vom 24. Oktober 1995 zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten und zum freien Datenverkehr [2] sollte strikt durchgesetzt werden, um sicherzustellen, dass die Privatsphäre der behinderten Menschen und der Personen mit eingeschränkter Mobilität geschützt wird, dass die erforderlichen Informationen sich auf die Erfüllung der in dieser Verordnung festgelegten Verpflichtungen zur Hilfeleistung beschränken und dass sie nicht gegen die Fluggäste verwendet werden, die die betreffende Dienstleistung anfordern.

(13) Alle wesentlichen Informationen für Fluggäste sollten in alternativen Formen erteilt werden, die für behinderte Menschen und Personen mit eingeschränkter Mobilität zugänglich sind, wobei diese Informationen zumindest in denselben Sprachen zur Verfügung stehen sollten wie diejenigen für andere Fluggäste.

(14) Gehen Rollstühle oder sonstige Mobilitätshilfen oder Hilfsgeräte bei der Abfertigung auf dem Flughafen oder bei der Beförderung an Bord des Luftfahrzeugs verloren oder werden sie beschädigt, sollte der Fluggast, dem die Ausrüstung gehört, gemäß den internationalen, gemeinschaftlichen und nationalen Rechtsvorschriften entschädigt werden.

(15) Die Mitgliedstaaten sollten die Einhaltung dieser Verordnung überwachen und sicherstellen und für die Durchsetzung eine geeignete Einrichtung bestimmen. Diese Überwachung lässt das Recht von behinderten Menschen und Personen mit eingeschränkter Mobilität, nach nationalem Recht ein Gericht anzurufen, unberührt.

(16) Es ist wichtig, dass ein behinderter Mensch oder eine Person mit eingeschränkter Mobilität, die der Auffassung ist, dass gegen diese Verordnung verstoßen wurde, die Möglichkeit hat, die Angelegenheit je nach Fall dem Leitungsorgan des Flughafens oder dem betreffenden Luftfahrtunternehmen zur Kenntnis bringen. Wenn der behinderte Mensch oder die Person mit eingeschränkter Mobilität auf diesem Wege nicht zufrieden gestellt wird, so sollte sie die Möglichkeit haben, bei der/den von dem betreffenden Mitgliedstaat zu diesem Zweck benannten Stelle(n) Beschwerde einzulegen.

(17) Beschwerden über Hilfeleistungen in einem Flughafen sollten an die Stelle(n) gerichtet werden, die der Mitgliedstaat, in dem der Flughafen liegt, zur Durchsetzung dieser Verordnung benannt hat. Beschwerden über Hilfeleistungen eines Luftfahrtunternehmens sollten an die Stelle(n) gerichtet werden, die der Mitgliedstaat, der dem Luftfahrtunternehmen die Betriebsgenehmigung erteilt hat, zur Durchsetzung dieser Verordnung benannt hat.

[1] ABl. L 272 vom 25.10.1996, S. 36. Geändert durch die Verordnung (EG) Nr. 1882/2003 des Europäischen Parlaments und des Rates (ABl. L 284 vom 31.10.2003, S. 1).

[2] ABl. L 281 vom 23.11.1995, S. 31. Geändert durch die Verordnung (EG) Nr. 1882/2003.

(18) Die Mitgliedstaaten sollten für Verstöße gegen diese Verordnung Sanktionen festlegen und für ihre Anwendung sorgen. Die Sanktionen, die die Zahlung einer Entschädigung an die betroffene Person einschließen können, sollten wirksam, verhältnismäßig und abschreckend sein.

(19) Da die Ziele dieser Verordnung, nämlich ein hohes, gleiches Maß an Schutz und Hilfe in allen Mitgliedstaaten sowie einheitliche Bedingungen für die Wirtschaftsteilnehmer im Binnenmarkt sicherzustellen, auf Ebene der Mitgliedstaaten nicht ausreichend verwirklicht werden können und daher wegen des Umfangs oder der Wirkung der Maßnahme besser auf Gemeinschaftsebene zu verwirklichen sind, kann die Gemeinschaft im Einklang mit dem in Artikel 5 des Vertrags niedergelegten Subsidiaritätsprinzip tätig werden. Entsprechend dem in demselben Artikel genannten Grundsatz der Verhältnismäßigkeit geht diese Verordnung nicht über das zur Erreichung dieser Ziele erforderliche Maß hinaus.

(20) Diese Verordnung steht im Einklang mit den Grundrechten und Grundsätzen, die insbesondere mit der Charta der Grundrechte der Europäischen Union anerkannt wurden.

(21) Am 2. Dezember 1987 haben das Königreich Spanien und das Vereinigte Königreich Großbritannien und Nordirland in London in einer gemeinsamen Erklärung ihrer Minister für auswärtige Angelegenheiten eine engere Zusammenarbeit bei der Nutzung des Flughafens Gibraltar vereinbart. Diese Vereinbarung ist noch nicht wirksam —

HABEN FOLGENDE VERORDNUNG ERLASSEN:

Artikel 1

Zweck und Geltungsbereich

(1) Diese Verordnung enthält Vorschriften für den Schutz und die Hilfeleistung für behinderte Flugreisende und Flugreisende mit eingeschränkter Mobilität, die diese Personen vor Diskriminierung schützen und sicherstellen sollen, dass sie Hilfe erhalten.

(2) Diese Verordnung gilt für behinderte Menschen und Personen mit eingeschränkter Mobilität, die gewerbliche Passagierflugdienste nutzen oder zu nutzen beabsichtigen und von einem Flughafen, der in dem unter den Vertrag fallenden Hoheitsgebiet eines Mitgliedstaates liegt, abfliegen, auf einem solchen ankommen oder einen solchen im Transit benutzen.

(3) Die Artikel 3, 4 und 10 gelten auch für Fluggäste, die von einem Flughafen in einem Drittland zu einem Flughafen reisen, der in dem unter den Vertrag fallenden Hoheitsgebiet eines Mitgliedstaates liegt, wenn es sich bei dem ausführenden Luftfahrtunternehmen um ein Luftfahrtunternehmen der Gemeinschaft handelt.

(4) Diese Verordnung berührt nicht die Rechte der Fluggäste, die in der Richtlinie 90/314/EWG und der Verordnung (EG) Nr. 261/2004 verankert sind.

(5) Kollidieren die Bestimmungen dieser Verordnung mit denjenigen der Richtlinie 96/67/EG, so hat diese Verordnung Vorrang.

(6) Die Anwendung dieser Verordnung auf den Flughafen Gibraltar erfolgt unbeschadet der Rechtsstandpunkte des Königreichs Spanien und des Vereinigten Königreichs Großbritannien und Nordirland in der strittigen Frage der Souveränität über das Gebiet, in dem der Flughafen liegt.

(7) Die Anwendung dieser Verordnung auf den Flughafen Gibraltar wird bis zum Wirksamwerden der Regelung ausgesetzt, die in der gemeinsamen Erklärung der Minister für auswärtige Angelegenheiten Spaniens und des Vereinigten Königreichs vom 2. Dezember 1987 enthalten ist. Die Regierungen Spaniens und des Vereinigten Königreichs unterrichten den Rat über den Zeitpunkt des Wirksamwerdens.

Artikel 2

Begriffsbestimmungen

Für die Zwecke dieser Verordnung gelten folgende Begriffsbestimmungen:

a) „Behinderter Mensch“ oder „Person mit eingeschränkter Mobilität“ ist eine Person, deren Mobilität bei der Benutzung von Beförderungsmitteln wegen einer körperlichen (sensorischen oder motorischen, dauerhaften oder zeitweiligen) Behinderung, einer geistigen Behinderung oder Beeinträchtigung, wegen anderer Behinderungen oder aufgrund des Alters eingeschränkt ist und deren Zustand angemessene Unterstützung und eine Anpassung der für alle Fluggäste bereitgestellten Dienstleistungen an die besonderen Bedürfnisse dieser Person erfordert.

b) „Luftfahrtunternehmen“ ist ein Lufttransportunternehmen mit einer gültigen Betriebsgenehmigung.

c) „Ausführendes Luftfahrtunternehmen“ ist ein Luftfahrtunternehmen, das im Rahmen eines Vertrags mit einem Fluggast oder im Namen einer anderen — juristischen oder natürlichen — Person, die mit dem betreffenden Fluggast in einer Vertragsbeziehung steht, einen Flug durchführt oder durchzuführen beabsichtigt.

d) „Luftfahrtunternehmen der Gemeinschaft“ ist ein Luftfahrtunternehmen mit einer gültigen Betriebsgenehmigung, die von einem Mitgliedstaat gemäß der Verordnung (EWG) Nr. 2407/92 des Rates vom 23. Juli 1992 über die Erteilung von Betriebsgenehmigungen an Luftfahrtunternehmen [1] erteilt wurde.

e) „Reiseunternehmen“ ist, mit Ausnahme von Luftfahrtunternehmen, ein Veranstalter oder Vermittler im Sinne von Artikel 2 Nummer 2 bzw. Nummer 3 der Richtlinie 90/314/EWG.

f) „Leitungsorgan eines Flughafens“ oder „Leitungsorgan“ ist die Stelle, die nach nationalem Recht vor allem die Aufgabe hat, die Flughafeneinrichtungen zu verwalten und zu betreiben, und der die Koordinierung und Überwachung der Tätigkeiten der verschiedenen Unternehmen auf einem Flughafen oder in einem Flughafensystem obliegt.

[1] ABl. L 240 vom 24.8.1992, S. 1.

g) „Flughafennutzer“ ist jede natürlich oder juristische Person, die Fluggäste auf dem Luftwege von oder zu dem betreffenden Flughafen befördert.

h) „Flughafennutzerausschuss“ ist ein Ausschuss von Vertretern der Flughafennutzer oder der sie vertretenden Verbände.

i) „Buchung“ ist der Umstand, dass der Fluggast über einen Flugschein oder einen anderen Beleg verfügt, aus dem hervorgeht, dass die Buchung von dem Luftfahrtunternehmen oder dem Reiseunternehmen akzeptiert und registriert wurde.

j) „Flughafen“ ist jedes speziell für das Landen, Starten und Manövrieren von Luftfahrzeugen ausgebaute Gelände, einschließlich der für den Luftverkehr und die Abfertigung der Luftfahrzeuge erforderlichen zugehörigen Einrichtungen, wozu auch die Einrichtungen für die Abfertigung gewerblicher Flugdienste gehören.

k) „Flughafenparkplatz“ ist ein Parkplatz, der sich innerhalb der Flughafengrenzen befindet oder der unmittelbaren Kontrolle des Leitungsorgans eines Flughafens untersteht und der unmittelbar den diesen Flughafen benutzenden Fluggästen zur Verfügung steht.

l) „Gewerblicher Passagierflugdienst“ ist ein von einem Luftfahrtunternehmen als Linien- oder Bedarfsflug betriebener Flugdienst zur Beförderung von Fluggästen, der der Allgemeinheit gegen Entgelt entweder separat oder als Teil einer Pauschalreise angeboten wird.

Artikel 3

Beförderungspflicht

Ein Luftfahrtunternehmen, sein Erfüllungsgehilfe oder ein Reiseunternehmen darf sich nicht aus Gründen der Behinderung oder der eingeschränkten Mobilität des Fluggastes weigern,

a) eine Buchung für einen Flug ab oder zu einem unter diese Verordnung fallenden Flughafen zu akzeptieren;

b) einen behinderten Menschen oder eine Person mit eingeschränkter Mobilität auf einem solchen Flughafen an Bord zu nehmen, sofern die betreffende Person über einen gültigen Flugschein und eine gültige Buchung verfügt.

Artikel 4

Abweichungen, besondere Bedingungen und Unterrichtung

(1) Ungeachtet des Artikels 3 kann ein Luftfahrtunternehmen, sein Erfüllungsgehilfe oder ein Reiseunternehmen sich aus Gründen der Behinderung oder der eingeschränkten Mobilität des Fluggastes nur weigern, die Buchung eines behinderten Menschen oder einer Person mit eingeschränkter Mobilität zu akzeptieren oder diese Person an Bord zu nehmen,

a) um geltenden Sicherheitsanforderungen, die in internationalen, gemeinschaftlichen oder nationalen Rechtsvorschriften festgelegt sind, oder den Sicherheitsanforderungen nachzukommen, die die Behörde aufgestellt hat, die dem betreffenden Luftfahrtunternehmen das Luftverkehrsbetreiberzeugnis ausgestellt hat;

b) wenn wegen der Größe des Luftfahrzeugs oder seiner Türen die Anbordnahme oder die Beförderung dieses behinderten Menschen oder dieser Person mit eingeschränkter Mobilität physisch unmöglich ist.

Im Falle einer Weigerung, eine Buchung aus den in Unterabsatz 1 Buchstabe a oder b genannten Gründen zu akzeptieren, bemüht sich das Luftfahrtunternehmen, sein Erfüllungsgehilfe oder das Reiseunternehmen im Rahmen des Möglichen nach besten Kräften, der betroffenen Person eine annehmbare Alternative zu unterbreiten.

Einem behinderten Menschen oder einer Person mit eingeschränkter Mobilität, der die Anbordnahme aufgrund ihrer Behinderung oder eingeschränkten Mobilität verweigert wurde, sowie jeder diese Person gemäß Absatz 2 des vorliegenden Artikels begleitenden Person muss der Anspruch auf Erstattung oder anderweitige Beförderung gemäß Artikel 8 der Verordnung (EG) Nr. 261/2004 angeboten werden. Das Recht auf die Möglichkeit eines Rückfluges oder einer anderweitigen Beförderung ist davon abhängig, dass alle Sicherheitsanforderungen erfüllt sind.

(2) Unter den in Absatz 1 Unterabsatz 1 Buchstabe a genannten Bedingungen darf ein Luftfahrtunternehmen, sein Erfüllungsgehilfe oder ein Reiseunternehmen verlangen, dass ein behinderter Mensch oder eine Person mit eingeschränkter Mobilität von einer anderen Person begleitet wird, die in der Lage ist, die Hilfe zu leisten, die dieser behinderte Mensch oder diese Person mit eingeschränkter Mobilität benötigt.

(3) Ein Luftfahrtunternehmen oder sein Erfüllungsgehilfe macht die Sicherheitsvorschriften, die es bzw. er bei der Beförderung von behinderten Menschen und Personen mit eingeschränkter Mobilität befolgt, sowie jede Beschränkung in der Beförderung solcher Personen oder von Mobilitätshilfen wegen der Luftfahrzeuggröße in zugänglicher Form und zumindest in den gleichen Sprachen wie die Informationen für andere Fluggäste öffentlich zugänglich. Ein Reiseunternehmen gibt die Sicherheitsvorschriften und Beschränkungen bekannt, die für die von ihm veranstalteten, verkauften oder zum Verkauf angebotenen, in Pauschalreisen eingeschlossenen Flüge gelten.

(4) Macht ein Luftfahrtunternehmen, sein Erfüllungsgehilfe oder ein Reiseunternehmen von den Ausnahmen gemäß Absatz 1 oder Absatz 2 Gebrauch, so unterrichtet es bzw. er unverzüglich den behinderten Menschen oder die Person mit eingeschränkter Mobilität über seine Gründe hierfür. Ein Luftfahrtunternehmen, sein Erfüllungsgehilfe oder ein Reiseunternehmen übermittelt diese Gründe auf Verlangen in Schriftform dem behinderten Menschen oder der Person mit eingeschränkter Mobilität innerhalb von fünf Werktagen, nachdem der Antrag eingegangen ist.

Artikel 5

Bestimmung von Ankunfts- und Abfahrtsorten

(1) In Zusammenarbeit mit den Flughafennutzern über den Flughafennutzerausschuss, sofern ein solcher besteht, und mit den entsprechenden Verbänden, die behinderte Menschen und Personen mit eingeschränkter Mobilität vertreten, bestimmt das Leitungsorgan eines Flughafens unter Berücksichtigung der örtlichen Gegebenheiten innerhalb und außerhalb der Abfertigungsgebäude Ankunfts- und Abfahrtsorte innerhalb der Flughafengrenzen oder an einem Ort unter direkter Aufsicht des

Leitungsorgans, an denen behinderte Menschen oder Personen mit eingeschränkter Mobilität ohne Schwierigkeiten ihre Ankunft auf dem Flughafen bekannt geben und um Hilfe bitten können.

(2) Die in Absatz 1 genannten Ankunfts- und Abfahrtsorte werden deutlich ausgewiesen und an ihnen werden grundlegende Informationen über den Flughafen in zugänglicher Form vermittelt.

Artikel 6

Weiterleitung von Informationen

(1) Luftfahrtunternehmen, ihre Erfüllungsgehilfen und Reiseunternehmen ergreifen alle Maßnahmen, die erforderlich sind, um Meldungen des Hilfsbedarfs von behinderten Menschen und Personen mit eingeschränkter Mobilität an allen ihren Verkaufsstellen, einschließlich Telefon- und Internetverkaufsstellen, in dem unter den Vertrag fallenden Hoheitsgebiet der Mitgliedstaaten entgegenzunehmen.

(2) Wird einem Luftfahrtunternehmen, seinem Erfüllungsgehilfen oder einem Reiseunternehmen mindestens 48 Stunden vor der für den Flug veröffentlichten Abflugzeit ein Hilfsbedarf gemeldet, so leitet es bzw. er die betreffenden Informationen mindestens 36 Stunden vor der für den Flug veröffentlichten Abflugzeit weiter an

a) die Leitungsorgane des Abflugflughafens, des Zielflughafens und des Transitflughafens sowie an

b) das ausführende Luftfahrtunternehmen, wenn die Buchung nicht bei diesem Luftfahrtunternehmen vorgenommen wurde; in den Fällen, in denen die Identität des ausführenden Luftfahrtunternehmens zum Zeitpunkt der Meldung noch nicht bekannt ist, werden die Informationen übermittelt, sobald dies möglich ist.

(3) In allen anderen als den in Absatz 2 genannten Fällen leitet das Luftfahrtunternehmen, sein Erfüllungsgehilfe oder das Reiseunternehmen die Informationen so bald wie möglich weiter.

(4) So bald wie möglich nach dem Abflug unterrichtet das ausführende Luftfahrtunternehmen das Leitungsorgan des Zielflughafens, sofern dieser in dem unter den Vertrag fallenden Hoheitsgebiet eines Mitgliedstaates liegt, über die Zahl der behinderten Menschen und Personen mit eingeschränkter Mobilität auf diesem Flug, die die in Anhang I genannte Hilfe benötigen, und über die Art dieser Hilfe.

Artikel 7

Recht auf Hilfeleistung auf Flughäfen

(1) Kommt ein behinderter Mensch oder eine Person mit eingeschränkter Mobilität auf einem Flughafen an, um einen Flug anzutreten, so obliegt es dem Leitungsorgan des Flughafens, dafür Sorge zu tragen, dass die in Anhang I genannte Hilfe so geleistet wird, dass die Person den Flug, für den sie eine Buchung besitzt, antreten kann, sofern die besonderen Bedürfnisse der Person nach einer solchen Hilfe dem betreffenden Luftfahrtunternehmen, seinem Erfüllungsgehilfen oder dem betreffenden Reiseunternehmen mindestens 48 Stunden vor der für den Flug veröffentlichten Abflugzeit gemeldet worden ist. Diese Meldung gilt auch für den Rückflug, wenn der Hin- und der Rückflug bei demselben Luftfahrtunternehmen gebucht wurden.

(2) Ist der Einsatz eines anerkannten Begleithundes erforderlich, so werden die entsprechenden Vorkehrungen getroffen, sofern dies dem Luftfahrtunternehmen, seinem Erfüllungsgehilfen oder dem Reiseunternehmen in Übereinstimmung mit geltenden nationalen Bestimmungen über die Beförderung von Begleithunden an Bord von Luftfahrzeugen — sofern vorhanden — gemeldet worden ist.

(3) Erfolgt keine Meldung nach Absatz 1, so bemüht sich das Leitungsorgan im Rahmen des Möglichen nach besten Kräften, die in Anhang I genannte Hilfe so zu leisten, dass die betreffende Person den Flug, für den sie eine Buchung besitzt, antreten kann.

(4) Absatz 1 gilt unter folgenden Bedingungen:

a) Die Person findet sich selbst zur Abfertigung ein, und zwar

   i) zu der von dem Luftfahrtunternehmen, seinem Erfüllungsgehilfen oder dem Reiseunternehmen im Voraus schriftlich (einschließlich auf elektronischem Wege) angegebenen Zeit oder

   ii) wenn keine Zeit angegeben wurde, spätestens eine Stunde vor der veröffentlichten Abflugzeit, oder

b) die Person findet sich an einem gemäß Artikel 5 ausgewiesenen Ort innerhalb der Flughafengrenzen ein, und zwar

   i) zu der von dem Luftfahrtunternehmen, seinem Erfüllungsgehilfen oder dem Reiseunternehmen im Voraus schriftlich (einschließlich auf elektronischem Wege) angegebenen Zeit oder

   ii) wenn keine Zeit angegeben wurde, spätestens zwei Stunden vor der veröffentlichten Abflugzeit.

(5) Benutzt ein behinderter Mensch oder eine Person mit eingeschränkter Mobilität einen unter diese Verordnung fallenden Flughafen im Transit oder wird sie von einem Luftfahrtunternehmen oder Reiseunternehmen von dem Flug, für den sie eine Buchung besitzt, auf einen anderen Flug verlegt, so obliegt es dem Leitungsorgan, dafür Sorge zu tragen, dass die in Anhang I genannte Hilfe so geleistet wird, dass die Person in der Lage ist, den Flug, für den sie eine Buchung besitzt, anzutreten.

(6) Kommt ein behinderter Mensch oder eine Person mit eingeschränkter Mobilität auf dem Luftwege auf einem unter diese Verordnung fallenden Flughafen an, so obliegt es dem Leitungsorgan des Flughafens, dafür Sorge zu tragen, dass die in Anhang I genannte Hilfe so geleistet wird, dass die Person in der Lage ist, den in Artikel 5 genannten Abfahrtsort von dem Flughafen zu erreichen.

(7) Die geleistete Hilfe muss, soweit wie dies möglich ist, auf die besonderen Bedürfnisse des einzelnen Fluggastes zugeschnitten sein.

Artikel 8

Verantwortung für die Hilfeleistung auf Flughäfen

(1) Dem Leitungsorgan eines Flughafens obliegt es, dafür Sorge zu tragen, dass behinderten Menschen und Personen mit eingeschränkter Mobilität die in Anhang I genannte Hilfe ohne zusätzliche Kosten geleistet wird.

(2) Das Leitungsorgan kann die Hilfe selbst leisten. Alternativ kann das Leitungsorgan unter Beibehaltung seiner Zuständigkeiten und in jedem Fall unter der Voraussetzung, dass die Qualitätsstandards nach Artikel 9 Absatz 1 eingehalten werden, einem oder mehreren Dritten einen Auftrag erteilen, diese Hilfe zu leisten. Das Leitungsorgan kann — in Zusammenarbeit mit den Flughafennutzern über den Flughafennutzerausschuss, sofern ein solcher besteht — einen solchen Auftrag bzw. solche Aufträge aus eigener Initiative oder auf Antrag unter anderem eines Luftfahrtunternehmens erteilen, wobei bestehende Dienste auf dem betreffenden Flughafen berücksichtigt werden. Im Falle einer Ablehnung eines solchen Antrags legt das Leitungsorgan eine schriftliche Begründung vor.

(3) Das Leitungsorgan eines Flughafens kann zur Finanzierung dieser Hilfe von den Flughafennutzern diskriminierungsfrei eine besondere Umlage erheben.

(4) Diese besondere Umlage muss angemessen, kostenabhängig, transparent und vom Leitungsorgan des Flughafens in Zusammenarbeit mit den Flughafennutzern über den Flughafennutzerausschuss, sofern ein solcher besteht, oder jede andere geeignete Einrichtung festgesetzt worden sein. Sie wird auf alle Flughafennutzer, im Verhältnis zu der Gesamtzahl der Fluggäste, die jedes Unternehmen zu und von dem Flughafen befördert, aufgeteilt.

(5) Das Leitungsorgan eines Flughafens führt über seine Tätigkeiten in Verbindung mit der Bereitstellung von Hilfe für behinderte Menschen und Personen mit eingeschränkter Mobilität und seine sonstigen Aktivitäten — entsprechend dem üblichen Handelsbrauch — getrennt Buch.

(6) Das Leitungsorgan eines Flughafens macht den Flughafennutzern über den Flughafennutzerausschuss, sofern ein solcher besteht, oder über jede andere geeignete Einrichtung sowie der Durchsetzungsstelle bzw. den Durchsetzungsstellen nach Artikel 14 einen geprüften Jahresbericht über die eingegangenen Umlagen und die im Zusammenhang mit der Bereitstellung von Hilfe für behinderte Menschen und Personen mit eingeschränkter Mobilität entstandenen Kosten zugänglich.

Artikel 9

Qualitätsstandards für Hilfeleistungen

(1) Ausgenommen auf Flughäfen mit weniger als 150 000 kommerziellen Fluggästen im Jahr legt das Leitungsorgan in Zusammenarbeit mit den Flughafennutzern über den Flughafennutzerausschuss, sofern ein solcher besteht, und mit den Verbänden, die behinderte Fluggäste und Fluggäste mit eingeschränkter Mobilität vertreten, für die in Anhang I genannte Hilfe Qualitätsstandards und die dafür notwendigen Mittel fest.

(2) Bei der Festlegung der Qualitätsstandards trägt es den international anerkannten Strategien und Verhaltenskodizes zur Erleichterung der Beförderung von behinderten Menschen und Personen mit eingeschränkter Mobilität, insbesondere dem „Code of Good Conduct in Ground Handling for Persons with Reduced Mobility“ der ECAC, in vollem Umfang Rechnung.

(3) Das Leitungsorgan eines Flughafens veröffentlicht seine Qualitätsstandards.

(4) Ein Luftfahrtunternehmen und das Leitungsorgan eines Flughafens können übereinkommen, dass Letzteres Fluggästen, die dieses Luftfahrtunternehmen zu und von dem Flughafen befördert, Hilfe mit einem höheren Standard als den in Absatz 1 genannten Qualitätsstandards oder zusätzliche Hilfe zu der in Anhang I genannten Hilfe leistet.

(5) Zur Finanzierung dieser Hilfeleistungen kann das Leitungsorgan von dem Luftfahrtunternehmen zusätzlich zu der in Artikel 8 Absatz 3 genannten Umlage eine weitere erheben, die transparent, kostenabhängig und nach Konsultation des betreffenden Luftfahrtunternehmens festgesetzt worden ist.

Artikel 10

Hilfeleistung von Luftfahrtunternehmen

Ein Luftfahrtunternehmen leistet einem behinderten Menschen oder einer Person mit eingeschränkter Mobilität, die von einem unter diese Verordnung fallenden Flughafen abfliegt, auf einem solchen ankommt oder einen solchen im Transit benutzt, die in Anhang II genannte Hilfe ohne Aufpreis, sofern die betreffende Person die in Artikel 7 Absätze 1, 2 und 4 genannten Bedingungen erfüllt.

Artikel 11

Schulung

Die Luftfahrtunternehmen und die Leitungsorgane von Flughäfen tragen dafür Sorge, dass

a) ihre eigenen und die Mitarbeiter von Subunternehmen, die behinderten Menschen und Personen mit eingeschränkter Mobilität unmittelbar Hilfe leisten, über Kenntnisse darüber verfügen, wie den Bedürfnissen von Personen mit unterschiedlichen Behinderungen oder Beeinträchtigungen der Mobilität entsprochen werden kann,

b) ihre Mitarbeiter, die auf dem Flughafen arbeiten und unmittelbar mit den Fluggästen zu tun haben, in Fragen der Gleichstellung von behinderten Menschen und der Sensibilisierung für Behindertenfragen geschult werden,

c) alle neuen Beschäftigten bei der Einstellung in Behindertenfragen geschult werden und dass die Mitarbeiter gegebenenfalls in Auffrischungskursen geschult werden.

Artikel 12

Entschädigung für verloren gegangene oder beschädigte Rollstühle, sonstige Mobilitätshilfen und Hilfsgeräte

Gehen Rollstühle oder sonstige Mobilitätshilfen oder Hilfsgeräte während der Abfertigung auf dem Flughafen oder während der

Beförderung an Bord des Luftfahrzeugs verloren oder werden sie beschädigt, so wird der Fluggast, dem diese Ausrüstung gehört, gemäß den internationalen, gemeinschaftsrechtlichen und nationalen Rechtsvorschriften entschädigt.

Artikel 13

Ausschluss von Verpflichtungsbeschränkungen

Verpflichtungen aufgrund dieser Verordnung gegenüber behinderten Menschen und Personen mit eingeschränkter Mobilität dürfen nicht eingeschränkt oder ausgeschlossen werden.

Artikel 14

Durchsetzungsstelle und ihre Aufgaben

(1) Jeder Mitgliedstaat benennt eine Stelle oder mehrere Stellen, die für die Durchsetzung dieser Verordnung bei Flügen von oder zu in seinem Hoheitsgebiet gelegenen Flughäfen zuständig ist bzw. sind. Gegebenenfalls ergreift bzw. ergreifen diese Stelle(n) die notwendigen Maßnahmen, um sicherzustellen, dass die Rechte von behinderten Menschen und Personen mit eingeschränkter Mobilität gewahrt und die in Artikel 9 Absatz 1 genannten Qualitätsstandards eingehalten werden. Die Mitgliedstaaten teilen der Kommission mit, welche Stelle oder Stellen benannt worden ist bzw. sind.

(2) Die Mitgliedstaaten sorgen gegebenenfalls dafür, dass die nach Absatz 1 benannte(n) Durchsetzungsstelle(n) auch die zufrieden stellende Durchführung des Artikels 8, einschließlich der Bestimmungen über die Umlagen im Hinblick auf die Vermeidung unlauteren Wettbewerbs, gewährleisten. Sie können auch eine besondere Stelle zu diesem Zweck benennen.

Artikel 15

Beschwerdeverfahren

(1) Ein behinderter Mensch oder eine Person mit eingeschränkter Mobilität, die der Auffassung ist, dass gegen diese Verordnung verstoßen wurde, kann die Angelegenheit je nach Fall dem Leitungsorgan des Flughafens oder dem betreffenden Luftfahrtunternehmen zur Kenntnis bringen.

(2) Sofern der behinderte Mensch oder die Person mit eingeschränkter Mobilität auf diesem Wege nicht zufrieden gestellt wird, können Beschwerden über einen angeblichen Verstoß gegen diese Verordnung bei einer bzw. mehreren gemäß Artikel 14 Absatz 1 benannten Stelle bzw. Stellen oder einer sonstigen von einem Mitgliedstaat benannten zuständigen Stelle eingereicht werden.

(3) Eine Stelle in einem Mitgliedstaat, bei der eine Beschwerde eingeht, die eine Angelegenheit betrifft, die in die Zuständigkeit einer benannten Stelle in einem anderen Mitgliedstaat fällt, übermittelt diese Beschwerde an die Stelle in dem anderen Mitgliedstaat.

(4) Die Mitgliedstaaten treffen Maßnahmen, damit die behinderten Menschen und Personen mit eingeschränkter Mobilität über ihre in dieser Verordnung verankerten Rechte und die Möglichkeit einer Beschwerde bei dieser/diesen benannten Stelle(n) unterrichtet werden.

Artikel 16

Sanktionen

Die Mitgliedstaaten legen für Verstöße gegen diese Verordnung Vorschriften über Sanktionen fest und treffen alle zu ihrer Anwendung erforderlichen Maßnahmen. Die Sanktionen müssen wirksam, verhältnismäßig und abschreckend sein. Die Mitgliedstaaten teilen der Kommission diese Vorschriften mit und melden ihr spätere Änderungen unverzüglich.

Artikel 17

Berichterstattung

Die Kommission erstattet dem Europäischen Parlament und dem Rat spätestens bis zum 1. Januar 2010 über die Anwendung und die Ergebnisse dieser Verordnung Bericht. Dem Bericht sind, soweit erforderlich, Legislativvorschläge beizufügen, die diese Verordnung durch weitere Einzelheiten ergänzen oder ändern.

Artikel 18

Inkrafttreten

Diese Verordnung tritt am zwanzigsten Tag nach ihrer Veröffentlichung im *Amtsblatt der Europäischen Union* in Kraft.

Sie gilt ab dem 26. Juli 2008, mit Ausnahme der Artikel 3 und 4, die ab dem 26. Juli 2007 gelten.

Diese Verordnung ist in allen ihren Teilen verbindlich und gilt unmittelbar in jedem Mitgliedstaat.

Geschehen zu Straßburg am 5. Juli 2006.

Im Namen des Europäischen Parlaments	*Im Namen des Rates*
Der Präsident	*Die Präsidentin*
J. BORRELL FONTELLES	P. LEHTOMÄKI

ANHANG I

Hilfeleistungen unter der Verantwortung der Leitungsorgane von Flughäfen

Hilfeleistungen und Vorkehrungen, um behinderte Menschen und Personen mit eingeschränkter Mobilität in die Lage zu versetzen,

— an den gemäß Artikel 5 innerhalb und außerhalb der Abfertigungsgebäude ausgewiesenen Orten ihre Ankunft auf dem Flughafen bekannt zu geben und um Hilfe zu bitten,

— von dem ausgewiesenen Ort zum Abfertigungsschalter zu gelangen,

— die Abfertigung zu erledigen und ihr Gepäck aufzugeben,

— vom Abfertigungsschalter zum Luftfahrzeug zu gelangen und dabei gegebenenfalls die nötigen Auswanderungs-, Zoll- und Sicherheitsverfahren zu durchlaufen,

— gegebenenfalls mithilfe von Lifts, Rollstühlen oder sonstigen benötigten Hilfen an Bord des Luftfahrzeugs zu gelangen,

— von der Luftfahrzeugtür zu ihrem Sitz zu gelangen,

— ihr Gepäck im Luftfahrzeug zu verstauen und wieder in Besitz zu nehmen,

— von ihrem Sitz zur Luftfahrzeugtür zu gelangen,

— gegebenenfalls mithilfe von Lifts, Rollstühlen oder sonstigen benötigten Hilfen das Luftfahrzeug zu verlassen,

— von Luftfahrzeugen zur Gepäckhalle zu gelangen und ihr Gepäck wieder in Besitz zu nehmen und dabei gegebenenfalls die nötigen Einwanderungs- und Zollverfahren zu durchlaufen,

— von der Gepäckhalle zu einem ausgewiesenen Ort zu gelangen,

— im Transit mit der in der Luft und am Boden benötigten Hilfe innerhalb eines Abfertigungsgebäudes und zwischen zwei Abfertigungsgebäuden Anschlussflüge zu erreichen,

— erforderlichenfalls zu den Toiletten zu gelangen.

Wird ein behinderter Mensch oder eine Person mit eingeschränkter Mobilität von einer Begleitperson unterstützt, muss dieser Person auf Verlangen gestattet werden, die notwendige Hilfe im Flughafen und beim An-Bord-Gehen und Von-Bord-Gehen zu leisten.

Abfertigung aller notwendigen Mobilitätshilfen, wie elektrischer Rollstühle am Boden (sofern diese 48 Stunden vorher angemeldet wurden und an Bord des Luftfahrzeugs genügend Platz ist und sofern die einschlägigen Vorschriften über Gefahrgüter nicht entgegenstehen).

Vorübergehender Ersatz beschädigter oder verloren gegangener Mobilitätshilfen, wobei allerdings nicht identische Ausrüstungen gestellt werden müssen.

Gegebenenfalls Abfertigung anerkannter Begleithunde am Boden.

Mitteilung der für einen Flug benötigten Informationen in zugänglicher Form.

ANHANG II

Hilfeleistung des Luftfahrtunternehmens

Beförderung anerkannter Begleithunde in der Kabine, vorbehaltlich der nationalen Vorschriften.

Zusätzlich zu medizinischen Geräten Beförderung von bis zu zwei Mobilitätshilfen pro behindertem Mensch oder Person mit eingeschränkter Mobilität, einschließlich elektrischer Rollstühle (sofern diese 48 Stunden vorher angemeldet wurden und an Bord des Luftfahrzeugs genügend Platz ist und sofern die einschlägigen Vorschriften über Gefahrgüter nicht entgegenstehen).

Mitteilung von wesentlichen Informationen über einen Flug in zugänglicher Form.

Auf Wunsch Bemühen im Rahmen des Möglichen nach besten Kräften um Sitzvergabe entsprechend den Bedürfnissen des jeweiligen behinderten Menschen oder der jeweiligen Person mit eingeschränkter Mobilität, vorbehaltlich der Sicherheitsanforderungen und der Verfügbarkeit.

Erforderlichenfalls Hilfe, um zu den Toiletten zu gelangen.

Wird ein behinderter Mensch oder eine Person mit eingeschränkter Mobilität von einer Begleitperson unterstützt, bemüht sich das Luftfahrtunternehmen im Rahmen des Möglichen nach besten Kräften, dieser Person einen Sitzplatz neben dem behinderten Menschen oder der Person mit eingeschränkter Mobilität zuzuweisen.

IV

(Informationen)

INFORMATIONEN DER ORGANE, EINRICHTUNGEN UND SONSTIGEN STELLEN DER EUROPÄISCHEN UNION

GERICHTSHOF DER EUROPÄISCHEN UNION

Der folgende Text – ergänzt um eine neue Nr. 25 und mit einer geänderten Nr. 40 – ersetzt die im Amtsblatt C 297 vom 5. Dezember 2009, S. 1, veröffentlichten Hinweise.

HINWEISE

zur Vorlage von Vorabentscheidungsersuchen durch die nationalen Gerichte

(2011/C 160/01)

I – **Allgemeine Bestimmungen**

1. Die Vorabentscheidungsvorlage ist ein wichtiger Mechanismus des Rechts der Europäischen Union, der es den nationalen Gerichten ermöglichen soll, eine einheitliche Auslegung und Anwendung dieses Rechts in allen Mitgliedstaaten sicherzustellen.

2. Der Gerichtshof der Europäischen Union entscheidet im Wege der Vorabentscheidung über die Auslegung des Rechts der Europäischen Union und über die Gültigkeit der Handlungen der Organe, Einrichtungen und sonstigen Stellen der Union. Diese allgemeine Zuständigkeit wird ihm durch Art. 19 Abs. 3 Buchst. b des Vertrags über die Europäische Union (ABl. EU 2008, C 115, S. 13, im Folgenden: EUV) und Art. 267 des Vertrags über die Arbeitsweise der Europäischen Union (ABl. EU 2008, C 115, S. 47, im Folgenden: AEUV) eingeräumt.

3. Nach Art. 256 Abs. 3 AEUV ist das Gericht in besonderen in der Satzung festgelegten Sachgebieten für Vorabentscheidungen nach Artikel 267 zuständig. Da die Satzung insoweit noch nicht angepasst worden ist, bleibt der Gerichtshof vorerst allein für Vorabentscheidungsersuchen zuständig.

4. Art. 267 AEUV räumt dem Gerichtshof zwar eine allgemeine Zuständigkeit ein, verschiedene Bestimmungen sehen jedoch insoweit Ausnahmen oder Beschränkungen vor. Hierbei handelt es sich insbesondere um die Art. 275 und 276 AEUV sowie Art. 10 des Protokolls (Nr. 36) über die Übergangsbestimmungen des Vertrags von Lissabon (ABl. EU 2008, C 115, S. 322).

5. Da das Vorabentscheidungsverfahren auf der Zusammenarbeit zwischen dem Gerichtshof und den nationalen Gerichten beruht, erscheint es, um seine Effektivität zu gewährleisten, nützlich, den nationalen Gerichten folgende Hinweise zu geben.

6. Diese praktischen Hinweise, die nicht verbindlich sind, sollen den nationalen Gerichten eine Orientierung bieten, wann ein Vorabentscheidungsersuchen angebracht ist, und ihnen gegebenenfalls bei der Formulierung der Fragen und deren Vorlage an den Gerichtshof helfen.

Rolle des Gerichtshofs im Vorabentscheidungsverfahren

7. Die Rolle des Gerichtshofs im Vorabentscheidungsverfahren besteht darin, das Unionsrecht auszulegen oder über seine Gültigkeit zu entscheiden, nicht aber darin, dieses Recht auf den Sachverhalt anzuwenden, der dem Ausgangsverfahren zugrunde liegt; dies ist vielmehr Sache des nationalen Gerichts. Der Gerichtshof hat weder über Tatsachenfragen, die im Rahmen des Ausgangsrechtsstreits aufgeworfen werden, noch über Meinungsverschiedenheiten bezüglich der Auslegung oder Anwendung des nationalen Rechts zu entscheiden.

8. Der Gerichtshof entscheidet über die Auslegung oder die Gültigkeit des Unionsrechts, wobei er sich bemüht, eine der Entscheidung des Rechtsstreits dienliche Antwort zu geben; die Konsequenzen daraus hat jedoch das vorlegende Gericht zu ziehen, gegebenenfalls, indem es die fragliche nationale Bestimmung nicht anwendet.

Entscheidung, dem Gerichtshof eine Frage vorzulegen

Urheber der Frage

9. Im Rahmen des Art. 267 AEUV kann grundsätzlich jedes mitgliedstaatliche Gericht, das in einem auf den Erlass einer Entscheidung mit Rechtsprechungscharakter gerichteten Verfahren zu entscheiden hat, dem Gerichtshof eine Frage zur Vorabentscheidung vorlegen ([1]). Der Begriff „Gericht" wird vom Gerichtshof als eigenständiger Begriff des Unionsrechts ausgelegt.

10. Die Entscheidung, den Gerichtshof um Vorabentscheidung zu ersuchen, liegt, ob die Parteien des Ausgangsverfahrens einen entsprechenden Antrag gestellt haben oder nicht, allein beim nationalen Gericht.

Ersuchen um Auslegung

11. Jedes Gericht ist **befugt**, dem Gerichtshof eine Frage nach der Auslegung einer Norm des Unionsrechts vorzulegen, wenn es dies zur Entscheidung eines bei ihm anhängigen Rechtsstreits für erforderlich hält.

12. Ein Gericht, dessen Entscheidungen nicht mehr mit nationalen Rechtsmitteln angefochten werden können, ist jedoch **grundsätzlich verpflichtet**, dem Gerichtshof eine solche Frage vorzulegen, es sei denn, es existiert bereits eine einschlägige Rechtsprechung (und der möglicherweise neue Kontext weckt keine echten Zweifel an der Möglichkeit, diese Rechtsprechung anzuwenden) oder die richtige Auslegung der fraglichen Rechtsnorm ist offenkundig.

13. Demnach kann ein Gericht, dessen Entscheidungen noch angefochten werden können, insbesondere dann, wenn es sich durch die Rechtsprechung des Gerichtshof für ausreichend unterrichtet hält, selbst über die richtige Auslegung des Unionsrechts und seine Anwendung auf den von ihm festgestellten Sachverhalt entscheiden. Ein Vorabentscheidungsersuchen kann sich jedoch im richtigen Verfahrensstadium als besonders nützlich erweisen, wenn es sich um eine neue Auslegungsfrage handelt, die von allgemeiner Bedeutung für die einheitliche Anwendung des Unionsrechts in allen Mitgliedstaaten ist, oder wenn die vorhandene Rechtsprechung auf einen noch nicht vorgekommenen Sachverhalt nicht anwendbar erscheint.

14. Das nationale Gericht muss darlegen, weshalb die beantragte Auslegung für die Entscheidung des Rechtsstreits erforderlich ist.

Ersuchen um Prüfung der Gültigkeit

15. Die nationalen Gerichte haben zwar die Möglichkeit, die vor ihnen geltend gemachten Ungültigkeitsgründe zurückweisen, doch kann nur der Gerichtshof einen Rechtsakt eines Organs, einer Einrichtung oder einer sonstigen Stelle der Union für ungültig erklären.

16. Jedes nationale Gericht **muss** sich somit mit einer Frage an den Gerichtshof wenden, wenn es Zweifel an der Gültigkeit eines solchen Rechtsakts hat, und die Gründe angeben, aus denen dieser nach seiner Auffassung ungültig sein könnte.

([1]) Nach Art. 10 Abs. 1 bis 3 des Protokolls Nr. 36 bleiben die Befugnisse des Gerichtshofs jedoch bezüglich der vor Inkrafttreten des Vertrags von Lissabon (ABl. 2007, C 306, S. 1) nach Titel VI EUV im Bereich der polizeilichen Zusammenarbeit und der justiziellen Zusammenarbeit in Strafsachen angenommenen und seither nicht geänderten Rechtsakte für einen Zeitraum von höchstens fünf Jahren ab Inkrafttreten des Vertrags von Lissabon (1. Dezember 2009) unverändert. Während dieses Zeitraums können solche Rechtsakte daher nicht Gegenstand eines Vorabentscheidungsersuchens durch die Gerichte der Mitgliedstaaten sein, die die Zuständigkeit des Gerichtshofs anerkannt haben, wobei jeder Staat entscheidet, ob die Möglichkeit, den Gerichtshof zu befassen, sämtlichen oder nur den letztinstanzlich entscheidenden Gerichten offensteht.

17. Das nationale Gericht kann jedoch, wenn es ernsthafte Zweifel an der Gültigkeit eines Rechtsakts eines Organs, einer Einrichtung oder einer sonstigen Stelle der Union hat, auf den eine nationale Maßnahme gestützt ist, ausnahmsweise die Anwendung dieses Rechtsakts vorläufig aussetzen oder insoweit sonstige einstweilige Maßnahmen treffen. In diesem Fall ist das Gericht verpflichtet, die Gültigkeitsfrage dem Gerichtshof vorzulegen und dabei die Gründe anzugeben, aus denen es diesen Rechtsakt für ungültig hält.

Zeitpunkt der Vorlage einer Vorabentscheidungsfrage

18. Das nationale Gericht kann eine Vorabentscheidungsfrage an den Gerichtshof richten, wenn es feststellt, dass es für die Entscheidung des Rechtsstreits auf die Auslegung oder die Gültigkeit des Unionsrechts ankommt. In welchem Verfahrensstadium eine solche Frage vorzulegen ist, kann das betreffende Gericht selbst am besten beurteilen.

19. Es ist jedoch wünschenswert, dass die Vorlage erst in einem Verfahrensstadium erfolgt, in dem das Gericht in der Lage ist, den tatsächlichen und rechtlichen Rahmen des Problems zu bestimmen, damit der Gerichtshof über alle Informationen verfügt, die er benötigt, um gegebenenfalls prüfen zu können, ob das Unionsrecht auf den Ausgangsrechtsstreit anwendbar ist. Es kann außerdem im Interesse einer geordneten Rechtspflege liegen, die Vorabentscheidungsfrage erst nach streitiger Verhandlung vorzulegen.

Form des Vorabentscheidungsersuchens

20. Die Form der Entscheidung, mit der das nationale Gericht dem Gerichtshof eine Frage zur Vorabentscheidung vorlegt, richtet sich nach den Verfahrensregeln des nationalen Rechts. Es ist jedoch zu berücksichtigen, dass dieses Dokument die Grundlage des Verfahrens vor dem Gerichtshof bildet und dass dieser über Informationen verfügen muss, die es ihm ermöglichen, dem nationalen Gericht eine sachdienliche Antwort zu geben. Außerdem wird nur das Vorabentscheidungsersuchen den zur Einreichung von Erklärungen beim Gerichtshof Berechtigten – insbesondere den Mitgliedstaaten und Organen – übermittelt und übersetzt.

21. Da das Ersuchen übersetzt werden muss, sollte es einfach, klar und präzise abgefasst sein und keine überflüssigen Elemente enthalten.

22. Ein Text von nicht mehr als ungefähr zehn Seiten reicht oft aus, um den Rahmen eines Vorabentscheidungsersuchens angemessen darzustellen. Trotz der Knappheit muss die Vorlageentscheidung jedoch ausführlich genug sein und alle relevanten Informationen enthalten, damit der Gerichtshof und die zur Einreichung von Erklärungen Berechtigten den tatsächlichen und rechtlichen Rahmen des Ausgangsverfahrens richtig erfassen können. Insbesondere muss die Vorlageentscheidung

— eine kurze Schilderung des Streitgegenstands und der festgestellten relevanten Tatsachen enthalten oder zumindest die Tatsachenannahmen erläutern, auf denen die Vorabentscheidungsfrage beruht;

— den Wortlaut der möglicherweise anwendbaren Vorschriften wiedergeben und gegebenenfalls die einschlägige nationale Rechtsprechung angeben; dabei ist jeweils die genaue Fundstelle zu nennen (z. B. Seite eines bestimmten Amtsblatts oder einer bestimmten Rechtsprechungssammlung, eventuell mit Fundstelle im Internet);

— so genau wie möglich die einschlägigen Vorschriften des Unionsrechts angeben;

— die Gründe erläutern, aus denen das vorlegende Gericht Zweifel bezüglich der Auslegung oder der Gültigkeit bestimmter Vorschriften des Unionsrechts hat, und den Zusammenhang erklären, den es zwischen diesen Vorschriften und dem auf den Ausgangsrechtsstreit anwendbaren Recht herstellt;

— gegebenenfalls eine Zusammenfassung des relevanten Vorbringens der Parteien des Ausgangsverfahrens enthalten.

Um die Lektüre der Vorlageentscheidung und die Bezugnahme auf sie zu erleichtern, sollten die einzelnen Punkte oder Absätze der Entscheidung nummeriert werden.

23. Schließlich kann das vorlegende Gericht, wenn es meint, dass es dazu in der Lage ist, knapp darlegen, wie die zur Vorabentscheidung vorgelegten Fragen seines Erachtens beantwortet werden sollten.

24. Die Vorabentscheidungsfrage oder -fragen müssen in einem gesonderten und klar kenntlich gemachten Teil der Vorlageentscheidung, üblicherweise an deren Anfang oder Ende, aufgeführt sein. Sie müssen verständlich sein, ohne dass eine Bezugnahme auf die Begründung des Ersuchens, die den notwendigen Kontext für eine sachgerechte Beurteilung enthält, erforderlich wäre.

25. Im Rahmen des Vorabentscheidungsverfahrens übernimmt der Gerichtshof grundsätzlich die in der Vorlageentscheidung enthaltenen Angaben, einschließlich der Namensangaben und personenbezogenen Daten. Es ist daher Sache des vorlegenden Gerichts, die von dem Ausgangsrechtsstreit betroffene(n) Person(en), wenn es dies für erforderlich hält, in seinem Vorabentscheidungsersuchen zu anonymisieren.

Wirkungen des Vorabentscheidungsersuchens auf das nationale Verfahren

26. Die Vorlage einer Vorabentscheidungsfrage führt dazu, dass das nationale Verfahren bis zur Entscheidung des Gerichtshofes ausgesetzt wird.

27. Das nationale Gericht bleibt jedoch, insbesondere im Rahmen eines Ersuchens um Prüfung der Gültigkeit, zuständig, einstweilige Maßnahmen zu erlassen (siehe oben, Nr. 17).

Kosten und Prozesskostenhilfe

28. Das Vorabentscheidungsverfahren vor dem Gerichtshof ist gerichtskostenfrei. Über die Kosten der Parteien des Ausgangsverfahrens entscheidet nicht der Gerichtshof, sondern das nationale Gericht.

29. Verfügt eine Partei nicht über ausreichende Mittel, so kann das vorlegende Gericht, soweit dies nach nationalem Recht zulässig ist, der Partei Prozesskostenhilfe für die im Verfahren vor dem Gerichtshof entstehenden Kosten, insbesondere die Kosten der Vertretung, bewilligen. Der Gerichtshof kann ebenfalls eine Beihilfe bewilligen, wenn die fragliche Partei nicht bereits auf nationaler Ebene Prozesskostenhilfe erhält oder diese Hilfe die im Verfahren vor dem Gerichtshof entstehenden Kosten nicht oder nur teilweise abdeckt.

Schriftverkehr zwischen dem nationalen Gericht und dem Gerichtshof

30. Die Vorlageentscheidung und die relevanten Unterlagen (gegebenenfalls die Verfahrensakten, eventuell in Kopie) sind vom nationalen Gericht per Einschreiben unmittelbar an den Gerichtshof (Kanzlei des Gerichtshofs, L-2925 Luxemburg; Tel.-Nr. +352-4303-1) zu senden.

31. Bis zur Verkündung der Entscheidung bleibt die Kanzlei des Gerichtshofs mit dem nationalen Gericht in Verbindung und übermittelt ihm Kopien der Verfahrensunterlagen.

32. Der Gerichtshof übermittelt dem vorlegenden Gericht auch seine Entscheidung. Er würde es begrüßen, wenn ihn das nationale Gericht darüber informieren würde, wie es die Vorabentscheidung im Ausgangsverfahren berücksichtigt hat, und wenn es ihm gegebenenfalls seine Endentscheidung zusenden würde.

II – **Eilvorlageverfahren**

33. Dieser Teil der Hinweise gibt praktische Handreichungen zum Eilvorlageverfahren für Vorabentscheidungsersuchen zum Raum der Freiheit, der Sicherheit und des Rechts. Dieses Verfahren ist in Art. 23a des Protokolls (Nr. 3) über die Satzung des Gerichtshofs der Europäischen Union (ABl. EU 2008, C 115, S. 210) und Art. 104b der Verfahrensordnung des Gerichtshofs geregelt. Die Möglichkeit, die Anwendung dieses Verfahrens zu beantragen, tritt neben die Möglichkeit, unter den Voraussetzungen des Art. 23a der Satzung und des Art. 104a der Verfahrensordnung die Durchführung eines beschleunigten Verfahrens zu beantragen.

Voraussetzungen für die Anwendung des Eilvorlageverfahrens

34. Das Eilvorlageverfahren ist nur in den Bereichen statthaft, die von Titel V des Dritten Teils des AEUV über den Raum der Freiheit, der Sicherheit und des Rechts erfasst sind.

35. Die Entscheidung, dieses Verfahren durchzuführen, wird vom Gerichtshof getroffen. Sie ergeht grundsätzlich nur auf Antrag des vorlegenden Gerichts, der zu begründen ist. Ausnahmsweise kann der Gerichtshof von Amts wegen beschließen, ein Ersuchen dem Eilverfahren zu unterwerfen, wenn dies geboten erscheint.

36. Das Eilvorlageverfahren vereinfacht die verschiedenen Abschnitte des Verfahrens vor dem Gerichtshof, doch seine Anwendung hat zur Folge, dass der Gerichtshof sowie die Parteien und sonstigen Verfahrensbeteiligten und insbesondere die Mitgliedstaaten erheblichen Zwängen unterworfen sind.

37. Das Eilvorlageverfahren soll daher nur beantragt werden, wenn es nach den Umständen absolut erforderlich ist, dass der Gerichtshof über das Ersuchen in kürzester Zeit entscheidet. Insbesondere wegen der Vielfalt und des Evolutivcharakters der Unionsvorschriften über den Raum der Freiheit, der Sicherheit und des Rechts können die Sachverhalte, bei denen diese Voraussetzung erfüllt ist, hier nicht erschöpfend aufgezählt werden; jedenfalls könnte ein nationales Gericht einen Antrag auf Eilvorlageverfahren z. B. bei folgenden Sachverhalten in Betracht ziehen: in dem in Art. 267 Abs. 4 AEUV vorgesehenen Fall des Freiheitsentzugs oder der Freiheitsbeschränkung, wenn die aufgeworfene Frage für die Beurteilung der Rechtsstellung des Betroffenen entscheidend ist, oder in einem Rechtsstreit über das elterliche Erziehungs- und Sorgerecht, wenn die Zuständigkeit des gemäß dem Unionsrecht angerufenen Gerichts von der Antwort auf die Vorlagefrage abhängt.

Antrag auf Anwendung des Eilvorlageverfahrens

38. Damit der Gerichtshof schnell entscheiden kann, ob das Eilvorlageverfahren durchzuführen ist, muss der Antrag die rechtlichen und tatsächlichen Umstände, aus denen sich die Dringlichkeit ergibt, und insbesondere die Gefahren darlegen, die bei Anwendung des gewöhnlichen Vorabentscheidungsverfahrens drohen.

39. Soweit möglich, gibt das vorlegende Gericht knapp an, wie die vorgelegte Frage oder Fragen beantwortet werden sollten. Diese Angabe erleichtert die Stellungnahme der Parteien und sonstigen Verfahrensbeteiligten sowie die Entscheidung des Gerichtshofs und trägt damit zur Schnelligkeit des Verfahrens bei.

40. Der Antrag auf Eilvorlageverfahren ist in einer unmissverständlichen Form einzureichen, die es der Kanzlei des Gerichtshofs ermöglicht, unmittelbar festzustellen, dass die Angelegenheit eine spezifische Behandlung erfordert. Zu diesem Zweck wird das vorlegende Gericht gebeten, in seinem Ersuchen auf Art. 104b der Verfahrensordnung Bezug zu nehmen, und zwar an herausgehobener Stelle (z. B. auf dem Deckblatt oder in einer gesonderten gerichtlichen Urkunde). Gegebenenfalls kann der Antrag auch in einem Begleitschreiben des vorlegenden Gerichts gestellt werden.

41. Zur Vorlageentscheidung selbst wird darauf hingewiesen, dass es bei Vorliegen von Dringlichkeit umso wichtiger ist, dass sie knapp gefasst ist, als dies zur Schnelligkeit des Verfahrens beiträgt.

Schriftverkehr zwischen dem Gerichtshof, dem nationalen Gericht und den Verfahrensbeteiligten

42. Für die Kommunikation mit dem nationalen Gericht und den Beteiligten des dort anhängigen Verfahrens werden die nationalen Gerichte, die ein Eilvorlageverfahren beantragen, gebeten, die E-Mail-Adresse und gegebenenfalls die Fax-Nummer, die der Gerichtshof verwenden kann, sowie die E-Mail-Adressen und gegebenenfalls die Fax-Nummern der Prozessbevollmächtigten der Verfahrensbeteiligten anzugeben.

43. Eine Kopie der unterschriebenen Vorlageentscheidung und des Antrags auf Eilvorlageverfahren kann dem Gerichtshof vorab per E-Mail (ECJ-Registry@curia.europa.eu) oder per Fax (+352 43 37 66) übermittelt werden. Die Behandlung des Ersuchens und des Antrags kann unmittelbar nach Eingang dieser Kopie beginnen. Gleichwohl ist die Urschrift dieser Dokumente dem Gerichtshof binnen kürzester Frist zu übermitteln.

KOMMISSION DER EUROPÄISCHEN GEMEINSCHAFTEN

Brüssel, den 7.8.2008
KOM(2008) 510 endgültig

MITTEILUNG DER KOMMISSION

Mitteilung über den Umfang der Haftung von Luftfahrtunternehmen und Flughäfen für Zerstörung, Beschädigung oder Verlust von Mobilitätshilfen von Flugreisenden eingeschränkter Mobilität

Text von Bedeutung für den EWR

MITTEILUNG DER KOMMISSION

Mitteilung über den Umfang der Haftung von Luftfahrtunternehmen und Flughäfen für Zerstörung, Beschädigung oder Verlust von Mobilitätshilfen von Flugreisenden eingeschränkter Mobilität

Text von Bedeutung für den EWR

1. HINTERGRUND

Am 5. Juli 2006 verabschiedeten der Rat und das Europäische Parlament die Verordnung (EG) Nr. 1107/2006 über die Rechte von behinderten Flugreisenden und Flugreisenden mit eingeschränkter Mobilität[1] (nachstehend „Verordnung" genannt). Durch diese Verordnung soll im Wesentlichen sichergestellt werden, dass behinderte Menschen und Personen eingeschränkter Mobilität bei Flugreisen nicht benachteiligt werden. Im Zuge der politischen Verhandlungen über den Kommissionsvorschlag gab die Kommission am 30. November 2005 in Bezug auf den künftigen Artikel 12, der die „Entschädigung für verloren gegangene oder beschädigte Rollstühle, sonstige Mobilitätshilfen und Hilfsgeräte" betraf, eine Erklärung für das Protokoll[2] ab, in der sie sich zur Durchführung einer Studie und zur Vorlage eines entsprechenden Berichts verpflichtete; in dieser Studie sollte geprüft werden, ob es möglich ist, die nach dem Gemeinschaftsrecht, dem innerstaatlichen oder dem internationalen Recht bestehenden Rechte von Flugreisenden, deren Rollstuhl oder sonstige Mobilitätshilfen bei der Abfertigung auf dem Flughafen oder bei der Beförderung an Bord des Luftfahrzeugs zerstört oder beschädigt werden oder verloren gehen, auszuweiten.

Die Kommission veröffentlichte eine Auftragsbekanntmachung[3] für eine Studie, in der geprüft werden sollte, welche Entschädigungshöchstgrenzen in Bezug auf beschädigte oder verloren gegangene Ausrüstungen und Geräte von Fluggästen eingeschränkter Mobilität gelten (nachstehend „Studie" genannt); diese Studie kann auf der Website der Kommission eingesehen werden. In dieser Mitteilung wird über die Ergebnisse der Studie und die Möglichkeiten zur Ausweitung bestehender Rechte berichtet.

2. PROBLEMSTELLUNG

„Die Beschädigung oder der Verlust von Gepäck ist ärgerlich. Werden aber Mobilitätshilfen beschädigt oder gehen verloren, kann dies die gesamte Reise unmöglich machen und den Alltag des Betroffen für lange Zeit sehr schwierig gestalten. Es ist gleichbedeutend mit dem Verlust von Unabhängigkeit und Würde[4]."

Ein großer Teil der derzeitigen EU-Bevölkerung hat Mobilitätsprobleme und ist unter Umständen auf einen Rollstuhl, andere Mobilitätshilfen oder Hilfsgeräte (nachstehend

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1 ABl. L 204 vom 26.7.2006, S. 1.
2 Arbeitsdokument des Rates Nr. 15206/05 (COD 2005/007).
3 Auftragsbekanntmachung 2006/S 111-118193 vom 14.6.2006.
4 Auszug aus der Antwort eines Verbandes von Personen eingeschränkter Mobilität an die Berater.

„Mobilitätshilfen“ genannt) angewiesen. Der Anteil von Menschen eingeschränkter Mobilität an der Gesamtbevölkerung wird wahrscheinlich weiter zunehmen, da das Durchschnittsalter der EU-Bevölkerung steigt.

Die Kommission möchte in dieser Mitteilung nicht Daten reproduzieren, die bereits in der Studie, die ergänzend zu dieser Mitteilung gelesen werden sollte, enthalten sind. Sie stellt allerdings fest, dass diesen Daten zufolge Menschen, deren Mobilität eingeschränkt ist und die auf Mobilitätshilfen angewiesen sind, offenbar seltener mit dem Flugzeug reisen als der Durchschnitt der Bevölkerung. Es ist sehr wahrscheinlich, dass die Angst vor Verlust, Beschädigung oder Zerstörung ihrer Mobilitätshilfen mit dazu beiträgt, diese Menschen vom Reisen abzuhalten, und so ihrer Integration in die Gesellschaft entgegensteht. Für diese Angst gibt es eine Reihe objektiver Gründe:

(1) Der Verlust oder die Beschädigung von Rollstühlen oder anderen Mobilitätshilfen führt dazu, dass Personen eingeschränkter Mobilität ihre Unabhängigkeit einbüßen, und wirkt sich auf alle Bereiche ihres täglichen Lebens aus, solange keine zufriedenstellende Lösung gefunden werden kann.

(2) Für Personen eingeschränkter Mobilität bedeuten Verlust, Beschädigung oder Zerstörung ihrer Mobilitätshilfen eine Gefährdung ihrer Gesundheit und Sicherheit, da nicht immer ein Ersatz zur Verfügung gestellt wird, und selbst wenn dies der Fall ist, dieser Ersatz nicht immer den Bedürfnissen der Person entspricht.

(3) Die Luftfahrtunternehmen oder Flughäfen brauchen für die Lösung der praktischen Probleme, die durch Beschädigung oder Verlust von Mobilitätshilfen entstehen, viel mehr Zeit, als in einem solchen Notfall angemessen wäre.

(4) Die bestehenden Verfahren und der durchschnittliche Ausbildungsstand des Personals der meisten Luftfahrtunternehmen und Flughäfen in Bezug auf angemessene Maßnahmen im Falle des Verlusts oder der Beschädigung von Mobilitätshilfen sind unzureichend.

(5) Die finanziellen Konsequenzen von Verlust, Beschädigung oder Zerstörung von Mobilitätshilfen stellen bei Flugreisen für Personen eingeschränkter Mobilität im Vergleich zu anderen Fluggästen ein zusätzliches Risiko dar.

(6) Der Schadensersatz für Beschädigung, Zerstörung oder Verlust von Mobilitätshilfen ist je nach Luftfahrtunternehmen und Flughafen unterschiedlich geregelt.

3. ERGEBNIS DER STUDIE: DIE HERAUSFORDERUNGEN

In der Praxis kommt es pro Jahr und pro Fluggesellschaft nur zu wenigen Vorfällen, bei denen es um Mobilitätshilfen geht. Die Gesamtzahl entsprechender Schadensanzeigen bewegt sich in einer Größenordnung zwischen 600 und 1000 Fällen pro Jahr - bei jährlich 706 Millionen Fluggästen in der Europäischen Union[5]. Dies bedeutet, dass auf eine Million Fluggäste im Durchschnitt weniger als eine und höchstens eineinhalb Schadensanzeigen kommen.

[5] 2005 wurden in der EU 705,8 Millionen Fluggäste befördert.

In der Studie werden sowohl die Erfahrungen in den USA als auch die Lage in Europa analysiert. Die beiden Analysen liefern eine vertretbare Grundlage für die Annahme, dass diese Schätzung der tatsächlichen Anzahl weitgehend entspricht. Die Studie kommt weiter zu dem Schluss, dass es sowohl in Bezug auf die quantitativen als auch auf die qualitativen Aspekte des Problems noch offene Fragen gibt, auf die hingewiesen werden sollte:

3.1. Quantitatives Ziel: Reduzierung der Zahl der Vorfälle

Es besteht ein klarer Zusammenhang zwischen der Anzahl der Vorfälle, bei denen Mobilitätshilfen von Personen eingeschränkter Mobilität zerstört oder beschädigt wurden oder verloren gingen, und dem ordnungsgemäßen Umgang mit solchen Geräten und ihrer korrekten Verstauung an Bord der Flugzeuge; die Abfertigung von Mobilitätshilfen in den Flughäfen ist ein wesentlicher Aspekt der Beförderung von Personen eingeschränkter Mobilität unter Bedingungen, die ihren Bedürfnissen entsprechen, und erfordert Kenntnisse, für die das Personal ausreichend geschult sein muss. Alles sollte darauf angelegt sein, dass eine Person eingeschränkter Mobilität ihr persönliches Hilfsgerät so lange wie möglich benutzen kann. Im Idealfall sollte eine Person eingeschränkter Mobilität immer dann, wenn sie ihre eigene Mobilitätshilfe an Bord des Flugzeuges nicht benutzen kann, diese an der Kabinentür abgeben und dort auch wieder im Empfang nehmen können. Andere Verfahren können vorgesehen werden, wenn dies aufgrund von Sicherheitserwägungen oder aus praktischen Gründen erforderlich ist.

In der Anlage zum „Airline Passenger Service Commitment“[6] von 2001, einer freiwilligen Verpflichtung betreffend Dienstleistungen für Fluggäste, die von der Mehrzahl der europäischen Fluggesellschaften unterzeichnet wurde (nachstehend „Airline Commitment“ genannt) ist festgelegt, dass die Unterzeichner alle vertretbaren Maßnahmen ergreifen, um den Verlust oder die Beschädigung von Mobilitätshilfen oder anderen Hilfsgeräten zu verhindern: sie entwickeln individuelle Ausführungspläne, in die das Airline Commitment aufgenommen wird*;* sie legen Schulungsprogramme für das Personal fest und ändern ihre Computersysteme dem Airline Commitment entsprechend; sie sorgen dafür, dass Personen eingeschränkter Mobilität in die Lage versetzt werden, so weit wie möglich ihre Unabhängigkeit zu behalten.

Im „Airport Voluntary Commitment on Air Passenger Service“ (nachstehend „Airport Commitment“ genannt), das von den europäischen Flughäfen unter der Leitung des Internationalen Flughafenrats - Europa[7] ausgearbeitet wurde, heißt es, dass das Personal angemessen geschult wird, um die Bedürfnisse von Personen eingeschränkter Mobilität zu verstehen und ihnen gerecht zu werden. Die Unterzeichner beabsichtigten, auf der Grundlage dieser Verpflichtungserklärung ihre eigenen individuellen Ausführungspläne zu erstellen und darin die einschlägigen Bestimmungen des Dokuments Nr. 30 (Teil 5) der Europäischen Zivilluftfahrtkonferenz (ECAC)[8] und der Internationalen Zivilluftfahrt-Organisation [9] (ICAO Anhang 9) aufzunehmen.

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6 Airline Passenger Service Commitment: siehe Artikel 8 und Anlage.

7 ACI Europe (2001), Airport Voluntary Commitment on Air Passenger Service and its Special Protocol to Meet the Needs of People with Reduced Mobility.

8 ECAC Policy Statement in the Field of Civil Aviation Facilitation (ECAC.CEAC Dok. Nr. 30 (TEIL I) 10. Ausgabe/Dezember 2006.

9 Richtlinien und Empfehlungen der Internationalen Zivilluftfahrt-Organisation (Anhang 9 des Chicagoer Abkommens).

In Punkt 5.2.3.2 des ECAC-Dokuments Nr. 30[10] heißt es, dass die Mitgliedstaaten die Verteilung einer Broschüre an das Personal der Luftfahrtunternehmen und Flughäfen unterstützen sollten, in der erläutert wird, welche Verfahren und Hilfsgeräte zur Hilfeleistung für Personen eingeschränkter Mobilität vorzusehen sind, und die alle nötigen Informationen über die Bedingungen für die Beförderung solcher Personen, über die erforderlichen Hilfsangebote sowie über die Maßnahmen enthält, die diese Personen selber ergreifen müssen. Die Mitgliedstaaten sollten dafür sorgen, dass die Luftfahrtunternehmen in ihre Handbücher alle Verfahren aufnehmen, die Personen eingeschränkter Mobilität betreffen. Nach Punkt 5.5 des gleichen Dokuments sollten die Mitgliedstaaten sicherstellen, dass auf den Flughäfen ein Abfertigungsdienst für Personen eingeschränkter Mobilität mit Personal, das geschult und qualifiziert ist, um ihren Bedürfnissen gerecht zu werden, und mit geeigneten Hilfsgeräten zur Verfügung steht.

Diese freiwilligen Absprachen werden jedoch nicht immer zufriedenstellend eingehalten. Erstens haben nur wenige Unternehmen und Flughäfen in der EU tatsächlich eigene Ausführungspläne oder eine entsprechende Kundenpolitik entwickelt, um diese freiwilligen Absprachen umzusetzen. Zweitens unterscheiden sich in diesen Fällen Ausführungspläne und Kundenpolitik so stark, dass dies zu einem völlig uneinheitlichen Schutzniveau für Personen eingeschränkter Mobilität führt. Drittens werden Ausführungspläne und Kundenpolitik nicht immer veröffentlicht, so dass Personen eingeschränkter Mobilität häufig nicht wissen, was sie erwarten können.

Was das Airport Commitment betrifft, so leisten die meisten Flughäfen spontan Hilfe für Personen eingeschränkter Mobilität. Allerdings unterscheiden sich die Verfahren, die es den Personen eingeschränkter Mobilität ermöglichen, im eigenen Rollstuhl bis zur Kabinentür zu gelangen oder ihren eigenen Rollstuhl bei der Ankunft in Empfang zu nehmen, von Flughafen zu Flughafen erheblich.

3.2. Qualitatives Ziel: Minimierung der Folgen eines Vorfalls

3.2.1. Es fehlt ein einheitliches Verfahren für prompte Abhilfe

Werden Mobilitätshilfen beschädigt, kann dies nicht nur aufgrund der damit verbundenen Kosten schwerwiegende Auswirkungen haben. Es geht auch darum, dass Personen eingeschränkter Mobilität ihre Hilfsgeräte eine Zeitlang nicht benutzen können, und Schadensersatz erst mit großer Verzögerung geleistet wird. Zu dem Zeitaufwand und Stress, die mit der Suche selbst nach einer nur vorläufigen Lösung für die praktischen Probleme des täglichen Lebens ohne Mobilitätshilfe verbunden sind, kommen die Schwierigkeiten hinzu, bei der Ankunft an einem häufig unbekannten Flughafen herauszubekommen, an wen Schadensanzeigen und Hilfsanfragen zu richten sind.

Es gibt derzeit keine internationalen, gemeinschaftlichen oder nationalen Rechtsvorschriften, in denen unmittelbare Hilfe für Personen eingeschränkter Mobilität, deren Mobilitätshilfe verloren gegangen ist, beschädigt oder zerstört wurde, vorgesehen ist, und auch keine Regelung, in welcher Form diese unmittelbare Hilfe zu leisten wäre oder welches ihre wesentlichen Aspekte wären.

[10] Siehe Fußnote 8.

Das Airline Commitment enthält keine konkreten Angaben dazu, wie entsprechende Schadensersatzansprüche zu behandeln oder welche Maßnahmen bei Beschädigung oder Verlust eines Rollstuhls oder einer anderen Mobilitätshilfe unmittelbar zu ergreifen sind.

Die meisten Flughäfen haben keine Politik in Bezug auf Schadensersatzforderungen für Beschädigung oder Verlust von Rollstühlen oder Mobilitätshilfen. Trotz Airport Commitment[11] unterscheiden sich Schadensersatzleistung und Verfahren für die Bereitstellung eines Ersatzgeräts von Flughafen zu Flughafen. Es ist daher möglich, dass die Bereitstellung von Ersatzgeräten und Schadensersatzleistungen für Personen eingeschränkter Mobilität, deren Ausrüstung zerstört oder beschädigt wurde, während sie sich in der Obhut des Flughafens befand, lückenhaft und inkohärent geregelt sind. Dies führt ganz sicher zu Unsicherheit und Verwirrung bei Personen eingeschränkter Mobilität, da sie nicht wissen, wie sie sich verhalten oder an wen sie sich bei einem Unfall mit ihrer Mobilitätshilfe wenden sollten.

3.2.2. Die Unterschiede zwischen Art und Umfang der Haftung von Luftfahrtunternehmen und von Flughäfen

Es gab von jeher Unterschiede zwischen Art und Umfang der Haftung von Luftfahrtunternehmen und von Flughäfen. Diese Unterschiede können bei den Betroffenen zu Verwirrung führen.

3.2.2.1. Beförderung von Ausrüstung im Flugzeug (Haftung der Luftfahrtunternehmen)

Derzeit erhalten Personen eingeschränkter Mobilität Hilfe von den Luftfahrtunternehmen im Rahmen der Bodenabfertigung. Die Luftfahrtunternehmen können diese Hilfe unmittelbar, durch ein drittes Unternehmen oder durch den Flughafen leisten, wenn dieser als Dienstleister für das Luftfahrtunternehmen handelt. Die Haftung der Luftfahrtunternehmen wird derzeit durch zahlreiche internationale Übereinkommen[12], Rechtsvorschriften der Gemeinschaft zur Umsetzung dieser internationalen Übereinkommen in der EU[13] sowie Rechts- und Verwaltungsverfahren beschränkt, die andere Länder den EU-Unternehmen auferlegen, die Zugang zum Markt dieser Länder haben möchten. Es steht den Unternehmen frei, auf eine Beschränkung ihrer Haftung zu verzichten und den Wert der verloren gegangenen Mobilitätshilfe oder deren Reparatur vollständig zu ersetzen.

Alle diese Rechtstexte basieren auf dem gleichen Prinzip: grundsätzliche Haftung des Luftfahrtunternehmens für aufgegebenes Reisegepäck[14]. Dies bedeutet, dass der Geschädigte ein Verschulden des Luftfahrtunternehmens nicht nachzuweisen braucht, um seine Ansprüche

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11 Siehe Fußnote 6.

12 Es handelt sich um folgende Übereinkommen: 1 – Das Abkommen zur Vereinheitlichung bestimmter Vorschriften über die Beförderung im internationalen Luftverkehr, unterzeichnet in Warschau am 12. Oktober 1929, das so genannte Warschauer Abkommen von 1929. 2 – Das Protokoll zur Änderung des Abkommens zur Vereinheitlichung von Regeln über die Beförderung im internationalen Luftverkehr, unterzeichnet in Warschau am 12. Oktober 1929, unterzeichnet in den Haag am 28.9.1955, das so genannte Haager Protokoll von 1955. 3 – Das Übereinkommen zur Vereinheitlichung bestimmter Vorschriften über die Beförderung im internationalen Luftverkehr, unterzeichnet in Montreal am 28.5.1999, das so genannte Montrealer Übereinkommen von 1999.

13 Verordnung (EG) Nr. 889/2002 des Europäischen Parlaments und des Rates vom 13. Mai 2002 (ABl. L 140 vom 30.5.2002, S. 2) zur Änderung der Verordnung (EG) Nr. 2027/97 des Rates über die Haftung von Luftfahrtunternehmen bei Unfällen.

14 Siehe Artikel 1 Absatz 10 der Verordnung (EG) Nr. 889/2002.

geltend zu machen. Personen eingeschränkter Mobilität müssen lediglich nachweisen, dass es zu Verlust oder Beschädigung während der Zeit kam, in der sich die Ausrüstung in der Obhut des Luftfahrtunternehmens befand (der so genannten Beförderungszeit).

Die Beförderungszeit beginnt bei Ausrüstung, die am Abfertigungsschalter (durch den oder im Namen des Luftfahrtunternehmens) aufgegeben und entsprechend als Reisegepäck gekennzeichnet wurde, eindeutig mit dem Zeitpunkt, zu dem der Abfertigungsvorgang beginnt. Gleiches gilt für Reisegepäck, das an der Kabinentür übergeben wird. Auch wenn die Ausrüstung gekennzeichnet werden kann, bevor sie tatsächlich dem Luftfahrtunternehmen übergeben wird (am Flugsteig oder an der Kabinentür), sollte die Haftung des Luftfahrtunternehmens erst ab dem Zeitpunkt greifen, an dem ihm die Ausrüstung (am Flugsteig oder an der Kabinentür) tatsächlich übergeben wird.

3.2.2.2. Abfertigung der Ausrüstung am Flughafen (Haftung des Flughafens)

Die Verordnung gilt seit dem 26. Juli 2008 uneingeschränkt; seit diesem Zeitpunkt sind folglich die Flughäfen dafür verantwortlich, Personen eingeschränkter Mobilität Hilfe zu leisten. Die Haftung der Flughäfen ist im Prinzip unbeschränkt[15] und unterliegt nationalem Haftungs-/Deliktsrecht. Aufgrund der Tatsache, dass für Flughäfen und Luftfahrtunternehmen ein unterschiedlicher Rechtsrahmen gilt, gibt es zwei wesentliche Unterschiede in der Art ihrer Haftung: Erstens ergibt sich die Haftung des Flughafens grundsätzlich aus einem nachgewiesenen Verschulden seines Leitungsorgans. Zweitens ist im Gegensatz zur Haftung der Luftfahrtunternehmen die Haftung des Flughafens unbegrenzt. Dies bedeutet, dass eine Person eingeschränkter Mobilität das Verschulden des Flughafens vor einem Gericht nachweisen muss, wenn der Flughafen die Forderung ablehnt (dies ist nicht der Fall, wenn das Luftfahrtunternehmen verantwortlich ist), jedoch ihren Schaden in voller Höhe ersetzt bekommen kann (dies ist nicht der Fall, wenn das Luftfahrtunternehmen verantwortlich ist, da seine Haftung normalerweise beschränkt ist).

3.2.3. Entschädigung: Höhe und Verfahren

Lange Zeit haben die Organisationen, die Personen eingeschränkter Mobilität vertreten, auf unbeschränkte Haftung bei Vorfällen mit Mobilitätshilfen gedrängt, und zwar sowohl während der Abfertigung am Flughafen als auch während der Beförderung an Bord von Flugzeugen. Der Grund dafür ist, dass moderne Mobilitätshilfen sehr teuer sind[16], während die geltenden Haftungsbeschränkungen für Reisegepäck im Rahmen internationaler Übereinkommen, insbesondere des Montrealer Übereinkommens[17], relativ niedrig angesetzt wurden, so dass der durch internationale Übereinkommen festgelegte Entschädigungsbetrag kaum in allen Fällen angemessen ist.

Die meisten Luftfahrtunternehmen leisten Schadensersatz entsprechend dem Montrealer Übereinkommen. Das Risiko für Schäden an Mobilitätshilfen, die 1 000 SZR übersteigen, trägt der Reisende selbst, sofern er nicht bei der Übergabe des aufgegebenen Reisegepäcks an den Luftfrachtführer sein Interesse an der Ablieferung am Bestimmungsort betragsmäßig

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15 Die Haftung der Flughäfen wird weder durch ein internationales Übereinkommen noch durch Gemeinschaftsrecht geregelt.

16 Ein elektrischer Rollstuhl kann beispielsweise bis zu 10 000 EUR kosten.

17 Bis zu 1000 SZR (ungefährer Betrag in EUR ausgehend von dem vom IWF festgelegten SZR-Wert am 10.3.2008: 1060 EUR).

angegeben und den verlangten Zuschlag entrichtet hat[18]. Eine spezielle Versicherung für Mobilitätshilfen von Personen eingeschränkter Mobilität wird nur von sehr wenigen Unternehmen und nur für eine ganz geringe Zahl von Flughäfen angeboten. Die Mehrzahl der Luftfahrtunternehmen und Flughäfen bietet keinen speziellen Versicherungsschutz für die Beschädigung oder Zerstörung von Rollstühlen oder Mobilitätshilfen an.

Aus der Studie geht hervor, dass nur eine Minderheit der EU-Luftfahrtunternehmen Personen eingeschränkter Mobilität die Möglichkeit gibt, eine Erklärung über einen höheren Wert ihrer Mobilitätshilfen abzugeben, den sie dann entsprechend geltend machen können. Einige dieser Unternehmen beschränken die Wertzuschlagserklärung auf einen Betrag, der über dem durch internationale Regeln und EU-Vorschriften festgelegten Entschädigungsniveau liegt, aber trotzdem nicht die tatsächlichen Kosten der Mobilitätshilfe deckt. Mehrere Gesellschaften wiesen darauf hin, dass bei einer Wertzuschlagserklärung ein Zuschlag erhoben wird, der vom Reisenden zu entrichten ist.

Alle Betroffenen stimmen darin überein, dass den Personen eingeschränkter Mobilität nicht unmittelbar die Kosten dafür weitergegeben werden dürfen, dass ihren Bedürfnissen entsprochen wird. Nur wenige haben jedoch daraus die logische Schlussfolgerung gezogen, bei Beschädigung oder Verlust der Mobilitätshilfe die Kosten voll zu erstatten. In der Verordnung wird zwar der Grundsatz festgeschrieben, dass Hilfe für Personen eingeschränkter Mobilität ohne zusätzliche Kosten geleistet wird[19], es ist jedoch kein konkreter Entschädigungsbetrag vorgesehen – dieser soll dann „gemäß den internationalen, gemeinschaftsrechtlichen und nationalen Rechtsvorschriften“ geregelt werden[20].

Es ist darauf hinzuweisen, dass im Schienenverkehr die Eisenbahngesellschaften nach den Rechtsvorschriften der Gemeinschaft Schadensersatz in voller Höhe leisten müssen, falls das Eisenbahnunternehmen für den vollständigen oder teilweisen Verlust oder die Beschädigung von Mobilitätshilfen haftet[21].

3.2.4. Die Definition von „Reisegepäck“ - Einbeziehung oder Ausschluss von Mobilitätshilfen

Die Organisationen, die Personen eingeschränkter Mobilität vertreten, sowie die meisten Zivilluftfahrtbehörden, die sich an der Umfrage in Verbindung mit der Studie beteiligten, vertreten die Auffassung, dass Mobilitätshilfen nicht als Reisegepäck betrachtet werden sollten. Der Grund für diesen Ausschluss ist, dass auf Mobilitätshilfen nicht die Regelungen über Haftungsbeschränkungen der Luftfahrtunternehmen Anwendung finden sollten, die in den internationalen Übereinkommen festgelegt sind. Luftfahrtunternehmen und Flughäfen sollten die Kosten für verloren gegangene Mobilitätshilfen oder deren Reparatur vollständig erstatten.

Die für die Vereinigten Staaten geltende Regelung des „Air Carrier Access Act“ (ACAA) enthält keine Begriffsbestimmung für Mobilitätshilfen und schließt sie nicht ausdrücklich aus

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18 Entsprechend Artikel 22 Absatz 2 des Montrealer Übereinkommens und Artikel 1 Absatz 5 der Verordnung Nr. 889/2002.

19 Siehe Artikel 8 der Verordnung Nr. 1107/2006.

20 Siehe Artikel 12 der Verordnung Nr. 1107/2006.

21 Verordnung (EG) Nr. 1371/2007 des Europäischen Parlaments und des Rates vom 23. Oktober 2007 über die Rechte und Pflichten der Fahrgäste im Eisenbahnverkehr, ABl. L 315 vom 31.12.2007, Artikel 25.

der Definition von Reisegepäck aus. Sie sieht jedoch für alle Luftfahrtunternehmen, die Inlandstrecken in den Vereinigten Staaten bedienen wollen, die uneingeschränkte objektive Haftung ohne Obergrenze bei Vorfällen mit Mobilitätshilfen vor[22]. Das US-Verkehrsministerium beabsichtigt, in Kürze die Vorschriften zur Umsetzung der ACAA-Regelung zu ändern, um die meisten der derzeit für US-Luftfahrtunternehmen geltenden Vorschriften aus Teil 382 in Bezug auf behinderte Menschen, unter anderem die Behandlung von Mobilitätshilfen und anderen Hilfsgeräten, auch auf ausländische Luftfahrtunternehmen anzuwenden, die Strecken von und nach den USA bedienen.

Die geltenden kanadischen Rechtsvorschriften in Bezug auf Personen eingeschränkter Mobilität finden sich in Teil VII der Air Transport Regulations: Terms and Conditions of Carriage Regulations[23]. Die nationale Verkehrsbehörde Kanadas definiert offenbar Mobilitätshilfen als prioritär aufgegebene persönliche Gegenstände, auch wenn die Mobilitätshilfen nicht aus der Begriffsbestimmung für Reisegepäck im engeren Sinn ausgenommen sind. Auf diese Weise verhindert die kanadische Verkehrsbehörde, dass auf kanadischem Gebiet tätige Luftfahrtunternehmen die in den internationalen Übereinkommen enthaltenen Bestimmungen über Haftungsbeschränkungen bei Zerstörung, Beschädigung oder Verlust von Reisegepäck auf Mobilitätshilfen anwenden. Es besteht eine Vereinbarung, dass ein Luftfahrtunternehmen, das in Kanada landet, die kanadischen Bestimmungen einhalten muss. Diese Vereinbarung wird offenbar von allen ausländischen Luftfahrtunternehmen respektiert.

4. DIE ANTWORT: VERORDNUNG NR. 1107/2006

4.1. Quantitatives Ziel: Reduzierung der Zahl der Vorfälle

Angesichts der Tatsache, dass - wie unter Punkt 3.1 ausgeführt - spezielle Verfahren für den Umgang mit Rollstühlen oder anderen Mobilitätshilfen fehlen und nicht auf allen Flughäfen und durch alle Luftfahrtunternehmen Schulungsmaßnahmen zum Umgang mit Rollstühlen oder anderen Mobilitätshilfen angeboten werden, könnten Verbesserungen leicht erzielt werden. In der Verordnung Nr. 1107/2006 wurden Maßnahmen zur Behebung dieser Mängel vorgesehen, indem sowohl hinsichtlich der erforderlichen Verfahren als auch hinsichtlich der nötigen Schulung des Personals für eine angemessene Hilfeleistung für Personen eingeschränkter Mobilität Vorschriften erlassen wurden[24].

Diese Vorschriften betreffen unter anderem den Umgang mit Mobilitätshilfen auf dem Flughafen und ihre Beförderung an Bord des Flugzeugs. Daher sollten die Hilfeleistungen der Luftfahrtunternehmen erheblich verbessert und den Bedürfnissen angepasst werden. Durch spezielle Verfahren bei der Abfertigung und durch Schulung des Personals im Umgang mit Mobilitätshilfen werden Arbeitgeber und Arbeitnehmer gleicherweise sensibilisiert und Anzahl und Schwere von Vorfällen sowie die persönlichen und finanziellen Folgen gemildert.

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22 Nach der ACAA-Regelung ist die Benachteiligung behinderter Personen bei Flugreisen untersagt. Das US-Verkehrsministerium erließ eine Vorschrift (14 CFR Teil 382) zur Umsetzung dieser Regelung, in der ausdrücklich auf die Behandlung von Mobilitätshilfen und anderen Hilfsgeräten eingegangen wird.

23 Beförderungsbedingungen auf der Grundlage des kanadischen Beförderungsgesetztes. In Teil V dieses Gesetzes wird die Beförderung behinderter Personen geregelt. Abschnitt 155 dieses Teils V enthält die Bestimmungen in Bezug auf die Beschädigung oder den Verlust von Hilfsgeräten.

24 Siehe Artikel 9 und Artikel 11 der Verordnung.

4.2. Qualitatives Ziel: Minimierung der Folgen eines Vorfalls

Unter Punkt 3.2.1 wird erläutert, dass ein einheitliches Verfahren fehlt, das bei Beschädigung oder Verlust von Mobilitätshilfen prompte Abhilfe ermöglicht. Durch die Verordnung Nr. 1107/2006 wird diese Lücke teilweise geschlossen. Zunächst wird in Anhang I der Verordnung Nr. 1107/2006 in die Definition der Hilfeleistungen von Flughäfen ausdrücklich der Punkt *„Vorübergehender Ersatz beschädigter oder verloren gegangener Mobilitätshilfen, wobei allerdings nicht identische Ausrüstungen gestellt werden müssen“*[25] aufgenommen. Zweitens legen die Flughäfen nach Artikel 9 *„für die in Anhang I genannte Hilfe Qualitätsstandards und die dafür notwendigen Mittel fest“*.

Hinsichtlich der unter Punkt 3.2.2 genannten Unterschiede zwischen Art und Umfang der Haftung von Luftfahrtunternehmen und von Flughäfen ist in Artikel 12 der Verordnung Nr. 1107/2006 festgelegt, dass *„gemäß den internationalen, gemeinschaftsrechtlichen und nationalen Rechtsvorschriften“* zu entschädigen ist.

Die Kommission wird genau beobachten, wie Flughäfen und Luftfahrtunternehmen ihrer Verantwortung in diesem neuen, von der Verordnung vorgegebenen Kontext nachkommen, um zu einem späteren Zeitpunkt zu beurteilen, ob die Aufnahme einer genaueren Definition für die Haftung des Flughafens nach dem Muster der Bestimmungen für Luftfahrtunternehmen in der Verordnung Nr. 889/2002 ratsam ist.

In Bezug auf die unter Punkt 3.2.3 behandelte Höhe des Schadensersatzes und das entsprechende Verfahren ist zu sagen, dass die Zahl der Vorfälle mit Mobilitätshilfen ohnehin klein ist und die neuen Schutzbestimmungen der Verordnung Nr. 1107/2006 dazu beitragen sollten, die Anzahl dieser Vorfälle und ihre Folgen noch weiter einzudämmen. Es ist daher deutlich, dass auch nach einer Änderung der geltenden Schadensersatzregelung die wirtschaftlichen Folgen solcher Unfälle für die Luftfahrtunternehmen und Flughäfen sehr beschränkt blieben.

Schließlich wird unter Punkt 3.2.4 die Frage gestellt, ob Mobilitätshilfen als „Reisegepäck“ gelten sollten. Dies ist ein wichtiger Punkt, denn davon hängt, da die in den internationalen Übereinkommen festgelegten Haftungsobergrenzen nur für Reisegepäck gelten, die Höhe des Schadensersatzes ab. Einige der größten Partner der Gemeinschaft im Luftverkehr haben bereits detaillierte Verwaltungsverfahren in Bezug auf die Rechte der Personen eingeschränkter Mobilität in diesem Zusammenhang ausgearbeitet. Grob gesagt sehen diese Verwaltungsverfahren die verschuldensunabhängige Haftung und die uneingeschränkte Schadensersatzpflicht für die Luftfahrtunternehmen und in einigen Fällen für die Flughäfen vor. Europäische Luftfahrtunternehmen, die Transatlantikrouten nach Kanada oder Inlandsstrecken in den USA oder Kanada bedienen, erfüllen diese Vorschriften außerhalb der Grenzen der Gemeinschaft bereits. Einige Gesellschaften haben bereits ihre Haftungsbeschränkung durch ihre eigene Kundenpolitik oder ihre internen Qualitätsstandards aufgehoben.

Wie diese Beispiele zeigen, sind mehrere Ansätze denkbar, um die im Falle der Zerstörung, der Beschädigung oder des Verlusts von Mobilitätshilfen zahlbare Entschädigung an den tatsächlichen Wert solcher Geräte anzunähern. Dies kann erreicht werden, indem der Begriff „Reisegepäck“ so ausgelegt oder definiert wird, dass Mobilitätshilfen ausgeschlossen sind,

[25] Siehe Anhang I der Verordnung Nr. 1107/2006.

solche Geräte jedoch im Rahmen der geltenden internationalen Übereinkommen weiterhin rechtlich abgedeckt sind, oder indem die in diesen internationalen Übereinkommen vorgesehenen Entschädigungshöchstgrenzen gestrichen oder geändert werden. Außerdem könnten Luftfahrtunternehmen und Lufthäfen sich freiwillig dazu entschließen, auf die derzeitige Beschränkung ihrer Haftung für Mobilitätshilfen zu verzichten.

Nach Ansicht der Kommission wäre es sinnvoll, diese Frage auf Ebene der ICAO zu erörtern, mit dem Ziel, alle im Montrealer Übereinkommen festgelegten Entschädigungshöchstbeträge für den Verlust, die Beschädigung oder die Zerstörung von Mobilitätshilfen zu streichen oder zu ändern. Die Kommission weiß, wie schwierig es ist, ein internationales Übereinkommen neu auszuhandeln. Die Tatsache, dass einige ICAO-Mitglieder einseitig beschlossen haben, ihre Vorschriften zu ändern und auf ihren Inlandsstrecken vollen Schadensersatz für Mobilitätshilfen vorzuschreiben, lässt jedoch die Vermutung zu, dass eine solche EU-Initiative politische Unterstützung finden könnte.

Mittelfristig wird nach Ansicht der Kommission durch die uneingeschränkte Anwendung der Verordnung Nr. 1107/2006 sowohl die Überwachung als auch die Durchsetzung geltender Rechte von Personen eingeschränkter Mobilität in Bezug auf die Entschädigung für und/oder den Ersatz zerstörter, beschädigter oder verloren gegangener Mobilitätshilfen und auch die Art der Hilfeleistung bei einem Unfall verbessert. Bevor sie beschließt, einen Legislativvorschlag zu diesem Thema vorzulegen, hält es die Kommission für vernünftig, die Anwendung der Verordnung Nr. 1107/2006 abzuwarten und dann zu prüfen, ob sie sich günstig durch eine Abnahme der Fallzahlen auswirkt. Angesichts der Praxis in anderen Ländern und der Rechtsvorschriften der Gemeinschaft im Schienenverkehr fordert die Kommission vorläufig die Luftfahrtunternehmen auf, ihre Haftungsbeschränkung freiwillig aufzugeben.

5. SCHLUSSFOLGERUNGEN

(1) Die Kommission erinnert Flughäfen und Luftfahrtunternehmen an ihre Verpflichtung, für die Ausarbeitung der Qualitätsstandards und die erforderlichen Schulungen und Verfahren in Bezug auf den Umgang mit Mobilitätshilfen und auf die Rechte der Fluggäste eingeschränkter Mobilität bei Unfällen mit ihren Mobilitätshilfen zu sorgen; diese Verpflichtung ergibt sich insbesondere aus dem ECAC-Dokument Nr. 30 und seinen einschlägigen Anhängen.

(2) Hinsichtlich des Entschädigungsbetrags, der stärker an den tatsächlichen Wert der Ausrüstung angenähert werden sollte, wird die Kommission dem Rat vorschlagen, dass die Gemeinschaft in Zusammenarbeit mit den Mitgliedstaaten eine Initiative im Rahmen der ICAO einleitet, um den Begriff „Reisegepäck“ zu klären oder zu definieren, und auf diese Weise Mobilitätshilfen auszunehmen oder aber statt dessen alle im Montrealer Übereinkommen vorgesehenen Haftungsbeschränkungen in Bezug auf den Verlust, die Beschädigung oder die Zerstörung von Mobilitätshilfen zu streichen oder zu ändern.

(3) Die Kommission fordert die Luftfahrtunternehmen in der EU auf, ihre derzeitigen Haftungsbeschränkungen freiwillig aufzugeben um den Entschädigungsbetrag stärker an den tatsächlichen Wert der Mobilitätshilfen anzunähern.

(4) Die Kommission wird zwischen 2008 und 2009 überprüfen, inwieweit die Mitgliedstaaten, Luftfahrtunternehmen und Flughäfen den Rechtsvorschriften der Gemeinschaft nachkommen, unter anderem der Verordnung Nr. 1107/2006.

(5) Die Kommission fordert die Betroffenen auf, umfassender und systematischer Daten im Zusammenhang mit Schadensanzeigen in Bezug auf Mobilitätshilfen zu sammeln.

(6) Die Kommission wird in den Bericht nach Artikel 17 der Verordnung Nr. 1107/2006 ein Kapitel über die Rechte von Personen eingeschränkter Mobilität aufnehmen, deren Mobilitätshilfen verloren gegangen sind oder beschädigt oder zerstört wurden. Weiter wird sie die Entwicklungen nach Inkrafttreten der Verordnung Nr. 1107/2006 und die Fortschritte der unter Punkt (2) dieser Schlussfolgerungen genannten Initiative innerhalb der ICAO bewerten. Sollte diese Bewertung zeigen, dass die erforderlichen Verbesserungen nicht erzielt wurden, wird die Kommission einen geeigneten Legislativvorschlag vorlegen, um die im Gemeinschaftsrecht festgelegten Rechte von Fluggästen zu stärken, deren Rollstühle oder andere Mobilitätshilfen während der Abfertigung auf dem Flughafen oder während der Beförderung an Bord des Luftfahrzeugs zerstört oder beschädigt werden oder verloren gehen; dies umfasst auch eine Änderung der derzeit geltenden Entschädigungshöchstgrenzen und die dringend erforderlichen Verbesserungen bei der Festlegung der Haftungsverpflichtungen von Flughäfen.

EVALUATION OF REGULATION 1107/2006

Final report

Main report and Appendices A-B

June 2010

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EXECUTIVE SUMMARY

Background

1. Regulation 1107/2006, which took full effect in July 2008, introduced new protections for people with reduced mobility when travelling by air. Key provisions included:

   - The right, subject to certain derogations, not to be refused embarkation or reservation.
   - The right to be provided with assistance at airports, at no additional cost, in order to allow access to the flight.
   - Responsibility for provision of assistance to PRMs at airports is placed with the airport management company; previously, these services were usually contracted by airlines.
   - The costs of providing assistance at airports can be recovered from airlines through transparent and cost-reflective charges levied for all passengers.

2. The Regulation also required Member States to introduce sanctions into national law for non-compliance with the Regulation, and create National Enforcement Bodies (NEBs) responsible for enforcement of the Regulation. The Regulation applies to all flights from and within the European Union (EU), as well as to flights to the EU operated by EU-registered carriers.

3. The Regulation requires the Commission to report to the Council and the Parliament on its operation and results, and if appropriate to bring forward new legislative proposals. In order to inform this report, the Commission has asked Steer Davies Gleave to undertake an independent review of the Regulation.

Factual conclusions

4. Our review has gathered evidence on the implementation of the Regulation through in-depth discussions and consultation with stakeholders, supplemented by desk research. Stakeholders included airports, airlines, NEBs and PRM organisations. The evidence gathered shows that most of the airports and airlines examined for the study have implemented the requirements of the Regulation. However, there is significant variation in the quality of service provided by airports, and in the policies of airlines on carriage of PRMs. We also identified relatively little activity by NEBs to monitor the Regulation's implementation, or to promote awareness of the rights it grants.

5. Conclusions regarding each of the groups of stakeholders are set out below.

Airlines

6. The key issue we identified in the study is the lack of consistency in policies on carriage, and the significant variation between carriers. For example, Ryanair permits a maximum of 4 PRMs who require assistance on any flight, and Brussels Airlines permits at most 2 on most aircraft; in contrast, British Airways does not impose any restrictions. There is similar variation in policies on whether PRMs have to be accompanied. Approval of policies is the responsibility of national safety regulators, however typically airlines propose policies which are then approved with little or no challenge by the licensing authority (often the same organisation as the NEB).

Although the rationale for these restrictions is safety, there is limited evidence to justify them. Limitations on carriage of PRMs are specifically prohibited by the equivalent US regulation on carriage of PRMs[1].

7. All airlines in the study sample had published some information on carriage of PRMs, however 13 of the 21 did not publish on their websites all of the restrictions on carriage of PRMs that they imposed. Most stated in their Conditions of Carriage that PRMs would not be refused, but this was usually conditional on pre-notification; this may be an infringement of the Regulation.

8. The Regulation encourages PRMs to pre-notify their requirements for assistance to airlines, which are then required to pass on this information to the relevant airports. In theory this should both ensure that PRMs promptly receive the services they need, and allow airports to minimise resourcing costs through efficient rostering. However, our research found that levels of pre-notification too low to allow this: at 11 of 16 airports for which we were provided with information, pre-notification rates were lower than 60%.

9. PRM representative organisations informed us that loss or damage to mobility equipment could still be a significant issue. The Regulation requires airports to handle mobility equipment but does not introduce any new provisions which reduce the risk of loss or damage, or increase the amount of compensation payable, which is restricted by the limits defined in the Montreal Convention.

Airports

10. All airports in the study sample had implemented the Regulation, although we were informed that the Regulation had not been implemented at all at regional airports in Greece. Most had subcontracted the service through a competitive tender; several informed us that they were considering or were in the process of retendering the service, generally because service quality in the initial period had not been sufficient.

11. The frequency with which the PRM services are used varies considerably between airports: among the airports for which we have been able to obtain data use of services varies by a factor of 15, although in most cases between 0.2% and 0.7% of passengers requested assistance.

12. Most airports in the case study States had published quality standards, typically following the format of the minimum recommended standards in ECAC Document 30. Most undertook some form of internal monitoring of performance, however few used external checks of service such as ‘mystery shoppers’. Most stakeholders informed us that airports were providing an adequate level of service quality.

13. Variability in airport service quality (including safety) was reported by PRM organisations and some airlines, but this is subjective and hard to quantify. Airports reported variation in equipment and facilities provided, and we observed significant

[1] US Department of Transport 14 CFR part 382.

variation in the level of training given to personnel providing services to PRMs. In the sample examined, training varied between 3 and 14 days, ostensibly to provide the same services.

14. Charges levied by airports varied considerably (between €0.16 and €0.90 per departing passenger), and we were unable to identify any apparent link to frequency of service use, price differentials between States or service quality. Airports in Spain and mainland Portugal levied uniform charges across all airports managed by the national airport company; this may be an infringement of the Regulation. Many airlines believed consultation by airports regarding charges was poor; Cyprus, Spain and Portugal were identified as particular issues.

NEBs

15. All States except Slovenia have designated NEBs; in most cases the NEB is the CAA, and is the same organisation as the NEB for Regulation 261/2004. All States except Poland and Sweden have introduced penalties into national law for infringements of the Regulation, although several have not introduced sanctions for all possible infringements. The maximum sanction which can be imposed varies significantly, and in some States may not be at a high enough level to be dissuasive; for example, in Estonia, Lithuania and Romania the maximum sanction is lower than €1,000.

16. Most States have received very few complaints to date; in total 1,110 received to date, compared to a total of 3.2m passengers assisted in 2009 across 21 case study airports. 80% of all complaints regarding infringements of the Regulation had been submitted to the UK NEBs; this may be the result of national law in the UK which permits financial compensation to be claimed under the Regulation. No sanctions have yet been imposed, although the NEBs for France, Portugal and Spain have opened proceedings to impose fines. In a number of States we identified significant practical difficulties in imposing and collecting sanctions, typically in relation to imposing fines on carriers registered in other States. These issues are in most cases equivalent to those that apply in relation to Regulation 261/2004[2].

17. Although most case study NEBs had taken some action to monitor the services provided under the Regulation beyond the monitoring of complaints (14 out of 16 had undertaken at least one inspection of airports), in most cases this was limited. Most inspections focussed on checks of systems and procedures, and did not assess the experience of passengers using the services. Monitoring of PRM charges was also poor: NEBs in 9 of the 16 States had undertaken no direct monitoring of airport charges.

18. Few NEBs had made significant efforts to promote awareness of the Regulation by passengers, as required by the Regulation; only two informed us of national public awareness campaigns they had undertaken. This lack of promotion undermines the claims of some NEBs that reviewing complaints is sufficient to monitor the

[2] See Evaluation of Regulation 261/2004, February 2010: http://ec.europa.eu/transport/passengers/studies/doc/2010_02_evaluation_of_regulation_2612004.pdf.

implementation of the Regulation. Awareness of the NEBs' performance appeared in general to be poor: most stakeholders contacted for the study held no opinion on the effectiveness of enforcement by NEBs, and many informed us that this was because they had had no interaction with them.

Other issues

19. A particular issue raised by stakeholders was the conflict between the Regulation and the equivalent US legislation (14 CFR Part 382), which applies to European carriers operating flights to/from the US, and other flights where these are operated as codeshares with US carriers. The most significant conflict is the allocation of responsibilities for assistance: the Regulation requires airports to arrange the provision of services to PRMs, while under the US legislation it is the airlines that have this responsibility. The US legislation also prohibits airlines from imposing numerical limits on PRMs, and from requiring pre-notification from PRMs. This has caused issues for carriers who are required to comply with pieces of legislation that conflict, although the US legislation does allow carriers to apply for a waiver where there is a conflict of laws.

20. A number of other issues regarding specific Articles are discussed in the section below on recommended changes to the Regulation.

Recommendations

21. We have made a number of recommendations, addressing:

- improvements to the implementation of the Regulation which would not require any legislative changes; and
- further recommendations which could only be implemented through amendment to the text of the Regulation.

Measures to improve the operation of the Regulation

22. Several airlines argued in their submissions to the study that they should be permitted to provide or contract their own PRM assistance services, as they could provide this more cost-efficiently than airports. We believe that this could create an incentive to minimise the service provided and hence would risk a reduction in service quality. Whilst there were initially significant issues with the quality of PRM service provision at certain airports, most stakeholders believed that these issues had now been addressed, and our most important recommendation is therefore that allocation of responsibility for PRM services to airports should not be amended.

23. Many of the concerns raised regarding airports relate to inconsistency of application of the Regulation. To address this, we suggest that the Commission should:

- improve provision of information regarding accessibility of airports, through a centralised website listing factors such as maximum likely walking distance within an airport, means used for access to aircraft, and any facilities available for PRMs;
- develop and share best practice on contracting of PRM service providers, both to improve the content and structure of the contracts used and therefore reduce

the likelihood of unnecessary retendering, and to recommend methods of cooperation; and

- develop and share best practice advice on training of staff providing PRM services, so that a more consistent standard of service is provided.

24. Similarly, many of the concerns raised regarding airlines also relate to inconsistency of application of the Regulation, in particular to inconsistent policies on carriage of PRMs. We therefore suggest that the Commission should:

- work with EASA to determine safe policies on carriage of PRMs, in particular to address the wide and unjustifiable variation in airline policies on carriage of PRMs (in particular on numerical limits and circumstances under which PRMs are required to be accompanied); and
- ensure that the airlines we have identified as not publishing clear policies on carriage of PRMs do so, through actions by the relevant NEBs (which could also review airlines outside the study sample for the same reason).

25. Given the current low rates of rates pre-notification, we suggest that the Commission monitor this issue, through encouraging NEBs to collect rates of pre-notification. In future, the Commission should assess the situation and consider either eliminating the requirement for pre-notification or alternatively retaining it and providing passengers and carriers with more incentive to pre-notify.

26. An additional problem reported with pre-notification is where PRMs had pre-notified their requirements for assistance, but then found that this information had not been passed on to airport or airline staff. To address this, and to provide PRMs with evidence that they can use when making a complaint, we recommend that the Commission encourage airlines to provide PRMs with a receipt for pre-notification.

27. The greatest problem identified by the study regarding NEBs was the lack of pro-active measures taken to monitor or enforce the Regulation. In most cases this has not had significant detrimental effect, as most airports and airlines have implemented the provisions of the Regulation, but could become an issue if the situation changes in the future. We suggest that the Commission should encourage all Member States to:

- designate NEBs and introduce penalties for all infringements of the Regulation;
- take measures to inform PRMs of their rights under the Regulation and of the possibility of complaint to the relevant NEB, for example through national promotional campaigns; and
- pro-actively monitor the application of the Regulation (rather than relying on complaints), for example through increased interaction with PRM organisations, and through direct monitoring of quality of service provided.

28. We also recommend that the Commission should, in consultation with stakeholders, develop a detailed good practice guide regarding implementation of the Regulation. This could include sections regarding recommendations on safety limits, the format and content of policies on carriage, and consultation. It could also specify recommended minimum quality standards covering qualitative aspects of the services provided. Publishing voluntary policies such as these would allow potential future amendments to the Regulation to be tested in practice before adoption.

Changes to the Regulation

29. There are some areas where improvements can only be effected through changes to the text of the Regulation. These include minor amendments which we recommend should be implemented as soon as possible, and more significant amendments to be considered in the longer term.

30. The minor amendments we would suggest are:

- Extend Article 11 to require airlines to ensure that the personnel of their ground handling companies are trained to handle mobility equipment.
- Amend Article 8 to make specific PRM charges obligatory for airports wishing to recover costs from users, and therefore ensure costs are transparent, reasonable and cost-related.
- Amend Article 8 to make clear that that PRM charges are airport-specific and cannot be set at a network level.
- Amend Article 14 to require that NEBs must be independent of any bodies responsible for providing services under the Regulation (at present this is not the case in Greece).
- Amend Article 14 to clarify that NEBs are responsible for flights departing from (rather than both departing from and arriving at) airports in their territory, in addition to flights by Community carriers arriving at airports within the State's territory but departing from a third country.
- Amend Recital 17 to be consistent with Article 14, so that both state that complaints regarding the Regulation should be addressed to the NEB of the State where the flight departed, rather that of the State which issued the operating license to the carrier.

31. These changes would improve the functioning of the Regulation in its current form, without making significant changes to its overall approach.

32. A key issue with the Regulation is its lack of detail when compared to equivalent legislation (in particular, the equivalent US regulations on carriage of PRMs); in our view, as a result of this, it leaves too much scope for interpretation and variation in service provision. We suggest that, to ensure greater consistency, and that PRMs' rights are adequately respected, the Commission should consider making the text more detailed and specific about the requirements for airlines and airports. Some key areas in which we suggest that changes could be made are as follows:

- Specify the circumstances under which carriage of PRMs may be restricted (including any numerical limits) or where PRMs may be required to be accompanied[3].
- Clarify the definitions of 'PRM', 'mobility equipment' and 'cooperation'.

[3] This could be implemented either through amendment to this Regulation or through amendment to Commission Regulation (EC) 859/2008

- Clarify whether airlines may levy additional charges for supply of medical oxygen and for multiple seats where one seat is insufficient for the passenger (for example, in the case of obese or injured passengers).
- Extend the Regulation to include a provision requiring airports to publish information on the rights of PRMs (including the right to complain) at accessible points within the airport.

33. It would be necessary to consult with stakeholders about these changes and to undertake an impact assessment, and therefore these changes could not be introduced immediately.

34. We also suggest that the Commission and the Member States should work with other contracting States to amend the Montreal Convention so as to exclude mobility equipment from the definition of baggage. This would address the problem faced by users of technologically advanced wheelchairs, the values of which often substantially exceed the maximum compensation allowable under the Montreal Convention (1,131 SDRs, or €1,370). Although most airlines we contacted for the study informed us that they waived the Montreal limits in this type of situation, several PRM organisations informed us of cases where they did not, and even in the case that an airline voluntarily waives the limit the PRM is in a position of uncertainty.

1. INTRODUCTION

Background

1.1 Approximately 10% of the EU population has some type of disability[4]. Equal access to air transport services is necessary to enable full and equal participation in modern society. In order to ensure equal treatment as far as possible, Regulation 1107/2006 introduced new protections for people with reduced mobility when travelling by air, including the right, subject to certain derogations, not to be refused embarkation or reservation, and the right to be provided with assistance at airports, at no additional cost, in order to allow access to the flight. Before the introduction of the Regulation, there had been some well-publicised examples of carriers charging passengers for the provision of assistance that was essential in order to travel[5].

1.2 The Regulation creates obligations towards disabled persons and persons of reduced mobility (PRMs) for air carriers and their agents, tour operators, airport management companies, and Member States:

- Airlines are prohibited from refusing carriage (except where necessary to comply with safety regulations or where it is physically impossible) and have to provide certain types of assistance on board the aircraft.
- Airlines, their agents and tour operators have to ensure that they can accept notification of the need for assistance at all points of sale, and transmit this information to the airport and the operating air carrier.
- Airport management companies have to provide assistance at the airport, and develop and publish quality standards for this assistance. The costs of providing this assistance can be recovered through transparent and cost-reflective charges levied for all passengers.
- Member States are required to introduce sanctions into national law for non-compliance with the Regulation, create bodies responsible for enforcement of the Regulation, and promote awareness of the rights created by the Regulation and how to complain about infringements.

The need for this study

1.3 Article 17 of the Regulation requires the Commission, by 2010, to report to the Parliament and the Council on the operation and results of the Regulation. In order to inform this report, the Commission requires an independent evaluation of the operation of the Regulation.

This report

1.4 This report is the Final Report for the study. It sets out the work undertaken over the five month duration of the study, and draws conclusions on the current functioning of the Regulation. The recommendations set out in this report were discussed at the final

[4] ECAC document 30, section 5, annex N

[5] For example, on January 2004 a UK court ruled that Ryanair had acted unlawfully by charging a passenger Bob Ross £18 in each direction for wheelchair hire at London Stansted airport

meeting with the Commission.

Structure of this document

1.5 The rest of this report is structured as follows:

- Section 2 summarises the methodology used for this study;
- Section 3 sets out how the Regulation is being applied by airports;
- Section 4 sets out how the Regulation is being applied by airlines;
- Section 5 describes enforcement and complaint handling by NEBs;
- Section 6 summarises stakeholder views on other policy issues relating to the Regulation;
- Section 7 summarises the factual conclusions; and
- Section 8 summarises the recommendations.

1.6 Further detailed information on the policies of airlines regarding carriage of PRMs is provided in Appendices A and B.

1.7 Case studies have been undertaken of complaint handling and enforcement in 16 Member States. These are provided in Appendix C, which, due to its size, is provided as a separate document.

2. RESEARCH METHODOLOGY

Introduction

2.1 This section provides a summary of the research methodology used. It describes:

- the overall approach used;
- the selection of case studies;
- the scope of the desk research that has been undertaken; and
- the stakeholders that have participated in the study, and how they have provided inputs.

Overview of our approach

2.2 The Commission requested us to collect evidence to address a number of questions, most of which can be categorised as either relating to:

- enforcement and complaint handling undertaken by National Enforcement Bodies (NEBs); and
- application of the Regulation by air carriers, their agents, tour operators and airports.

2.3 In order to address these questions, we developed a research methodology divided into two parts:

- case study research; and
- cross-EU interviews and analysis.

2.4 The rationale for this division is that enforcement and complaint procedures are specific to Member States and are therefore best evaluated through a case study approach. It was agreed to undertake case studies of complaint handling and enforcement in 16 Member States as part of this study. The case studies also describe state-specific aspects of airline and airport implementation of the Regulation.

2.5 Key airlines cover the whole of the EU rather than restricting operations primarily to one State (for example, the Irish-registered carrier Ryanair operates domestic flights in the UK, France, Spain and Italy). In addition, the issues faced by airports in implementing the Regulation are, in most cases, not State-specific. Questions relating to the application of the Regulation by airlines and airports have therefore been addressed through a cross-EU approach. Information from both elements of the research has been used for the conclusions, and will be used in the development of recommendations.

2.6 Both the case study and the cross-EU research use a mixture of stakeholder interviews and desk research. The desk research has been useful to supplement the information provided by stakeholders, particularly regarding the charges levied by airports for services to PRMs.

Selection of case study States

2.7 The 16 case study states were selected in agreement with the Commission, with reference to the following criteria:

- The Member States with the largest aviation markets (measured by passenger numbers these are UK, Spain, Germany, Italy, France, Greece, Netherlands and Ireland);
- At least some of the Member States that, at the time the study commenced, had not introduced sanctions into national law;
- Member States in which the structure of the NEB is unusual (for example, in the UK, the Equality and Human Rights Commission is responsible for complaint handling);
- Member States in which airlines are based with which we identified significant issues of non-compliance with Regulation 1107/2006 in our 2008 review of Conditions of Carriage (carriers with some particularly non-compliant terms were based in Denmark and Italy); and
- States covering a wide geographical scope and variation in sizes.

2.8 The case study states are:

- Belgium;
- Denmark;
- France;
- Germany;
- Greece;
- Hungary;
- Ireland;
- Italy;
- Latvia;
- Netherlands;
- Poland;
- Portugal;
- Romania;
- Spain;
- Sweden; and
- United Kingdom.

2.9 In order to present a thorough analysis of the operation of the Regulation across the EU we conducted a more limited programme of data collection and stakeholder interviews in the remaining 11 Member States.

Stakeholder selection and inputs

2.10 The stakeholders important for the study were:

- NEBs;
- Airlines;
- Airport managing bodies; and
- Organisations representing disabled people, and people with reduced mobility (PRM organisations).

2.11 In addition to these, we spoke to cross-EU bodies which represented these organisations at a European level.

National Enforcement Bodies

2.12 We interviewed (face-to-face or by telephone) the NEB(s) notified to the Commission in every case study State, and obtained written responses from the NEBs of all other States.

2.13 We obtained the following information from each NEB:

- The legal basis for complaint handling and enforcement in the Member State;
- The degree of compliance by airlines;
- The degree of compliance by airports;
- Statistics on the number of complaints and the process for handling them;
- Issues relating to enforcement; and
- Any other issues.

2.14 Non-case study states were provided with a shorter question list which, while addressing the areas listed above, does so at a less detailed level.

2.15 Engagement of the NEBs was obtained through a combination of written responses, meetings and telephone interviews, depending on whether the State concerned is one of the 16 case study states. The approach adopted for case study NEB is listed in Table 2.1, together with the final status of contact as we drafted this Report.

TABLE 2.1 STAKEHOLDER INTERVIEWS: CASE STUDY NEBS

Member State	Organisation	Form of input
Belgium	SPF Mobilité et Transport	Written response and face-to-face interview
Denmark	CAA-Denmark (Staetens Luftfarsvaesen)	Face-to-face interview
France	DGAC Sous-direction du tourisme	Face-to-face interview
Germany	Luftfahrt-Bundesamt (LBA) BM für Verkehr, Bau und Stadtentw	Face-to-face interview
Greece	CAA, Air Transport Economics Section CAA, Airports Division	Written response and telephone interview

Member State	Organisation	Form of input
Hungary	Nemzeti Közlekedési Hatóság (Directorate for Aviation) Egyenlő Bánásmód Hatóság (Equal Treatment Authority)	Face-to-face interview
Ireland	Commission for Aviation Regulation	Face-to-face interview
Italy	ENAC - Direzione Centrale Operazioni	Face-to-face interview
Latvia	Civil Aviation Agency	Written response and telephone interview
Netherlands	Inspectie Verkeer en Waterstaat	Written response and face-to-face interview
Poland	Civil Aviation Office	Face-to-face interview
Portugal	Instituto Nacional de Aviação Civil	Face-to-face interview
Romania	Autoritatea Nationala Pentru Persoanele cu Handicap Romanian Civil Aeronautical Authority	Face-to-face interview
Spain	Servicio de inspección y relaciones con usuarios	Written response and face-to-face interview
Sweden	Swedish Civil Aviation Authority	Written response and telephone interview
United Kingdom	Equality and Human Rights Commission (England) Civil Aviation Authority	Face-to-face interview

2.16 We obtained responses from all NEBs in the non-case study States, as shown in Table 2.2. We requested written responses from all non-case study NEBs and these were followed up with telephone interviews where necessary for clarification.

TABLE 2.2 STAKEHOLDER INTERVIEWS: NON-CASE STUDY NEBS

Member State	Organisation
Austria	Civil Aviation Authority
Bulgaria	Civil Aviation Administration Ministry of Transport, Information Technologies and Communications
Cyprus	Department of Civil Aviation
Czech Republic	Civil Aviation Authority
Estonia	Consumer Protection Body
Finland	Civil Aviation Authority
Lithuania	Civil Aviation Administration
Luxembourg	Direction de l'Aviation Civile
Malta	Department of Civil Aviation
Slovakia	Slovak Trade Inspection Ministry of Transport, Posts and Telecommunications, Directorate General of Civil Aviation and Water Transport, Air Transport Department
Slovenia	Ministry of Transport, Directorate of Civil Aviation

Airlines

2.17 20 airlines have been selected to include a sample with variation across several criteria. These are:

- One key airline with major operations in each case study State;
- At a minimum to include the top 10 European airlines measured in terms of passenger numbers;
- Also to include a mix of different airline types (legacy, low cost and charter), States of registration, and sizes; and
- At least 2 non-EU airlines.

2.18 The airlines selected, and their relevance to each of the criteria, is shown in Table 2.3. We were originally planning to consider Air France-KLM as one airline, but various differences (for example, in its Conditions of Carriage) have meant that it is more logical to consider it as two airlines, meaning there are 11 airlines under the 'Top 10 passenger numbers' criterion. We have consequently excluded the 11th (Austrian) from the interview sample, although the airline still forms part of the desk research.

TABLE 2.3 AIRLINE SELECTION CRITERIA

Airline	Case study State coverage		Airline type				
	Selected for case study state coverage	Case study states	Non-EU	Legacy	Low cost	Charter	Top 10 passenger numbers
Aegean Airlines	✓	Greece			✓		
Air Berlin					✓		✓
Air France	✓	France / Netherlands		✓			✓
AirBaltic	✓	Latvia			✓		
Alitalia	✓	Italy		✓			✓
British Airways	✓	UK		✓			✓
Brussels Airlines	✓	Belgium		✓			
Delta			✓	✓			
EasyJet					✓		✓
Emirates			✓	✓			
Iberia	✓	Spain		✓			✓
KLM	✓	Netherlands		✓			✓
Lufthansa	✓	Germany		✓			✓
Ryanair	✓	Ireland			✓		✓
SAS	✓	Denmark / Sweden		✓			✓
TAP Portugal	✓	Portugal		✓			
TAROM	✓	Romania		✓			
Thomas Cook						✓	
TUI (Thomsonfly)						✓	

Wizzair	✓	Hungary / Poland	✓	

2.19 We approached all 21 case study airlines requesting either a face-to-face or telephone interview. The methods they chose to respond are shown in Table 2.4 below.

TABLE 2.4 STAKEHOLDER INTERVIEWS: AIRLINES

Airline	Form of input
Aegean Airlines	Written response and telephone interview
Air Berlin	Input through IACA only
Air France	Telephone interview
AirBaltic	Did not respond
Alitalia	Written response
British Airways	Declined to participate
Brussels Airlines	Did not respond
Delta	Written response
easyJet	Face-to-face interview
Emirates	Did not respond
Iberia	Telephone interview
KLM	Face-to-face interview
Lufthansa	Declined to participate
Ryanair	Face-to-face interview
SAS	Written response
TAP Portugal	Face-to-face interview
TAROM	Face-to-face interview
Thomas Cook	Face-to-face interview
TUI (Thomsonfly)	Input through IACA only
Wizzair	Did not respond

2.20 We also consulted the five main associations representing airlines operating airlines within the EU, listed in Table 2.5 below.

TABLE 2.5 STAKEHOLDER INTERVIEWS: AIRLINE ASSOCIATIONS

Organisation	Full Name	Type of airline represented	Form of input
IATA	International Air Transport Association	Legacy	Written response and telephone interview
ELFAA	European Low Fares Airline Association	European low cost	Face-to-face interview
AEA	Association of European Airlines	European legacy	Face-to-face interview
ERA	European Regions Airlines Association	European regional	Face-to-face interview
IACA	International Air Carrier Association	Leisure / charter	Face-to-face interview

Airports

2.21 The 21 case study airports were selected according to the following criteria:

- All of the top 10 European airports in terms of passenger numbers;
- The main airport in each of the 16 case study Member States; and
- A sample of smaller airports.

2.22 The airports selected under each criterion, and the methods they chose to respond, are shown in Table 2.6. Note that three of the top 10 airports were excluded from the case study consultation as they were operated by the same organisations as others in the top 10. These comprise Paris Orly, London Gatwick, Zaragoza and Barcelona airports which, at the time the study was planned, were managed by the same companies as Paris CDG, Heathrow and Madrid Barajas respectively[6]. These airports do still form part of the desk research, however.

TABLE 2.6 AIRPORT SELECTION CRITERIA

Airport	State	Main airport in case study State	Top 10 passenger numbers	Smaller airport	Form of input
Amsterdam	Netherlands	✓	✓		Face-to-face interview
Athens	Greece	✓			Written response and telephone interview
Bologna	Italy			✓	Face-to-face interview
Brussels	Belgium	✓			Face-to-face interview
Bucharest Otopeni	Romania	✓			Face-to-face interview
Budapest	Hungary	✓			Face-to-face interview
Brussels Charleroi	Belgium			✓	Face-to-face interview
Copenhagen	Denmark	✓			Written response and telephone interview
Dublin	Ireland	✓			Face-to-face interview
Frankfurt Main	Germany	✓	✓		Face-to-face interview
Lisbon	Portugal	✓			Face-to-face interview
London Heathrow	United Kingdom	✓	✓		Face-to-face interview
London Luton	United Kingdom			✓	Face-to-face interview
Madrid Barajas	Spain	✓	✓		Face-to-face interview*
Munich	Germany		✓		Not able to obtain a response
Paris Charles De Gaulle	France	✓	✓		Face-to-face interview
Riga	Latvia	✓			Written response and telephone interview
Roma Fiumicino	Italy	✓	✓		Written response and telephone interview

[6] Gatwick ceased to be managed by BAA, the operator of Heathrow, on 2 December 2009

Stockholm	Sweden	✓			Written response and telephone interview
Warsaw	Poland	✓			Face-to-face interview
Zaragoza	Spain			✓	Face-to-face interview*

* Interview with AENA covered all State airports in Spain

Selection of PRM organisations and other passenger groups

2.23 In each case study State we selected a PRM organisation representing all disabilities and impairments at a national level. We initially approached the national council organisations that are members of the European Disability Forum (EDF); however in a small number of cases we were unable to obtain a response from this organisation and had to contact an alternative organisation in their place. The table also includes four cross-EU PRM organisations.

TABLE 2.7 PRM AND PASSENGER ORGANISATIONS BY CASE STUDY STATE

State	Organisation	Form of input
Belgium	Belgium Disability Forum	Telephone interview
Denmark	Danske Handicaporganisationer (DH; Disabled Peoples Organisations Denmark)	Face-to-face interview
France	Conseil Français des personnes Handicapées pour les questions Européennes (CFHE ; French Council of Disabled People for European Affairs)	Telephone interview
Germany	Deutscher Behinderten Rat (DBR; German Disability Council)	Unable to obtain a response
Greece	National Confederation of Disabled People (ESAEA)	Written response and telephone interview
Hungary	National Council of Federations of People with Disabilities (FESZT)	Written response and telephone interview
Ireland	People with Disabilities in Ireland (PWDI)	Face-to-face interview
Italy	Forum Italiano sulla Disabilità (FID; Italian Disability Forum)	Face-to-face interview
Latvia	Latvian Umbrella Body for Disability Organisations (SUSTENTO)	Written response and telephone interview
Netherlands	CG-Raad*	Face-to-face interview
Poland	Polskie Forum Osob Niepelnosprawnych (PFON; Polish Disability Forum)	Face-to-face interview
Portugal	Confederação Nacional dos Organismos de Deficientes (CNOD; National Confederation of Organisations of Disabled People)	Unable to obtain a response
Romania	National Disability Council (CNDR)	Face-to-face interview
Spain	Fundación ONCE*, on request of Comité Español de Representantes de Personas con Discapacidad (CERMI)	Face-to-face interview
Sweden	Swedish Disability Federation (HSO)	Written response and telephone interview
United Kingdom	UK Coalition for Disability Rights in Europe (UKCDRE)	Telephone interview

EU	European Disability Forum	Face-to-face interview
EU	European Blind Union	Face-to-face interview
EU	European Union of the Deaf	Written response and telephone interview
EU	Inclusion Europe	Declined to respond

* Not a national council organisation member of EDF

Selection of other organisations

2.24 In addition to the stakeholders listed above, we contacted a number of cross-EU organisations. These comprised:

- **Passenger organisations:** the European Passenger Federation;
- **Travel agent associations:** ECTAA;
- **Airport association:** ACI Europe; and
- **Advisory bodies:** EASA, ECAC.

2.25 At the level of Member States, there were stakeholders which did not correspond to the categories described so far, but which we believed would provide useful information. These organisations were as follows:

- **Wings on Wheels (UK):** This organisation provides package holidays tailored to the needs of disabled people.
- **Thomas Cook, TUI:** Elements of the Regulation apply to travel agents as well as to airlines.
- **Air Transport Users Council (UK):** Prior to the introduction of the Regulation, this organisation had handled complaints from disabled passengers regarding travel by air, and as a result continued to receive some complaints after the Regulation came into force. In addition, the AUC is the only government-funded body in the EU specifically to represent the interests of air passengers

2.26 The form of input adopted by each stakeholder is shown in Table 2.8.

TABLE 2.8 STAKEHOLDER INTERVIEWS: OTHER ORGANISATIONS

State	Association name	Form of input
EU	ECTAA	Written response
EU	EPF	Did not respond
EU	ACI Europe	Face-to-face interview
EU	EASA	Written information provided
EU	ECAC	Face-to-face interview
United Kingdom	Wings on Wheels	Unable to obtain a response
Germany	Thomas Cook	Face-to-face interview
United Kingdom	TUI	Through IACA only
United Kingdom	Air Transport Users Council	Face-to-face interview

Desk research

2.27 The main objectives of the desk research were:

- To evaluate the extent to which air carriers demonstrate compliance with the Regulation through published information, such as Conditions of Carriage and policies on carriage of PRMs; and
- The extent to which airports have complied with the requirement to develop and publish PRM quality standards, as specified in Article 9 of the Regulation, and the content of these standards.

2.28 Conclusions emerging from the desk research were supplemented by the information collected through stakeholder interviews.

Airlines

2.29 The research methodology employed for this part of the study was based on a review of the websites of the 21 case study airlines listed above. Although the focus was on the English language version of the websites, versions in other languages were checked to check whether additional information was provided.

2.30 Three key sources of information were surveyed from each website:

- Conditions of Carriage, with particular regard to the conditions set out for the carriage of PRMs;
- Other policies on the carriage of PRMs: a more detailed search across the airline's website for any policies and relevant information on PRM travel; and
- Options to notify carriers of assistance requirements.

Airports

2.31 Again, the research conducted for this part of the study was internet-based. The websites of each of the case study airports was surveyed against the following criteria:

- whether the airport publishes quality standards;
- how easy these are to find;
- the content of the standards; and
- whether the airport publishes details of its performance against the standards.

Review of relevant legislation and other documentation

2.32 We also reviewed airline and airport policies with reference to other applicable legislation and guidance. The only other EU-wide legislation which relates to the carriage of PRMs by air is EU-OPS 1 (Commission Regulation 859/2008). In addition, many EU carriers which operate flights to the US are also covered by the corresponding US regulation (14 CFR Part 382, Nondiscrimination on the Basis of Disability in Air Travel); this is significantly different from Regulation 1107/2006 and this has an impact on the operating procedures of some carriers.

2.33 Other current guidance includes:

- ECAC Document 30;
- JAR-OPS 1 Section 1;
- JAA Temporary Guidance Leaflet (TGL) No. 44; and
- UK Department for Transport (DfT), *Access to Air Travel for Disabled Persons and Persons with Reduced Mobility – Code of Practice.*

3. APPLICATION OF THE REGULATION BY AIRPORTS

Introduction

3.1 One of the most fundamental changes introduced by the Regulation was the change in responsibility for provision of assistance to PRMs: where previously these services were provided by airlines, the Regulation requires airports to provide them, and permits them to pass on the associated costs to users, provided this is done in a fair and transparent manner. The Regulation also requires airports handling over 150,000 passenger movements per year to develop and publish quality standards for assistance. The detailed requirements are set out in the following section.

3.2 In order to assess how airports are implementing these requirements, we met or sought responses from a sample of airports selected under the criteria set out above (see 2.21). The information gathered was supplemented by tours of the services provided at certain airports, by interviews with other stakeholders who gave their views on service provision, and by desk research. The desk research included analysis of the charges and quality standards set out by the airports in the sample.

Requirements of the Regulation

3.3 As noted above, the Regulation places responsibility for provision of assistance with the airport, whereas previously assistance had been provided by ground handling companies on the basis of contracts with individual airlines. The Regulation requires each airport to provide a uniform service quality for all airlines that it handles (except where an airline requests a higher level of service). The key requirements for the PRM assistance service are summarised below:

- **Designated points:** Airports are required to designate points inside and outside the terminal building at which PRMs can announce their arrival at the airport and request assistance. These must be developed in cooperation with airport users and relevant PRM organisations, must be clearly signed and must offer basic information about the airport in accessible formats.
- **Assistance:** Airports must provide assistance to PRMs so that they are able to take the flight for which they hold a reservation, providing that they have pre-notified their requirements and arrive with sufficient time before the departure of their flight. If they have not pre-notified, the airport must make all reasonable efforts to enable to them to take their flight. For PRMs on arriving flights, the airport must provide assistance to enable them to leave the airport or reach a connecting flight. The assistance provided should be appropriate to the individual passenger. An airport may contract for these services to be provided by another company, in compliance with quality standards (discussed below).
- **Charges:** An airport cannot charge a PRM for this service, but may levy a specific charge on airport users for it. The charge must be reasonable, cost-related and transparent, and the accounts for these services must be separated from its other accounts. The charge must be shared between airport users in proportion to the total number of passengers carried to and from the airport by each. If an airport wishes to contract for services or levy a charge, both must be done in cooperation with airport users through the Airport Users Committee (AUC).

- **Quality standards:** Airports with over 150,000 annual passenger movements must set and publish quality standards for these services, and decide resource requirements to meet them, in cooperation with airport users and PRM organisations. The standards must take account of relevant policies and codes, such as the ECAC Code of Good Conduct in Ground Handling for Persons with Reduced Mobility (ECAC Document 30). An airline can agree with an airport to receive a higher standard of service, for an additional charge.
- **Training:** All employees (including those employed by sub-contractors) providing direct assistance to PRMs should be trained in how to meet their needs. Disability-equality and disability-awareness training should be provided to all airport personnel dealing directly with the travelling public, and all new employees should attend disability−related training.

Categories of PRM defined by carriers and airports

3.4 The Regulation covers passengers with a wide range of impairments for which the needs for assistance are different. Although each individual is different, airlines and airports find it helpful to apply some categorisation when referring to the needs of different passengers. The most commonly used categorisation is the list of Special Service Request (SSR) codes defined by IATA. These categories are:

- **WCHR:** Wheelchair (R for Ramp). Passengers who are able to ascend and descend steps and move about inside the aircraft cabin, but who require a wheelchair or other assistance for longer distances (e.g. between the terminal and the aircraft).
- **WCHS:** Wheelchair (S for Steps): Passengers who cannot ascend or descend steps, but can move about inside the aircraft cabin. They require a wheelchair for the distances to and from aircraft and must be assisted up and down any steps.
- **WCHP:** Wheelchair (P for Paraplegic). Passengers with a disability of the lower limbs who have sufficient personal autonomy to take care of themselves, but who require assistance to embark and disembark and can move about inside the aircraft cabin only with the assistance of an onboard wheelchair.[7]
- **WCHC:** Wheelchair (C for Cabin Seat). Passengers who are completely immobile, and who can move about only with the assistance of a wheelchair or other means, and require this assistance at all points from arrival at the airport to seating (which may be fitted to their specific needs) on board the aircraft, and the reverse process on arrival.
- **BLND:** Blind or visually impaired passengers.
- **DEAF:** Deaf or hearing impaired passengers, and passengers who are deaf without speech.
- **BLND/DEAF:** Passengers who are both visually and hearing impaired, and who can only move about with the assistance of an accompanying person.
- **DPNA:** Disabled passengers with intellectual or developmental disabilities who need assistance.
- **MEDA:** Passengers whose mobility is impaired due to illness or other clinical reasons, and who are authorised to travel by medical authorities.

[7] This code is not widely used or universally recognised at present

- **STCR:** Passengers who can only be transported on a stretcher.
- **MAAS:** Meet and Assist. All other passengers requiring special assistance.

3.5 Some airlines use different categorisations. For example, Ryanair uses a more detailed classification system with 16 categories that also identify, for example, whether the passenger is travelling with their own wheelchair.

3.6 In addition to the codes above which describe the needs of the passenger, when referring to wheelchair users airlines may also add a description of the type of wheelchair which will be carried. The codes used are WCMP for manual power, WCBD for dry cell battery and WCBW for wet cell battery. These codes are useful for planning the type of assistance which will be necessary to transport them, for example if they require preparation or disassembly.

Services actually provided by airports

3.7 All of the case study airports had implemented the Regulation, and were providing the required services in some form. We were given tours of the services provided at several of the airports we visited. From these, and descriptions of services given in interviews, we have drawn together a description of a typical process by which the services required by the Regulation are provided.

Departures

Pre-notification	Almost all airports and airlines have contracted SITA (a company providing aviation information technology) to provide a telex or email service for the purpose of passing notification of the needs of PRMs (see 4.64). For each series of flights for a given aircraft, any assistance required is communicated via a telex which includes a four letter code describing the category of disability of each PRM on each flight (see 3.4). This message is known as the passenger assistance list (PAL); if requirements change prior to the flight this is updated by a change assistance list, or CAL. Where a request for assistance is made by a PRM at least 48 hours before the published departure time for the flight, the airline is obliged to transmit this information to the relevant airports at least 36 hours before the published departure time.
Recording of notification	This information arrives at a telex server in the dispatch office of the airport PRM service provider. The telex describes: the time of the flight, the flight number, the names of passengers on board requiring assistance, and the category of disability of these passengers. The information from this telex is used to update the service provider's task management system, either via an automatic link, or via manual input. The task management system can be purposely developed task management software, or in some airports a piece of paper containing notes on expected assistance. Information regarding requests for assistance may also arrive via email. Airlines and airports may use email for several reasons: some airlines (such as non-EU charter carriers) may not have a SITA terminal; larger groups (such as operators of cruises) may send an off-line message in addition to PAL/CAL messages.
PRM arrives and is assigned an assistant	Each new request for assistance creates a new task; if a passenger arrives without notification, the task is created on their arrival. The task management software lists PRMs requiring assistance as tasks, and sets out expected arrival times and real-time information about their flights. When the passenger announces their arrival (either via a designated point or a check-in desk), the type of assistance they require is confirmed, and the task is assigned to one or more available assistants. At some airports, assistants carry personal digital assistants (PDAs) which record progress on a particular task; if this is the case, information regarding the passenger to be met will be forwarded to the PDA of the selected assistant. At other airports (for example in Spain) the management of tasks is a manual process. More than one assistant may be assigned if the passenger requires more involved assistance, such as carrying into their seat or is in a stretcher.

PRM is met and needs are confirmed	The assistant meets the passenger at the point at which they announced their presence; when they meet the PRM, they update the dispatch office with their action. This update may be via PDA linking through to the software in the dispatch office, or via calling in. Assistants should be trained in how to approach passengers with different requirement. If the PRM has difficulty with long distances, the airport may use electric carts, or may push the passenger in a wheelchair provided by the airport. The electric carts may be capable of carrying a passenger in an airport wheelchair. The extent of the use of electric carts may be dependent on airport design. PRMs who are blind or visually impaired may require someone whose arm they can hold guide them through the airport. A PRM with an intellectual disability may require information about the airport to be presented to them in a simplified manner, or may require check-in and other procedures to be conducted in a particular manner. The assistant will help PRMs with a reasonable amount of baggage, but only as much as any other passenger would take.
PRM is assisted through check-in and security	The passenger is taken through check-in and security. At check-in, there may be lowered desks for passengers in wheelchairs. At security, there may be a track where the security staff are trained in searching PRMs, including searching wheelchairs, and a screen to provide privacy for the search. Usually it is not possible for wheelchairs to be taken through metal detector arches, and therefore wheelchair users are searched manually. The security track is not typically exclusively for PRMs, but they may receive priority. There may be a dedicated PRM lounge; if there is time before their flight leaves, they will have the option of resting there or if there is time may wish to use the facilities in the departure lounge until called for their flight. Some airports are willing to take PRMs to these facilities (such as restaurants and shops), while others require PRMs to remain in the waiting area allocated. Where the airport is willing to provide this, the assistant arranges a time at which to collect the passenger. Some airports allow PRMs to use the business lounge regardless of class of travel.
PRM is assisted through customs and to gate	Once the flight is ready for boarding, the assistant takes the passenger to the gate. Different methods of assisting a PRM into the aircraft will be used depending on the passenger's needs and on the manner in which the aircraft is embarked (e.g. via airbridge or from the apron). Some PRMs will be able to use either stairs or an airbridge and will not require specific assistance at this point.
PRM is assisted on board aircraft with airbridge	Where passengers board via an airbridge, category WCHC and WCHS PRMs are transferred to the onboard wheelchair at the door of the aircraft. If they have remained in their own chair up to this point, their wheelchair is transferred to the hold; otherwise the airport's wheelchair is returned with the assistant. The onboard wheelchair is narrower to allow it to pass down the aisle, and has straps to hold the passenger safely in the chair. Other categories of PRM board the aircraft on foot, without particular assistance. Depending on the policy of the carrier concerned, PRMs may have to board either first or last.
PRM is assisted on board aircraft without airbridge	Where passengers board via steps, category WCHC and WCHS PRMs are transferred to the onboard wheelchair on the apron before entering the aircraft. They are then lifted up to the aircraft either by an Ambulift8, by a motorised stair-climbing chair or at some airports by manual lifting. Other categories of PRM board the aircraft on foot, and may require assistance to ascend the stairs. If the aircraft is boarded away from the terminal building and passengers are brought to the aircraft by bus, a dedicated PRM vehicle may be used to bring the PRM to the aircraft.
PRM is assisted to seat on board aircraft	On board, the assistant provides the assistance necessary for the passenger to get to their seat. This may include lifting the passenger from the on-board wheelchair into the seat and if, as required by certain carriers, the PRM has to be seated in a window seat, transferring across other seats. The assistant may also help the passenger with storing any baggage in the overhead lockers. Once the passenger is installed in their seat, the airport ceases to have responsibility for providing assistance, and it transfers to the airline.

[8] An Ambulift is a vehicle with a hydraulic platform which can be raised to the level of the flight deck to allow wheelchairs to be pushed on board.

Arrivals

Notification arrives	In addition to arriving via PAL or CAL, notification for arriving passengers may arrive by passenger service message (PSM). This is a list of passengers on board the aircraft requiring particular treatment on arrival, dispatched when an aircraft departs. The message states the points of embarkation and disembarkation, the flight number and date, and lists the names of the passengers requiring particular assistance with a description of the assistance. In addition to PRMs, the PSM lists children travelling alone (unaccompanied minors, or UMs), deportees and returned inadmissible passengers. In some circumstances, no PAL or CAL is received for arriving passengers, and the only notification is via PSM; this reduces the period of notification from 36 hours to the duration of the flight. In some cases no notification is received at all.
PRM is met and assisted to disembark	The information from the PSM is input into the task management system in the same manner as the PAL or CAL. When a flight lands, available assistants are assigned to each of the PRMs on board the flight, and dispatched to meet them at the gate. On landing, if a PRM requires assistance to disembark they will typically disembark once all other passengers have disembarked. The PRM is met at the door of the aircraft or within the aircraft by their assigned assistant. Depending on the code included in the PSM the assistant may have equipment such as wheelchairs, or may be accompanied by another member of staff. If the passenger has their own wheelchair, this is removed from the hold, and the passenger may then be assisted to transfer from the aircraft wheelchair into their own. At some airports the passenger's wheelchair is not returned to them until baggage reclaim, for security reasons.
PRM is assisted from aircraft to point of arrival	The passenger is then assisted through passport control (where there may be a dedicated PRM-accessible track) to the baggage hall, where they are assisted to retrieve their bags. They are then assisted through customs, and the assistant accompanies them as far as is required, up to the designated point of arrival outside the terminal. If it is situated close to the arrival point, they may also assist the PRM to their car if requested.

Connections

Connecting flights	Where a PRM requires assistance to make a connecting flight, the assistance offered varies depending on the length of time between arrival and departure. If there is limited time, assistance is offered as described above to disembark, transfer, and embark the passenger onto their next flight. If there is a significant wait between arrival and departure, the passenger may be taken to a PRM lounge or waiting area, until their departing flight is ready for boarding.

Policies on service provision

Provision for non pre-notified passengers

3.8 The Regulation sets out the assistance which must be provided to PRMs where they have notified the air carrier or tour operator at least 48 hours before the published time of departure of their flight. It also requires that where no such notification is made, the airport should make all reasonable efforts to provide this assistance.

3.9 Of the airports we contacted, most stated that there was little or no difference in the service received by passengers who had not pre-notified, and differences in service quality only occurred when the services were busy. Even in the cases where a choice did have to be made between assisting a pre-notified and non-pre-notified passenger, some airports informed us that they would make decisions on the basis of ensuring all passengers could make their flights, rather than on the basis of notification. Some airports informed us that the level of notification was so low that it was not useful to make any distinction on this basis. Only a small minority of the case study airports stated that a slower service was provided to passengers who did not pre-notify (Table 3.1 below).

TABLE 3.1 AIRPORT SERVICE PROVIDED TO NON-PRE-NOTIFIED PRMS

Airport	Service provided to non-pre-notified PRMs
Amsterdam Schiphol	Equivalent service, priority based on ensuring passengers can make their flights
Athens	Slower service than pre-notified for departures, equal service for arrivals
Bologna	Equivalent service is provided
Brussels	Equivalent service as pre-notified, lower priority when busy
Bucharest Otopeni	Equivalent service is provided (some equipment may not be available)
Budapest	Equivalent service is provided (possible delay of a few minutes)
Brussels Charleroi	Equivalent service, priority based on ensuring passengers can make their flights
Copenhagen	Equivalent service as pre-notified, lower priority when busy
Dublin	Slower service
Frankfurt Main	Equivalent service as pre-notified, lower priority when busy
Lisbon	Standards not defined
London Heathrow	N/A
London Luton	Equivalent service is provided
Madrid Barajas	Equivalent service is provided (possible delay on arrival)
Munich	Equivalent service as pre-notified, lower priority when busy
Paris Charles De Gaulle	Equivalent service as pre-notified, lower priority when busy
Riga	Equivalent service is provided
Roma Fiumicino	Slower service
Stockholm	Slower service
Warsaw	Equivalent service as pre-notified, lower priority when busy
Zaragoza	Equivalent service is provided (possible delay on arrival)

3.10 Airports' estimates of the impact of pre-notification rates on staffing and equipment levels varied considerably. Several airports informed us that while an increase in the rate of pre-notification would improve the quality of the service provided, they would not expect it to significantly affect the number of staff they employed. In contrast, Aèroports de Paris believed that improving rates of pre-notification could allow them to reduce the costs of PRM service provision by 30%-40%. In January 2010, London Heathrow introduced a banded charge which varies the amount paid depending on the level of pre-notification of the airline (see 3.34).

Restrictions on service

3.11 Unlike for airlines, the Regulation does not explicitly state any grounds for airports to restrict the services provided. However, there may be national laws which have bearing on the functions which airport staff are permitted to undertake; for example, we were informed that in Denmark national laws on health and safety did not permit people of above a certain weight limit to be carried up stairs and into an aircraft.

Other issues noted

3.12 All of the case study airports provide the services required under the Regulation. The manner and quality of provision varies among the sample, and there have been a number of incidents of significant service failure, but we identified no fundamental problems with service provision at major airports. However, we were informed that the Regulation had not been implemented at Greek airports other than Athens: at these airports, services are provided to PRMs, but the change of responsibility from airline to airport has not yet been effected; provision of and payment for services is agreed between airlines and ground handling companies, as it was prior to the introduction of the Regulation.

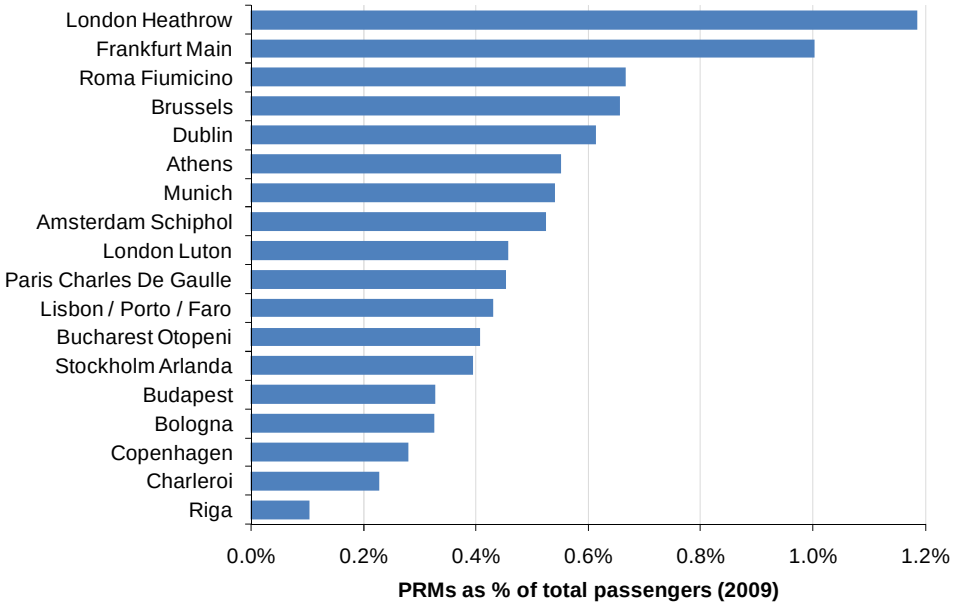
3.13 The views of stakeholders on the provision of services are discussed at the end of this chapter (see 3.76).

Statistical evidence for carriage of PRMs

The proportion of passengers requiring assistance

3.14 The frequency with which PRM assistance services are used varies considerably between airports. Figure 3.1 shows the rate of use at the airports in our sample for which we were provided with data. At London Heathrow 1.2% of passengers are PRMs requiring assistance, while at Riga only 0.1% of passengers require assistance. However, for most airports in the sample, the proportion requiring assistance is between 0.2% and 0.7%. ACI informed us that the higher rates at some airports were the result of the demographics of the passengers flying to these destinations.

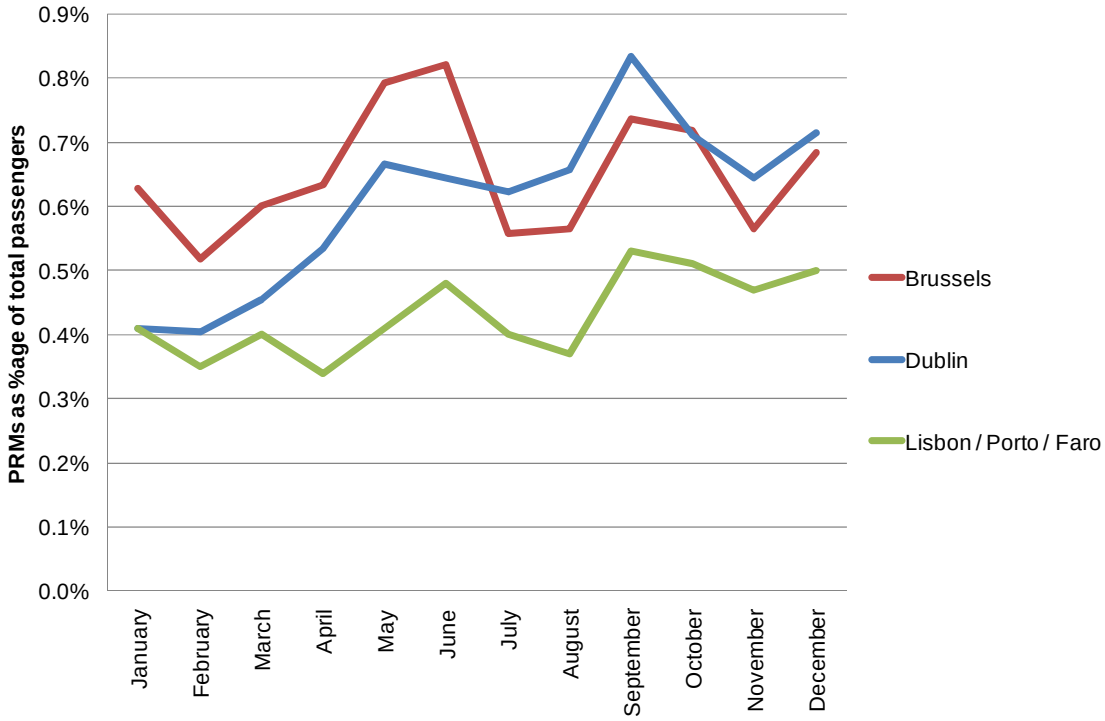
FIGURE 3.1 FREQUENCY OF PRMS REQUESTING ASSISTANCE AT AIRPORTS (2009)



3.15 Some other airports have higher proportions of PRMs requiring assistance, resulting from the demographic profile of passengers using the airports. These include holiday destinations popular with elderly people, such as Alicante, Malaga and Tenerife Sur; and pilgrimage destinations such as Lourdes.

3.16 Based on the information we have received from airports, the profile of PRM travel differs markedly from that of other passengers (see Figure 3.2). Most data indicates that the number of PRMs travelling tends to be lower in relative terms, and at some airports also in absolute terms, during July and August when total air travel is at a peak. At some airports, there appears to be a peak in December and January, however this is not consistent across all the airports for which we have data. Airports informed us that provision of services between April and September can be particularly affected by passengers travelling to cruise ships: these often carry high numbers of PRMs, and since a cruise ship usually disembarks passengers at the same time as it embarks the next load, there is a twofold increase in the number of PRMs travelling through the airport. The winter peak in PRMs is partly due to high rates of injury amongst passengers returning from winter sports holidays.

FIGURE 3.2 FREQUENCY OF PRMS OVER THE YEAR (2009)

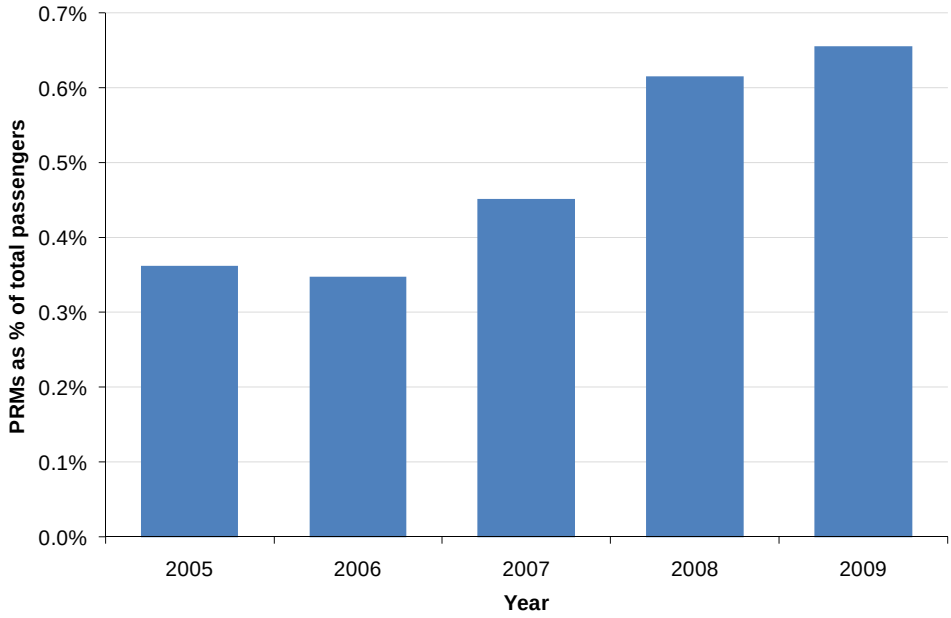


Trend in PRM travel

3.17 Several airports and airlines informed us that the number of PRMs requiring assistance has increased significantly since the introduction of the Regulation. It is difficult to verify this, as airports generally did not provide PRM services before July 2008, and therefore did not have a time series of data available. However, Brussels Zaventum airport introduced a PRM service similar to that required by the Regulation earlier, and as a result was able to provide figures for PRM's travelling between 2005 and 2010. This shows an increasing trend (Figure 3.3): the proportion of passengers

requiring assistance appears stable at approximately 0.35% over 2005 and 2006, and then climbs to 0.66% in 2009. It believed that this was a result of significant abuse of the services.

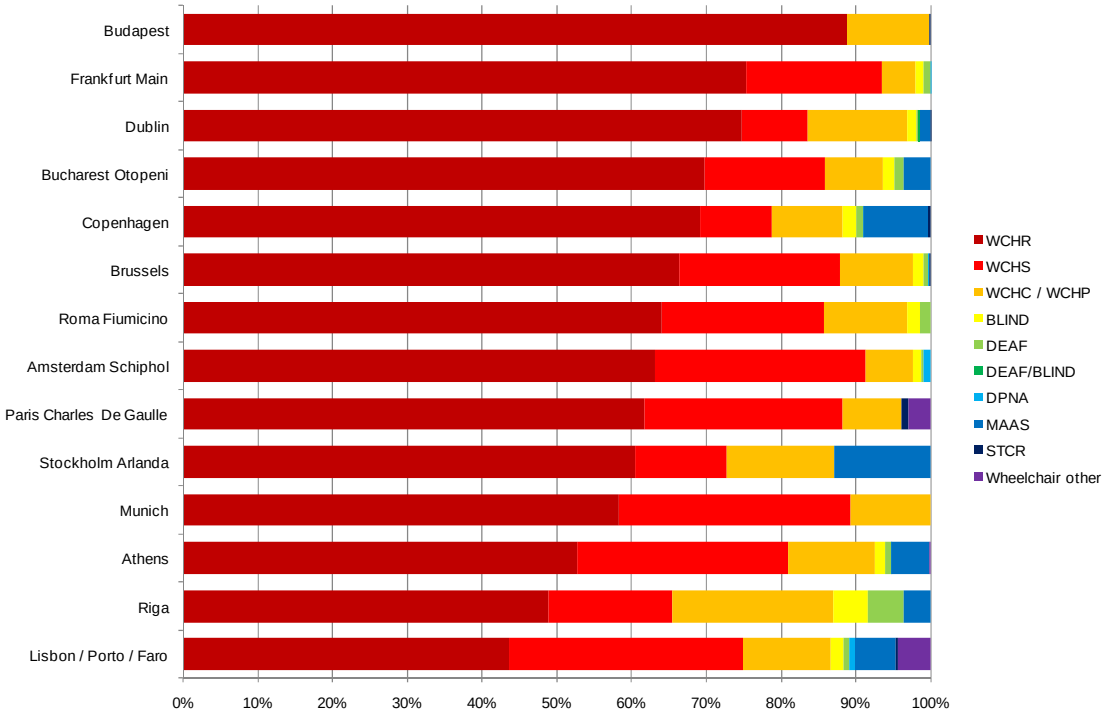
FIGURE 3.3 RATE OF PRMS OBSERVED AT BRUSSELS ZAVENTUM AIRPORT



Types of assistance provided

3.18 Assistance is often divided by airports into WCHC/WCHS (see 3.4), which requires significant time and resources, and others. We requested data on the types of passengers assisted from each of the case study airports and a summary of the data is shown in Figure 3.4. At all airports which provided data, the most frequent category of assistance was WCHR, although the proportion ranged from 44% to 89% (median 64%). The category "Wheelchair other" comprises wheelchair codes which do not fit into the other wheelchair categories: WCMP, manually powered wheelchair; WCBD, dry cell operated wheelchair; and WCBW, wet cell operated wheelchair. We have excluded the codes for medical cases and unaccompanied minors (MEDA and UM respectively) from this analysis, as they are not within the scope of the Regulation.

FIGURE 3.4 VARIATION IN TYPES OF PRMS ASSISTED (2009)



Abuse of services

3.19 Many airports – particularly larger and busier airports – reported that the services they provided for PRMs were sometimes used by passengers who did not appear to have the right to do so under the Regulation. A typical observation was of a passenger who was assisted in a wheelchair from a designated point of arrival through security and customs, and who then walked to the gate unassisted. Several types of passenger who might be motivated to do this were suggested:

- Passengers who feel confused by a large and complex airport, and do not feel that they would able to navigate it successfully;
- Passengers who do not speak the language used for the airport signs and announcements;
- Passengers who have no mobility impairment which prevented them from walking long distances within the airport, but who did not wish to; and
- Passengers (particularly those arrive at the airport with limited time before the departure of their flight) who wish to avoid lengthy queues at emigration, customs and security.

3.20 In addition, some airports reported cases where airlines had requested PRM assistance for passengers such as unaccompanied minors, passengers with excessive cabin baggage, and VIPs. These passengers might previously have been classified ‘meet and assist’ (MAAS) and any assistance required would have been paid for by the airline.

3.21 By its nature, it is hard to establish the true level of this abuse. PRM organisations noted that a passenger's disability may not always be visible. They also noted the perceived stigma attached to travelling in a wheelchair, and believed that many passengers would prefer to avoid this in preference to receiving the services offered under the Regulation.

3.22 The level of abuse reported varied between airports. Copenhagen Airport reported a rate of approximately one passenger per day whom they suspected was not entitled to services under the Regulation, while Brussels reported 20-30 passengers per day. Brussels Airport perceived abuse as a bigger problem than other airports within the sample.

3.23 However, Charleroi Airport informed us that abuse of services had decreased since the introduction of the Regulation, as a result of changes made to procedures. The two changes it identified as having had an impact were:

- requiring passengers who had not pre-notified requirements for assistance to wait; and
- boarding passengers requiring assistance after, rather than before, other passengers, and hence users of the PRM service no longer get first choice of seats on low cost carriers that do not allocate seats in advance.

3.24 These changes had the effect of reducing the number passengers without mobility needs who wished to use the services to avoid queues, and to obtain first choice of seating. However, these policies create some disadvantages for passengers who are entitled to the services.

Organisation of service delivery

3.25 Airport managing bodies may provide the services required under the Regulation themselves, or may contract with other parties to provide the assistance. Any arrangements for assistance to be provided through other parties must be compliant with published quality standards, and must be determined with the cooperation of airport users.

Overview

3.26 15 of the sample of 21 airports provided PRM services through a subcontractor (Table 3.2 below) and, of these, 12 were procured through open tenders. The advantage of procuring this service through an open tender include:

- a specialised provider might more easily be able to provide services of the cost or quality required;
- providing services through subcontractors facilitates the separation of costs of PRM services in an airport's accounts; and
- open tenders allow the airport to demonstrate that the costs are reasonable, as required by the Regulation.

3.27 Some of the largest airports split the tendering of provision into more than one contract, usually through grouping terminals together on a geographical basis.

3.28 In contrast, some of the airports provide the services required under the Regulation through specially trained airport staff. This may be through the creation of new department with this remit, or through extending the remit of a pre-existing department (for example the firefighting department). Airports may also subcontract some services (such as assisting passengers from the gate to the aircraft) to ground handling staff whilst providing other elements of the service themselves.

3.29 We also identified variation in the type of organisation providing services, where this was sub-contracted:

- **Subsidiary company of airport:** This approach is very similar to providing the services in-house, although an advantage is that it is easier for the airport to separate the accounts relating to the provision of PRM services.
- **Ground handling companies:** Airports may be able to realise economies of scope through provision of PRM services by ground handling companies.
- **Specialist PRM contractor:** Among the airports examined for this study, the most frequent type of organisation providing PRM services was a company that specialised in this kind of assistance service. Some such companies provided PRM services only, while a number provide it as part of a range of services. These other services might include cleaning services, facilities management, emergency assistance, and ambulance services.

TABLE 3.2 METHODS OF PROCURING PRM SERVICES AT AIRPORTS

Airport	Approach to procurement	Type of organisation providing PRM services
Amsterdam Schiphol	Open tender	Specialist PRM contractor
Athens	Open tender	3 ground handling companies
Bologna	In-house / non-competitive tender	Airport staff, 2 ground handling companies
Brussels	Open tender	Specialist PRM contractor
Bucharest Otopeni	In-house	Airport staff
Budapest	Open tender	Ground handling company
Brussels Charleroi	In-house	Airport staff
Copenhagen	Open tender	Specialist PRM contractor
Dublin	Open tender	Specialist PRM contractor
Frankfurt Main	Non-competitive tender	Subsidiary of airport
Lisbon	In-house	Airport staff, subcontracted ground handling staff
London Heathrow	Open tender	2 specialist PRM contractors
London Luton	Open tender	Specialist PRM contractor
Madrid Barajas	Open tender	Information not provided at interview
Munich	Open tender	Specialist PRM contractor
Paris Charles De Gaulle	Open tender	2 specialist PRM contractors
Riga	In-house	Airport staff
Roma Fiumicino	Non-competitive tender	Subsidiary of airport

Stockholm Arlanda	In-house	Airport staff
Warsaw	Non-competitive tender	Ground handling company
Zaragoza	Open tender	Information not provided at interview

3.30 Although the PRM service had only been provided by airports for around 18 months at the time of our research, we were informed by a number of airports that they were considering or were in the process of retendering the service. The primary reason given for retendering was that service quality had not been sufficiently high, although some airports cited a higher than expected increase in use of services after the introduction of the Regulation.

3.31 The Regulation also allows[9] for airlines to request a higher level of service than those set out in the quality standards for the airport, and to levy a supplementary charge for this service. However, none of the sample airports or airlines were requesting or providing such a service.

Consultation

3.32 The Regulation requires contracts for the supply of services under the Regulation to be entered into in cooperation with airport users and with organisations representing PRMs. Cooperation with airport users is usually through the airport users committee (AUC). Although this is intended to improve consultation, airlines informed us that in some circumstances it did not do so, citing examples where:

- the proceedings of the AUC were conducted only in the native language of the airport;
- only ground handlers were represented on the committee; and
- one stakeholder has a voting majority on the committee, allowing it to disregard the views of other carriers.

3.33 We were also informed of circumstances where the consultation provided by airports was extensive. London Luton retendered for PRM services in March 2010, and involved airport users (airlines and ground handling companies) at all stages of the tendering process, including the development of the specification, and the evaluation and scoring of bids.

Airport charges

3.34 The Regulation permits airports to fund the provision of assistance through a specific charge on airport users. This charge must be reasonable, cost-related, transparent and established in co-operation with airport users. It must be shared among airport users in proportion to the total number of passengers that each carries to and from the airport (this is typically calculated on the basis of departing passengers). The accounts of the airport relating to provision of PRM services must be separate from its accounts relating to other services, and it must make available to airport users and NEBs an audited annual overview of charges received and costs incurred relating to the provision.

[9] Articles 9 (4) and (5).

3.35 The majority of the case study airports recover costs for PRM assistance through a PRM charge levied on all departing passengers which is specific to the airport and set to fully recover the costs of the PRM service. However, we identified the following key variations in this approach:

- **Uniform charge:** The PRM charges in Spain and Portugal are uniform across the airports operated by AENA and ANA respectively. This approach appears to infringe the Regulation, which requires a specific charge "established by the managing body of the airport", although there is some uncertainty about this due to differences between the English and Spanish language versions of the Regulation. Both AENA and ANA believed that, since the service was provided across a network of airports, it was appropriate that there should be a uniform network charge.
- **Economic regulation:** Many airports are subject to economic regulation of the charges they may levy on airlines. At most of the airports in our sample, the PRM charge is excluded from the regulated price cap, but at Dublin and Brussels Zaventum the PRM charge is included within this. As a result, their flexibility to amend charges (for example to reflect a higher than expected use of PRM services) is constrained: for example, they may require regulatory approval for any changes, or have the level of any increases limited by a charging cap. Charges may also be fixed over the course of a given regulatory period.
- **Pre-existing provision:** Stockholm Arlanda and all other State-owned airports in Sweden provided some elements of the services required under the Regulation prior to its introduction. In Sweden, charges for services for WCHC and WCHS passengers were introduced in 2001 at a rate of 1 SEK (€0.10[10]) per departing passenger; charges have not yet been increased since the Regulation came into force to reflect the wider range of passengers requiring assistance, but we were informed that this is likely to happen in the next year.
- **Non-implementation of the Regulation:** With the exception of Athens, none of the airports in Greece provide assistance for PRMs. Assistance is provided by ground handling companies, and charges are negotiated directly between airlines and ground handling companies, and consequently not made public.

3.36 We were informed by ACI that the proportion of airports which identify this fee separately was 52% across the airports it surveyed, as opposed to 48% which include it in the passenger fee.

3.37 The types of costs which may be recovered using the PRM charge are:

- **Direct assistance costs:** The direct costs of the day-to-day running of the service.
- **Other incidental operating costs:** These may include maintenance, purchase of operating materials, other services, etc.
- **Capital expenditure:** Expenditure to invest in facilities required to provide services, such as mobility equipment and the fitting out of a dispatch office.
- **Administrative expenses:** These may include time spent by airport personnel in running the contract, and project costs such as airport management time in developing the tender.

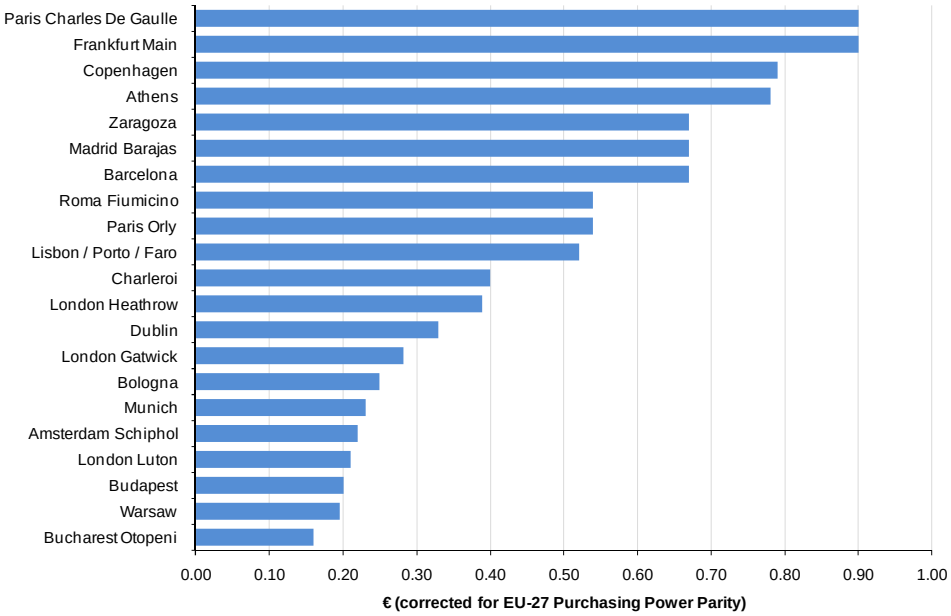
[10] Calculated on the basis of €1 = 9.7 SEK.

- **Other airport fees:** The PRM contractor may have to, for example, rent space from the airport and to pay a fee for doing so. This would also be recovered through the PRM charge.

Level of charges

3.38 Figure 3.5 shows the charges at the case study airports in euros, converted using current (January 2010) exchange rates where required. There is significant variation in the level of the PRM charge between airports, from a minimum of €0.16 in Bucharest to €0.90 at Frankfurt Main and Paris CDG.

FIGURE 3.5 AIRPORT CHARGES PER DEPARTING PASSENGER (€ AT CURRENT EXCHANGE RATES)



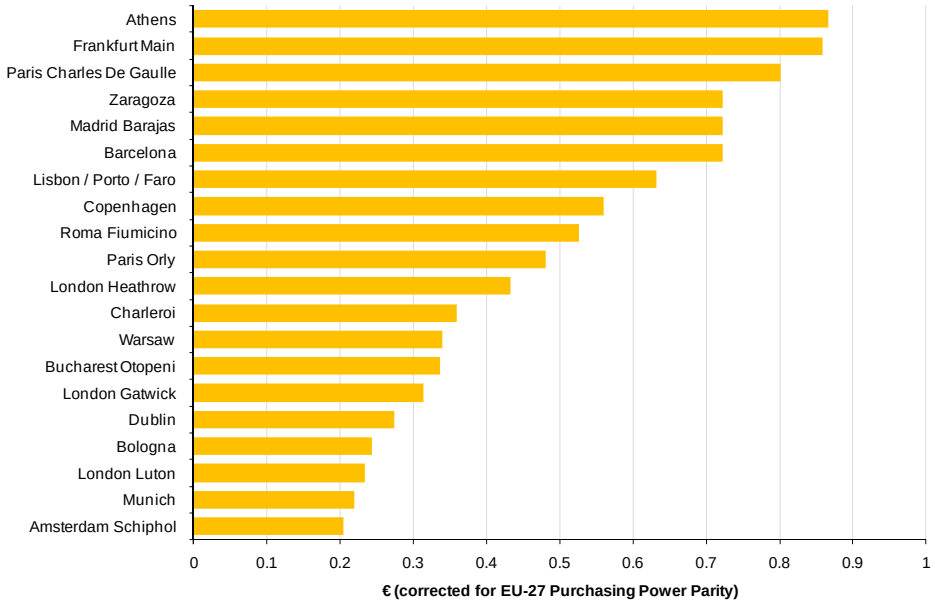
3.39 The variation in charges between airports may result from several factors, including:

- staff cost variation;
- quality standards in place;
- the frequency with which the PRM services are used;
- the proportion of connecting flights; and
- the design of the terminal or airport.

3.40 We discuss each of these possible reasons for variation in turn.

3.41 **Purchasing power parities (PPPs)** can be used to compensate for differences in price levels between States. Figure 3.6 uses Eurostat PPPs for 2008 to convert PRM charges in national currency to euros at average price levels for the EU-27. The harmonisation only very slightly reduces the variation in the charges (measured in terms of standard deviation).

FIGURE 3.6 AIRPORT CHARGES PER DEPARTING PASSENGER, 2009 (€ AT 2008 EU-27 PPP)



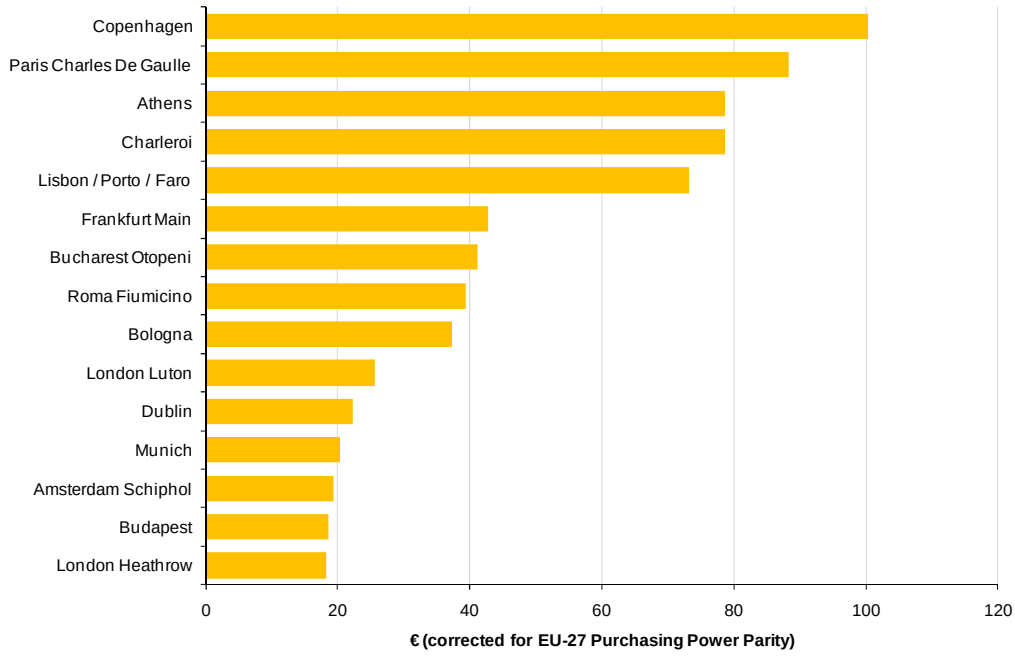
3.42 Although it was not possible to find published data showing the actual **level of service** offered to PRMs at any of the case study airports, the level of service set out in the PRM quality standards might help explain the variation in charges. To test this, we have calculated a weighted average PRM wait time and compared this with the PRM charge at each airport. This analysis suggests little or no correlation: for example, although the London airports state the highest service standards in terms of waiting times, the charges levied are lower than those at many other airports. Similarly, low charges at Bucharest are not reflected in longer proposed waiting times for PRMs requesting assistance.

3.43 It might also be expected that airports with **higher proportions of PRMs** would have higher charges. To examine this we calculated a proxy for the cost of assisting each PRM, for the airports for which we had data. This was obtained by dividing the PRM charge by the proportion of PRMs at each airport, to obtain the revenue gained by the airport for each PRM assisted.

3.44 It should be noted that there are some limitations to this analysis. It calculates revenue per PRM, and for this to be a valid proxy for costs, it must be assumed that charges are accurately cost-reflective, which is not the case in some airports: in Spain and Portugal the charge is uniform across all mainland State-owned airports, and does not therefore reflect local variation in costs; at State-owned airports in Sweden, the charge reflects only the costs of providing services for WCHC and WCHS passengers. For the costs to be cost-reflective it is also necessary that the frequency of use of the service is as forecast when the charges were calculated.

3.45 Figure 3.7 shows the results of the analysis. There is still significant variation between airports; the maximum cost per PRM assisted (€100 at Copenhagen, PPP adjusted) is 5 times the minimum cost (€18 at Bucharest, PPP adjusted). This shows that the variation in the number of PRMs does not fully explain the variation in the charge.

FIGURE 3.7 AIRPORT COSTS PER PRM ASSISTED, 2009 (€ AT 2008 EU-27 PPP)



3.46 The level of variation also does not appear to be accounted for by the **size of the airport**: the charge at London Heathrow is relatively low, while Paris CDG is relatively high.

3.47 Several airports cited **high proportions of connecting passengers** as a factor which increased costs. However, we do not believe that high proportions of connecting passengers would increase the costs of provision: transfer passengers are counted as two passengers in airport statistics and any PRM charge is levied twice, so if the service is less than twice the cost of that for an arriving or departing passenger, such passengers would in fact result in a cost saving relative to other PRMs. This view is supported by the data, where the charge at London Heathrow is relatively low.

3.48 **Terminal design** may impact on the amount of time required to provide assistance, or the efficiency with which it can be provided. For example, Amsterdam Schiphol airport, which has one integrated terminal building and the concourse is generally at the same level, can make extensive use of electric carts to transport multiple passengers together; this is not practical at airports such as CDG.

Changes to charges in 2010

3.49 The charges and costs in this section are based on those current in 2009, as this is the only complete year for which data was available. Where updated charges have been published for 2010[11], we have compared these with those for 2009. Most airports had not made any changes, but Munich and Rome Fiumicino increased charges by 48% and 28% respectively.

[11] IATA Airport, ATC and Fuel Charges Monitor, February revision, published March 2010.

3.50 London Heathrow changed the structure of its PRM charges in 2010. Whereas previously it levied a charge of £0.35 (€0.38) per passenger for all airlines, from 1 January 2010 the charges vary depending on the level of pre-notification. Airlines which pre-notify 85% or more of PRMs are charged £0.42 (€0.46) per departing passenger, while those which pre-notify 45% or less of their passengers are charged £0.83 (€0.91).

Consultation

3.51 Airports are required to determine charges in cooperation with users through airport user committees. The Regulation does not define cooperation further, however, and as a result the form this consultation has taken varies considerably. London Luton informed us that their tender process involved airlines, ground handlers and PRM organisations at all points of the tender process, from developing the specification to evaluating the bids and awarding the contract. In contrast, several airlines informed us that the consultation in Portugal and Spain was limited to the publication of a letter stating the amount the charge per person. We were also informed that consultations on PRM charges were often included in wider general charge negotiations.

3.52 A number of issues were raised regarding this cooperation.

- We were informed by several airports that certain carriers have contested the procedural steps taken by airport managing bodies to establish the charge. This has in at least one case been supported by an NEB taking a strict interpretation of the meaning of 'in cooperation with airport users', as requiring agreement between the airport and the airline both on the tender and the level of the charge. This has led to delays, particularly due to challenges by low-cost airlines, including requests to see cost information, which the airports regarded as unnecessary, after the tender processes were completed.
- Some airlines have blocked the process of approving charges by refusing to participate in the consultation.
- Some airports believed that direct involvement of users in the tender process can be problematic: without signing personal non-disclosure agreements, it may not be possible to share the commercially sensitive information included in tenders; there may also be conflicts of interests between some of the handlers and the tendering parties. However, the example of London Luton discussed above demonstrates that these barriers are not impossible to overcome.

Quality standards

Standards published

3.53 The Regulation requires all airports serving over 150,000 passenger movements per year to set and publish quality standards. Figure 3.8 indicates the proportions of airports publishing quality standards. The following airports had not yet done so:

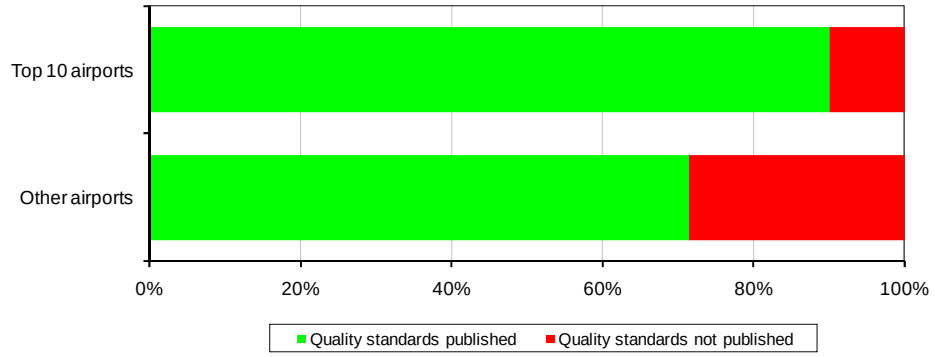
- Amsterdam Schiphol: quality standards are in the process of being re-developed with airlines, and have not been published yet;
- Bologna: standards not yet published;
- Budapest: standards published to airlines and handling companies by letter; and
- Stockholm Arlanda: standards published to airlines but not yet published on its

website; it informed us that the standards would be published soon.

3.54 Three of these airports provided the quality standards to us at interview, but Amsterdam Schiphol and Bologna did not provide any details of their quality standards.

3.55 We found that the largest ten European airports in terms of passenger numbers were more likely to publish quality standards that those outside the top 10.

FIGURE 3.8 PROPORTION OF AIRPORTS PUBLISHING QUALITY STANDARDS



Ease of finding quality standards

3.56 The ease with which the quality standards could be located on airport websites varied considerably. For the airports which published quality standards, some of the main issues encountered were:

- Having to click through an excessive number of links before finding the standards, e.g. the website of Charleroi Airport requires the user to click on five links before the standards can be viewed;
- Locating the standards on the site of the management company rather than within the section or website dedicated to the airport – this was the case for the Spanish airports for which the information is on the main AENA website;
- Using terminology which may not be obvious, avoiding the actual term 'quality standards', e.g. BAA use the term 'Service Level Agreement'; and
- Restrictions on language – Bucharest Otopeni, Brussels Charleroi and the Paris airports only publish quality standards on the local language versions of their websites.

Standards for waiting time

3.57 The standards defined by the case study airports are shown in Table 3.3 and Table 3.4 below. At all of the case study airports for which we were able to obtain standards, these are defined in terms of the percentage of PRMs who should wait for up to a given number of minutes. For example, at Barcelona, 80% of departing passengers who have pre-notified requirements for assistance should wait for 10 minutes or less from the point at which notice is given that they have arrived at the airport. This

approach is consistent with the example standards in Annex 5-C of ECAC Document 30[12], and eight of the airports in the sample (including Copenhagen, Munich and the AENA Spanish airports) follow these exactly.

3.58 There are however variations in both how the standards are structured and the level of the standards. Paris Charles de Gaulle is unusual in that, with the exception of the top 99% bracket, an additional ten minutes is added to the wait time for departing passengers located 'further away'. The published standards do not define how far away this is. Aéroports de Paris also define an additional category, of pre-notification of between 8 and 36 hours, for whom the standards are part-way between those applying to PRMs for which notification was received 36 hours or more before travel ('pre-booked'), and those for which notification was received less than 8 hours beforehand ('non-pre booked'). This is not shown in the table as it is not comparable with the standards offered by the other airports.

3.59 There are also some differences in how the wait time for arriving passengers is measured. At most airports, it is measured from when the aircraft reaches the parking position, but there are the following exceptions:

- From descent of last passenger: Rome Fiumicino;
- From boarding bridge lock: Brussels; and
- Not defined: Athens, Budapest, Lisbon, Stockholm Arlanda.

3.60 The standards proposed for pre-booked departing passengers are generally consistent, at least in terms of the waiting times which percentages are applied to: 10, 20 and 30 minutes are the most commonly used intervals, at 80%, 90% and 100% respectively. For non pre-booked passengers 80%, 90% and 100% apply to 25, 35 and 45 minutes. Better standards are offered by the UK and French airports that we reviewed. This is also reflected in the standards for arriving passengers, with the London and Paris airports targeting zero waiting time for 90-100% of passengers. There is also a clear pattern for arriving passengers, with 80% of pre-notified PRMs waiting no more than 5 minutes, 90% no more than 10 and 100% no more than 20 minutes. Standards are not as high as this for non pre-booked passengers, however.

3.61 Several airports informed us that the standards suggested by ECAC Document 30 for arriving passengers were not short enough to meet airline requirements on turnaround times: if the airports adhered only to these standards, there would be significant operational issues. Some of these airports published standards in line with Document 30, but stated that they actually provided services in much shorter times.

[12] ECAC Policy Statement in the field of Civil Aviation Facilitation, 11th Edition/December 2009.

Other elements of published quality standards

3.62 Some airports define additional standards other than the waiting time targets, generally reflective of the assistance set out in Annex 1 of the Regulation. For example, Charleroi provides detailed information regarding the level of assistance which will be provided for PRMs, for example support for embarking and disembarking the aircraft, or for dealing with customs formalities. Brussels Airport also defines how many assistants will accompany a PRM, depending on their type of disability.

3.63 Some airports also include more general, qualitative targets, less directly related to the assistance offered to an individual PRM. For example, Luton Airport's published standards include responding to 'disabled customer enquiries to offer guidance and advice', and auditing to ensure compliance with all disability legislation. Athens Airport also provides extensive details of the measures it has taken to accommodate PRMs, including disabled-access internet points and a special walkway for partially sighted PRMs.

TABLE 3.3 SCOPE OF QUALITY STANDARDS: DEPARTING PASSENGERS

	Pre-booked / airport informed *% of PRMs who should wait no longer than (minutes)*										Non-pre-booked / airport not informed *% of PRMs who should wait no longer than (minutes)*									
	5	10	15	20	25	30	35	40	45	60	5	10	15	20	25	30	35	40	45	60
Athens		80%		90%		100%							80%		90%		100%			
Barcelona		80%		90%		100%									80%		90%		100%	
Brussels		80%		90%		100%									80%		90%		100%	
Bucharest Otopeni		80%		90%		100%									80%		90%		100%	
Budapest		100%										100%								
Charleroi		80%		90%		100%									80%		90%		100%	
Copenhagen		80%		90%		100%									80%		90%		100%	
Dublin		80%		90%		100%									80%		90%		100%	
Frankfurt Main		80%		90%		100%									Not defined					
Lisbon		80%		90%		100%									Not defined					
London Gatwick	80%	90%	100%									80%	90%	100%						
London Heathrow	80%	90%	100%									80%	90%	100%						
London Luton		90%	95%	100%									90%	95%	100%					
Madrid Barajas		80%		90%		100%									80%		90%		100%	
Munich		80%		90%		100%									80%		90%		100%	
Paris CDG		90%			99%										80%		90%		99%	
Paris Orly		90%			99%				100%			40%			80%				90%	100%
Riga		80%		90%		100%									80%		90%		100%	
Roma Fiumicino		80%				100%									80%			100%		
Stockholm Arlanda		80%		90%		100%									80%		90%		100%	
Warsaw		100%													100%					
Zaragoza		80%		90%		100%									80%		90%		100%	

TABLE 3.4 SCOPE OF QUALITY STANDARDS: ARRIVING PASSENGERS

	Pre-booked / airport informed *% of PRMs who should wait no longer than (minutes)*										Non-pre-booked / airport not informed *% of PRMs who should wait no longer than (minutes)*									
	0	5	10	15	20	25	30	35	40	45	0	5	10	15	20	25	30	35	40	45
Athens		80%	90%		100%									80%		90%		100%		
Barcelona		80%	90%		100%											80%		90%		100%
Brussels		80%	90%		100%									80%		90%		100%		
Bucharest Otopeni		80%	90%		100%										80%		90%			100%
Budapest		100%										100%								
Charleroi		80%	90%		100%											80%		90%		100%
Copenhagen		80%	90%		100%											80%		90%		100%
Dublin		80%	90%		100%									80%		90%		100%		
Frankfurt Main			80%		100%										Not defined					
Lisbon		80%	90%		100%										Not defined					
London Gatwick	100%												80%	90%		100%				
London Heathrow	100%												80%	90%		100%				
London Luton	99%	100%											90%	100%						
Madrid Barajas		80%	90%		100%											80%		90%		100%
Munich		80%	90%		100%											80%		90%		100%
Paris CDG	90%		99%												80%		90%			100%
Paris Orly	90%		99%							100%					80%		90%			100%
Riga			80%	90%	100%											80%		90%		100%
Roma Fiumicino					90%	100%									Not defined					
Stockholm Arlanda		80%	90%		100%											80%		90%		100%
Warsaw		100%														100%				
Zaragoza		80%	90%		100%											80%		90%		100%

Monitoring

3.64 While the Regulation requires larger airports to develop and publish quality standards, it does not require them publish whether they are actually met, and none of the case study airports do so. Nonetheless most airports do undertake some form of monitoring and several provided us with performance statistics. There were a number of approaches to monitoring:

- **Time spent waiting to receive assistance:** This is the most common measure used by airports, as set out above. These times are often measured by time stamps inputted into the personal digital assistants (PDAs) or equivalent devices carried by staff providing assistance to PRMs (discussed earlier). The data recorded can often give wider outputs than solely the time taken to receive assistance, such as time from gate to boarding, or time waiting once disembarked from an aircraft. This approach should give accurate information on the time spent waiting by passengers, but does not address other aspects of quality of service.
- **Spot checks:** Many airports reported that the PRM service manager will undertake frequent unannounced tours of the services and infrastructure provided within the airport. They may check, for example, that the designated points of arrival and departure are functioning correctly. This approach is useful to identify wide-ranging problems but may not be sufficiently systematic to identify all problems.
- **Surveys:** A number of airports reported using surveys to obtain feedback from passengers. Typically, a postcard with survey questions to be completed was given to PRMs at some point during their use of the airport's services, which could be submitted at information desks or at various comment boxes place throughout the airport. These covered questions on the services received, and in some cases assessed the passenger's knowledge of the Regulation. A potential problem with this approach is the lack of accessibility for all passengers.
- **Mystery shoppers:** 'Mystery shoppers' are people (typically PRMs) paid to anonymously receive the service provided by the airport and afterwards give detailed reports or feedback about their experiences. This approach gives a thorough appraisal of the service provided at a particular time.

3.65 Table 3.5 sets out the actions airports have taken to monitor their quality standards. Most airports do not include any external auditing in their monitoring processes; Athens, Bucharest Otopeni, Luton, Madrid Barajas, Zaragoza include some external checks.

TABLE 3.5 AIRPORT ACTIONS TO MONITOR QUALITY STANDARDS

Airport	Measures monitored
Amsterdam Schiphol	Manual checks of numbers of PRMs and service quality
Athens	Audits, including 'mystery PRM' audit; PRM surveys
Bologna	PRM survey; time taken for assistance
Brussels	Time taken for assistance (in real time); passenger complaints
Bucharest Otopeni	Passenger surveys; complaints; external audits by NEB, PRM organisations, Commission, and airlines
Budapest	Monthly reports of time taken for assistance and passenger complaints; daily contact with service provider; 'walk-throughs' of service provided; airline audits

Brussels Charleroi	Passenger complaints received
Copenhagen	Time taken for assistance (in real time)
Dublin	Weekly audits of time taken; annual training audit
Frankfurt Main	Monthly reports of time taken for assistance
Lisbon	Time taken for assistance
London Heathrow	Time taken for assistance; missed flights; flight delays; internal audits; regular meetings with service providers; complaints from passengers and airlines; some of these measures monitored through a 'dashboard'; monthly 'scorecard' review
London Luton	Passenger feedback forms; 'walk-throughs' of service provided; internal and external audit teams of provider; airline and PRM organisation audits
Madrid Barajas	Monthly meetings with service providers and PRM organisation; surveys by service providers; independent surveys; PRM feedback forms
Munich	Monthly reports of time taken for assistance; spot checks; quality service manager as 'mystery shopper'; yearly passenger survey
Paris Charles De Gaulle	Flight delays for which PRM services are responsible; passenger complaints
Riga	Questionnaires to airlines, passengers and others; daily service monitoring by duty managers; internal audits
Rome Fiumicino	Time taken for assistance (in real time); other unspecified monitoring
Stockholm Arlanda	Time taken for assistance; passenger complaints; AOC meetings
Warsaw	Infrequent spot checks of time taken
Zaragoza	Monthly meetings with service providers and PRM organisation; surveys by service providers; independent surveys; PRM feedback forms

3.66 In addition, we found that most NEBs had not undertaken any direct, systematic monitoring of whether airports were meeting quality standards. Table 3.6 sets out the actions NEBs have taken to monitor airport quality standards.

TABLE 3.6 NEB ACTIONS TO MONITOR QUALITY STANDARDS

Member State	Monitoring
Belgium	Inspections of infrastructure and procedures
Denmark	No monitoring, biannual meetings
France	No monitoring
Germany	No monitoring
Greece	Inspections of infrastructure and procedures at Athens, not of regional airports
Hungary	Inspections of infrastructure and procedures, questionnaire on training
Ireland	No monitoring
Italy	Inspections of quality standards including infrastructure, procedures, information, training
Latvia	Inspection of infrastructure, procedures, waiting times, documentation
Netherlands	Inspection of infrastructure and procedures
Poland	No monitoring
Portugal	No monitoring

Member State	Monitoring
Romania	Request annual reports
Spain	Checks of staff training and procedures
Sweden	No monitoring
United Kingdom	Inspections of infrastructure and procedures, attend monthly PRM groups at major airports, less frequently at smaller airports

Complaints to airports

Airport processes for handling complaints

3.67 Most case study airports accepted complaints relating to PRM services in the same way as other complaints. Often airports will accept complaints via email, via information desks at the airport, or via forms which can be filled in and deposited in comment boxes located at various points within the terminals.

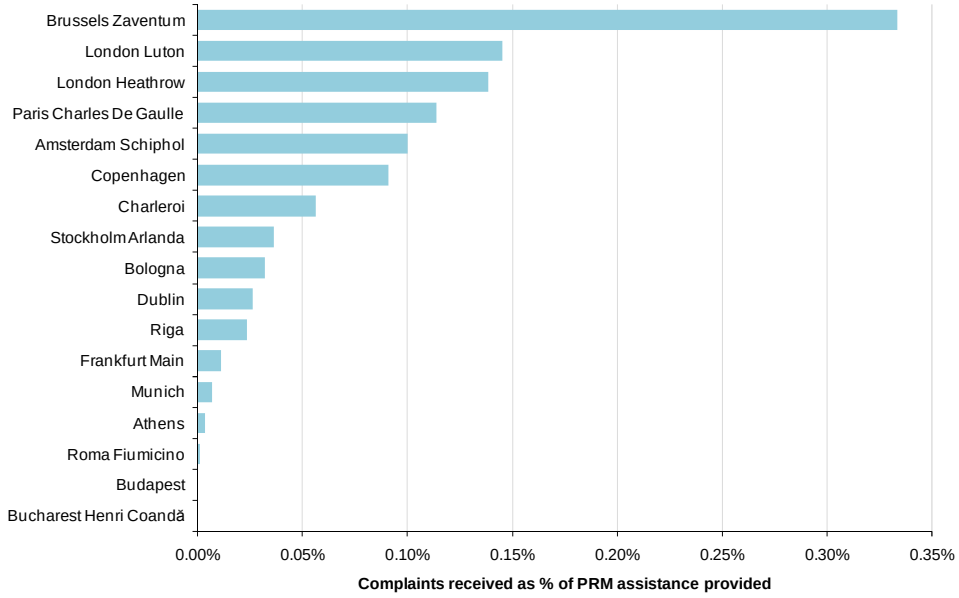
3.68 Typically, complaints are registered in a database which is reviewed by a member of staff on the service quality team. The staff member allocated to the complaint reviews documents relating to the service referred to in the complaint, and talks to the member of staff who provided the service (this member of staff may be employed by either the airport or a contractor). After investigating the complaint, the staff member writes a report including the findings and any response which is sent to the passenger. The service quality manager may review monthly reports on complaints, which will include complaints regarding the PRM service.

3.69 The level of detail to which the complaint handling process is specified varies depending on the volume of complaints received: an airport which handles many complaints may follow clearly defined procedures for handling complaints, while an airport which receives only few complaints may address them on a more ad hoc basis.

Number of complaints received

3.70 For each airport in the case study sample we requested the number of complaints received relating to provision of services to PRMs. We compared the data received with the assistance provided to give a rate of complaints, shown in Figure 3.9. This shows a high level of variation in the number of complaints received. Most of the larger airports have a similar rate of complaints. The highest rate of complaints is at Brussels Zaventum (0.33%, over double the next highest).

FIGURE 3.9 RATE OF COMPLAINTS RECEIVED BY AIRPORTS, 2009



3.71 Some airports note that they have received no complaints regarding the Regulation since its introduction, while during the same period they have received several thousand complaints regarding aspects of their service not covered by the Regulation. This is evidence that their system for receiving complaints is functioning well, but it is not necessarily evidence that there are no problems regarding the implementation of the Regulation. We were informed by several PRM organisations that a mobility-impaired passenger who receives poor service may be reluctant to complain, as they may wish to forget the incident, and since these passengers may face many obstacles during a journey, they may take the view that reporting the more frequent minor incidents is not worthwhile. In addition, the lack of compensation in most Member States means there is little direct incentive to complain.

Training

3.72 The Regulation requires that airports provide training relating to PRMs for their personnel:

- All personnel who provide direct assistance to PRMs, including those employed by subcontractors, must have knowledge of how to meet the needs of various different types of PRMs.
- All airport personnel who have direct contact with the travelling public must have disability-equality and disability-awareness training.
- All new employees must attend disability-related training and personnel must have appropriate refresher training.

3.73 We requested information on the training provided at each of the airports in the sample for the study. As many considered this material confidential, we were not able to obtain many copies of training documents. From the information we have received, the content of the three types of training may typically include the following:

- **Staff assisting PRMs directly:** Most courses described included: theoretical training on rights and obligations under the Regulation, training in awareness of disabilities, and physical training in lifting and other handling of PRMs. Some elements of training may be given to all staff; these could include Ambulift licenses and sign language. It may also include training not directly related to PRMs, such as training in first aid. Not all of the training courses we were given information for included provision for 'soft' elements of interacting with PRMs, such as ensuring that the person providing assistance is at the same height as a wheelchair user when talking to them, or being aware of the type of circumstances which could cause a person with autism to become distressed.
- **Passenger-facing staff:** This training is typically the disability-equality and disability-awareness sections of the training for staff providing direct assistance to PRMs. Several airports ensured that this training was undertaken by all staff working in the airport (including external staff) by making this training a requirement for obtaining the security clearance pass needed to work in the airport. It may include specific training for security staff who perform searches on PRMs, relating for example to how to search a passenger in their own wheelchair, and awareness of the importance to blind passengers of having belongs replaced in exactly the same place within their baggage.
- **Other employees:** The form of this training was often a short video on disability awareness. Some airports did not provide this training, or did not make it compulsory, which appears to be an infringement of the Regulation.

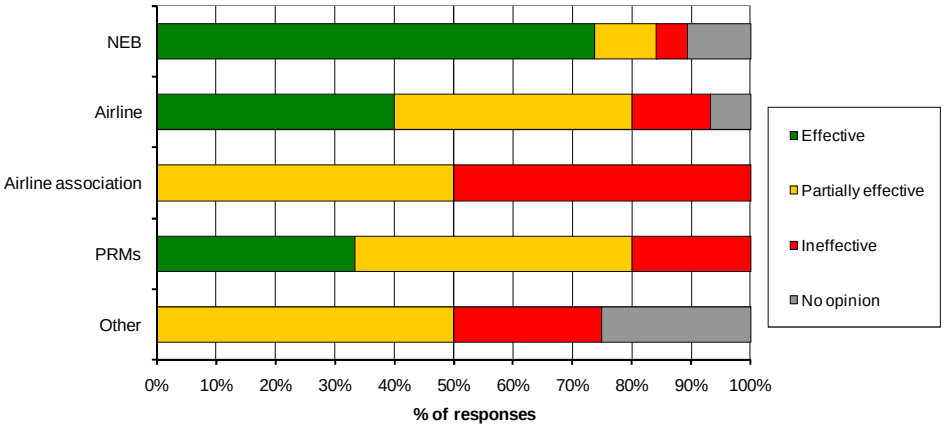
3.74 Training was delivered either internally, by external contractors specialising in training, or by PRM organisations. Several airports informed us that they used a "train the trainer" approach, where employees who have received the training then go on to train other employees. Several airports informed us that their training programmes were compliant with the guidance given in Annex 5-G of ECAC Document 30. A number of airports had involved PRM organisations in their training in some way, including in the development of the training, in its delivery, or through audit and approval. Several airports informed us that they had sought assistance from local PRM organisations but had found this problematic.

3.75 The lengths of the training programmes about which we were given information varied widely. We were given information relating to 6 training programmes for those providing direct assistance to PRMs: of these, 4 lasted 3-6 days, while two lasted 12 days or more. The length of training for passenger-facing staff also varied, with some airports requiring a full day of training whilst others only required the staff member to watch a 20 minute video. Refresher courses also varied considerably in length (between 1 and 4.5 days) and frequency: one airport informed us that it had monthly refresher training, while another required refresher training every 2 years.

Stakeholder views on effectiveness of implementation

3.76 We asked each of the stakeholders we contacted about how effectively they believed airports had implemented the Regulation; views vary considerably between different groups of stakeholders (Figure 3.10 below). Airlines and PRM organisations both believe that there are significant improvements to be made, but over 70% of NEBs believe that the actions of airports are largely sufficient. The rest of this section summarises the views expressed by stakeholders.

FIGURE 3.10 VIEWS OF STAKEHOLDERS ON AIRPORT EFFECTIVENESS



Airports

3.77 Most airports viewed their own actions as effective implementations of the Regulation. The most common problem reported by airports was misuse of the PRM service, however the level of impact of this reported misuse varied considerably between airports. The following other issues were identified by airports:

- Connecting flights: Minimum connection times, while sufficient for other passengers, can be insufficient for a PRM.
- Initial implementation of the Regulation: Several airports informed us that they had had problems with subcontracted service providers; a number had since retendered the service because of unsatisfactory service quality.
- Several airports informed us that they had had difficulty obtaining the cooperation of PRM organisations when developing quality standards.

Airlines and airline associations

3.78 Many airlines reported that quality of service and level of charges varied considerably between airports. This did not necessarily relate to size of airport: some airlines informed us that larger airports tended to provide better assistance, while other airlines informed us that their provision tended to be worse. Few airlines reported significant delays due to PRM services.

3.79 The most common problems with airport implementation of the Regulation reported by airlines related to airport charges. These issues were raised, in particular, by low cost and charter carriers:

- many airlines believed that the method of determining charges was not transparent and that the charges determined by airports were not reasonable or cost reflective;
- many airlines reported that the costs of the PRM service had increased (in some cases significantly) since the introduction of the Regulation, relative to the previous situation when the PRM service was contracted directly by the carrier, generally from its ground handler;

- this increase was believed by several airlines to be a result of overstaffing, or by some as a result of the inclusion of a margin, which they believed to be a contravention of the Regulation;
- at the same time as this perceived increase in cost, many airlines believed the quality of service had decreased, or at best not improved, since the introduction of the Regulation, and that the charges therefore represented poor value for money; and
- some States (in particular Spain and Portugal) have introduced uniform charges for services at State-operated airports, which airlines do not believe are cost-reflective or give value for money.

3.80 Some airlines informed us that they had serious concerns regarding the safety of uses of the PRM assistance services provided by airports, and noted that the airlines have no right to audit or directly influence the service provider.

3.81 Airline associations raised many of the same issues. ELFAA had particularly negative views regarding the assistance provided by airports: it believed that assistance was provided by unskilled staff and that the quality had decreased as a result, and that the cost of provision had tripled at some airports. It also believed that services were poorly synchronised with airline schedules. All of the airline associations from whom we obtained a response raised at least some concerns on all points regarding charges, including whether the costs were reasonable, cost-related and transparent, and whether the cooperation with airlines was sufficient.

NEBs

3.82 Most NEBs believed that airports had implemented the Regulation effectively. Several informed us that they believed there had initially been problems with implementation, but that these were now resolved. Those that believed there were areas which should be improved identified problems with designated points, infrastructure, delays on arrival and provision of information. It is not clear whether the level of supervision by most NEBs would be sufficient to allow an in-depth analysis of airport effectiveness (see 5.42).

PRM organisations

3.83 Most organisations representing disabled people believed there were some issues with the implementation of the Regulation by airports, and identified issues at all points of the process. Most organisations also noted that there was wide variation in the quality of service provided at different airports; several believed that this was a result of variation in the training given. Frequently identified problems included:

- **Mobility equipment is frequently damaged:** Many PRM organisations informed us that understanding of mobility equipment was poor and that training regarding it was insufficient. They believed that this poor understanding amongst airport and ground handling staff contributed to frequent damage. There was an expectation amongst most of the PRMs using wheelchairs that we spoke to that, if they travel by air, there is a high likelihood their chair will be damaged. For disabled people with extremely limited mobility who rely heavily on their wheelchair and may have adaptations particular to their needs, damage to their chair can be extremely distressing.

- **Lengthy waits for disembarkation:** Although the initial disembarking from the plane may be completed within the time set out in the quality standards, the passenger may then have to wait a long period of time in a holding area before the rest of the arrivals procedure is finished.
- **Information provision is poor:** This includes information on the layout of the airport, accessible real-time information on flights, and information on the rights of PRMs.
- **Websites are inaccessible:** We were informed by many organisations that airport websites are frequently inaccessible to visually impaired people.
- **Poor training of staff:** Several organisations reported that the interaction of airport assistance staff with PRMs could be poor. Examples of this included the assumption that all PRMs require a wheelchair, and where the assistance staff talk to a companion of a PRM rather than directly to the PRM.
- **Inability to use own wheelchair:** As discussed above, some wheelchair users with particularly limited mobility may wish to use their own wheelchair for as long as possible. We were informed that many airports do not permit the use of a passengers own chair up to the gate, and that some have a policy of transferring the passenger to an airport chair at check-in.
- **Inadequate provision where connection times are long:** Where there is a wait of several hours between the arrival of one flight and the scheduled departure of the connecting flight, at some airports this may result in a PRM being left unattended for a long period in an area without facilities or assistance.
- **Insufficient time allowed for connections:** The minimum connection time given by airports may not be sufficient to unload, transfer and board a PRM. This is a particular problem at larger, more complex airports with multiple terminals.
- **Parking provision:** A number of issues were raised with the parking spaces made available to PRMs. These included comments on inconvenient location, insufficient capacity, or inappropriate requirements for payment.
- **"Holding areas":** Some airports do not enable PRMs to access departure lounge facilities such as shops or restaurants, and require them to remain in a "holding area" for PRMs. Although such access to facilities is not required by the Regulation, it can significantly improve the experience of air travel of PRMs, and is provided by many airports.
- **Communication of arrival:** Communication of arrival at the airport can be difficult, for example through poor signage for points of communication, or points of communication failing to respond to calls for assistance.
- **Poor provision for the visually impaired:** Many airports do not provide adaptations to allow visually impaired passengers to access the airport independently. These can include tactile surfaces or Braille maps. We were also informed that training on how security staff should search the bags of these passengers was often lacking; it is important that all items are returned to their original location, as otherwise the passenger may have difficulty finding them.

Other organisations

3.84 The other organisations we interviewed raised issues which have been raised by the stakeholder groups already discussed. These included:

- "Teething problems" when the Regulation was first introduced;
- Poor provision of information;

- Variability of training; and
- Falling service levels, in particular falling standards of safety.

Conclusions

3.85 All airports in the sample for this study had implemented the provisions of the Regulation. We were informed that the regional airports in Greece had yet to effect the change from provision by ground handlers to provision by airports, but we were not told of any other airports at which the Regulation has not been implemented. Most of the sample airports had contracted the provision of PRM assistance services to an external company, and several had changed their service provider within 18 months of the Regulation coming into force; this was interpreted by some as a sign that initial procurement and specification had not met actual needs.

3.86 The service provided at the sample airports varies in terms of a number of factors including the resources available to provide the services; the level of training of the assistance staff; the type of equipment used to provide services; the facilities provided to accommodate PRMs (such as PRM lounges). According to the information provided by PRM organisations, there is resulting variability in service quality, although this is difficult to quantify.

3.87 There is also significant variation between airports in the frequency with which PRM services are requested: the level of use of the service varies by a factor of 15 between the airports for which we have been able to obtain data. The type of PRM service requested also varies considerably between airports. Both the frequency of use and the type of service required are likely to be affected by the varying demographics of the passengers using different airports.

3.88 The Regulation requires airports to publish quality standards. Most sample airports had done so, although some had published them only to airlines and other service users. Almost all quality standards followed the example format set out in ECAC Document 30, which defines the percentage of PRMs who should wait for up to given numbers of minutes. Some airports published qualitative measures in addition to these time standards, such as descriptions of the treatment the passenger should expect at all points of the service. However, none of the sample airports had published the results of any monitoring of these quality standards, and whilst most did undertake monitoring in some form, only four had commissioned external checks of the service.

3.89 The Regulation allows airports to levy a specific charge to cover the costs of assistance. All but one of the sample airports had done so. The level of charges varied considerably. We analysed this charge to examine whether variation could be explained by higher frequency of use of the service, differences in price levels between States, or differences in service quality, but there was no evidence that this was the case. The design of the airport may be a further factor influencing the cost of service provision and hence the level of charges.

3.90 Some stakeholders believe that the requirements to select contractors and establish charges in cooperation with users and PRM organisations were not followed thoroughly. Many airlines did not believe that consultation on either element had been sufficient, and this view was shared by some PRM organisations. There were a

number of barriers to effective consultation, including linguistic restrictions and airport user committees which failed to include all interested stakeholders. Consultation with airlines was reported as particularly poor in Spain, Portugal and Cyprus. In contrast to this, we note that several airports stated that they had sought the participation of PRM organisations but had found this difficult to obtain.

3.91 The Regulation requires airports to provide specialised disability training for staff directly assisting PRMs, and whilst all sample airports had done so, there were significant variations in the length and format of this training. The shortest training course among those for which we have data was 3 days long, while the longest lasted 14 days. There was similar variation in the length of training provided for passenger-facing staff who did not provide direct assistance. A number of airports informed us that they did not provide disability-awareness training for staff not in public-facing roles, or only provided it on a voluntary basis.

4. APPLICATION OF THE REGULATION BY AIRLINES

Introduction

4.1 Regulation 1107/2006 also sets out requirements for air carriers relating to their treatment of passengers with reduced mobility (PRMs). This section assesses how airlines are implementing these requirements. Information is drawn from two key sources:

- a detailed review of information published by the case study airline on their websites, against a range of criteria; and
- interviews with representatives of the carriers and other stakeholders.

4.2 This section begins by outlining the obligations imposed on airlines by the Regulation, and evaluates how airlines are implementing these requirements.

Requirements of the Regulation for air carriers

4.3 The Regulation imposes a range of requirements on airlines, which can be summarised as follows:

- **Prevention of refusal of carriage:** The Regulation prohibits airlines from refusing carriage or accepting reservations from PRMs, unless this is necessary to comply with safety requirements, or necessitated by the physical constraints of the aircraft. Where boarding is refused, the provisions of Regulation 261/2004 should apply with regard to refunds or rerouting. Airlines are permitted to require that a PRM be accompanied by a person who is able to provide any assistance that is required (again subject to this being necessary to meet safety requirements), and are required to publish any safety rules which they attach to the carriage of PRMs.
- **Transmission of information:** Airlines are required to take all necessary measures to enable the receipt of PRM assistance requests at all points of sale. Where such requests are received up to 48 hours prior to departure, the airline should transmit the information to the relevant airport(s) at least 36 hours before departure, or as soon as possible if notification is received from the passenger less than 48 hours before departure. Following departure of a flight the airline is also required to provide the destination airport with details of the PRMs requiring assistance on the arriving flight.
- **Assistance:** Annex II specifies the level of assistance which air carriers should provide to PRMs. This comprises carriage of assistance dogs, transport of up to two items of mobility equipment, communication of flight information in accessible formats, making efforts to accommodate seating requests (and seating accompanying persons next to the PRM where possible) and assistance in moving to toilet facilities.
- **Training:** All employees (including those employed by sub-contractors) handling PRMs should have knowledge of how to meet their needs. Disability-equality and disability-awareness training should be provided to all airport personnel dealing directly with the travelling public, and all new employees should attend disability‑related training.

- **Compensation for lost or damaged mobility equipment:** Airlines are required to compensate passengers for lost or damaged mobility equipment or assistive devices, in accordance with national and international law.

Published safety rules

4.4 Article 4(3) requires airlines to publish the safety rules relating to carriage of PRMs. The Regulation does not state in any more detail what these safety rules should cover, but we would expect from the context that this is intended to mean rules relating to where carriers would exercise a derogation under Article 4(1) to allow refusal or limitation of carriage, or for where passengers would have to be accompanied. This would include any rules necessitating limitations on the number of PRMs which can be carried, restrictions on the types of PRM posing specific safety risks, or limitations on their carriage or on that of mobility equipment due to the size of aircraft.

4.5 In some cases the information published by airlines is in the form of a document defined as 'safety rules' or 'information pursuant to Regulation 1107/2006', but more commonly information is provided on a web page (or pages) without these descriptions. The limited use of the 'safety rules' term by airlines may indicate that carriers do not understand what is meant by the term, or that the requirement is open to interpretation. It is also possible that airlines do not have specific PRM safety rules – both KLM and SAS informed us that the same safety rules apply to PRMs as to all other passengers.

4.6 The airlines' Conditions of Carriage may also provide a useful source of information on policy on the carriage of PRMs, and in some cases may provide more detail than dedicated PRM web pages.

4.7 Seven carriers' Conditions of Carriage also refer to other requirements (often described as 'Our regulations' or 'Other regulations') which apply to carriage of PRMs. In the sample we have reviewed, the reference to such regulations does not always specify exactly what the scope of these is or where they are to be found. This may infringe the requirement in Article 4(3) to publish any safety rules affecting PRMs, and may also raise issues of consistency with the Unfair Contract Terms Directive, as the conditions on which bookings are made should be transparent at the time. Whilst some airlines' Conditions state that these regulations are published on their websites, the following case study carriers' Conditions include such references without saying where the information can be found:

- Air Baltic;
- Emirates;
- SAS; and
- TAP Portugal.

4.8 The carriers which provided the most detailed information set out the information listed below, and we would therefore expect a comprehensive PRM web page to provide at least some information on these topics:

- Any limitations on the carriage of PRMs, for example a limit on the number that can be conveyed on a given flight;

- Advance booking requirements for any PRM requiring assistance;
- Conditions under which an accompanying passenger will be required;
- Guidance on the carriage of assistance animals;
- Policies on the carriage of equipment, e.g. wheelchairs, stretchers and oxygen; and
- Any assistance which will be offered on board.

Information actually published by carriers

4.9 Three of the sample airlines (Air Berlin, easyJet and Ryanair) provide either 'safety rules', or a notice specifically stated to be pursuant to Regulation 1107/2006. In a further six cases Regulation 1107/2006 is mentioned in a first sentence of the web page / PRM document, or elsewhere in the text.

4.10 We found that eight of the sample airlines include on their website all the information likely to be required. This was normally in the form of a web page, sometimes with sub-sections, however AirBaltic and KLM provide downloadable documents containing all PRM guidance. Delta also provides a PRM brochure, but this does not contain all the information provided on the PRM web page. In the remainder of cases airlines provide fairly comprehensive web pages, but omit certain items which may appear on other sections of the website (for example in the Conditions of Carriage).

4.11 In some cases we found inconsistencies between the PRM web page and that the information provided in the Conditions of Carriage. For example, Delta's Conditions of Carriage state that 48 hours' advance notice is required for any PRMs who wish to receive special assistance, but the PRM information section states that 48 hours' advance notice is only required if the passenger needs to use oxygen during the flight, requires the packaging of a wheelchair battery for shipment as checked luggage, or is travelling with a group of 10 or more people with disabilities. Austrian Airlines' PRM information emphasises the importance of booking in advance, but does not reflect the stronger wording in the Conditions of Carriage, which state that carriage of PRMs 'is subject to express prior arrangement'. Similarly, the Conditions of Carriage of Alitalia, Brussels Airlines, Delta, Ryanair and Wizzair state that carriage may be refused to PRMs if not arranged in advance; however although the PRM webpage states that assistance should be requested at the time of booking, it is not indicated that failure to do this may result in denial of boarding.

4.12 Some of the rules set out in airlines' Conditions of Carriage do not appear in the PRM information section of the website. For example, Thomsonfly imposes a limit on the number of PRMs or wheelchairs which will be accepted per flight in their Conditions of Carriage, which does not appear on the airline's PRM web page.

Table 4.1 outlines the coverage of the PRM web pages against the criteria set out in paragraph 4.9 above.

TABLE 4.1 INFORMATION AVAILABLE ON CARRIER WEBSITES

Airline	Information provided	Key issues and omissions
Aegean Airlines	'Travel Guide' section of website provides some information on carriage of assistance animals, wheelchairs and oxygen.	No information on advance booking, accompanying passengers or animals Information on wheelchairs is incomplete – conditions of carriage state that spillable batteries cannot be carried. No information on stretchers.
Air Berlin	Information is provided within a section entitled 'Flying barrier-free', and in a safety rules section entitled 'airberlin's safety regulations for the carriage of passengers with restricted mobility (PRMs) in accordance with EC regulation no. 1107/2206' downloadable from the same page. The safety rules discuss the following: • PRM limit • Accompanying persons • Seat allocation • Guide dogs • Information in the event of refusal of carriage	The safety rules do not include advance booking or policies on carriage of equipment. However, with the exception of stretchers this information is provided on the PRM webpage which contains the safety rules.
Air France	Information is provided within a section entitled 'Passengers with reduced mobility'	None
AirBaltic	Detailed information is provided within a document entitled 'Air travel for physically challenged passengers'	None
Alitalia	Limited information across all categories is provided in a section entitled 'No barriers travelling'.	More detailed information on some topics can be accessed only by searching the site for specific terms, e.g. 'stretcher'.
Austrian	Information on most categories is provided in a section entitled 'Barrier-free travel'.	No reference is made to the carriage of stretchers.
British Airways	Information on all categories is provided within a section entitled 'Disability assistance'	None
Brussels Airlines	Reasonably detailed information across all categories is provided in a section entitled 'Special Assistance'.	Information on accompanying passengers, wheelchairs and stretchers is incomplete.
Delta	Detailed information on all categories is provided within a section entitled 'Services for Travelers with Disabilities'. A brochure providing a summary of this information can also be downloaded from the site.	None
easyJet	Detailed information on almost all categories is provided within a notice entitled 'For passengers who are disabled or have reduced mobility (PRM) due to a physical, cognitive (learning) disability or any physical impairment, as defined by current European law, Regulation EC1107/2006 Article 2(a).' In addition detailed information is provided in the 'Carrier's Regulations'.	The information notice on the website is detailed and generally appears complete. There is no reference to provision of oxygen or carriage of stretchers although both are addressed in the Carrier's Regulations.
Emirates	Some information across all categories is provided within the sections 'Health & Travel', 'Special Needs' and 'FAQs'.	The information provided appears to be complete but it is fragmented between these

Airline	Information provided	Key issues and omissions
		three sections, which could be confusing.
Iberia	The website has a general information section entitled 'Passengers with reduced mobility or special needs'. This provides a link to a more detailed information leaflet, downloadable by clicking on a 'No barriers to travel' icon.	The location of the information leaflet is not obvious as it is not listed under 'Information of interest'. Information in the leaflet on accompanying passengers and carriage of mobility equipment appears to be incomplete. There is a document entitled 'Attending to the needs of people with reduced mobility' but this appears to be a general summary of ECAC/ICAO guidance and it is not clear what applies to Iberia.
KLM	Information is provided within a section entitled 'Physically challenged passengers' and in a 'Carefree travel' brochure.	None
Lufthansa	Information on most categories is provided in a section entitled 'Travellers with special needs'.	No information on accompanying passengers or stretchers, although some info is provided in a section on flights to and from the USA.
Ryanair	Detailed information on almost all categories is provided within a notice entitled 'NOTICE PURSUANT TO EC REGULATION 1107/2006 CARRIAGE OF DISABLED PERSONS AND PERSONS WITH REDUCED MOBILITY'.	None
SAS	Information on almost all categories is provided within a section entitled 'Special needs'.	No information on accompanying passengers or stretchers
TAP Portugal	Detailed information on all categories is provided within a section entitled 'Special Assistance'.	None
TAROM	Limited information across all categories is provided in a section entitled 'Persons with disabilities'.	Because the information is not detailed it is not clear whether it is complete, e.g. whether all circumstances where passengers need to be accompanied are listed.
Thomas Cook	Information on all categories is provided within a section entitled 'Medical - passengers with Reduced Mobility'.	None
TUI (Thomsonfly)	Some information on most categories is provided within a section entitled 'Passengers with special needs'.	No information on stretchers or oxygen
Wizzair	Limited information is provided within a section entitled 'Passengers with Special Needs'.	No information on assistance animals or stretchers, although both are referred to in the Conditions of Carriage.

Carrier requirements on carriage of PRMs

Safety requirements defined in law or by licensing authorities

4.13 Article 4(1) allows derogations from Article 3 in order to meet safety requirements defined by national or international law, or to meet safety requirements established by the authority that issued the air operator's certificate to the air carrier concerned. The only EU-wide legislation which applies is EU-OPS1 (Commission Regulation 859/2008), which is aligned with JAR-OPS 1 Section 1 guidance previously produced by the Joint Aviation Authorities.

4.14 National health and safety legislation may also provide safety-related grounds for imposing restrictions on the carriage of PRMs – for example cabin crew may not be permitted to lift passengers between their seat and an on-board wheelchair, which would then necessitate an accompanying passenger if it is expected that they will need to leave their seat at any point during the flight.

4.15 All other restrictions are governed by safety requirements established by licensing authorities, which are often (although not always) the same organisation that has been designated as the NEB for the Regulation. The main guidance material relating to carriage of PRMs that licensing authorities should take into account is that originally defined in Section 2 of JAR-OPS 1. Section 2 was not included in EU-OPS1, but ECAC Document 30 states that, pending the adoption of implementing rules related to operations based on the EASA Regulation (216/2008), Member States are allowed to use the Section 2 guidance material, provided that there is not conflict with EU-OPS. To accompany EU-OPS 1, the JAA published an updated version of Section 2 in the form of Temporary Guidance Leaflet (TGL) 44. The section relating to the carriage of PRMS, ACJ OPS 1.260, remains unchanged from the original JAR-OPS 1 Section 2. It states that:

> *1 A person with reduced mobility (PRM) is understood to mean a person whose mobility is reduced due to physical incapacity (sensory or locomotory), an intellectual deficiency, age, illness or any other cause of disability when using transport and when the situation needs special attention and the adaptation to a person's need of the service made available to all passengers.*
>
> *2 In normal circumstances PRMs should not be seated adjacent to an emergency exit.*
>
> *3 In circumstances in which the number of PRMs forms a significant proportion of the total number of passengers carried on board:*
>
> *a. The number of PRMs should not exceed the number of able-bodied persons capable of assisting with an emergency evacuation; and*
>
> *b. The guidance given in paragraph 2 above should be followed to the maximum extent possible.*

4.16 Licensing authorities may require their carriers to impose more stringent restrictions on carriage of PRMs than the 50% limit defined by TGL 44. However, this is rare: the only example identified amongst the case study States is the Belgian Civil Aviation Authority (BCAA), which has set restrictions on the numbers of certain types of PRM, and minimum numbers of accompanying passengers. The numerical limits, which are outlined in more detail in the case study for Belgium in appendix C, are reflected in the conditions imposed by Brussels Airlines. In contrast, some licensing authorities

(for example the UK CAA) have stated that they will not generally approve limits on carriage of PRMs below the 50% defined in TGL 44.

4.17 In the remainder of cases, licensing authorities do not have any defined policy and will consider any restrictions on carriage of PRMs on a case by case basis. Therefore, more stringent restrictions on carriage of PRMs may be proposed by the airlines themselves, included in their Operations Manuals and submitted for approval by the licensing authority. As a result, there are significant variations between airlines, even where operational models and types of aircraft are similar. For example, whilst Wizzair, easyJet and Ryanair have similar operational models and aircraft types, Ryanair has a limit of 4 PRMs who require assistance per aircraft whilst Wizzair has a limit of 28 PRMs and easyJet 50%. Although the limits imposed by the three airlines are all based on safety, it is difficult to imagine that all three could be 'safe' limits. There does not seem to be an evidence base for these limits and a stakeholder suggested to us that, in the event of an emergency, it is impossible to predict whether even 'able bodied' passengers will be in a physical or psychological state consistent with evacuating the aircraft in the expected time; therefore, it was discriminatory to have a PRM limit.

4.18 The policy adopted by many of the legacy carriers is influenced by the United States Department of Transport Regulation, 14 CFR Part 382 (hereafter described as rule 382). The United States Air Carrier Access Act of 1999 made rule 382 apply to non-US carriers on flights to/from the US, and to all flights which are codeshares with US carriers (even flights not to/from the US), except where there is a specific conflict with non-US law. Despite sharing the same aspiration of ensuring equal access to air travel for all, there are significant differences between the US and EU regulations. Rule 382 specifically prohibits airlines from imposing numerical limits on PRMs, on the basis that this practice is discriminatory. Lufthansa and TAP Portugal are the only case study airlines operating to and from the US to publish PRM limits.

4.19 PRM limits have also been challenged on the basis of national law. In 2009, the Madrid Provincial Court ruled that Iberia must change its Flight Operation Manual because it was indirectly discriminatory against disabled people. The case was brought by three deaf people who were refused boarding because they were unaccompanied.

4.20 The Regulation allows airlines to **request that a passenger be accompanied**, but only on the basis of safety. Three carriers cited the UK Department for Transport's *Access to Air Travel for Disabled Persons and Persons with Reduced Mobility – Code of Practice* as the basis for the criteria they use to determine whether a PRM should be accompanied. The document also supports the Regulation in providing guidance to airlines and airports on best practice approaches to the handling and transit of PRMs. The guidance states that an accompanying passenger should only be required "when it is evident that the person is not self-reliant and this could pose a risk to safety". The document defines this as being as passenger who cannot:

- Unfasten their seat belt;
- Leave their seat and reach an emergency exit unaided;
- Retrieve and fit a lifejacket;
- Don an oxygen mask without assistance; or
- Is unable to understand the safety briefing and any advice and instructions given

by the crew in an emergency situation (including information communicated in accessible formats).

4.21 The document also states that passengers who require a level of personal care which cabin crew cannot provide should be told that they should be accompanied. This includes assistance with the following:

- Breathing (reliance on supplementary oxygen);
- Feeding;
- Toileting; and
- Medicating.

4.22 The guidance implies that a passenger should only be required to be accompanied if they are likely to require such assistance during the course of the flight. This is consistent with rule 382, which states that ”concern that a passenger with a disability may need personal care services…is not a basis for requiring the passenger to travel with a safety assistant”.

4.23 The most significant difference between US and EU law relates to the **48 hour advance notification** requirement in the Regulation for passengers requiring assistance. Rule 382 states that requiring pre-notification from PRMs is discriminatory, given that the same requirement is not imposed on other passengers. It does however allow airlines to require 48 hours pre-notification in circumstances where a passenger:

- Requires oxygen on a domestic flight (72 hours notice can be requested on international flights);
- Is travelling in an incubator;
- Requires a respirator or oxygen concentrator to be connected to the aircraft power supply;
- Is travelling in a stretcher;
- Is travelling in an electric wheelchair on an aircraft with 60 seats or less;
- Requires hazardous material packaging, e.g. for an electric wheelchair;
- Is travelling in a group of 10 or more PRMs;
- Requires an on-board wheelchair on an aircraft with more than 60 seats that does not have an accessible toilet;
- Intends to travel in the cabin with an emotional support animal;
- Intends to travel in the cabin with a service animal on a flight of 8 hours or more; or
- Has both severe vision and hearing impairments.

4.24 The Regulation does not define the circumstances under which **medical clearance** can be reflected from a passenger, but rule 382 prohibits airlines from requesting medical certification unless the passenger’s condition poses a ‘direct threat’, which ‘means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services’.

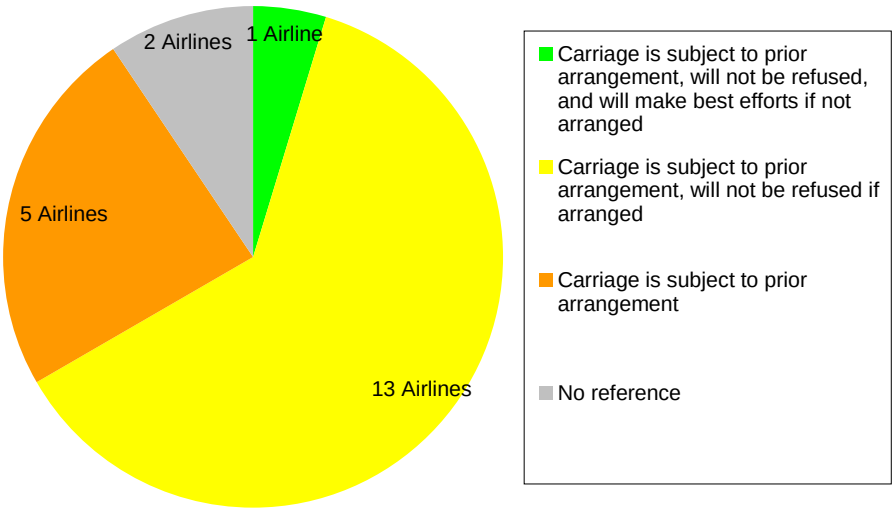
Policy on carriage of PRMs defined in Conditions of Carriage

4.25 The element of carriers' Conditions of Carriage relating to PRMs can be classified into the following six categories:

- **Will not refuse carriage on disability grounds** – all PRMs carried without restriction or requirement for pre-booking;
- **Carriage subject to prior arrangement, but will not be refused if not arranged** – the airline would prefer that advance arrangements are made, but PRMs may nevertheless be carried without this;
- **Carriage subject to prior arrangement and will not be refused if arranged –** PRMs are required to make advance arrangements, and will not be refused carriage on the basis of their disability if advance arrangements have been made;
- **Carriage is subject to prior arrangement** – as above, but without the additional clause on non-refusal of carriage to PRMs who have made arrangements;
- **Non-compliant term** – e.g. airline refuses to carry certain PRMs;
- **No reference** – PRMs not discussed in Conditions of Carriage.

4.26 Figure 4.1 shows the general approach adopted in the Conditions of Carriage of the case study airlines. None of the case study Conditions of Carriage were at the extreme ends of the scale, i.e. explicitly non-compliant terms or carriage of all PRMs without any restriction.

FIGURE 4.1 CONDITIONS ON CARRIAGE OF PRMS



4.27 Most (13) of the Conditions of Carriage of the sample airlines surveyed state a policy of not refusing carriage to PRMs on the grounds of their special requirements subject to arrangements being made in advance, although boarding may still be denied for other reasons. Alitalia adds an additional disclaimer, which states that the PRMs who have made advance arrangements will be carried, unless this is "…impossible due to objective causes of force majeure".

4.28 The advance booking requirement does not necessarily apply to all PRMs. Air Berlin states that the carriage of medical devices and mobility aids can only be guaranteed with up to 48 hours' notice, and visually impaired passengers with guide dogs are also required to make advance arrangements. No reference is made to PRMs not falling within these categories, however.

4.29 Table 4.2 shows the approaches adopted by each of the case study airlines in their Conditions of Carriage. Air Berlin is unusual in that the advance booking requirement appears only to apply to PRMs reliant on mobility aids, medical devices or assistance animals, and it appears that no such requirement exists for other PRMs.

TABLE 4.2 CONDITIONS OF CARRIAGE OF PRMS

Airline	State	General approach
Aegean Airlines	Greece	No reference
Air Berlin	Germany	Carriage of mobility aids, medical devices and assistance animals is subject to prior arrangement
Air France	France	Carriage is subject to prior arrangement, will not be refused if arranged
AirBaltic	Latvia	Carriage is subject to prior arrangement, will not be refused if arranged
Alitalia	Italy	Carriage is subject to prior arrangement, will not be refused if arranged
Austrian	Austria	Carriage is subject to prior arrangement
British Airways	UK	Carriage is subject to prior arrangement, will not be refused, and will make best efforts if not arranged
Brussels Airlines	Belgium	Carriage is subject to prior arrangement, will not be refused if arranged Also state that they will make reasonable efforts even if not arranged.
Delta	Non-EU	Carriage is subject to prior arrangement
EasyJet	UK	Carriage is subject to prior arrangement
Emirates	Non-EU	Carriage is subject to prior arrangement
Iberia	Spain	No reference
KLM	Netherlands	Carriage is subject to prior arrangement, will not be refused if arranged
Lufthansa	Germany	Carriage is subject to prior arrangement, will not be refused if arranged
Ryanair	Ireland	Carriage is subject to prior arrangement, will not be refused if arranged
SAS	Sweden	Carriage is subject to prior arrangement, will not be refused if arranged
TAP Portugal	Portugal	Carriage is subject to prior arrangement, will not be refused if arranged
TAROM	Romania	Carriage is subject to prior arrangement, will not be refused if arranged
Thomas Cook	Germany / UK	Carriage is subject to prior arrangement, will not be

Airline	State	General approach
		refused if arranged
TUI (Thomsonfly)	Germany / UK / Netherlands	Carriage is subject to prior arrangement, will not be refused if arranged
Wizzair	Hungary	Carriage is subject to prior arrangement

Circumstances under which carriage may be refused

4.30 Although all of the case study airlines impose a range of conditions on PRM bookings, only a proportion state explicitly that carriage may be refused if certain conditions are not met. In some cases, an individual PRM travelling cannot control whether the conditions are met, but some conditions can be satisfied if the PRM follows a defined course of action:

- Conditions which individual PRMs cannot control whether they meet include limits on the number of PRMs which can be carried on a given flight, and restrictions posed by the physical size and configuration of specific aircraft
- Conditions which PRMs can take actions to comply with include advance booking (discussed in the preceding section), travelling with an accompanying passenger or obtaining medical clearance.

4.31 The remaining categories are discussed in turn below.

4.32 Under Article 4 of the Regulation carriage can only be refused on safety grounds, or if boarding is physically impossible due to space constraints, a requirement with which most of the case study airlines are compliant. The only condition we have identified which is potentially non-compliant is the requirement for advance booking cited by Alitalia, Brussels Airlines, Delta, Ryanair and Wizz Air.

PRM limits and physical constraints

4.33 Ryanair is the only case study airline to set out numerical limits on carriage of PRMs in its Conditions of Carriage. In addition, Delta's Conditions of Carriage include the vague statement that carriage may be refused to any PRM on the basis of safety.

4.34 Airline PRM web pages provide more information on PRM limits, with several airlines setting out limits:

- Air Berlin;
- AirBaltic;
- Brussels Airlines;
- Lufthansa;
- TAROM (only for PRMs in wheelchairs); and
- Wizz Air.

4.35 Aegean Airlines and TAP Portugal also informed us that they have PRM limits in place, although these are not published. Full details of the PRM limits adopted by each airline are given in Table 4.3. Several of the other case study airlines informed us that they are required to adhere to the limit set out in TGL 44 that the number of PRMs

should not exceed the number of able bodied passengers; this restriction is not included in the table below, although it is possible that some of the unspecified restrictions actually relate to this. Note that other carriers may have unpublished limits which we have not been informed about.

TABLE 4.3 AIRLINE PRM LIMITS

Airline	Published limits	Unpublished limits	Applies to
Aegean Airlines	-	Unspecified restriction	All unaccompanied PRMs
AirBaltic	If number of PRMs exceeds number of cabin crew per flight (typically 3-4 on short haul aircraft)	-	All PRMs, only where PRMs form a large proportion of passengers on flight
Air Berlin	Unspecified limit for safety reasons	-	All PRMs
Brussels Airlines	2 when travelling individually, except on A330-300, where limit of 4. When travelling in group limit ranges from 9 (on BAe 146) to 27 (on A330-300), including escorts.	-	WCHS + WCHC + STCR + BLND + DEAF/BLND, in any combination
Lufthansa	Limit on unaccompanied passengers in wheelchairs: 3 on regional flights (>70 seats); 5 on other flights Limit on no. of wheelchairs per flight: 3 on most intercontinental flights, 2 on continental flights and 1 on regional flights. Also unspecified general limit on limited mobility passengers for care and safety reasons.	-	All unaccompanied PRMs
Ryanair	Limit of 4 per aircraft for safety reasons	-	Passengers with reduced mobility, blind/visually impaired or requiring special assistance.
TAP Portugal	-	Stretcher: 2, except Fokker 100 and Embraer 145; WCHC: 4-10 depending on aircraft; WCHS, blind and deaf: 9, except Fokker 100 and Embraer 145; Incubator: 1, except Fokker 100 and Embraer 145.	See left
TAROM	Limit on passengers requiring wheelchair in		

	cabin: 0 on AT42, 2 on B737 and 6 on A318. No limits on other PRMs		
Wizz Air	Limit of 28 disabled or incapacitated or passengers with reduced mobility, including a maximum of 10 who require a wheelchair from check-in to the cabin seat	-	See left

4.36 Fewer airlines refer to other physical constraints in their Conditions of Carriage, with only AirBaltic and Brussels Airlines indicating that carriage may be refused if the PRM is unable to physically board via the aircraft's doors.

Accompanying passengers

4.37 Article 4(2) of the Regulation allows airlines to require PRMs to be accompanied in order to meet the applicable safety requirements referred to in Article 4(1). As with any numerical PRM limits, requirements for PRMs to be accompanied should be set out in the carriers' Operations Manuals, which again would require the approval of the licensing authority in the relevant Member State.

4.38 Most airlines publish criteria under which a PRM would have to be accompanied. These are again generally safety related, or relate to the level of assistance cabin crew are able to give. Three common themes emerge:

- The PRM has certain specified conditions, e.g. difficulty walking;
- The PRM requires care which the cabin crew are unable to provide (typically this means that the passenger is not self-reliant); or
- The PRM is unable to evacuate the aircraft without assistance.

4.39 Although many airlines make reference to self-reliance criteria there is a difference between those requiring **all** passengers who are not self-reliant to be accompanied; and those which state that passengers who, for example, require help with eating, should be accompanied. In the latter case a passenger could argue that they will not be eating on the flight, and that this criterion is therefore irrelevant. Six of the sample airlines state that all passengers who are not self-reliant must be accompanied, and this is not limited to cases where there is a safety implication. In our view, these airlines may be infringing the Regulation as well as (if they fly to the US) rule 382.

Medical clearance

4.40 The majority of the case study airlines required medical clearance for certain types of PRM, either confirming fitness to travel, or stating a need to carry medical equipment such as syringes or oxygen, although again it is generally not explicitly stated that boarding will be refused if clearance is not obtained. In most cases, the PRM is required to ask their doctor to fill in a medical clearance form, which is then forwarded to the airline's medical department for approval.

4.41 Given the importance of not confusing disability with illness, it might be expected that

the proportion of passengers required to seek clearance before travelling would be minimised. This is the case for most of the case study airlines. Although the types of PRM required to obtain clearance varies, this normally includes those requiring oxygen or stretchers and is not overly restrictive. However, six airlines adopt slightly different policies:

- Lufthansa states that 'In the case of a physical or psychological limitation, you must obtain an assessment of your fitness for air travel from a Lufthansa doctor in advance', although it is stated elsewhere that this does not apply to blind people. Nevertheless, this requirement could potentially encompass many types of PRM, and the requirement to see a Lufthansa doctor is likely to be particularly onerous.
- The policy adopted by Wizz Air, although vague, also has the potential to be quite onerous. The airline reserves the right to require medical clearance in all cases, and will refuse the reservation if this is not obtained.
- Austrian, Iberia (both on the PRM web pages) and Wizzair (in the airline's Conditions of Carriage) all state explicitly that boarding may be refused to passengers on medical grounds if clearance has not been arranged in advance.
- Thomas Cook takes an unusually vague approach in stating that 'Some medical conditions require a fitness to fly certificate'. Passengers who consider themselves to have a condition that will require the authorisation of their doctor are advised to obtain their approval before flying. A telephone number is however provided, where presumably clarification of the conditions requiring medical authorisation can be obtained.

4.42 Policies on denial of boarding, accompanying passengers and medical clearance are summarised in Appendix A. This information is mostly derived from the PRM web pages provided by the airlines, unless explicit reference is made to the conditions of carriage. Any unpublished information provided to us directly by the airline is shown in italics.

Actions to be taken when carriage refused

4.43 Article 4(1) requires that, where a PRM is refused boarding, the airline is required to offer reimbursement or rerouting in line with Regulation 261/2004. Although none of the case study airlines make any references to this in either their PRM web pages or Conditions of Carriage, almost all of the airlines we interviewed confirmed that passengers who have been refused boarding would be offered a refund, rerouting or cost-free cancellation, depending on the circumstances. However, some carriers indicated that this situation would be rare, as refusal would most commonly occur at the booking stage.

4.44 Where boarding is refused, airlines are required under Article 4(4) of the Regulation to immediately inform the PRM of the reasons for the refusal and, on request, should communicate the reasons to the PRM in writing within five working days. Alitalia and Ryanair are the only airlines to refer to this in their Conditions or policies, Alitalia stating in its Conditions of Carriage that in the event of refusal of carriage the passenger may request additional information, and Ryanair stating on its PRM webpage that 'If we are unable to carry a disabled/reduced mobility passenger, we will inform the person concerned of the reasons for refusal of carriage'.

4.45 However, although only two of the case study airlines provide details of the actions

they will take when carriage is refused, again most indicated in their interviews with us that they will provide either written or verbal explanations to passengers who have been refused boarding.

Services provided to PRMs

Requirements defined in law or other guidance

4.46 Annex II of the Regulation requires that airlines provide the following assistance to pre-notified PRMs without additional charge:

- Carriage of recognised assistance dogs in the cabin, subject to national regulations.
- In addition to medical equipment, transport of up to two pieces of mobility equipment per disabled person or person with reduced mobility, including electric wheelchairs (subject to advance warning of 48 hours and to possible limitations of space on board the aircraft, and subject to the application of relevant legislation concerning dangerous goods.
- Communication of essential information concerning a flight in accessible formats.
- The making of all reasonable efforts to arrange seating to meet the needs of individuals with disability or reduced mobility on request and subject to safety requirements and availability.
- Assistance in moving to toilet facilities if required.
- Where a disabled person or person with reduced mobility is assisted by an accompanying person, the air carrier will make all reasonable efforts to give such person a seat next to the disabled person or person with reduced mobility.

4.47 This guidance is reflected in ECAC Document 30 and the UK DfT Code of Practice. The Code of Practice also suggests the following:

- Cabin crew should provide reasonable assistance with the stowage and retrieval of any hand baggage and/or mobility aid whilst in flight.
- Cabin crew should familiarise disabled passengers with any facilities on board designed particularly for disabled passengers. In the case of visually impaired people they should additionally offer more general familiarisation information and such other explanations as may be requested, such as about on-board shopping.
- Other printed material, such as dinner menus, should, where reasonably practicable, be accessible to blind and partially sighted people. Alternatively, cabin crew should explain the material.
- Where video, or similar systems, are used to communicate safety or emergency information, sub-titles should be included to supplement any audio commentary.
- Where possible, films and other programmes should be subtitled for deaf and hard of hearing passengers.
- In selecting catering supplies, air carriers should consider how “user-friendly” the packaging is for disabled people.
- Cabin crew should describe the food, including its location on the tray, to blind and partially sighted passengers.
- During the flight, cabin crew should check periodically to see if PRMs need any

assistance. In the case of those requiring the use of the on-board wheelchair (where one is installed), the staff must be trained in how to assist the passenger to and from the toilet by pushing the on-board wheelchair.

- Passengers' own portable oxygen concentrators should normally be allowed if battery powered, though air carriers will need to check the type of device to ensure it does not pose any technical problems.

4.48 The assistance provided by the case study airlines generally reflects this guidance, although not all provide comprehensive information on the service they provide to PRMs, particularly in terms of general assistance on-board the aircraft.

4.49 Again, there are some conflicts between Regulation 1107/2006 and the US guidance defined in rule 382, which would apply to some flights operated by EU carriers including all flights to/from the US. In particular, the US regulations do not define an upper limit on the number of items of mobility equipment that should be carried. Some additional requirements established by rule 382 include:

- Assistance in moving to and from seats;
- Assistance in preparation for eating;
- All new videos, DVDs, and other audiovisual displays played on aircraft for safety purposes should be high-contrast captioned;
- Passengers should be able to use moveable armrests seats where their condition requires it;
- Seats with additional legroom should be provided for passengers with fused or immobilised legs;

- PRMs should be permitted to use ventilator, respirator, continuous positive airway pressure machine, or portable oxygen concentrator (POC) of a kind equivalent to an FAA-approved POC on all aircraft originally designed to have a maximum passenger capacity of more than 19 seats, unless the equipment does not meet safety requirements or cannot be used or stowed safely in the cabin.

Assistance animals

4.50 Of all the case study airlines which refer to guide dogs, almost all accept them in the cabin free of charge, as required by Annex II of the Regulation, although carriage is also limited by national regulations regarding the transport of animals. However, we identified the following issues with the carriers' published policies:

- Alitalia – assistance dogs are only allowed in the cabin if space is available;
- Emirates – assistance animals can only be carried in the hold;
- TAP Portugal / Thomas Cook / Wizz Air – insufficient information regarding charging and carriage in cabin;
- TUI – assistance dogs carried for a nominal charge. It is not stated whether animals can be carried in the cabin; and
- Air France / EasyJet – not stated whether carriage is free of charge.

4.51 There is some variation in terms of the conditions applied to the carriage of guide dogs; some airlines require a carrying case, muzzle or harness, for example; Austrian,

EasyJet and TAP Portugal require certification of service animal status; and carriage in exit rows is often prohibited. Several airlines state limits on the number of guide dogs that can be carried on a given flight – AirBaltic, British Airways and Ryanair. Other airlines may enforce similar unpublished limits. Full details of airline policies are provided in Appendix B.

4.52 In most cases, the information provided by carriers on which routes service dogs can be carried on is quite vague. Two exceptions are British Airways and Iberia, which include detailed information and links to external websites; in the case of British Airways this is the UK DEFRA (Department for Environment, Food and Rural Affairs) guidance on the Pet Travel Scheme which governs the carriage of assistance animals on flights within and to/from the UK. This includes detailed guidance on travel preparation and a full list of approved routes. The guidance provided by Brussels Airlines is also reasonably detailed, and both Austrian and Thomas Cook provide links to EU and UK regulations respectively, but without detailed supporting explanations.

Mobility equipment

4.53 All the airlines reviewed accept wheelchairs, and in most cases airlines state that there is no charge for this. Three airlines allow at least certain types of personal wheelchair in the cabin, with carriage restricted to the hold or not stated in the remainder of cases. Spillable wet-cell batteries are not accepted by some airlines and where they are accepted this is usually subject to preparation. Where specified, most airlines policies on the carriage of wheelchairs are consistent with the upper limit of two items of mobility equipment per passenger specified in Annex II of the Regulation. Air Berlin is the only one of the case study airlines to define a limit below this.

4.54 Dangerous goods legislation is cited by many airlines as posing a limitation on the range of battery operated wheelchairs which may be carried. However, few airlines provide specific details of the laws and regulations which apply. Austrian does provide references to both Regulation (EC) No 820/2008 and the IATA Dangerous Goods Regulations, the latter accessible via an external link; and Delta provides a link to the US Department of Transportation's Safe Travel information, which provides information to passengers on the carriage of batteries. The Thomas Cook and TUI websites include a reference to the IATA Dangerous Goods Regulations, but without external links. It is worth noting that, although only a fraction of the case study airlines provide this level of detail on their PRM web pages, many may provide such information in their luggage regulations or elsewhere in the Conditions of Carriage.

4.55 Under Article 12 airlines are required to compensate for losses or damage to mobility equipment, up to the limits specified by national and international law, which effectively means the limits defined in the Montreal Convention. This limits any compensation to 1131 SDR (approximately €1260), which would be inadequate for technologically advanced wheelchairs which can cost up to €20,000. However, several airlines have indicated that these limits would be waived in practice, partly to avoid bad publicity associated with provision of insufficient compensation, and also because it is generally agreed that such events are rare. Air France, Iberia, KLM, TAROM, Thomas Cook and TUI informed us that they compensate passengers for the full value of the equipment; with TUI also indicating that all UK airlines have agreed to waive

the Montreal limits. In contrast, one PRM organisation informed us that it was aware of cases where airlines had not waived the limits.

4.56 Almost all stakeholders stated that the Regulation had made no impact on loss or damage to mobility equipment, both in terms of the number of incidents and levels of compensation for loss or damage; although some felt that the training requirements imposed by the Regulation has resulted in improved handling procedures.

Medical equipment

4.57 Oxygen is available on most of the case study airlines, and can either be provided by the airline or the passenger. Where stated, charges range from €100 (Ryanair / Thomas Cook) to €335 (SAS intercontinental flights). Wizzair is the only exception: the airline accepts passengers who need oxygen with medical certification, but does not provide additional oxygen or allow passengers to bring their own onboard. Such restrictions appear to equate to a complete ban on PRMs requiring oxygen.

4.58 Policies on the carriage of stretchers (where stated) tend to be based on aeroplane size, with several operators not accepting stretchers on the smaller planes in their fleet. Most low cost carriers including easyJet, Ryanair, Thomas Cook and Wizzair prohibit carriage of stretchers entirely.

Accessible information

4.59 Only 6 airlines specify the types of accessible information provided for PRMs. This tends to be safety-related, although may also include Braille seat numbers and verbally describing food-related information.

Seating

4.60 Austrian, British Airways, Delta and KLM are the only case study airlines to state on their web pages that PRMs can be allocated any seat most appropriate to their needs, subject to safety regulations restricting access to exit row seats. Where most other airlines discuss their PRM seating policy this is usually in terms of restrictions, again the most frequent being not allowing PRMs to be seated in exit rows. Many airlines provide seats with retractable armrests, although normally only a proportion of the seats on an aircraft are provided with this feature (KLM is the only airline to state that all seats have moveable armrests). British Airways state that passengers will be allocated a bulkhead seat when requested, provided that this is not already allocated to another PRM. Similarly, Delta and Lufthansa also state that customers with service animals (or immobilised legs in the case of Delta) are entitled to bulkhead seats. Again, only a proportion of the airlines (14 out of 21) provide any of this kind of information, so it is unclear what the other case study airlines offer. The results of our analysis are shown in Appendix Table A.2.

4.61 Ryanair requires PRMs to sit in window seats, so that they do not impede the evacuation of other passengers, although this could result in a difficult or uncomfortable transfer to and from the seat for some passengers. Other airlines may adopt similar policies which we were not informed about. Iberia informed us that, although they recommend that PRMs are accommodated in window seats, through

their online booking systems PRMs are able to choose any seat, with the exception of emergency exit rows.

4.62 Several airlines prohibit PRMs from being seated in exit rows 'for safety reasons', but generally do not make a specific reference to the legal basis for this, which in most cases would be EU-OPS1. Air Berlin, Delta and Ryanair are the only airlines to provide details of the regulations on which this prohibition is based – in the case of Delta this is the Exit Seat Regulation, 14 CFR 121.585; and for Air Berlin and Ryanair EU/JAR-OPS 1.260. Thomas Cook and TUI make more vague references to UK CAA regulations as a justification for their seating restrictions.

Restrictions on service

4.63 12 of the case study airlines provide an indication of the level of assistance in-flight provided to PRMs, although mostly in terms of the assistance staff are unable to provide. This generally includes feeding, lifting passengers, administering medication and assisting in personal hygiene or toilet functions. The level of assistance which is provided is generally limited to preparation for eating, assistance in moving around the aircraft and stowing and retrieving luggage.

Pre-notification of requirements

Requirements defined in law or other guidance

4.64 Article 6(1) of the Regulation requires that airlines take all measures necessary to ensure that they are able to receive PRM assistance requests via all normal points of sale. Articles 6(2) and 6(3) state that, where this information is received more than 48 hours before departure it should be transmitted to the relevant airports no later than 36 hours before the flight departs. Requests received after 48 hours should be communicated at the earliest opportunity. Article 6(4) requires that, after departure of a flight, airlines inform the destination airport (if within the EU) of the number of disabled persons and persons with reduced mobility on that flight requiring assistance, and the nature of the assistance required.

Methods by which passengers can pre-notify

4.65 In addition to the requirements of Article 6(1), the Recitals of the Regulation state that all essential information provided to air passengers should be provided "in at least the same languages as the information made available to other passengers". Several airlines do not meet this standard, although the Recitals are in themselves not binding.

4.66 Many of the major airlines provide offices and contact telephone numbers in a number of countries where the official language may not be one of the languages in which the airline website is offered. In most cases it is not possible to assess the languages offered by staff in these offices, and if the website is not offered in this language passengers may in any case have difficulty finding the contact for their country. For these reasons the language category is based on the website languages offered rather than the geographical spread of airline offices.

4.67 Some NEBs highlighted the use of premium rate special assistance telephone numbers as being an issue. Our research indicates that many carriers use phone numbers that do

charge, although rates are usually moderate, with the following exceptions:

- Some carriers, for example AirBaltic, provide international numbers only.
- Ryanair provides national phone numbers in most Member States but the rates in some States are high – for example, €0.50 per minute in Belgium
- Brussels Airlines provides (for calls from the UK) either a Belgian telephone number, or the UK reservations centre which charges £0.40 (€0.44) per minute, although this number centre deals with all reservations, and not just PRM assistance requests.
- SAS provides (for calls from the UK) a UK reservations number, which charges £0.25 (€0.28) per minute, although again this is not PRM-specific.

4.68 Each of these airlines accept notifications online, so passengers could theoretically avoid payment of these charges. However, we are not able to comment on the accessibility of these systems or whether they enable collection of all of the information that would be required in each case – some passengers may still need to use the telephone numbers for these reasons.

4.69 The notification options available to PRMs for the 21 case study airlines are shown in Table 4.4. It should be noted that options presented during the booking process could only be examined up to the point of payment for tickets. Some airlines may provide a notification option after payment has been made, which we would not have identified.

TABLE 4.4 OPTIONS TO NOTIFY CARRIERS OF REQUIREMENTS

Airline	Options provided	Differences between languages of PRM info and main website	Languages for phone calls
Aegean Airlines	Telephone	None	Not stated
Air Berlin	Telephone	None	Not stated
Air France	During online booking process Email / website Telephone	Main site in 15 languages PRM info in 10 languages	Not stated
AirBaltic	Telephone	None	Not stated
Alitalia	Telephone	Main site in 8 languages PRM info in 6 languages	Not stated
Austrian	Email / website Fax	Main site in 22 languages PRM info in 2 languages	Not applicable
British Airways	During online booking process Email / website Telephone	None	Not stated
Brussels Airlines	Email / website Telephone	None	Not stated
Delta	Telephone	None	Not stated
EasyJet	During online booking process Email / website Telephone	None	Telephone numbers only accessible after logging into personal account
Emirates	Email / website Telephone	None	Not stated
Iberia	During online booking process	None	Not applicable
KLM	Email / website Telephone	Main site in 15 languages PRM info in 9 languages	Not stated
Lufthansa	Email / website Telephone	None	Not stated
Ryanair	During online booking process Telephone	None	English French Italian Spanish
SAS	During online booking process Email / website Telephone	Main site in 15 languages PRM info in 12 languages	Not stated
TAP Portugal	Telephone	Main site in 9 languages PRM info in 7 languages	Not stated

Airline	Options provided	Differences between languages of PRM info and main website	Languages for phone calls
TAROM	During online booking process	None	Not applicable
Thomas Cook	During online booking process Telephone	None	Not stated
TUI (Thomsonfly)	Telephone	None	Not stated
Wizzair	During online booking process Telephone	None	Bulgarian Czech English French German Hungarian Italian Polish Romanian Ukrainian

Process for collection and transmission of requests

4.70 Although many case study airlines enable PRMs to make special assistance requests online, this often has to be supplemented by a telephone call to the airline to establish the PRM's exact requirements. Air France informed us that, when notifying online, a 'pop up' window will appear which informs the passenger that they will be contacted by the airline to clarify the assistance required. Similarly, KLM stated that, although they do provide an online notification option, the passenger would still need to call the airline to establish their exact requirements.

4.71 The standard procedure for transmitting assistance requests to the relevant airports is the PAL (Passenger Assistance List), which under Article 6(2) should be sent 36 hours before departure. Additional requests received after this time can be included in the CAL (Change Assistance List) in line with the requirements of Article 6(3). Most requests are transmitted using the standard special assistance codes IATA codes, although some airlines their own codes.

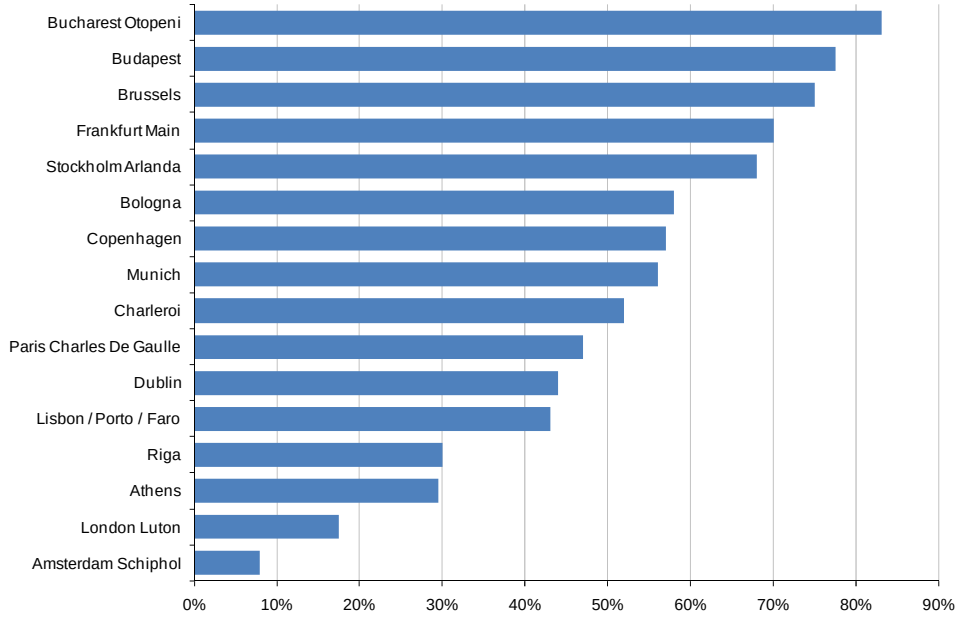
4.72 This information is supported by Passenger Service Messages (PSM) which are automatically generated by all special assistance requests recorded on the Passenger Name List of a given flight (thus complying with Article 6(4) of the Regulation). PSM messages are generated automatically on departure from the origin airport, so can be particularly useful for airports in relation to long haul flights, where there is sufficient time to mobilise staff and equipment before the aircraft arrives. Conversely, PRM messages are of less use in relation to short haul flights, as staffing arrangements cannot be so easily amended at short notice.

Effectiveness of process

4.73 All of the case study airlines interviewed use the standard PAL / CAL / PSM system, although Ryanair informed us that they also have their own system of codes and notifications (discussed in section 3 above).

4.74 Rates of pre-notification vary substantially, as shown in Figure 4.2. It should be noted that the definition of pre-booked assistance may vary between airports – for example Brussels Charleroi airport informed us that its figures for pre-notification includes notification by PSM message, which would not be received prior to the 36 hours specified by the Regulation. A number of other airports did not clarify their definition of pre-notification, including Bucharest and Budapest, which may explain why the percentages here are particularly high.

FIGURE 4.2 PRE-NOTIFICATION RATES BY AIRPORT



4.75 There a number of possible explanations for both the wide divergence of pre-notification rates, and the particularly low values observed at some airports. These include:

- **Passenger factors**, e.g. not being aware of the pre-notification requirement, abuse of the system or not realising that they would need assistance until arriving at the airport;
- **Airline factors**, e.g. not providing sufficient or appropriate means for passengers to pre-notify of their requirements, or failing to transmit assistance requests to airports within the time limits specified in the Regulation;
- **Other factors** – primarily communication and other technological failures.

4.76 Stakeholder views on the possible explanations for pre-notification issues are explored in the relevant section below.

Complaints to airlines

Airline processes for handling complaints

4.77 Most of the case study airlines have dedicated complaint forms and departments for the handling of complaints. Complaints regarding the Regulation do not necessarily require specialised procedures – both easyJet and Ryanair stated that their process for handling complaints was the same as for Regulation 261/2004, and KLM reported that PRM complaints were handled in the same way as all others. The only differences cited by the airlines were that, in the case of easyJet, complaints regarding refusal of boarding were escalated to head office; and KLM informed us that the airline's medical department may need to be involved in more complex cases. Ryanair also informed us that they will amend standard procedures for receipt of complaints where required, for example if a customer needs to complain by phone rather than in writing. KLM stated that to date they have only received complaints by phone, email or letter; and none in Braille / audio tape or other accessible formats.

4.78 Delta reported a more complex procedure, shaped primarily by the requirements of rule 382. The airline is required to designate Complaints Resolution Officials, responsible for providing a 'dispositive response' to customer complaints of an alleged violation, summarising the facts and explaining the airline's determination of the issue. If the complaint relates to the airline's policy and not a specific infringement the airline is still responsible for providing a full and final response and the reasons for its determination.

4.79 The stated time taken by airlines to respond to complaints is variable, and is not related to the airline type or business model.

4.80 Air France, SAS, TAP Portugal reported that they would (at least in theory) be able to accept complaints in any of the languages of the countries which they serve and/or have offices. Aegean Airlines, Ryanair and TAROM reported a more restricted range – despite its destinations including Albania, Egypt, Israel, Serbia, Spain and Turkey, Aegean Airlines stated that it can only accept complaints in Greek, English, German, French and Italian. Likewise, despite both Ryanair and TAROM operating services to 25 countries, the range of languages in which they will accept complaints is limited. Ryanair is only able to accept complaints in English, German, French, Spanish and Italian; and TAROM will only process complaints in Romanian, English, French, German, Spanish and Italian. Thomas Cook stated that, to date, they have only received complaints in English, although they do have a retainer with a language translation service which can be used if required.

Number of complaints received

4.81 Only TAROM and Thomas Cook were able to provide us with PRM complaint statistics. TAROM reported so far receiving no complaints from PRMs; Thomas Cook received 51 complaints in each of 2008 and 2009.

Cost of complying with the Regulation

4.82 The main compliance cost identified by airlines was the airport PRM charge. As discussed in section 3 above, several airlines (mostly low cost and charter carriers)

expressed dissatisfaction with the level of these charges; in contrast, Air France stated that it did not consider the PRM charge to be a real cost, as it was passed directly to passengers. Another legacy carrier stated that the Regulation did not generate any additional costs for it, as it was already complaint with the (generally more onerous) requirements of rule 382.

4.83 An issue raised by Air Berlin and TUI related to the additional costs likely to be associated with providing a cost-neutral special assistance telephone number. The German NEB considers that the special assistance helpline should be free, and the UK DfT Code of Practice also suggests that cost-neutral telephone numbers should be provided for PRMs, which TUI accommodates by requesting that the special assistance helpline calls the passenger back. However, the costs associated with telephone assistance calls are likely to be relatively small, particularly in relation to the staffing costs associated with providing a call centre.

4.84 TUI also highlighted the initial training costs incurred by the Regulation, which have now diminished as the focus shifts to more limited refresher training where required.

Training

4.85 Under Article 11 airlines are required to:

- Ensure that all staff (including those employed by sub-contractors) providing direct assistance to PRMs, have knowledge of how to meet the needs of these persons;
- Provide disability-equality and disability-awareness training to all staff working at airports dealing directly with the travelling public;
- Ensure that, upon recruitment, all new employees attend disability‑related training and that personnel receive refresher training courses when appropriate.

4.86 Most of the case study airlines were able to demonstrate compliance with the training criteria set out in Article 11, although the carriers informed us that training was restricted to passenger-facing staff only. Some examples of the training provided to airline staff are given below.

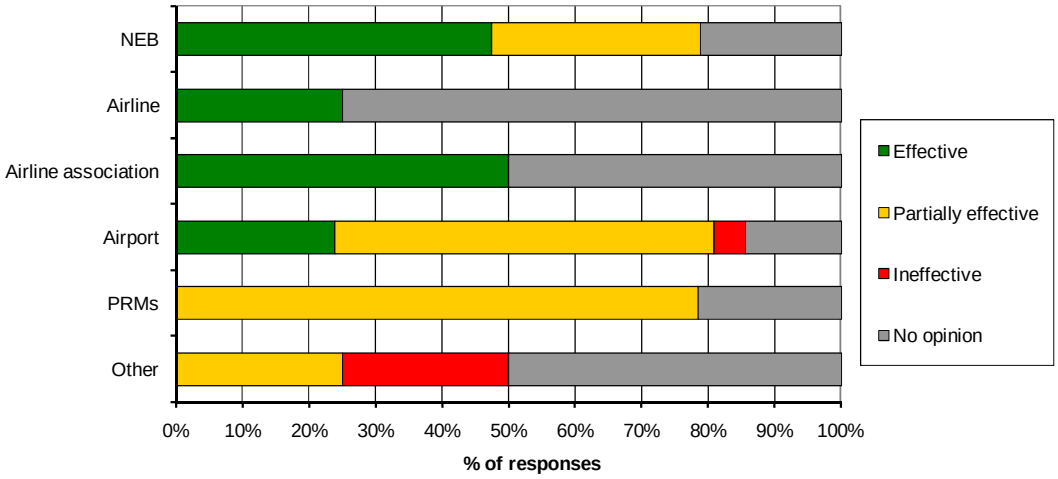
- Major European network carrier: 2.5 hours theory (e.g. responsibilities under the Regulation, how to approach PRMs) and practical (e.g. guiding blind PRMs, lifting to and from wheelchairs) training for crew; 1.5 hours theory for all other passenger-facing personnel.
- US network carrier: annual recurrent training is provided to all Complaint Resolution Officers (CROs); required under 14 CFR Part 382 to ensure effective implementation and to resolve passengers' problems as quickly as possible).
- European low cost carrier: initial and refresher cabin crew training includes PRM training, and the airline has requested that this training should be a requirement in contracts with ground handling staff.
- European low cost carrier: basic training in sign language is included.

4.87 Airlines operating to the US and therefore already compliant with rule 382 stated that few if any changes to their existing training programmes were required to comply with the Regulation.

Stakeholder views on effectiveness of implementation by airlines

4.88 Figure 4.3 summarises stakeholder views on the effectiveness of the implementation of the Regulation by airlines. Although many stakeholders did not express an opinion on this, relatively few stakeholders were dissatisfied. A summary of views of each stakeholder group is given below.

FIGURE 4.3 STAKEHOLDER VIEWS: AIRLINES



Airlines and airline associations

4.89 Unsurprisingly, the majority of airlines did not express an opinion on their own effectiveness in implementing the Regulation, and none felt that implementation was ineffective. Similarly, airline associations either expressed no opinion, or stated that implementation by their members was effective. ELFAA felt that all its members were complying and not refusing carriage. AEA was also generally satisfied that its members were not discriminating against PRMs in any way, but did suggest that there may be issues around the interpretation of the safety rules governing embarkation by PRMs, leading to inconsistencies between its members.

Airports

4.90 Pre-notification was the most frequently cited issue raised by the airports, an issue discussed separately below. The second most common theme emerging across several airports was the alleged non-payment of PRM charges by airlines.

4.91 Alongside the non-payment issue ACI highlighted several other issues relating to agreement of the PRM charges at airports. These included trying to avoid or reduce the charge, for example by requiring excessive levels of detail on the costs of PRM assistance at airports after the tender process had been completed, and refusing to cooperate with consultation meetings. Two airports with high proportions of low cost carrier traffic informed us that some carriers sought to specify the lowest possible levels of service in order to minimise PRM charges.

NEBs

4.92 The majority of NEBs informed us that compliance by airlines was satisfactory.

Although some issues were raised no common themes emerged, suggesting that any issues may be somewhat isolated. The NEBs which stated that implementation by airlines was partially effective were:

- France (DGAC): lack of information, and limited consistency in policies between airlines.
- Germany (BMBVS): use of premium rate telephone numbers by airlines.
- Portugal (INAC): some issues with the explanations provided for refusal of carriage.
- Spain (AESA): notification can incur additional costs for the passenger, airline safety rules are sometimes insufficient, and some airlines claim that passengers with mobility equipment are taking two seats, and charge for this.
- Sweden (CAA): issues around pre-notification (see section below).
- UK (CAA / EHRC / CCNI): lack of consistency in criteria for refusal of carriage. Some airlines charge for reserving specific seats.

PRM organisations

4.93 Satisfaction with implementation by airlines was generally lower among the PRM organisations, although none of the stakeholders informed us that airlines were significantly non-compliant with the Regulation. Inconsistencies in airline policies, accessibility of websites and the level of information provided by airlines emerged as the most frequently cited issues – *Danske Handicaporganisationer* (DH) suggested that less than 5% of airlines' websites were accessible. Two organisations also indicated that they had not seen any PRM safety rules published online.

4.94 Two organisations highlighted issues with medical clearance – this was felt to be requested too frequently, and that an unnecessary level of information was being requested by some airlines. Other issues raised included insufficient training, issues with handling of mobility equipment, seating, and inaccessibility of airport check-in systems. Guide Dogs reported instances where flight crew had not reported allergies which then prevented a passengers with guide dogs from flying, or had not checked that the dog was secure prior to take-off or landing. It was felt that policies of refusing boarding to unaccompanied blind passengers on the basis that they could not evacuate was misguided, given that they were accustomed to not being able to see and could therefore cope more easily in smoky conditions.

4.95 These views were echoed by the European Blind Union (EBU) and the European Disability Forum (EDF). In addition, EBU emphasised continuing difference in the handling of PRM travel between carriers, and felt that booking processes were discriminatory against those without access to a computer (we were informed that requesting assistance by phone can take several hours). The UK PRM organisation informed us that only 30% of the disabled population are online, which would increase this discrimination. EDF also noted that some airlines still only paid up to the Montreal Convention limits in cases of damage or loss of mobility equipment; that insurance for mobility equipment was extremely difficult to obtain; and that establishing liability for damage can be very complex. EDF also believe that the enforcement of numerical limits on PRMs is inappropriate and discriminatory, and that it is unacceptable for carriers to require passengers to be accompanied on self-reliance criteria.

4.96 EDF provided us with some examples of discrimination which had been reported to them. Some examples relating to treatment on-board the aircraft include:

- A blind passenger was not given any safety information in an accessible way, and the cabin crew were unaware of how to assist the passenger when serving a meal, or to communicate with the passenger more generally.
- A passenger was not allowed to check-in online, due to him using a wheelchair. Once on the aircraft he was forced to sit in a window seat at the back of the plane, which he found both discriminatory and difficult, as being tetraplegic meant that it was not easy to access the seat, or to receive assistance in an emergency.
- A passenger was informed that he had to pay extra to bring his prosthetic legs when going on holiday.
- A wheelchair user tried to book a ticket with an airline but noticed on their website that it was clearly indicated that they do not accept passengers using wheelchairs.
- A blind couple travelling with their baby were told that in order to be allowed to travel, they needed to bring an accompanying person, as it was not considered safe that the couple were responsible for their baby on board.
- A blind passenger was asked by a member of cabin crew in a rude manner whether she really was entirely blind.

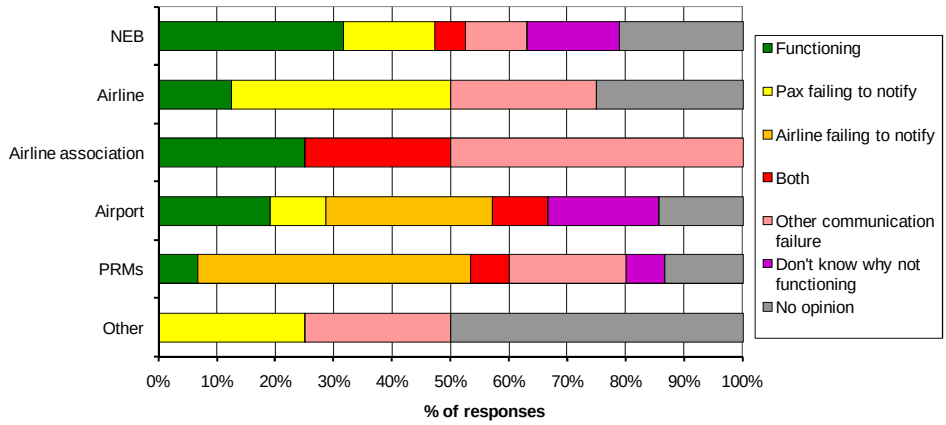
Other organisations

4.97 Key issues raised by other organisations were the application by some carriers of limits on the numbers of PRMs that could be carried, and that these limits could be further reduced based solely on arbitrary decisions by pilots. In addition, ECAC felt that information should be simplified for passengers with learning disabilities. However, ECTAA highlighted the improvements which airlines, tour operators and travel agents had made to their websites and booking procedures to enhance PRM travel.

Stakeholder views on effectiveness of pre-notification systems

4.98 Figure 4.4 shows stakeholder views on the effectiveness of the pre-notification system and reasons cited for low rates of notification. Most stakeholders believed that this system was not functioning well, although the explanations cited by each stakeholder group vary.

FIGURE 4.4 STAKEHOLDER VIEWS: PRE-NOTIFICATION



4.99 The NEBs were generally the most optimistic about how the pre-notification system was working, with fewer than half identifying problems. Where they did express a view on the cause of pre-notification issues it was most commonly that the passenger was the cause. The Irish NEB suggested that awareness of the Regulation and the need to pre-notify to receive assistance was low amongst PRMs who were not members of representative groups. Most of the PRM groups felt that the airlines were the primary cause of problems with the pre-notification system, for a variety of reasons:

- Poor design and accessibility of airline websites makes it difficult for passengers to pre-notify;
- Airlines have been unwilling to make the significant investments required to ensure an effective system; and
- Airlines have been ineffective at transmitting special requests (e.g. dietary needs) between staff and departments.

4.100 The majority of airlines believed that the main issue in terms of pre-notification was that passengers were themselves failing to notify of their assistance needs. Several airlines and airports suggested a possible explanation as being that, although they may not normally consider themselves as being in need of special assistance, some travellers (especially infrequent flyers and the elderly) may find they need this once in the airport and having to walk long distances to reach their flight. Low rates of pre-notification were also attributed partly to abuse of the system, as it was believed that 'genuine' PRMs would usually pre-notify.

4.101 However, the majority of airports stated that the most significant problem was failure by airlines to pass on notifications, or erroneous notifications. Several highlighted the large differences in pre-notification rates between airlines: some airlines are able to achieve high rates of pre-notification (60-80%) whereas others have very low rates

(10% or less). Non-EU airlines were often stated to be worse, with flights from North Africa and India often cited as being particularly problematic, both in terms of the low levels of pre-notification and the high numbers of PRMs on these flights. Aéroports de Paris stated that passengers travelling from some north African airports would be charged for assistance if pre-notifying, even though the European airport provided assistance free of charge. US flights also pose difficulties for airports as US carriers are generally not allowed, under rule 382, to request details of assistance requirements in advance; however, the relative length of these flights means that PSM messages are usually received 7-10 hours in advance of arrival.

4.102 Several airports also indicated that charter carriers had particularly low rates of pre-notification. This was attributed by some carriers to low rates of notification by travel agents – in many cases agents may have an incomplete knowledge of the full range of wheelchair codes, often simply observing that the passenger is using a wheelchair and then allocating the WCHR special assistance code.

4.103 Communication failures were also cited by a number of stakeholders, sometimes a result of the confusion generated by the IATA special assistance codes themselves, particularly unnecessary requests for wheelchairs. Although technological failures may have been a problem when the Regulation was first implemented, these did not emerge as a significant current issue.

Conclusions

4.104 The main obligation that the Regulation places on carriers is that it prohibits refusal of carriage of PRMs, unless this is necessary to meet national or international safety rules or requirements imposed by the carrier's licensing authority, or is physically impossible due to the size of the aircraft or its doors. We found that most carriers comply with this, although some make carriage of PRMs conditional on advance notification, which does not appear to be consistent with the Regulation. In addition, a small number of carriers impose requirements for medical clearance which appear to be excessively onerous.

4.105 There are significant differences in policies relating to carriage of PRMs between carriers – even between carriers with similar aircraft types and operational models. The most significant difference is that some carriers impose a numerical limit on the number of PRMs that can be carried on a given aircraft. These can be quite low: some carriers have limits of 2-4 PRMs on a standard single-aisle aircraft such as an Airbus 319. In most cases, these requirements are defined in carriers' Flight Operations Manuals, which have to be approved by the relevant licensing authority; often, although not always, this is the same organisation that has been designated as the NEB. In some cases the PRM limits are required by the licensing authority, but in most cases, they are proposed by the carrier and approved by the authority. Whilst the rationale for these limits is safety, there does not seem to be an evidence base for them, and they are specifically prohibited by the equivalent US regulation on carriage of PRMs (14 CFR part 382).

4.106 The Regulation also allows carriers to require that PRMs be accompanied, subject to the same safety-based criteria. We found that a number of carriers require PRMs to be accompanied where they are not 'self-reliant', which can mean that the PRM cannot (for example) eat unaided. In our view this may be an infringement of the Regulation because there is no direct link to safety; for those carriers that fly to the US, it is also an explicit breach of the US PRM rules. Other carriers require PRMs to be accompanied where they are not self-reliant **and** this has a safety impact (for example, if the PRM could not exit the aircraft unaided in an emergency); this is consistent with the Regulation.

4.107 The Regulation also requires carriers to publish safety rules relating to the carriage of PRMs, although it does not specifically state what issues these safety rules should cover. We found that carriers all published some PRM-related information but in some cases there appeared to be significant omissions from this information.

4.108 Annex II of the Regulation sets out various requirements for services which have to be provided to PRMs by carriers. Evidence for the extent to which this is provided is limited, and restricts a fair assessment of compliance with these requirements. There is however sufficient evidence to conclude that the vast majority of case study airlines are complying with the requirement to carry up to two items of mobility equipment free of charge. Some PRM representative groups were critical of the effectiveness of airlines in implementing the Regulation, and we were informed of some particularly bad passenger experiences, but it is difficult to assess how common such occurrences are.

5. ENFORCEMENT AND COMPLAINT HANDLING BY NEBS

Introduction

5.1 This section summarises the complaint handling and enforcement process undertaken by National Enforcement Bodies (NEBs). We set out the following information:

- an overview of the NEBs, describing the types of organisations they are and the resources they have available;
- the legal basis for complaint handling and enforcement in each State;
- statistics for the number of complaints received, the nature of the complaints, and the outcomes, and for sanctions that have been issued;
- the typical process for complaint handling and enforcement in each State, and outline a number of common issues and difficulties;
- a summary of the activities of NEBs to monitor the implementation of the Regulation; and
- an overview of other activities undertaken by NEBs in relation to the Regulation, such as interactions with other stakeholders and promotional activity.

5.2 Most of the information within this section is provided for the NEBs in all Member States. The detailed information relating to the complaint handling and enforcement process, and to monitoring and other activities undertaken by the NEB, has been collected for the case study States only. Further detail on complaint handling and enforcement in the 16 case study States is provided in the case studies, in Appendix C.

Requirements of the Regulation relating to States and NEBs

5.3 The Regulation requires each Member State to designate a National Enforcement Body (NEB) responsible for the enforcement of the Regulation regarding flights departing from or arriving at airports within its territory, and to inform the Commission of this designation. This body is required to ensure that the rights of PRMs are respected, and in particular that the quality standards defined by Article 9(1) (see 3.53) are respected. It must also ensure that the provisions of Article 8 are respected. More than one body may be designated. To allow NEBs to enforce the Regulation, Member States must set out penalties for infringements of the Regulation, which must be effective, proportionate and dissuasive.

5.4 These bodies must also accept complaints from PRMs where they are dissatisfied with the service they have received under the Regulation and have been unable to obtain satisfaction by complaining directly to the service provider. If a body receives a complaint for which a body in another State is competent, it must forward the complaint to the other NEB. Other bodies may be designated specifically for the purpose of receiving complaints.

5.5 Member States should also inform PRMs about their rights under the Regulation, and the possibility of complaint to the bodies above.

Overview of the NEBs

5.6 Most of the NEBs (68%) are Civil Aviation Authorities. The other NEBs are government departments, independent statutory bodies or consumer protection authorities. Some Member States have designated more than one NEB. In these States, the responsibilities of the NEBs are divided in two ways:

- according to which type of organisation the enforcement relates to: in France, there are separate bodies for complaints handling and enforcement relating to airlines and airports, and to tour operators; and
- according to task: in the UK, there are separate NEBs for complaints handling and for enforcement.

5.7 In Belgium, there are three NEBs and an additional body responsible for handling complaints; the case of Belgium is unique, as the Flemish- and French-speaking regions are administered separately. For some of the States, there is a body which acts as the NEB but which has not yet been explicitly designated (see 5.13).

5.8 No States have designated a separate body for the enforcement of Article 8.

5.9 Table 5.1 lists the NEBs, the nature of the organisation, and where there is more than one NEB in a State, the role of each organisation. The table is divided into case study and non-case study States.

TABLE 5.1 ENFORCEMENT BODIES

State	Enforcement Body	Nature of organisation	Role
Belgium	Belgian CAA	CAA	Enforcement and sanctions
	Departement Mobiliteit en Openbare Werken	Regional government department	Enforcement and sanctions
	Service public de Wallonie, direction générale opérationnelle de la mobilité et des voies hydrauliques	Regional government department	Enforcement and sanctions
	Passenger Rights Department of Federal Public Service of Mobility and Transport	Federal government department	Complaints handling
Denmark	Statens Luftfartsvæsen (SLV)	CAA	-
France	Direction Générale de l'Aviation Civile (DGAC)	CAA	Airlines and airports
	Ministry of Economy, Industry and Labour, Division on Competition, Industry and Services	Government department	Tour operators
Germany	Luftfahrts-Bundesamt (LBA)	CAA	-
Greece	Hellenic Civil Aviation Authority (HCAA): Airports Division	CAA	Airports
	Hellenic Civil Aviation Authority (HCAA): Air Transport Economics	CAA	Airlines and tour operators

Hungary	Equal Treatment Authority (ETA)	Independent statutory body	Complaint handling, enforcement relating to PRM complaints
	National Transport Authority Directorate for Aviation (NTA)	CAA	Other enforcement
Ireland	Commission for Aviation Regulation	Independent economic regulator	-
Italy	Ente Nazionale Aviazione Civile (ENAC)	CAA	-
Latvia	CAA, Aircraft Operations Division	CAA	-
Netherlands	Transport and Water Management Inspectorate (IVW)	CAA	-
Poland	Civil Aviation Office (CAO) Commission on Passengers' Rights	CAA	-
Portugal	National Institute for Civil Aviation (INAC)	CAA	-
Romania	Autoritatea Naţională pentru Persoanele cu Handicap (ANPH)	Independent statutory body	All Articles except 8
	Autoritatea Areonautică Civilă Română (AACR)	CAA	Article 8
Spain	Agencia Estatal de Seguridad Aérea (AESA)	CAA	-
Sweden	Swedish Transport Agency, Civil Aviation Department	CAA	-
UK	CAA	CAA	Enforcement
	EHRC	Independent statutory body	Complaints handling in UK except Northern Ireland
	CCNI	Consumer protection authority	Complaints handling in Northern Ireland
Austria	Federal Ministry of Transport, Innovation and Technology	CAA	-
Bulgaria	CAA	CAA	-
Cyprus	Department of Civil Aviation	CAA	-
Czech Republic	Civil Aviation Authority	CAA	-
Estonia	Consumer Protection Board	Consumer protection authority	-
Finland	Finnish Transport Safety Agency	CAA	-
Lithuania	Civil Aviation Administration	CAA	-
Luxembourg	Direction de l'Aviation Civile	CAA	-
Malta	Civil Aviation Directorate	CAA	-
Slovak Republic	Slovak Trade Inspectorate	Consumer protection authority	Consumer protection
	Civil Aviation Authority	CAA	Safety aspects
	Ministry of Transport, Post and	Government	Implementation, including airline

	Telecommunications	department	conditions of carriage and aspects of airport operations
Slovenia	Civil Aviation Directorate	CAA	-

5.10 Most of the bodies designated as NEBs under Regulation 1107/2006 are also designated as NEBs under Regulation 261/2004. The States which have different NEBs are shown in Table 5.2.

TABLE 5.2 STATES WHERE NEBS ARE DIFFERENT UNDER REGULATIONS 1107/2006 AND 261/2004

State	NEB(s) under Regulation 1107/2006	NEB(s) under Regulation 261/2004
Finland	Finnish Transport Safety Agency	Consumer Ombudsman & Agency
		Consumer Disputes Board
		Finnish Civil Aviation Authority
Hungary	Equal Treatment Authority (ETA)	Hungarian Authority for Consumer Protection
	National Transport Authority Directorate for Aviation (NTA)	National Transport Authority Directorate for Aviation
Latvia	CAA, Aircraft Operations Division	Consumer Rights Protection Centre
Romania	Autoritatea Naţională pentru Persoanele cu Handicap (ANPH)	National Authority for Consumer Protection
	Autoritatea Areonautică Civilă Română (AACR)	
Slovak Republic	Slovak Trade Inspectorate	Slovak Trade Inspectorate
	Civil Aviation Authority	
	Ministry of Transport, Post and Telecommunications	
Sweden	Swedish Transport Agency, Civil Aviation Department	Konsumentverket
		Allmänna reklamationsnämndens
UK	CAA	CAA
	EHRC	Air Transport Users Council
	CCNI	

5.11 Only BCAA is shown as a notified NEB for Belgium in the list published by the Commission. As a result, we were not made aware of the existence of the other Belgian NEBs until our interview with BCAA, and therefore did not seek responses from them; in addition, at the time of our research for this project, BCAA had not held meetings with the other regional departments. For these reasons, we therefore have only limited information on their operations, and the data relating to Belgian NEBs in this report refers only to BCAA.

Separation of regulation from service provision

5.12 There is no requirement in the Regulation that the NEB be independent from service providers. However, in our view, it is inappropriate for the NEB also to be a service provider, as it would be difficult for it to act independently in undertaking

enforcement in relation to an infringement that it was itself committing. The only case we have identified where an NEB is also a service provider is the Greek NEB, HCAA, which is also the operator of the regional airports in Greece. This is a significant issue because, as identified in section 4 above, the most significant failure to implement the Regulation that we have identified is that it has not been implemented at the HCAA airports.

Legal basis for complaint handling and enforcement

5.13 Most Member States have complied with the obligations set out in Articles 14 and 16 to designate an NEB and introduce sanctions into national law, with the exception of:

- **Poland:** No sanctions have yet been introduced; a proposed amendment which includes fines is before the Polish parliament, but has not yet been passed.
- **Slovenia:** As yet no body has been designated, and no sanctions have been introduced.
- **Spain:** Enforcement relies on a law which predates the Regulation and hence does not refer explicitly to it. As a result, sanctions for infringements of Regulation 261/2004 (which have an equivalent legal basis) have been challenged by airlines. In most cases, the courts have upheld the right of the NEB to impose sanctions, but cases have not as yet reached the Supreme Court, and in one case a court has ruled that the NEB was not competent to impose sanctions. This is discussed in detail in the case study for Spain (appendix C).
- **Sweden:** No sanctions have yet been introduced; a proposed amendment which includes fines is before the Swedish parliament, but has not yet been passed. The proposed amendment does not define the levels of fines.

5.14 There are a number of States where sanctions have not been introduced for all potential infringements of the Regulation:

- Bulgaria, which does not define penalties for Article 8;
- Estonia, where sanctions have only been introduced for carriers;
- Luxembourg, which only defines explicit fines for Article 4; and
- Romania, where the law defining responsibilities makes the CAA responsible for enforcing compliance with Article 8, but does not endow it with the powers to do so.

5.15 In several Member States, enforcement is dependent on more than one law; for example, the law defining how the NEB must operate and the procedure for imposing sanctions may differ from the law introducing sanctions. There may also be other laws – typically defining rights to equal treatment – which may apply at the same time as the Regulation. Table 5.3 below summarises the relevant legislation in the case study States. More detailed information is provided in the case studies in Appendix C.

TABLE 5.3 RELEVANT NATIONAL LEGISLATION

State	Summary of relevant legislation
Belgium	• Articles 32 and 45-52 of Law of 27 June 1937
Denmark	• Air Navigation Act, Articles 149(11) and 149a define sanctions

France	• Article 330-20 of the Civil Aviation Code, as amended by Decree 2008-1445 of 22 December 2008: gives the Minister of Civil Aviation the power to impose sanctions
Germany	• Air Traffic Licensing Regulation (Luftverkehrszulassungsordnung): defines LBA as the NEB and that breaches of the Regulation are considered an offence. • Air Traffic Law (Luftverkehrsgesetz): defines that breach of EU Regulations relating to air traffic is an offence, and defines the fines applying. • Law on Administrative Offences (Gesetz über Ordnungswidrigkeiten): defines the administrative process that must be followed in order to impose sanctions.
Greece	• Letter of 1 December 2006 (reference 6310/A/10909) from Permanent Representation of Greece to Commission designates NEB; National Aviation Law 1815/1988 sets out fines
Hungary	• Act CXXV of 2003 defines role and sanctions of ETA • Act CXXX of 2003, and Article 4 (2) of Government Decree No 362/2004 define complaints handling procedure • Act XCVII of 1995 on Air Traffic, implemented by Government Decree No. 141/1995 defines role and sanctions of NTA • Ministerial Order 97/2005 makes NTA responsible for approving airport charges • Act CXL of 2004 defines procedure for imposing fines and sets out administrative penalties
Ireland	• Section 45(a) of the Aviation Regulation Act 2001 as inserted by the Aviation Act 2006: defines basis for enforcement and sanctions • Statutory Instrument SI 299/2008: transposes the Regulation into law
Italy	• Legislative Decree 24/2009 of 24 February 2009: defines process to be followed by ENAC and fines that can be imposed
Latvia	• Air Navigation Order (2007): designates NEB • Administrative Violations Code: defines fines
Netherlands	• Resolution to set up the Transport and Water Management Inspectorate (Instellingsbesluit Inspectie Verkeer en Waterstaat), Article 2, paragraph 1, item d: sets up the NEB • Civil Aviation Act (Wet luchtvaart), revised December 2009, Article 11.15, section b, item 1 and Article 11.16, paragraph 1.e.3: defines circumstance under which sanctions may be imposed • General Administrative Law Act (Algemene wet bestuursrecht), chapter 4 (process to impose sanctions) and chapter 5 (level of fines).
Poland	• Aviation Act (Article 21.2(3)): designates NEB • Administrative Procedure Code: defines procedures to be followed • No sanctions yet defined - draft amendment to Aviation Act (Articles 205a, 205b, 209a, 209b) will set out fines
Portugal	• Decree Law 241/2008: designates NEB and defines level of fines which can be imposed for each infringement • Decree Law 10/2004: defines standard scale of fines
Romania	• Decree 27/2002: requires all government bodies to be able to receive complaints • Decision 787/2007: defines penalties (except for Article 8) • Decree 2/2001 (approved and modified by Law 180/2002): defines framework for imposing penalties
Spain	• Royal Decree 184/2008: designates NEB • Aviation Security Law (Law 21/2003): basis for enforcement and sanctions • Royal Decree 28/2009: defines inspection regime • Law on Public Administrations and Administrative Procedures (Law 30/1992): defines operational procedures for the NEB

	• Regulation on Procedures for the Imposition of Sanctions (Royal Decree 1398/1993): defines process for imposing sanctions
Sweden	• Förordning (1994:1808) om behöriga myndigheter på den civilia luftfartens område (ordinance on competent authorities in civil aviation): designates the NEB • No sanctions yet defined, but some are set out in a proposed amendment Regeringens proposition 2009/10:95- Luftfartens lagar • Prohibition of Discrimination Act may also apply in some circumstances (e.g. infringements of Articles 3 and 4)
UK	• Statutory Instrument 2007/1895: designates NEBs, defines penalties and introduces a right to compensation for injury to feelings resulting from an infringement • Enterprise Act 2002: defines civil powers for NEB, including power to apply for an injunction ('stop now order') and power to seek binding undertakings
Austria	• Austrian Civil Aviation Law
Bulgaria	• Civil Aviation Act, Art. 81a
Cyprus	• Civil Aviation Act N 213(I)/2002
Czech Republic	• Civil Aviation Act (No 49/1997), § 93 Articles 7 (a) - (l) and 8 • Administrative Code (No 500/2004)
Estonia	• Consumer Protection Act • Aviation Act §58 and §60
Finland	• Finnish Aviation Act (1194/2009) - Section 157 (Conditional fines and conditional orders of execution) • Conditional Fine Act (1113/1990)
Lithuania	• Paragraph 2 of Article 70 of the Act of Aviation No. VIII-2066 (O.J. 2000, No. 94-2918; 2007, No. 59-2279): designates CAA as NEB • Code of Administrative Violations, Article 115: defines penalties
Luxembourg	• Law of 31st January 1948, art 43, modified by the law of June 5, 2009, Article 1 (19)
Malta	• Civil Aviation (rights of Disabled Persons and Persons with Reduced Mobility) Regulations (LN234/07) as amended by (LN 411/07)
Slovak Republic	• Act No 128/2002 (State Inspections Act): defines powers of NEB to conduct inspections, impose preventative measures, and impose sanctions • Act No 250/2007 on Consumer Protection: provides legal framework for NEB's consumer protection activities
Slovenia	• Not yet implemented

Sanctions allowed in national law

5.16 There are significant differences between the States in the maximum sanctions for infringements of the Regulation that can be imposed under national law (Table 5.4). The highest defined maximum sanctions are in Spain (€4.5 million) but in Denmark, Finland, Netherlands and the UK unlimited fines can be imposed, and in Cyprus the maximum fine is 10% of the turnover of the carrier. In Austria, Belgium and Denmark sanctions may also include a prison sentence.

5.17 However, in many States, sanctions are low, and in some States maximum sanctions are close to or below the costs that a service provider may in some circumstances avoid through non-compliance with the Regulation. In these States, it is possible that the sanctions regime may not comply with the requirement in Article 16 for dissuasive

sanctions to be introduced by Member States; however, without data on the costs of compliance we are unable to assess this. Maximum sanctions are particularly low (less than €1,000) in Estonia, Lithuania and Romania.

5.18 In most States, fines are determined by the NEB, taking into account various factors relating to the case, including the circumstances and conditions of the case, any reasons given for non-compliance, its impact on the passenger and the size of the company. In some States, fines may be imposed which relate directly to the financial impact of the alleged infringement:

- in Germany, additional fines may be imposed to recover any financial gains to the service provider which resulted from its non-compliance; and
- in the Netherlands, reparatory fines can be imposed, which require the service provider to make good any financial loss incurred by the passenger.

TABLE 5.4 MAXIMUM FINES

State	Maximum sanction (€)	Explanation/notes
Belgium	€4,000,000 (criminal and administrative)	In addition up to 1 year's imprisonment if a criminal prosecution
Denmark	Unlimited fine	In addition up to 4 months' imprisonment
France	€7,500	Maximum sanction 'per failing', which is not defined. Can be imposed on a per-passenger basis to give a higher total sanction. Can be doubled if repeated within a year.
Germany	€25,000	Additional fines can be imposed to recover the economic advantage that the carrier has obtained from infringement
Greece	€250,000	Minimum sanction is €500. Fines are generic, and do not refer specifically to the Regulation
Hungary	€22,600 (ETA) €11,300 (NTA)	Minimum sanction €189 for ETA. In addition penalty of up to €3,774 for failure to cooperate with an investigation.
Ireland	€150,000	Maximum €5,000 if the case is heard in a District Court. Fines only applicable on failure to comply with a Direction.
Italy	€120,000	Maximum depends on Article infringed and reduced by two thirds if paid within 60 days. Minimum fines of €2,500-€30,000.
Latvia	€2,800	Fine can be applied per passenger that complains. Law makes no direct reference to the Regulation, and it is possible that penalties could be open to legal challenge.
Netherlands	Reparatory fines: unlimited Punitive fines: €74,000	Reparatory fines should be in proportion to the amount of loss and to the severity of the violation. Punitive fines are per infringement and are not multiplied by number of passengers affected. IVW are conducting a study which will define policy on punitive fines.
Poland	Not yet defined, but proposed to be €1,875	Fines vary depending on Article infringed. Fines are variable for infringements of some Articles, but otherwise are fixed. Fines are cumulative per Article and per passenger that complains, so maximum could be a multiple of this. Minimum fines €47-€1,875.
Portugal	€250,000	The maximum and minimum fines depend on the infringement ('light', 'serious' or 'very serious'), the size of the

		company, and whether the infringement was intentional or negligent. Minimum fine €350-4,500.
Romania	€608	Maximum depends on Article infringed. Per Article breached and per passenger. No penalties available for Article 8. Minimum fines €195-€243.
Spain	€4,500,000	For most infringements maximum would be €4,500
Sweden	Not yet defined	Proposed amendment does not define levels of fines
UK	Unlimited fine	Maximum fines depend on Article breached; for many Articles the maximum fine is €5,600. Unlimited fines must be imposed by Crown Court, for serious cases.
Austria	€22,000	In addition up to 6 weeks' imprisonment
Bulgaria	€5,100	No penalties available for Article 8. Minimum fines €1,020.
Cyprus	€8,000 or 10% of operators turnover	-
Czech Republic	€192,000	-
Estonia	€640	Only applies to carriers
Finland	Unlimited fine	Fines are conditional on the period of time during which a condition is unfulfilled, and should be in proportion to company's size, amongst other factors
Lithuania	€870	Minimum sanction €290. Per case, not per passenger.
Luxembourg	€10,000	Fine of €10,000 for violation of Article 4, of €5,000 for failure to provide information, but no other sanctions given.
Malta	€2,300	Criminal procedure
Slovak Republic	€66,000	Depending on number of passengers affected and whether it is repeated
Slovenia	Not yet defined	-

Statistics for complaint handling and enforcement

5.19 Most NEBs had received very few complaints in relation to the Regulation. Of the 27 NEBs, 8 had received no complaints, and 26 had received less than 50. 80% of all complaints to NEBs had been received by the UK NEBs. Although, the UK has the largest aviation market in Europe, and therefore would be expected to receive a higher number of complaints, in 2009 it received over ten times as many complaints as Germany or Spain, the next largest markets. This may be a result of the right in the UK to claim compensation for infringements of the Regulation, discussed below.

5.20 Of those NEBs that had received complaints, most were not able to give a breakdown. Table 5.5 therefore gives a brief description of the types of complaints received.

TABLE 5.5 COMPLAINTS RECEIVED

State	2009	Total	Description/notes
Belgium	1	1	Poor quality of assistance
Denmark	0	0	-
France	5	24	Transport of insulin and other liquids; denied boarding and requirements to be accompanied; damage to mobility equipment
Germany	22	34	Assistance by the carrier (55%), at the airport (18%), refusal of reservation (14%), denial of boarding (14%)
Greece	3	4	Denial of boarding; carriage of oxygen; handling of passengers
Hungary	0	1	Denial of boarding
Ireland	14	18	Conditions imposed on travel e.g. seating or carriage of oxygen.
Italy	36	40	48% refusal to embark PRMs; most of remainder lack of assistance at airports
Latvia	0	0	-
Netherlands	5	6	IVW was only competent for 1 complaint
Poland	2	2	Both related to airports outside Poland
Portugal	16	34	Not provided
Romania	0	0	-
Spain	35	46	Not provided
Sweden	3	5	Denied boarding, assistance dog policy
UK	356	883	Allocation of appropriate seating; timely provision of assistance on landing; and communicating requests for assistance on arrival at the airport.
Austria	1	2	Treatment of injured passengers
Bulgaria	0	0	Denied boarding
Cyprus	1	3	Not provided
Czech Republic	0	0	-
Estonia	0	0	-
Finland	3	4	Seating, oxygen, movement within cabin
Lithuania	0	0	-
Luxembourg	0	1	Boarding denied to deaf passengers
Malta	1	1	Carriage of guide dogs
Slovak Republic	0	0	-
Slovenia	0	1	Denied boarding
Total	499	1110	

5.21 In addition, NEBs in several States had received questions which were not complaints, regarding, for example, airline seating policy.

Sanctions applied

5.22 At the time the interviews for this study were conducted, no sanctions had yet been applied for infringements of the Regulation. At the time of drafting this report, three States were in the process of applying sanctions:

- France had opened proceedings to impose fines in one case;
- Portugal had opened proceedings to impose fines in two cases; and
- Spain had opened proceedings to impose fines in five cases.

5.23 Two other States had taken other actions to encourage compliance:

- Hungary wrote to an airline requiring it to correct its policy, and published this letter; and
- the UK has threatened several organisations with sanctions, and has taken other actions to encourage compliance, including writing to airlines, and setting out its requirements for compliance.

The complaint handling and enforcement process

Overview of the process

5.24 The complaint handling process is broadly similar in each NEB, however, since most NEBs receive very few complaints, the process for handling them is often not defined in detail. A typical process is as follows:

- complaints are recorded (since the number of complaints is frequently very low, this may be in a spreadsheet or a filing system rather than in a database);
- most undertake an initial filter of the complaints, to remove those that are not related to the Regulation, where the passenger has not first sought redress from the service provider, or where there is no *prima facie* case of an infringement;
- complaints relating to flights departing from other States are forwarded to the NEB of the State which is competent to handle the complaint;
- the complaint is investigated through contacting service providers to request information and/or justification for their actions; and
- a decision is made on the complaint.

5.25 The complaint handling process is different for complaints submitted to one of the UK NEBs (see box below). Otherwise, the main differences between the processes in different Member States are in the following areas, which are discussed in more detail below:

- the nature of the ruling or decision issued to the passenger, in particular whether the ruling is binding;
- under what circumstances the investigation of the complaint may lead to sanctions; and
- the process by which sanctions may be imposed and collected.

Complaint handling in the UK (excluding Northern Ireland) by EHRC

The legislation implementing penalties for infringements of the Regulation in the UK also grants a right to compensation for injury to feelings resulting from an infringement. This is in line with UK disability rights legislation in other sectors. As a result of this, the process for complaint handling is structured around conciliation, with a possible civil claim for compensation if conciliation fails. In other States there is no right to compensation and therefore no reason to offer conciliation proceedings.

The EHRC handles complaints relating to incidents which occurred in the UK excluding Northern Ireland. When a complaint is submitted to the EHRC and an initial evaluation shows it to be potentially valid, a letter is sent to the service provider which summarises the complaint and requests comments. This letter also explains the conciliation process, and asks if the service provider would be willing to participate. The responses are evaluated to see whether they appear to justify the actions of the service provider, but there is no technical or operational investigation, for example, to establish whether any claims made by a service provider are true.

If the complaint remains unresolved, the EHRC will consider referring the case for conciliation. If both parties agree, conciliation is provided independently, and may result in a voluntarily binding agreement on both parties. This agreement may include financial compensation, or may include non-financial reparations such as an apology.

If a service provider does not wish to participate in conciliation, the EHRC may suggest to the passenger that they initiate legal proceedings, which may result in payment of compensation. The EHRC may also consider offering litigation support for cases where it believes that the outcome could help clarify the application of the Regulation.

Complaints related to incidents occurring in Northern Ireland are handled by CCNI. This follows a procedure similar to most other NEBs, including an investigation of the facts of the case, but if this procedure fails to resolve the complaint to the passenger's satisfaction, the passenger can seek financial compensation under UK national law.

Languages in which complaints can be handled

5.26 Most NEBs are able to handle and reply to complaints written in the national language and English, but in many cases NEBs were not able to handle complaints in other Community languages. The languages in which NEBs can receive complaints, and respond to passengers, are shown below.

TABLE 5.6 LANGUAGES IN WHICH COMPLAINTS ARE HANDLED

State	Languages in which complaints may be written	Languages in which the NEB will reply to the passenger
Belgium	Flemish, French, English	Flemish, French, English
Denmark	Danish, English, German	Danish, English
France	French, English, Spanish	French only
Germany	German, English	German, English
Greece	Greek, English, French, German, Spanish, Italian	Greek, English
Hungary	Hungarian, English, German, Italian, other languages where possible	Hungarian, English, German, Italian
Ireland	English, French, German, Spanish, Italian	English, Spanish
Italy	Italian, English, French, Spanish, German	Italian, English, French, Spanish

Latvia	Information not provided at interview	Information not provided at interview
Netherlands	Dutch, English; sometimes also French and German	Dutch, English; sometimes also French and German
Poland	Polish, English, German, French	Polish, informal translation to English provided
Portugal	Portuguese, Spanish, English and French	Portuguese, Spanish, English and French
Romania	Romanian, English	Romanian, English
Spain	Spanish, English	Spanish, English
Sweden	Swedish, English	Swedish, English
UK	English, but would make arrangements to handle any other languages	English, but would make arrangements to handle any other languages

Time taken

5.27 Many NEBs informed us that they had received too few complaints to be able to draw conclusions on the average time taken to handle them (see Table 5.7 below). Several other States had received very few complaints, but had a legal limit on time to respond set by national law. Of those that were able to estimate the actual time taken to resolve complaints, most reported wide variation: for example, Italy reported variation between 1 and 6 months. The longest time taken to resolve complaints was reported in the UK, where complaints may take up to 6 months, and there are instances where complaints have taken longer than this to resolve; as a result the passenger has no longer been able to claim for compensation under UK national law (see 5.25).

TABLE 5.7 TIME TAKEN TO RESOLVE COMPLAINTS

State	Average time taken	Explanation/Notes
Belgium	Too few complaints to estimate time	
Denmark	Too few complaints to estimate time	No complaints yet received, but in principle 2-3 months
France	Varies significantly	If the case goes to CAAC, it will take longer. Overall, durations are similar to under Regulation 261/2004
Germany	Too few complaints to estimate time	Complaints are handled faster than for Regulation 261/2004, which take 3-4 months
Greece	30 days	Response time is set by law and is generic across all complaints to HCAA
Hungary	75 days	Response time is set by law and is generic across all complaints to ETA
Ireland	3-4 months	Awaiting responses (from service providers or Commission) lengthens the average time taken, so many cases handled quicker than this
Italy	30 days to 6 months	Depends on investigation required and response of service provider
Latvia	Too few complaints to estimate time	
Netherlands	Too few complaints to estimate time	Same procedure as for Regulation 261/2004: in principle 3-6 months
Poland	Too few complaints to estimate time	Likely to be quicker than for Regulation 261/2004
Portugal	Too few complaints to estimate time	May be faster than for Regulation 261/2004

Romania	30 days	Time limit set by law
Spain	Too few complaints to estimate time	Always less than six months, and delay is due to service providers. Shorter than equivalent complaints under Regulation 261/2004.
Sweden	At most 6 weeks	This is a non-binding target for the CAA; little information at present on how well this has been met.
UK	EHRC: Up to 6 months, can take longer CCNI: Up to 6 weeks	EHRC: Wide variation in time taken. Process is driven by 6 month time limit for court cases for compensation under SI. CCNI: Wide variation in time taken.

Responses issued to passengers

5.28 All of the NEBs in the case study States provide PRMs who complain with an individual response. As there is no right to compensation, the extent to which an NEB can offer assistance to obtain redress is limited; most responses state a decision on whether the NEB considers the Regulation to have been infringed, but do not state whether any payment should be made to the PRM, for example for loss due to denied boarding. The UK is an exception, for the reasons given in above. Most responses from NEBs do not have specific legal status, however in Hungary the response is legally binding, and in the Netherlands non-compliance with a decision may lead to a fine.

5.29 Almost all States would undertake some form of investigation of a complaint. The exception to this is the UK (excluding Northern Ireland), where the body responsible for handling complaints does not take an investigative role, although the CAA does investigate the facts of a proportion of cases. As discussed above, the UK process is structured around claims for compensation and the NEB sees its role as to facilitate conciliation, where the service provider is incentivised to voluntarily provide some form of compensation, or risk having a court award compensation against it.

5.30 Table 5.8 summarises the responses issued to the passenger.

TABLE 5.8 RESPONSES ISSUED TO PASSENGERS

State	Nature of response issued
Belgium	Individual non-binding evaluation sent to both service provider and passenger
Denmark	Non-binding individual evaluation provided to PRM and service provider
France	Individual response provided by DGAC summarising the conclusions of the investigation and its opinion on the case
Germany	Individual response giving the result of the investigation and their conclusions
Greece	Individual response giving the result of the investigation and their conclusions
Hungary	ETA issues legally binding decision to both passenger and service provider
Ireland	CAR writes to each passenger to summarise conclusions and whether incident was an infringement of the Regulation
Italy	ENAC writes to each complainant to inform them of its conclusions
Latvia	No specific procedures established, but passengers would be issued with an official letter communicating the final decision

Netherlands	Formal decision issued to both passenger and carrier. Not legally binding, but non-compliance may lead to a fine.
Poland	Formal decision issued to both passenger and carrier
Portugal	Individual response summarising correspondence with service provider and reasons for decision.
Romania	Individual response is sent to the passenger, setting out any infringements of the Regulation and any corrective measures taken by ANPH
Spain	Individual response, including response from carrier and AESA's view on it, and information on how passenger can obtain redress
Sweden	Individual non-binding response summarising correspondence with service provider and reasons for decision.
UK	EHRC: Does not investigate complaints, and therefore does not have standard format for output. Conciliation process may result in form agreeing actions to be taken. CCNI: Individual opinion letter sent to passengers.

Circumstances in which sanctions may be imposed

5.31 There are also significant differences between the States as to whether and when sanctions are imposed.

5.32 Some NEBs, including one of the Hungarian NEBs, Italy, Portugal, and Romania, always impose sanctions in the case that an infringement is found, even if it is a minor or technical infringement which does not significantly inconvenience passengers. If the amendments to the Aviation Act are passed in their current form, the Polish NEB will in future apply fines for every infringement. The German NEB must also take some action whenever an infringement is identified, although it has discretion to choose between a warning letter and a fine. If it chooses a fine, this has to be proven to the same standard of evidence required for criminal cases, and the NEB is therefore unlikely to impose sanctions if the infringement is 'not significant'.

5.33 In other States, the policy is to impose sanctions far less frequently:

- In two States (Belgium and Greece), a sanction would only be imposed where a service provider fails to take corrective action when required to do so by the NEB. In Ireland, this is the case for infringements of some Articles. In Spain, this is the general policy of the NEB but it could in theory impose sanctions without first warning the service provider.
- Several States have a policy of imposing sanctions where there is evidence of serious or systematic infringements, including Denmark, and the Netherlands.
- The UK will consider prosecution of a service provider where it fails to comply with CAA requests for corrective action, or for wilful non-compliance. Any case to be taken to prosecution must proven to a criminal standard of evidence, despite the due diligence defence available in UK law. The UK NEB believed that this would less difficult than under Regulation 261/2004, as Regulation 1107/2006 is more prescriptive.

5.34 The policies of the case study States on imposition of sanctions are shown in Table 5.9 below.

TABLE 5.9 POLICY ON IMPOSITION OF SANCTIONS

State	Policy on imposition of sanctions	Explanation/Notes
Belgium	Applied for serious or systematic violations (allows opportunity for corrective action first). Public prosecutor decides whether to bring criminal case; if not, BCAA may then decide whether to impose administrative sanctions.	If prosecutor brings criminal case, BCAA may not impose administrative sanctions
Denmark	Applied for serious or systematic offenses; minor offences would receive a caution, which would not be made public	
France	In consultation with CAAC. Ultimate decision made by the Minister responsible for Civil Aviation on the advice of CAAC.	Cases would only be considered by CAAC if referred by DGAC
Germany	If a complaint is upheld, imposes warning letter or sanction; LBA has flexibility to decide which	Procedure is a mix between administrative and criminal procedures: level of proof required is equivalent to a criminal case but case is decided by LBA
Greece	First send a letter of caution; if service provider infringes again, then impose penalty.	
Hungary	Choice of actions (including fines and non-pecuniary measures) which may be applied by ETA, depending on nature of case. NTA has same choice of actions but must take some form of action. Fines also imposed for non-cooperation with cases.	Fines for non co-operation can be imposed even where there was no infringement found
Ireland	CAR would consider prosecuting if a service provider did not comply with a Direction, or if it identified a breach of Articles 3 or 6 (2)	CAR can consider issuing a Direction if issue identified during an inspection, or if a service provider does not rectify a case when required to do so
Italy	Applied in every case of an infringement, identified either by investigation of complaint or inspection	Amount of fine considers facts of the case. Appeals and collection process can be lengthy, up to 7 years
Latvia	At discretion of NEB	More specific policies to be developed when Administrative Violations Code amended.
Netherlands	In principle sanctions could be applied for every violation, but IVW policy is to apply them only for severe or repeated infringements	Appeals process includes several stages, and may take in principle up to 2 years
Poland	When in force, will be applied in every case of an infringement	No sanctions yet in place
Portugal	Applied for every confirmed infringement, identified either through complaint or inspection	
Romania	Applied for every confirmed infringement	Amount of fine considers facts of the case. Any sanctions must be imposed through the Social Inspectorate; specific methodology is in development. AACR cannot impose fines for violations of Article 8.
Spain	Whenever an infringement is identified, the service provider receives warning, with a period in which to rectify the issue; if it fails to	

	do so, AESA can impose a sanction.	
Sweden	Sanctions not yet defined	
UK	Applied when service provider fails to comply with CAA requests for corrective action, or for wilful non-compliance	In addition, standard of evidence required for criminal prosecution, and 'due diligence defence' means that it must be proved that senior management of carrier had intended not to comply

Process to impose sanctions

5.35 In most Member States, the process to impose sanctions is an administrative procedure undertaken by the NEB, and the decision to impose sanctions is made by the NEB alone. Service providers, and in some cases also passengers, can appeal to the courts.

5.36 The exceptions to this are the following States:

- In Germany, the procedure is similar to the administrative procedures applying in other States, but the standard of evidence required is equivalent to that in criminal cases.
- In Slovakia, the procedure is also similar to the administrative procedures in other States, but with the key difference that (as for Regulation 261/2004) an on-site inspection is required before a sanction can be issued. A consequence of this is that sanctions cannot be imposed on carriers that are not based in Slovakia.
- In Denmark, Ireland, Malta and the UK[13], sanctions are imposed under criminal law and therefore a criminal prosecution is required.
- In France, cases are referred by the NEB (DGAC) to an administrative commission (the CAAC) that meets twice per year. This makes a recommendation to the Minister of Civil Aviation, who takes the ultimate decision about whether a sanction should be imposed, and the level of any sanction.
- In Belgium, sanctions can be imposed under criminal law but administrative fines to an equivalent level are also available.
- In Austria, administrative fines can be imposed, but in aggravated cases a prison sentence of up to 6 weeks may also be imposed, under criminal law.

5.37 Some States have administrative fines to encourage compliance, which can be applied when a service provider fails to respond within a certain time; these include Hungary and Latvia.

Application of sanctions to carriers based in other Member States

5.38 A number of NEBs face difficulties in applying sanctions to carriers that are not based in their State. This arises because national law either:

- does not permit application of sanctions to carriers not based in the State; or
- requires administrative steps to be taken in order to impose a sanction, which are

[13] Issues regarding the imposition and collection of fines in the UK are discussed in further detail in the Evaluation of Regulation 261/2004, SDG for European Commission, February 2010.

either difficult or impossible to take if the carrier is not based in, or does not have an office in, the State concerned.

5.39 The problem is particularly significant in relation to carriers based in other EU Member States, as opposed to non-EU carriers. In many Member States where sanctions are imposed through an administrative process, national law requires a notification of a sanction, or the process to start imposition of a sanction, to be served at a registered office of the carrier, or on a specific office-holder within the carrier. Non-EU (long haul) carriers will usually have an office in the each of the States to which they operate, and this can be a condition of the bilateral Air Services Agreements which permit their operation; however there are no such requirements on EU carriers, which are free to operate any services within the Union.

5.40 We discussed this issue in detail in our recent report on Regulation 261/2004, and in most cases the issues are equivalent, because the process to impose the sanction is the same. However, since the research for that report was conducted, there have been changes affecting the imposition of fines on non-national carriers in two States:

- **Greece:** Until 2008, the legal process for serving a fine required that a writ was accepted by a representative in Greece of the company being fined. As a result, HCAA faced difficulties in imposing fines on non-national carriers that had not established an office in Greece. To resolve this problem, in May 2008 HCAA adopted a regulation on airline representation, requiring all non-national airlines to have representation agreements with their local representatives. This was withdrawn shortly after it came into force, as the restrictions it imposed violated Regulation 1008/2008 on common rules for the operation of air services in the Community. The difficulties in imposing sanctions on non-national carriers therefore remain.
- **Germany:** German national law requires LBA to prove that the notification of any sanction had been issued to a named person within the carrier; as these carriers often do not have offices or legal representation in Germany, at the time of the research for the study on Regulation 261/2004 it was often not possible to meet this requirement. LBA now believes that this problem has been resolved and expects to test this application within six months.

5.41 The problems with application of sanctions to carriers not based in the Member State are summarised in Table 5.10. Since no fines have yet been imposed for infringements of the Regulation, many of the procedures and issues described below have not been tested in practice. However, often the procedures for imposing fines are equivalent to those for Regulation 261/2004 and therefore where possible we have drawn conclusions on this basis.

TABLE 5.10 ISSUES WITH APPLICATION OF SANCTIONS TO CARRIERS NOT BASED IN THE STATE

State	Whether it is possible to impose sanctions	Explanation/Notes
Belgium	Yes in principle	In principle there are no problems although this has not been tested as yet as no sanctions have been imposed. BCAA believed the best approach would be through cooperation with other NEBs, but the scope of the Regulation could limit this.
Denmark	Yes, although only if the incident occurred on Danish territory	No sanctions have been imposed and therefore this has not been tested. Restriction to Danish territory means that a small proportion of incidents would not be covered, i.e. incidents occurring mid-flight on board a non-Danish carrier which had departed from or was landing at a Danish airport.
France	Yes	Sanctions have been imposed on foreign carriers without any difficulties for other Regulations, so in principle should not be a problem. Notification can be sent by registered mail, and by fax if it is not possible to obtain a receipt from the registered mail.
Germany	Yes in principle	Sanctions must be served on a named person within the airline, which caused problems when issuing fines for Regulation 261/2004. LBA believe this is now resolved, and that it should be sufficient to obtain a signed receipt either by registered mail or by a courier, or issue the sanction through the German embassy in the State concerned
Greece	Uncertain	In summer 2009 national legislation came into force on airline representation, requiring a representation agreement for all non-national airlines. This allowed HCAA to impose financial penalties on all carriers but has now been repealed. The same difficulties in imposing fines on non-national carriers are now present: the legal process of serving a fine requires that a representative of the airline in Greece accept the writ, and there are therefore difficulties in imposing fines on non-national carriers that have not established an office in Greece.
Hungary	No	ETA is only able to handle discrimination cases regarding companies based in the territory of the Republic of Hungary.
Ireland	Yes in principle	Notification of a Direction can be served at the carrier's registered office, which does not have to be within the State. Any proceedings would require proof of incorporation of an airline which could be accepted by the Irish courts.
Italy	Yes but slower / more complex	ENAC would use the process set out in Regulation 1393/2007 to serve notifications on carriers which do not have offices in Italy, but this is likely to be slow/complex. For fines imposed under Regulation 261/2004, this has been short-cut in some cases by the Italian embassy/consulate in the State serving the notification directly.
Latvia	No	The Latvian Administrative Violations Code only allows for sanctions to be imposed on 'legal persons'. This is defined as including foreign individuals but not foreign companies.
Netherlands	Yes	IVW must prove that the company being fined has been notified, for example by proving receipt of the letter setting out the fine. The law states that if IVW can prove it has sent the fine, it is up to the other party to prove it has not received it.
Poland	Yes	Notifications are sent by registered mail or courier to the head office of the carrier – there is no limitation provided a receipt is obtained. A receipt from a courier company is considered sufficient.

Portugal	Yes	No specific constraints on imposing sanctions. Procedure equivalent to that for national carriers.
Romania	No	Notification of any penalty must be made by mail with a receipt, or by physically presenting it in the presence of a witness. If an airline does not have a legal representation in Romania, this cannot be done.
Spain	Yes	Notifications are sent by registered mail – there is no limitation provided a receipt is obtained. In theory collection of sanctions is problematic if carrier does not have an office in Spain, but this has not yet proved a problem.
Sweden	Sanctions not yet defined	Proposed amendment to Civil Aviation Act is unlikely to allow this, as no other Swedish legislation does so.
UK	Yes in principle	In principle there are no problems although this has not been tested as yet as no sanctions have been imposed. As sanctions could only be imposed through a criminal process, this would be undertaken by the criminal courts system not the NEB.

Monitoring undertaken by NEBs

5.42 While the Regulation does not explicitly require NEBs to undertake monitoring of compliance with the Regulation, it does require them to take measures to ensure that the rights of PRMs are respected, including compliance with the quality standards required by Article 9 (1).

Monitoring of airport quality of service

5.43 Two NEBs, Denmark and Germany, had undertaken no actions to directly monitor airport service quality. Denmark holds biannual meetings with stakeholders including PRM organisations, airport managing bodies and airlines, but does not undertake any first-hand monitoring of service quality at airports.

5.44 NEBs in all but two of the case study States had undertaken some inspections of airports. Many undertook yearly inspections of the major airports, although some inspected airports more frequently: the Hungarian NEB inspects Budapest airport three times per year, and Spain had conducted 152 inspections since the introduction of the Regulation. Some had only undertaken one inspection, when the Regulation came into force; these included France, the Netherlands, Romania and Sweden.

5.45 Most inspections focus on checks of the systems and procedures in place to provide service. These checks included confirming the signage and functioning of the designated points of arrival, training records, and the written procedures followed by staff providing the service. Most did not assess the passenger experience; those that did were Latvia, Sweden and the UK. These checks included site visits accompanied by representatives of PRM organisations to check actual waiting times and infrastructure such as designated points.

5.46 In addition to inspections, there were a number of other approaches to monitoring quality of service, including:

- attending the PRM steering committees of larger airports on a monthly basis (UK);
- holding biannual meetings with stakeholders including PRM organisations (Denmark); and

- sending annual surveys on implementation of the Regulation to airports (Romania).

5.47 Table 5.11 summarises the actions NEBs have taken to monitor airport service quality.

TABLE 5.11 NEB ACTIONS TO MONITOR AIRPORT QUALITY OF SERVICE (EXCLUDING INDIRECT MONITORING)

State	Direct monitoring of airport quality of service
Belgium	Inspection and audit of subcontractors at Brussels Airport, covering part of Regulation
Denmark	Biannual meetings with stakeholders including PRM organisations, airport managing bodies and airlines
France	One inspection of Paris Charles De Gaulle
Germany	None
Greece	Inspections of all airports (including 3 at Athens) for compliance with quality standards (although no quality standards set at any airport other than Athens)
Hungary	Regular inspections (Budapest 3 per year, smaller airports once) covering systems and equipment; questionnaire requesting number of complaints received and training given; approves safety license of PRM service provider, including check of quality standards
Ireland	2 inspections at each airport under jurisdiction
Italy	Regular inspections by staff based at airports, reviewing equipment and procedures, application of quality standards, and provision of training
Latvia	Inspections for compliance with quality standards: checking 'time stamps', site visits to measure actual waiting times. Meetings two times a year to discuss standards.
Netherlands	Audit of systems at major Dutch airports in 2007/2008. Further investigations will be driven by complaints.
Poland	Surveys of all airports, covering: quality standards, training records and programmes, documentation of cooperation with PRM organisations and airport users. Documentation checked by inspections.
Portugal	Yearly inspections of major Portuguese airports, covering designated points and information, but excluding staff training and assistance provided.
Romania	Inspection of Bucharest Otopeni, in cooperation with Social Inspectorate. Annual surveys of airports on several topics, including training, accessible information and procurement.
Spain	152 inspections relating to the Regulation
Sweden	Inspection of Stockholm Arlanda with PRM organisation, including checks of designated points and signage. No such checks of smaller airports.
UK	CCNI: Annual PRM site visits at airports; quarterly meetings with airports. CAA: Physical inspections of airports combined with discussions with service providers. Attends airport-PRM consultative committees monthly for London Heathrow, Gatwick, Luton and Stansted, and for Manchester less frequently.

5.48 For most of the NEBs we spoke to, resource constraints were not an issue: most NEBs received few complaints, and did not undertake significant additional activity which would require additional resources. Where inspections of airports for compliance with the Regulation were undertaken, they were frequently combined with other inspections and did not therefore require significant additional resourcing. The case study States which informed us that they would undertake more inspections if they

had more resources were France and Ireland.

Monitoring of airline quality of service and policy regarding carriage of PRMs

5.49 Most NEBs did not inform us of any monitoring of airline service quality they had undertaken, and stated that they had not investigated or challenged any airline policies on carriage of PRMs.

5.50 The most pro-active approach to airline service quality was that of the Spanish NEB, which in 2009 undertook 409 inspections on passenger rights. The other NEBs which informed us of reviews of airline quality of service took a number of approaches:

- approval of ground handler training (Greece);
- reviewing operating manuals (Latvia, Poland);
- reviewing websites for accessibility (Latvia, Netherlands); and
- annual surveys on airline implementation of the Regulation (Romania).

5.51 Table 5.11 summarises the actions NEBs have taken to monitor airline service quality and policies on carriage of PRMs.

TABLE 5.12 NEB ACTIONS TO MONITOR AIRLINE QUALITY OF SERVICE AND POLICY

State	Monitoring of airline quality of service and policy on carriage of PRMs
Belgium	Developed advisory document which sets limits on PRM carriage by Belgian carriers
Denmark	No review of service quality. Discussion of hypothetical reasons for refusal of embarkation discussed at stakeholder meetings
France	None
Germany	No review of service quality.
Greece	Training of ground handlers is approved by HCAA
Hungary	Reviews requirements and Conditions of Carriage for compliance with Regulation
Ireland	Reviewed airline policies on carriage of PRMs
Italy	None
Latvia	Inspections of both main Latvian airlines: reviewed operating manuals, websites and records. Would use unannounced inspections if infringements identified.
Netherlands	Consultations with EDF to check accessibility of airline websites
Poland	NEB reviewed airline's operating manual as a result of one case
Portugal	None
Romania	Annual surveys of airlines on several topics, including refusal of carriage, training and accessible information
Spain	409 inspections in 2009 on passenger rights, including checks on information provided to passengers and compliance with conditions of carriage
Sweden	Reviewed policies on carriage in cooperation with Swedish Work Environment Authority; awaiting EASA report before defining policy on PRM limits
UK	Requested and reviewed information from airlines on the rationales for their policies

5.52 In addition, many NEBs are also the licensing authority for carriers registered in the State, and therefore have to approve carriers Operating Manuals. Where this is the case, these NEBs have to approve, and therefore could determine, carriers' policies on carriage of PRMs and requirements to be accompanied.

5.53 We have identified that in some cases the licensing authority does have specific policies on carriage of PRMs which must be reflected in carriers Operating Manuals. The stated rationale for these policies is safety, but these policies vary significantly between States, and have not been demonstrated to be evidence-based. In most cases, the licensing authorities do not have specific policies and will approve those proposed by the carriers, subject to these being reasonably based on safety. Most NEBs and licensing authorities have not done anything to challenge policies on carriage of PRMs proposed by carriers, and this has resulted in significant differences in policies between carriers. This issue is discussed in more detail in section 4 above.

Monitoring of airport charges

5.54 As noted previously (see 5.6), no Member State has designated a separate body for enforcement of Article 8 of the Regulation, and several have not yet passed legislation to allow penalties to be imposed for infringements of this Article.

5.55 7 out of 16 case study NEBs had undertaken no direct monitoring of the charges levied by airports for providing services under the Regulation, or of the consultation which airports are also obliged to undertake when setting such charges.

5.56 The NEBs for Hungary and Italy had undertaken audits of the charges levied, while a number of NEBs had undertaken high level reviews of expenses and charges (including Greece, Latvia, Poland and Romania). The Netherlands and Portugal had undertaken benchmarking exercises against other airports.

5.57 Table 5.11 summarises the actions NEBs have taken to monitor airport charges under the Regulation.

TABLE 5.13 NEB ACTIONS TO MONITOR AIRPORT CHARGES (EXCLUDING INDIRECT MONITORING)

State	Direct monitoring of airport service charges
Belgium	None
Denmark	None
France	None
Germany	None
Greece	Annual review of expenses and charges
Hungary	Approves airport charges; in-depth audit of costs and charge for Budapest
Ireland	Charges included within regulated price cap. CAR has investigated level of consultation on charges.
Italy	Charges set by ENAC in cooperation with airports and airlines
Latvia	High-level check of charge
Netherlands	Reviews against other airports with advice of Netherlands Competition Authority.

Poland	Review of charges (by other CAO department)
Portugal	Benchmarking exercise across European countries, but no auditing or analysis of whether charges are cost-reflective
Romania	Checks for: existence of charges; separation of accounts; annual report on expenses and revenues. No checks on whether reasonable or cost-reflective (but in the process of recruiting staff with economic skills).
Spain	None
Sweden	None, but review is planned.
UK	None

Other activities undertaken by NEBs

Interaction between NEBs and with other organisations

5.58 Given the low number of complaints received by NEBs, interaction with other stakeholders is important to maintain an awareness of any issues arising. Table 5.14 summarises the interactions between NEBs and other organisations.

TABLE 5.14 NEB INTERACTION WITH OTHER ORGANISATIONS

State	Form of any interaction between NEB and other organisations
Belgium	None
Denmark	Biannual meetings with stakeholders, including airports, airlines and PRM organisations
France	No information provided at interview
Germany	No information provided at interview
Greece	Meetings with PRM organisations to help define quality standards, joint accessibility reviews of regional airports
Hungary	Biannual meetings with PRM organisations
Ireland	No information provided at interview
Italy	Round table discussions to develop advisory guidance, good relationship with PRM organisation
Latvia	CAA attends quarterly PRM steering committee at Riga Airport with PRM organisations
Netherlands	Consultations with EDF to check accessibility of airline websites
Poland	Worked with PRM organisation to improve CAO understanding of problems faced by PRMs
Portugal	One day seminar for aviation industry stakeholders on Regulations 261/2004 and 1107/2006. Did not include representatives of PRM organisations.
Romania	NEB and PRM organisation cooperated with Bucharest Otopeni to develop quality standards
Spain	No information provided at interview
Sweden	Approximately monthly contact with PRM organisations, including biannual aviation focus group
UK	CCNI: Worked with Equality Commission of Northern Ireland to support introduction. CAA: Attends monthly PRM steering committees at major UK airports with PRM organisations, receives guidance from government advisory committee on disabled travel.

Promotional activity undertaken by NEBs

5.59 The Regulation requires Member States to inform PRMs of their rights and the possibility of complaints to NEBs. Relatively few NEBs have made significant efforts towards this: of the case study NEBs, only Romania and UK had undertaken nationwide campaigns to promote awareness of passengers' rights under the Regulation, and even in the UK, the PRM organisation we spoke to was not aware of the campaign the UK NEB had conducted.

5.60 Other NEBs had undertaken less direct promotional activity, including the following:

- publishing of leaflets to be distributed at airports (Belgium, Germany);
- holding a conference (Germany); and
- actions to promote awareness of the Regulation to PRM organisations and other stakeholders, but which did not directly inform passengers (Denmark, Italy, Netherlands, Poland).

5.61 A number of NEBs had published information on their websites. While such information can be useful, if a passenger is unaware that they have rights, or is aware they have rights but unaware of the role the NEB plays in enforcing them, they are unlikely to find and read NEB websites. Table 5.15 lists the activities undertaken by NEBs.

TABLE 5.15 NEB ACTIVITY TO PROMOTE AWARENESS OF THE REGULATION

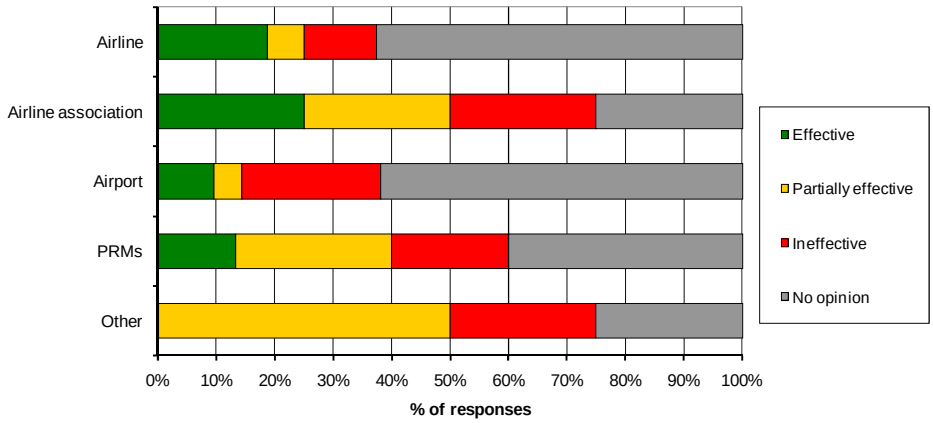
State	Actions taken by NEBs to promote awareness of the Regulation
Belgium	Leaflets sent to Brussels Airport; also available on the BCAA website.
Denmark	Letters to stakeholders on obligations under Regulation sent out when it was passed.
France	No information provided at interview. Section on website with information on Regulation.
Germany	BMBVS published a leaflet on Regulation in 2008 and held a conference with PRM organisations and the association of German air carriers; published information on website.
Greece	Information on the Regulation (including videos) placed on website.
Hungary	Information on the Regulation (including videos) placed on website.
Ireland	No information provided at interview. Section on website with in-depth information on Regulation.
Italy	Guidance on implementing the Regulation developed with and circulated to airports, airlines and PRM organisations. No direct promotional activity to passengers.
Latvia	Published PRM complaint form on website.
Netherlands	Contact with Dutch Association of Travel Agents to improve awareness and ensure correct allocation of IATA codes.
Poland	Provided information regarding the Regulation to PRM organisations.
Portugal	No information provided at interview. Section on website with information on Regulation.
Romania	Public awareness campaign with main PRM organisations, including dedicated website, posters and leaflets distributed throughout the country, through airports, carriers, travel agents and municipal bodies.
Spain	No information provided at interview. Section on website with information on Regulation.

Sweden	No information provided at interview. Section on website with information on Regulation. PRM org states well-publicised initially but not since.
UK	EHRC: distribution of guides on rights under Regulation; advertised in national media CCNI: distribution of guides on rights under Regulation, covered in regional media; advertorial piece in newspapers; exhibitions at relevant events.

Stakeholders views on complaint handling and enforcement

5.62 We asked each of the stakeholders we contacted about how effectively they believed NEBs had enforced the Regulation; there is some variation between different groups of stakeholders (Figure 3.10 below). A high proportion of stakeholders (over 60% of airports and airlines) have no opinion on how well NEBs have been enforcing the Regulation; often, the reason given for this response was that the stakeholder had had no interaction with the NEB in question. The proportion which believes that NEBs have not been enforcing the Regulation effectively is broadly consistent across stakeholder groups, at 20%-25%.

FIGURE 5.1 VIEWS OF STAKEHOLDERS ON NEB EFFECTIVENESS



5.63 In this section, we discuss the particular issues raised by each group of stakeholders.

Airlines and airline associations

5.64 Most airlines did not express strong views on whether NEBs had enforced the Regulation effectively, and did not give specific examples of areas where NEBs were performing well or poorly. One airline expressed frustration with the lack of action taken against airports, in particular relating to excessive charges and to lack of focus on safety.

5.65 Of the airline associations we spoke to, AEA believed that effectiveness of enforcement varied by State. IACA believed that in general NEBs were unfairly targeting airlines and not airports. Regarding specific NEBs, it believed that the UK complaint-handling NEB was bringing cases which were factually inaccurate, and that there was insufficient distinction between NEBs and service providers in Spain and Portugal.

Airports

5.66 A higher proportion of airports than airlines believed that NEBs were ineffective. Two airports believed actions needed to be taken by NEBs to raise the proportion of pre-notifications for assistance. One airport believed that the NEB should take more action to inform passengers of their rights and obligations. Three airports informed us that they had had no interaction with their NEBs, and two stated that their interactions with NEBs had been unsatisfactory: one informed us that the NEB was slow and unresponsive, and the other stated that it was not clear which organisation was their NEB. Only one airport informed us that it had good and close cooperation with its NEB.

NEBs

5.67 As there have been very few complaints received under the Regulation, there have also been very few complaints which have required forwarding to other NEBs. Therefore, the NEBs have no information on the effectiveness of other NEBs via their responses to forwarded complaints.

PRM organisations

5.68 13% of PRM organisations believed that NEBs were enforcing the Regulation effectively. Those that believed that NEBs were functioning ineffectively or only partially effectively believed that too little action was being taken, either through active monitoring of the services provided or through taking actions to remedy poor service. Four of the PRM organisations we spoke to had had little or no interaction with their NEB.

Other organisations

5.69 The other organisations we spoke to noted the following issues with regard to enforcement:

- lack of consistency of approach between NEBs, particularly in terms of whether they believe it is their role to handle complaints;
- unwieldy complaints systems; and
- unreasonable requests made by NEBs.

5.70 One organisation also believed that some NEBs were taking a sensible line between the demands of PRMs and of service providers.

Conclusions

5.71 Member States are required to designate a body responsible for enforcing the Regulation regarding flights from or arriving at its territory. They may also designate separate bodies responsible for handling complaints, and for enforcing Article 8. All Member States except Slovenia have designated an NEB, which in most cases is the Civil Aviation Authority and is the same organisation that is responsible for enforcement of Regulation 261/2004. In a number of States, the Regulation is not explicitly referred to in the law designating the NEB, and in Spain, the imposition of sanctions has been challenged, in one case successfully, on the basis that the NEB was not competent to impose the sanction.

5.72 There is no requirement in the Regulation that the NEB be independent from service providers and we have identified one case where it is not: the Greek NEB, HCAA, is also the operator of the airports other than Athens.

5.73 Member States are also required to introduce penalties in national law for infringements of the Regulation, which must be effective, proportionate and dissuasive. All States except Poland and Sweden have introduced sanctions into national law, although there are a number of States where sanctions have not been introduced for infringements of all Articles. In the UK, national law grants rights additional to those given in the Regulation: passengers who suffer injury to feelings as a result of an infringement of the Regulation may seek financial compensation from the service provider.

5.74 There is significant variation in the level of the maximum sanctions which can be imposed for infringements, and in some States the fines may not be at a high enough level to be dissuasive. While some States allow unlimited fines to be imposed and may also impose a prison sentence, maximum sanctions in Estonia, Lithuania and Romania are lower than €1,000.

5.75 The Regulation allows any passenger who believes that the Regulation has been infringed, and is dissatisfied with the response they have received from the service provider, to make a complaint to the appropriate body (usually an NEB). However, very few complaints have been received under the Regulation: to date, since the introduction of the Regulation, 1,110 complaints have been received, compared to a total of 3.2 million passenger assisted in 2009 across a sample of 21 EU airports. 80% of all complaints were received by the UK NEBs; none of the NEBs in the other 26 Member States has received more than 50 complaints.

5.76 Where an NEB identifies an infringement (through a complaint or other means) it may choose to enforce the Regulation by imposing sanctions. No sanctions have yet been imposed, but France, Portugal and Spain have opened proceedings to impose fines. However, in a number of States, there are likely to be significant practical difficulties in imposing and collecting sanctions, in particular in relation to airlines registered in different States.

5.77 Many NEBs had taken at least some action, other than the monitoring of complaints, to assess whether service providers were complying with the Regulation. NEBs in 14 of the 16 case study States had undertaken at least one inspection of airports for compliance with the Regulation, however most inspections have focused on checks of systems and procedures, and did not assess the actual experience of PRMs using the service provided by the airport. NEBs for 9 of the 16 States had undertaken no direct monitoring of the charges levied by airports for providing PRM services, although Hungary and Italy informed us that they had undertaken in-depth audits of the charges levied at airports.

5.78 Member States are required to take measures to inform PRMs of their rights under the Regulation, and the possibility of complaining to appropriate bodies. Of those that provided information, relatively few NEBs had made significant efforts to promote awareness of the Regulation by passengers; only two informed us of national public awareness campaigns they had undertaken.

5.79 Awareness of the NEBs performance appeared in general to be poor: most stakeholders contacted for the study held no opinion on the effectiveness of enforcement by NEBs, and many informed us that this was because they had had no interaction with them.

6. STAKEHOLDER VIEWS ON POLICY ISSUES

Introduction

6.1 This section summarises views expressed by stakeholders in the course of our consultation exercise on key policy issues, including whether any changes should be made to the scope or content of the Regulation, and what any changes should be.

6.2 Stakeholders also expressed views on the application of the Regulation by airports, carriers, and the complaint handling and enforcement process; these views are summarised in the relevant chapters above.

Whether changes should be made to the Regulation

6.3 We asked all of the stakeholders that we interviewed whether they considered that any changes should be made to the Regulation.

6.4 Half of the airports we interviewed believed that the Regulation should be changed. Several suggested that the definition of PRM was too broad, and that this was contributing to abuse of services. It was also suggested that the Regulation be amended to require proof of disability, and that the Regulation should also be amended to improve the functioning of pre-notification (for example by making it mandatory). ACI supported these positions. The airports which did not believe the Regulation should be amended, or had a neutral opinion, thought that any lack of clarity in the Regulation could be addressed through information from the Commission.

6.5 In addition, around half of the airlines we interviewed also believed that the Regulation should be changed, however this was for different reasons to those given by airports. A number of airlines believed that it should be possible for them to choose to provide the service themselves or that responsibility should lie with airlines, arguing that as customer-focussed organisations they are better able to do this. Of the airline associations, only ELFAA argued for this amendment. One airport strongly agreed with this position, however most believed that the allocation of responsibility should not be revised, as if airlines were to provide their own service, the incentive to reduce costs would result in unacceptable reductions in service quality. Airlines also supported amendments to clarify the definitions of PRM and mobility equipment, and to improve pre-notification.

6.6 Most of the NEBs we interviewed did not have a clear opinion on whether the Regulation should be amended. Seven NEBs believed that the definitions of terms such as PRM and mobility equipment should be clarified, and two of the NEBs in the case study sample supported changes which would allow airlines to opt out of the Regulation and provide the services themselves.

6.7 Slightly over half of the PRM representative organisations we interviewed believed that the Regulation should be amended. Amendments were suggested to address the following issues:

- limits on number of PRMs which can safely be carried;

- allocation of seating;
- requirements on compensation payable for damaged mobility equipment, and improvements to its handling; and
- provision of information.

6.8 EDF suggested that compensation should be introduced, as this would incentivise more complaints and therefore improve service. Those that did not believe the Regulation should be amended either believed that the Regulation had not been in force for long enough to assess its efficacy, or that poor implementation was the cause of any problems identified.

The content and drafting of the Regulation

6.9 We outline below some of the main detailed issues that have been raised by stakeholders. Few stakeholders believed that there were significant issues with the drafting of the Regulation that made it difficult to implement, however many stakeholders outlined issues relating to insufficient definition.

Definition of terms

6.10 The issue most commonly raised, particularly by airports and NEBs, is the definition of PRM set down in the Regulation. Many stakeholders believe this is too broad and opens the service to abuse, both by passengers and by airlines. A number of airports believed that airlines were using the wide definition to allow them to avoid costs: passengers who were previously classified as MAAS (including unaccompanied minors, VIPs and passengers with language issues), and therefore paid for by the airline, are now classified as WCHR and the cost is borne by all airlines. Some airports believed this could be resolved by setting out a clear definition of MAAS.

6.11 The definition in the Regulation could include a wide range of passengers who some stakeholders do not believe were the intended beneficiaries of the Regulation, including:

- obese passengers;
- stretchers;
- medical cases; and
- passengers who had sustained injuries (whose travel is often paid for by their travel insurance).

6.12 Some stakeholders believed that the definition of PRM was so broad that it could be considered to include passengers which the Regulation was clearly not intended to cover, such as passengers whose intellectual and sensory capacities were temporarily impaired by excessive consumption of alcohol.

6.13 Several stakeholders believed this issue could be resolved by requiring some proof of need for assistance in order to receive assistance, for example in the form of a disability ID card. This was opposed by some PRM organisations.

6.14 Stakeholders also considered that a number of other terms were not sufficiently defined. These included:

- **Mobility equipment:** The reference in Annex II to mobility equipment states that it should include electric wheelchairs but does not define the term any further. Stakeholders had differing views on what should be included in this: several airlines believe that it should refer only to equipment that is required to make it possible to travel by air, but a number of PRM organisations believed it should include items which make the *purpose* of the trip possible. This could include, for example, joists for lifting passengers in and out of seats.
- **Medical equipment:** Several stakeholders believed there was insufficient clarity on which items were classified as medical equipment and which as mobility equipment. It was also uncertain whether airlines could any limits (for example on weight) on its carriage.
- **Accessible formats:** It was reported that the requirement for designated points of arrival and departure to offer basic information about the airport in accessible formats did not define what was required, for example, whether all such points should include a map in Braille of the airport.
- **Safety rules:** Article 4(3) requires airlines to make publicly available the safety rules that it applies to the carriage of PRMs, and any restrictions on the carriage of PRMs or mobility equipment. Several stakeholders informed us that such documents were not defined, and it was not clear what this term referred to.

Lack of clarity in the Regulation

6.15 In one case, the requirements of the Regulation appear contradictory. Several NEBs noted that the responsibility for enforcement defined in Article 14 contradicts that specified in Recital 17. Article 14 states that NEBs are responsible for enforcement regarding flights departing from or arriving at airports within their State, while Recital 17 places responsibility on the NEB of the State which issued the carrier's operating license.

6.16 Stakeholders identified a number of other provisions where they considered the description of obligations was insufficiently clear, including:

- **Article 7:** Under this Article, airports are required to provide assistance to PRMs holding reservations so that they able to take their flight, however, it does not define what an airport is required to provide to a PRM who does not hold a valid reservation. In addition, it does not define the airport's liability when a PRM misses their flight, in particular where the passenger has not pre-notified their requirement for assistance.
- **Article 11:** One airport had been the subject of a legal challenge by an airline regarding the inclusion within its PRM service charge of the costs of providing training under Article 11(b) to subcontractors at the airport. The airline contended that since the paragraph did not refer to subcontractors (unlike Article 11(a)) the airport was not obliged to provide such training. Several airports believed that the requirement under this Article to provide disability-related training to all new staff (not just those whose role required them to interact with PRMs) was unnecessary. In contrast, some PRM organisations believed that training should be explicitly extended to Commanders of aircraft, to enable them to make better-informed decisions on whether to embark PRMs. PRM organisations also noted

that it was not clear whether airports were required to provide training on specific procedures for handling mobility equipment; as damage to mobility equipment is perceived to be a significant issue, they believed this requirement should be explicitly included.

- **Article 12:** Several PRM stakeholders raised concerns that the compensation referred to in this Article would be consistent with the Montreal Convention, and that the limits under the Convention were insufficient for some mobility equipment, such as technologically advanced wheelchairs (see 4.55). Although this had not been an issue to date – in almost all cases that we were informed of, airlines waived the limits – it creates uncertainty for wheelchair users travelling by air. This is heightened by the reported difficulties in obtaining insurance for such equipment.
- **Annex I:** A number of airlines raised concerns regarding the allocation of liability when boarding a passenger. For example, they did not believe that liability was clear in the case that an accident occurs on board an aircraft when airport staff are present. Some airports raised concerns regarding liability for damage to wheelchairs while in their care. In addition, the services which should be provided to transfer passengers and the measures which should be taken to accommodate assistance dogs are not defined.

6.17 Regarding training, some stakeholders raised the issue of the legal weight of ECAC Document 30, particularly Annex 5-G which sets out recommended guidance for training regarding PRM services. While this is referred to in the Regulation as a policy which should be considered when developing quality standards, the same reference is not made in Article 11 where training requirements are defined.

Conflicts with 14 CFR Part 382

6.18 As discussed in section 4 above, the US regulations on carriage of PRMs (14 CFR Part 382) apply to European carriers operating flights to/from the US, and other flights where these are operated as codeshares with US carriers. There are a number of differences between these rules and the Regulation, the most significant of which is the allocation of responsibilities for assistance: the Regulation requires airports to arrange the provision of services to PRMs, while under the US legislation it is the airlines that have this responsibility. This has caused difficulties for carriers who are required to comply with legislation that conflicts, although the US legislation does allow carriers to apply for a waiver where there is a conflict of laws.

Pre-notification

6.19 The requirement to pre-notify requests for assistance and problems in doing so were raised by many stakeholders (see 4.98). Stakeholders held differing views on how this should be improved. Several airlines (in particular those with operations to the US, where requiring pre-notification is usually prohibited) believed that the requirement to pre-notify should be removed; they believed that the resulting increases in costs of provision would be marginal, as most resourcing requirements could be planned on the basis of observed variation in demand (over the course of a year, a week or a day as appropriate). This approach was supported by some PRM organisations. In contrast, a number of airports believed that pre-notification should be made compulsory, and

this proposal was opposed by some PRM organisations.

Level of detail

6.20 Almost all stakeholders informed us that there was significant variation in the services provided under the Regulation. This is partly a result of the approach taken by the Regulation, which does not seek to define in detail the services to be provided. In contrast, the equivalent US rules set out in detail all aspects of the services to be provided, in effect setting out procedures to be followed by all service providers.

6.21 Several stakeholders have raised the lack of detail in the Regulation as an issue, and believe that a more prescriptive approach would lead to greater harmonisation of the services provided. In particular, they believed that the services set out in Annexes I and II and the training required under Article 11 should be defined with greater precision.

Conclusions

6.22 We asked each stakeholder we contacted for the study whether they believed that changes should be made to the Regulation. Slightly more thought that there should be changes than did not, but there was not a clear majority in favour of changes. The reasons given for making changes and what those changes should be varied depending on the stakeholder.

6.23 No significant problems were identified with the drafting of the Regulation, although there is a conflict between Recital 17 and Article 14. In general, stakeholders had not found it difficult to follow the provisions of the Regulation. The most common issue raised with regard to the text of the Regulation is that the definitions used are not sufficiently precise; in particular, the definition of PRM is believed by airports and some airlines to be too broad, and this is believed to make it difficult for them to take action to counter abuse. The Regulation is much less precise about the policies and procedures that have to be followed, particularly by air carriers, than the equivalent US regulation on carriage of PRMs, 14 CFR Part 382.

6.24 In addition, many stakeholders pointed out the significant differences between the Regulation and 14 CFR Part 382, which applies to European carriers on flights to/from the US and other flights operated as codeshares with US carriers. One of the most significant is the requirement to pre-notify requirements for assistance was raised as an issue, particularly by airlines operating to the US, and by airports where the rates of pre-notification were low. Two different approaches were proposed to address the perceived problem. Some airlines (primarily those flying to US) proposed removing the requirement to pre-notify, which would resolve the conflict with US legislation; this was opposed by airports on the grounds that it would reduce service quality and increase cost. Some airports proposed making pre-notification compulsory; this was opposed by some PRM organisations on the grounds that it would reduce the freedom of PRMs to travel.

7. FACTUAL CONCLUSIONS

Introduction

7.1 This section summarises our conclusions in relation to how effectively airports and airlines are providing the assistance required by the Regulation, and how effectively Member States and National Enforcement Bodies (NEBs) are undertaking their roles specified in the Regulation.

Implementation of the Regulation by airports

7.2 We selected a sample of 21 airports for detailed analysis for the study, and reviewed how they had implemented the Regulation, through desk research and through interviews with representatives of airport management and other stakeholders.

7.3 Prior to the introduction of the Regulation, assistance at airports was provided by airlines and usually contracted from ground handlers. The Regulation places responsibility for provision of this assistance with the airport management company. We found that all airports in the sample for this study had implemented the provisions of the Regulation, although we were informed by airlines and other stakeholders that the regional airports in Greece had yet to effect the change from provision by ground handlers to provision by airports. We were not informed by stakeholders of any other EU airports at which the Regulation has not been implemented.

7.4 Most of the sample airports had contracted the provision of PRM assistance services to an external company, generally selected through a competitive tender process. However, several airports had changed their service provider within 18 months of the Regulation coming into force; this was interpreted by some as a sign that the service initially specified and procured had been inadequate. One major hub airport acknowledged that it had had significant problems with a PRM service provider.

7.5 The service provided at the sample airports varies in terms of: the resources available to provide the services; the level of training of the staff providing assistance; the type of equipment used to provide services; and the facilities provided to accommodate PRMs (such as PRM lounges). According to the information provided by PRM organisations, this results in variability in service quality. PRM representative organisations, airlines and some airports cited a number of examples of poor quality or even unsafe provision of services at airports, although it is not possible to infer how regular these occurrences are. Overall, most stakeholders believed that the Regulation had been implemented effectively by airports.

7.6 There is also significant variation between airports in the frequency with which PRM services are requested: the level of use of the service varies by a factor of 15 between the airports for which we have been able to obtain data, although in most cases between 0.2% and 0.7% of passengers requested assistance. The type of PRM service requested also varies considerably between airports although in all cases the largest category is WCHR (passengers who cannot walk long distances but can board the aircraft, including using stairs, unaided). Both the frequency of use and the type of service required are likely to be affected by the varying demographics of the passengers using different airports; PRMs account for the highest proportions of

passengers at holiday airports, such as Alicante, and airports serving pilgrimage destinations, such as Lourdes.

7.7 The Regulation requires airports to publish quality standards. Most of the sample airports had done so, although some had published them only to airlines. Almost all quality standards followed the example format set out in ECAC Document 30, which defines the percentage of PRMs who should wait for up to given numbers of minutes. Some airports published qualitative measures in addition to these time standards, such as descriptions of the treatment the passenger should expect at all points of the service. However, none of the sample airports had published the results of any monitoring of these quality standards, and whilst most did undertake monitoring in some form, only four had commissioned external checks of the service.

7.8 The Regulation allows airports to levy a specific charge to cover the costs of assistance. All but one of the sample airports had done so. The level of charges varied considerably: the highest charges of the sample airports were at Paris CDG and Frankfurt. We analysed the charges to examine whether variation could be explained by higher frequency of use of the service, differences in levels of wages and other costs between States, or differences in service quality, but there was no evidence that this was the case. The design of the airport is a further factor influencing the cost of service provision and hence the level of charges: the assistance service can be provided at lower cost at an airport such as Amsterdam Schiphol, which is on a single level and has one integrated terminal building, than at an airport with a more complex configuration such as Paris CDG.

7.9 Some stakeholders believe that the requirements to select contractors and establish charges in cooperation with users and PRM organisations were not followed thoroughly. Many airlines did not believe that consultation on either element had been sufficient, and this view was shared by some PRM organisations. There were a number of barriers to effective consultation, including linguistic restrictions and airport user committees which did not adequately represent all air carriers. Consultation with air carriers was reported as particularly poor in Spain, Portugal and Cyprus. In contrast to this, we note that several airports stated that they had sought the participation of PRM organisations but had found this difficult to obtain.

7.10 The Regulation requires airports to provide specialised disability training for staff directly assisting PRMs, and whilst all sample airports had done so, there were significant variations in the length and format of this training. The shortest training course among those for which we have data was 3 days long, while the longest lasted 14 days. There was similar variation in the length of training provided for passenger-facing staff who did not provide direct assistance. A number of airports informed us that they did not provide disability-awareness training for staff not in public-facing roles, or only provided it on a voluntary basis.

Implementation of the Regulation by air carriers

7.11 We selected a sample of 20 air carriers for the study. We reviewed how they had implemented the Regulation, both through review of their published policies, procedures and Conditions of Carriage, and through interviews with the carriers themselves and with other stakeholders.

7.12 The main obligation that the Regulation places on air carriers is that it prohibits refusal of carriage of PRMs, unless this is necessary to meet national or international safety rules or requirements imposed by the carrier's licensing authority, or is physically impossible due to the size of the aircraft or its doors. We found that air carriers largely comply with this, although some state in their Conditions of Carriage that carriage of PRMs is conditional on advance notification. In our view, this is not consistent with the Regulation, which does not allow for a derogation on the prohibition of refusal of carriage on the basis that the passenger has not provided advance notification. In addition, we found that a small number of carriers impose requirements for medical clearance which appear to be excessively onerous and to be worded to include PRMs as well as passengers with medical conditions.

7.13 We found significant differences in policies relating to carriage of PRMs between carriers – even between carriers with similar aircraft types and operational models. The most significant difference is that some carriers impose a numerical limit on the number of PRMs that can be carried on a given aircraft. These can be quite low: some carriers have limits of 2-4 PRMs on a standard single-aisle aircraft such as an Airbus 319. These limits are not required by any international or European safety rules, although in some cases they are required by the licensing authority for the carrier concerned; often, although not always, this is the same organisation that has been designated as the NEB. However, in most cases, these requirements are defined by carriers in their Flight Operations Manuals; although the licensing authority has to approve this, it appears that in most States, little has been done to challenge the limits proposed by carriers. Whilst the stated rationale for these limits is safety, there does not seem to be a clear evidence base for them, and they are specifically prohibited by the equivalent US regulation on carriage of PRMs (14 CFR part 382).

7.14 The Regulation also allows carriers to require that PRMs be accompanied, subject to the same safety-based criteria. We found that a number of carriers require PRMs to be accompanied where they are not 'self-reliant', which can mean that the PRM cannot (for example) eat unaided. In our view this may be an infringement of the Regulation because there is no direct link to safety; for those carriers that fly to the US, it is also an explicit breach of the US PRM rules. This type of condition is also, in our view, unreasonable for short haul flights for which passengers could decide to (for example) not eat or drink during the flight. Other carriers require PRMs to be accompanied only where they are not self-reliant **and** this has a safety impact (for example, if the PRM could not exit the aircraft unaided in an emergency or put on an oxygen mask without assistance); this is consistent with the Regulation.

7.15 The Regulation also requires carriers to publish safety rules relating to the carriage of PRMs, although it does not specifically state what issues these safety rules should cover. We found that carriers all published some PRM-related information, but few published a notice specifically described as being the safety rules related to carriage of

PRMs. In some cases there appeared to be significant omissions from the information published by carriers: for example, some of the carriers which imposed a numerical limit on the number of PRMs which could be carried did not publish this.

7.16 Annex II of the Regulation sets out various requirements for services which have to be provided to PRMs by carriers. Evidence for the extent to which this is provided is limited, and restricts a fair assessment of compliance with these requirements. There is however sufficient evidence to conclude that the vast majority of case study air carriers are complying with the requirement to carry up to two items of mobility equipment free of charge. Some PRM representative groups were critical of the effectiveness of airlines in implementing the Regulation, and we were informed of some particularly bad passenger experiences, but it is difficult to assess how common such occurrences are.

Enforcement and complaint handling by NEBs

7.17 Member States are required to designate a body responsible for enforcing the Regulation regarding flights from or arriving at its territory. They may also designate separate bodies responsible for handling complaints, and for enforcing Article 8. All Member States except Slovenia have designated an NEB. In the majority of States, the NEB for this Regulation is the same organisation as the NEB for Regulation 261/2004, in most cases the Civil Aviation Authority. In a number of States, the Regulation is not explicitly referred to in the law designating the NEB, and in Spain, the imposition of sanctions has been challenged, in one case successfully, on the basis that the NEB was not competent to impose the sanction.

7.18 Member States are also required to introduce penalties in national law for infringements of the Regulation, which must be effective, proportionate and dissuasive. All States except Poland and Sweden have introduced sanctions into national law, although there are a number of States where sanctions have not been introduced for infringements of all Articles. There is significant variation in the level of the maximum sanctions which can be imposed for infringements, and in some States the fines may not be at a high enough level to be dissuasive. While some States allow unlimited fines to be imposed and may also impose a prison sentence, maximum sanctions in Estonia, Lithuania and Romania are lower than €1,000.

7.19 The Regulation allows any passenger who believes that the Regulation has been infringed, and is dissatisfied with the response they have received from the service provider, to make a complaint to the appropriate body (usually an NEB). However, very few complaints have been received relating to the Regulation: to date, since the introduction of the Regulation, 1,110 complaints have been received, compared to a total of 3.2 million passengers assisted in 2009 across the case study sample of 21 EU airports. There is also a significant disparity in which States had received complaints: 80% of all complaints about infringements of the Regulation were received by the UK NEBs; none of the NEBs in the other 26 Member States had received more than 50 complaints.

7.20 In the UK, national law grants rights additional to those in the Regulation: passengers who suffer injury to feelings as a result of an infringement of the Regulation may seek financial compensation from the air carrier or airport concerned. This is in line with

disability rights legislation applying to other sectors in the UK. A consequence of this is that the process for handling complaints is significantly different in the UK from other Member States, because passengers may have a right to claim compensation from the carrier or airport concerned. At least in part, this also explains the significantly higher number of complaints in the UK compared to the other Member States.

7.21 Where an NEB identifies an infringement (through a complaint or other means) it may choose to enforce the Regulation by imposing sanctions. No sanctions have yet been imposed, but the NEBs for France, Portugal and Spain have opened proceedings to impose fines. In most States, the process to impose sanctions is equivalent to that for Regulation 261/2004. In a number of States, there are likely to be significant practical difficulties in imposing and collecting sanctions, in particular in relation to airlines registered in different Member States. This is due to the same reasons identified in our recent study for the Commission of Regulation 261/2004[14]: either specific limitations in national law on imposition of sanctions on foreign companies, or administrative requirements which cannot be met if the carrier is based outside the State. This means that, in these States, the system of sanctions cannot be considered to be dissuasive as required by the Regulation.

7.22 There is no requirement in the Regulation that the NEB must be separate from the service providers that it has to regulate. The only case we have identified where the NEB is also a service provider is Greece, where HCAA is the operator of the airports other than Athens, as well as the NEB. Although not an infringement of the Regulation, this is a breach of the principle of separation of regulation and service provision. As noted above, the most significant failure to implement the Regulation that we have identified is at the HCAA airports, and HCAA has not imposed a sanction on itself for this failure to implement the Regulation.

7.23 Many NEBs have taken at least some action, other than the monitoring of complaints, to assess whether service providers were complying with the Regulation. NEBs in 14 of the 16 case study States have undertaken at least one inspection of airports for compliance with the Regulation. However, most inspections have focused on checks of systems and procedures, and did not assess the actual experience of PRMs using the service provided by the airport. NEBs for 9 of the 14 States have undertaken no direct monitoring of the charges levied by airports for providing PRM services, although Hungary and Italy informed us that they had undertaken in-depth audits of the charges levied at airports.

7.24 Member States are required to take measures to inform PRMs of their rights under the Regulation, and the possibility of complaining to appropriate bodies. Of those that provided information, relatively few NEBs had made significant efforts to promote awareness of the Regulation by passengers; only two informed us of national public awareness campaigns they had undertaken, and even in one of these States, a key national PRM organisation was not aware that the public campaign had taken place. Awareness of the NEBs performance appeared in general to be poor: most

[14] Evaluation of Regulation 261/2004; Steer Davies Gleave on behalf of European Commission, February 2010

stakeholders contacted for the study held no opinion on the effectiveness of enforcement by NEBs, and many informed us that this was because they had had no interaction with them.

Other issues that have arisen with the Regulation

7.25 Stakeholders also pointed out a number of other issues with the Regulation. Whilst few significant problems have been identified with the drafting of the Regulation, the following issues were identified:

- there is a conflict between Recital 17 and Article 14, regarding which NEB is responsible for enforcing the Regulation in relation to air carriers;
- the definition of PRM used in the Regulation is very broad, and could be interpreted to include some categories of passenger who it might not have been intended to cover (such as obese passengers, or even passengers temporarily incapacitated due to excess alcohol consumption); and
- the Regulation does not specify in detail the policies or procedures that have to be followed by air carriers, particularly if compared to the equivalent US regulations, and this has resulted in significant differences in policies between carriers.

7.26 In addition, stakeholders emphasised the significant differences between the Regulation and the equivalent US regulations on carriage of PRMs (14 CFR part 382). These can cause difficulties for air carriers, as part 382 applies to non-US carriers on flights to/from the US and all other flights that are operated as codeshares with US carriers (even if not to/from the US). The most significant differences are:

- in most circumstances, part 382 does not permit carriers to request pre-notification;
- part 382 does not allow limits on the number of PRMs on an aircraft and limits the circumstances in which an accompanying passenger may be required; and
- part 382 places the responsibility for provision of PRM assistance services on the air carrier, whereas the Regulation places this responsibility on the airport.

Conclusions

7.27 Overall, despite difficulties with service provision at some airports, the services required by the Regulation have been implemented at most European airports and compliance with the Regulation appears to be relatively good. Most stakeholders considered that the quality of service provision had improved since the introduction of the Regulation, although some airlines strongly disagreed with this.

7.28 The key issue we have identified with the implementation of the Regulation is that there are significant differences between carriers in their policies on carriage of PRMs. This arises in part from the fact that the Regulation does not specify in detail the services to be provided and the procedures to be followed, in particular if compared to the equivalent US regulations on carriage of PRMs. The Regulation allows carriers to refuse carriage or require a passenger to be accompanied on the basis of safety requirements, but these requirements are not specified in law, and therefore there are significant differences in interpretation of these requirements.

8. RECOMMENDATIONS

Overview

8.1 This section sets out our recommendations relating to how to improve the operation and enforcement of the Regulation. We present first a number of recommendations which would improve the operation of the Regulation without requiring any changes to be made to the text. However, we believe some changes are necessary which could only be implemented through amendments to the Regulation.

Measures to improve the operation of the Regulation

8.2 This section sets out measures to improve the operation of the Regulation. It covers the following:

- improvement in the operation of PRM services at airports;
- issues relating to the carriage of PRMs by airlines;
- actions to be taken by or in relation to NEBs; and
- guidance on PRM services and carriage which should be produced by the Commission, in consultation with other parties.

Airports

8.3 All airports in the sample for the study had implemented the provisions of the Regulation in some form, although as the Regulation does not precisely specify the quality of service to be provided, PRM organisations have reported this as being variable. We do not recommend any significant changes, and recommend a number of measures which will help airports to move towards consistency of service.

Maintain allocation of responsibility

8.4 Several airlines (primarily those operating low-cost business models) argued in their submissions to the study that they should be permitted to provide or contract their own PRM assistance services, as they could provide it more cost-efficiently than airports. We believe that this could create an incentive to minimise the service provided and hence would risk a reduction in service quality. Whilst there were initially significant issues with the quality of PRM service provision at certain airports, most stakeholders believed that these issues had now been addressed, and therefore we recommend that allocation of responsibility for PRM services to airports should **not** be amended.

Monitor misuse of services

8.5 A number of airports (in particular larger and busier airports) reported that the services they provided for PRMs were sometimes used by passengers who did not appear to have the right to do so under the Regulation. There was no consensus amongst airports about how significant this issue was. This variation in perception of the problem, combined with the nature of the problem itself, makes it difficult to accurately assess its extent. We recommend that the Commission monitor reports of misuse of services, so that it is alerted if the problem becomes more consistently serious.

Improve provision of information

8.6 Several PRM organisations informed us that provision of information on accessibility by airports could be improved. In particular, we were informed that many PRMs would find it helpful to have access to information, in a consistent format, regarding the accessibility of airports to which they were travelling. This could be provided through a webpage on an airport's website included, for example:

- the maximum likely walking distance within the airport;
- locations of any flights of stairs;
- the means used for access to aircraft (airbridge or stairs);
- any facilities available for PRMs;
- appropriate contact details for PRM services both for airlines and the airport[15].

8.7 Whilst some of this information is often available on airport websites, it can be difficult to find and is not always complete. To address this, we suggest that ACI could develop a single website which would either include all of this information or alternatively provide links to the specific pages on airport websites which include this information.

Share best practice on contracting of PRM service providers

8.8 We identified two issues with the process for selection of PRM service providers:

- several airports which had subcontracted PRM services had re-tendered within 18 months of the Regulation entering into force, as there were significant issues with the operation of the service; and
- many airlines informed us that they did not believe the extent of consultation from airports was sufficient.

8.9 To address these issues, we recommend that the Commission, in co-operation with ACI, develop and distribute best practice advice on contracting for services, including:

- **Content and structure of the contract:** This could include the level of detail at which contract terms relating to services should be specified, and any penalties for failure to meet required standards. It could be provided in the form of a sample contract. This would help to reduce the likelihood of issues with the contract leading to retendering.
- **Recommended methods of cooperation:** This could give details of the level and manner of consultation an airport should undertake. It could detail how to involve airport users in consultation at all points of a tendering process, including from drafting of invitation to tender documents, to evaluating and scoring bids, and might include input on the eventual decision. It could also include how to involve PRM organisations in this process. Where implemented, this would improve the perception by airport users and other parties of airport consultation.

[15] London Luton airport provides a good example of this; see http://www.london-luton.co.uk/en/content/3/1427/how-to-book-special-asistance.html.

Share best practice on training

8.10 Our research found that approaches to training of staff to provide PRM services varied significantly. In particular, there was significant variation in length of training (between 3 and 14 days) and method of delivery (videos, classroom-based or practical), to provide what should in principle be the same services. In addition, some airports reported that they had sought assistance on developing training from local PRM organisations, but the PRM organisations were too resource-constrained to be able to provide the required assistance. We therefore recommend that the Commission work with ACI and EDF to develop and distribute best practice advice on training, which would include recommended minimum levels.

Airlines

8.11 A key problem identified in our research is the lack of consistency between airline policies on the carriage of PRMs. These policies are subject to approval by the carriers' licensing authorities (which are often the same organisation as the NEB), but in many cases they approve policies with little or no challenge.

Work with EASA to determine safe policies on carriage of PRMs

8.12 Article 4 of the Regulation permits air carriers to refuse to accept reservations from a PRM, or to require that a PRM be accompanied, in order to meet safety requirements set out in international, Community or national law, or established by the authority that issued the carrier's operating certificate. However, other than minimal requirements in EU-OPS, Community law does not impose specific requirements regarding the safe carriage of PRMs. There is little published research into safety issues regarding carriage of PRMs, so even where licensing authorities do seek to challenge proposed airline policies or impose their own, there is a limited evidence base on which to do this. This results in wide and unjustifiable variation in airline policies.

8.13 Therefore, we recommend that the Commission work with EASA to determine policies on carriage of PRMs which are consistent with safe operation. Such policies should include any limits on the number of PRMs permitted on board an aircraft, where PRMs may be seated, and whether and under what circumstances PRMs must be accompanied. The policies should take into account the type of aircraft and the different safety implications of carriage of different types of PRMs.

Airlines to publish clear policies on carriage of PRMs

8.14 We have identified a number of airlines which are failing to publish clear policies on carriage of PRMs. We recommend that the Commission encourage the relevant NEBs to ensure that the airlines identified in Table 4.1 as not publishing sufficient information do so. The Commission could also encourage NEBs to review the policies of airlines outside the study sample to ensure that these provide sufficient information.

Monitor pre-notification

8.15 Pre-notification of requirements for assistance should have two benefits:

- it should ensure that PRMs are able, on arrival at an airport, to promptly receive the assistance they require to take their chosen flight; and
- it should allow airports to plan their staffing requirements efficiently, minimising the cost of service provision .

8.16 However, at present, as discussed in section 4.74 above, pre-notification is not functioning well. Of the 16 airports which provided us with information on levels of pre-notification, 11 have rates of pre-notification under 60%. The result of this is that at most airports, the rate of pre-notification is too low for the airport to gain efficiency benefits, and the incentive for PRMs to pre-notify is reduced (since at many airports a similar quality of service is provided regardless of pre-notification). Therefore the system as it presently operates requires airlines and airports to incur the costs of enabling pre-notification, but not to realise the benefits of reduced costs or smoother provision of services. We recommend that the Commission monitor the operation of pre-notification (for example by encouraging NEBs to collect appropriate data), and in future assess the situation and consider either eliminating the requirement for pre-notification or alternatively retaining it and providing passengers and carriers with more incentive to pre-notify.

Encourage airlines to provide receipts for pre-notification

8.17 Several PRM organisations reported problems where PRMs had pre-notified their requirements for assistance, but then found that this information had not been passed on to airport or airline staff. To address this, and to provide PRMs with evidence that they can use when making a complaint, we recommend that the Commission encourage airlines to provide PRMs with a receipt for pre-notification. Once this voluntary scheme has been in place for an appropriate length of time, the Commission could consider amending the Regulation to make it compulsory.

Monitor implementation of ECAC Document 30 recommendations on carriage

8.18 Section 5 of ECAC Document 30 contains a number of recommendations regarding on-board provisions for PRMs which it recommends airlines commission in new or significantly refurbished aircraft. These include (depending on the type of aircraft) the provision of on-board wheelchairs, provision of at least one toilet catering for the special needs of PRMs, and ensuring that at least 50% of all aisle seats should have moveable armrests[16]. We recommend that the Commission monitor uptake of these recommendations.

NEBs

8.19 The greatest problem identified by the study regarding NEBs was the lack of pro-active measures taken to monitor or enforce the Regulation. In most cases this has not had significant detrimental effect, as most airports and airlines have implemented the provisions of the Regulation, but could become an issue if the situation changes in the future. In most States few complaints had been received by the NEB, and as a result

[16] See ECAC.CEAC DOC No. 30 (PART I), 11th Edition/December 2009, Section 5.10.5.

the handling of complaints has not been raised as a significant issue.

Encourage all States to implement the Regulation

8.20 We identified in section 5.13 above that some States have not as yet either introduced penalties into national law for all infringements of the Regulation, or designated an NEB. We recommend that the Commission encourage all States to comply with their obligations under the Regulation.

Encourage better promotion of rights under Regulation

8.21 Article 15(4) of the Regulation requires Member States to take measures to inform PRMs of their rights under the Regulation and of the possibility of complaint to the relevant NEB. Of the NEBs which provided information on this point, few had taken direct actions to promote the Regulation. Many had published sections with information on their websites, but unless PRMs are made aware that this website exists and is relevant to them, we do not believe that this is sufficient. Only two case study NEBs informed us that they had commissioned national promotional campaigns relating to the Regulation. We recommend that the Commission takes actions to encourage NEBs to inform PRMs of their rights under the Regulation.

Encourage NEBs to pro-actively monitor application of Regulation

8.22 Article 14 of the Regulation requires Member States to take the measures necessary to ensure that the rights of PRMs are respected. Our research found that most NEBs were taking only limited actions to monitor the application of the Regulation (see 5.42), and few NEBs were directly monitoring whether airports were meeting published quality standards. Many NEBs rely on complaints as a method of monitoring, but without promotion of awareness of rights and of the NEB as the body able to receive complaints (see above), a low number of complaints cannot be interpreted as evidence that there are no issues with the application of the Regulation.

8.23 We therefore recommend that the Commission encourage NEBs to pro-actively monitor the application of the Regulation. This could take a number of forms:

- increased interaction with PRM organisations;
- direct monitoring of quality of service provided, for example through ‘mystery shopping’ and other types of inspections of airports (which could be conducted in cooperation with PRM organisations);
- collection of airline pre-notification data; and
- reviews of airline websites for accessibility.

Guidance to be produced

8.24 We recommend that the Commission should, in collaboration with airlines, airports, PRM representatives and NEBs, develop a detailed good practice guide regarding implementation of the Regulation. This could take the code of practice issued by the

UK Department for Transport[17] as a model, and could form the basis for later detailed revisions of the Regulation. Publishing voluntary policies would allow potential future amendments to the Regulation to be tested in practice before adoption.

8.25 The good practice guide could address the following areas (some of which are discussed in previous sections on recommendations regarding airports and airlines):

- recommendations on safety limits;
- the format and content of policies on carriage (including safety rules);
- detailed training modules implementing the recommendations in Annex 5G of ECAC Document 30, in addition to recommended minimum duration;
- consultation; and
- airport accessibility information.

8.26 A key issue to be addressed in this guidance would be the quality standards to be published by airports. At present, most airports follow the format of the minimum standards recommended in ECAC Document 30[18] (see 3.57). However, these standards are a limited measure of the quality of service received by PRMs. We recommend that the Commission work with ECAC to develop recommended minimum standards which are wider in scope, and cover qualitative aspects of the service received. Airports such as London Luton, which publishes a wide range of quality standards which address all aspects of the service, could provide a model for this approach.

8.27 The guidance should also specify the information which should be included in carriers' published policies on carriage of PRMs, which should cover at least the areas identified in 4.8.

Recommendations for changes to the Regulation

8.28 The measures described above could significantly improve the operation of the Regulation. However, we believe that some issues could only be addressed through amendments to the text, and therefore we also set out:

- Recommendations for some minor amendments to address issues with the text (such as areas where the Regulation is unclear) which we believe should be implemented as soon as possible.
- Suggestions for more significant revisions to be considered in the longer term. These would require consultation with stakeholders and an impact assessment to be undertaken.

Changes to be implemented as soon as possible

Training

[17] *Access to Air Travel for Disabled Persons and Persons with Reduced Mobility – Code of Practice*, UK Department for Transport, July 2008.

[18] See ECAC.CEAC DOC No. 30 (PART I), 11th Edition/December 2009, Annex 5C section 1.6.

8.29 We recommend that Article 11 be extended to require airlines to ensure that the personnel of their ground handling companies are trained to handle mobility equipment. Several PRM organisations informed us that damage to mobility equipment was one of the most serious problems for PRMs travelling by air, and that such damage could cause considerable distress to PRMs.

8.30 We recommend that Article 11 be amended to include the provisions in Recital 10, namely to specify that the provisions regarding training in ECAC Document 30 be taken into account when commissioning and developing training. This could be phrased in the manner of Article 9(2) on quality standards.

8.31 We recommend that Article 11b be amended to clarify that disability-equality and –awareness training is required for passenger-facing subcontractors as well as personnel directly employed by an airport. This would be consistent with Article 11a regarding personnel providing direct assistance. We were informed by one airport that an airline had disputed the level of PRM charges on the basis that the charges recovered the costs of training subcontractors, which the airline believed was not required by the Regulation.

8.32 We recommend that the Commission consider removing the requirement in Article 11c for disability-awareness training for non-passenger facing personnel, as it is not clear why this should be any more necessary in this sector than in others.

Obligatory charges where costs recovered

8.33 Article 8 permits airports to levy specific charges on airport users to fund the assistance provided under the Regulation, which must be reasonable, cost-related, transparent and established in cooperation with airport users. However, it does not *require* airports to levy such charges; several of the airports we researched for the study recovered costs through their general passenger charges, and did not identify the PRM component separately. Where specific charges are not applied, airports are not required to follow the requirements on reasonability, cost-relatedness, transparency and cooperation. We therefore recommend that, for airports above a minimum size, Article 8 be amended to make specific charges obligatory if costs are to be recovered from users.

Airport charges

8.34 We recommend that Article 8 be amended where necessary to make clear that PRM charges are airport-specific and cannot be set at a network level. At present, the translation into some languages (for example Spanish) could be interpreted to permit network charges, which we believe is contrary to the intention of the Regulation.

Independence of NEBs

8.35 We recommend that Article 14 be amended to require that NEBs must be independent of any bodies responsible for providing services under the Regulation.

Scope of Regulation

8.36 We recommend that Article 14 be amended to clarify that NEBs are responsible for

flights departing from (rather than, as is currently stated, both departing from and arriving at) airports in their territory, in addition to flights by Community carriers arriving at airports within State's territory but departing from a third country.

8.37 We also recommend that Recital 17 (which states that complaints regarding assistance given by an airline should be addressed to the NEB of the State which issued the operating license to the carrier) be amended to be consistent with Article 14.

PRMs without a reservation

8.38 Article 7 requires airports to provide assistance to PRMs arriving at an airport so that they are able to take the flight for which they hold a reservation. However, there may be rare occasions where a PRM (like any other passenger) arrives at an airport *without* a reservation, expecting to purchase a ticket at the airport. We therefore recommend that Article 7 be amended to set out the airport's responsibilities to such PRMs.

Longer term changes to the Regulation

8.39 The key issue that we have identified with the Regulation is that the text is much less detailed or specific than other comparable legislation (in particular, the equivalent US regulations on carriage of PRMs) and therefore leaves much more scope for interpretation and variation in service provision. We suggest that, to ensure greater consistency and that PRMs rights are adequately respected, the Commission should consider making the text more detailed and specific about the requirements for airlines and airports. The rest of this section describes key areas in which we suggest that changes could be made.

8.40 It would be necessary to consult with stakeholders about these changes and to undertake an impact assessment, and therefore these changes could not be introduced immediately.

Provisions on safe carriage PRMs

8.41 Once the Commission has established with EASA policies on the safe carriage of PRMs, particularly regarding any permissible limits on carriage and requirements for passengers to be accompanied (see 8.13), we recommend that either the Regulation or EU-OPS be extended to include these policies.

Definitions

8.42 We recommend that the following definitions should be clarified:

- **PRM:** The definition of PRM used in the Regulation is very broad and this has led to disputes as to whether obese passengers or those impacted by temporary injuries (e.g. winter sports) are included; and even that those temporarily incapacitated e.g. due to alcohol consumption might be included. We suggest that, at a minimum, the definition should be amended to clarify this, and ideally (but subject to consultation) a much more precise definition of passengers entitled to assistance should be used, along the lines of that used in the equivalent US Regulations (see below).
- **Mobility equipment:** The Regulation should make clear whether this includes

equipment required by PRMs for the trip but not required for them to be able to take the flight (e.g. joists for assisted lifting of PRMs).

- **Cooperation:** The Regulation should to specify what measures airports must take when required by the Regulation to set out policies and charges in cooperation with airport users and PRM organisations - in particular in Article 8(4).

Definition of disability used in US CFR part 14 rule 382

Individual with a disability means any individual who has a physical or mental impairment that, on a permanent or temporary basis, substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(a) *Physical or mental impairment* means:

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardio-vascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments; cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction, and alcoholism.

(b) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(c) Has a record of such impairment means has a history of, or has been classified, or misclassified, as having a mental or physical impairment that substantially limits one or more major life activities.

(d) *Is regarded as having an impairment* means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by an air carrier as constituting such a limitation;

(2) Has a physical or mental impairment that substantially limits a major life activity only as a result of the attitudes of others toward such an impairment; or

(3) Has none of the impairments set forth in this definition but is treated by an air carrier as having such an impairment.

Supplementary charges

8.43 Although we have not been made aware of any incidences of airlines or airports charging for assistance provided under the Regulation, several airlines charge for the supply of medical oxygen, and for multiple seats where one seat is insufficient for the passenger (for example, in the case of obese or injured passengers). Several PRM organisations informed us that they believed these charges were unjust. We recommend that in any amendment of the Regulation it should be clarified whether airlines may levy such additional charges.

Information on rights of PRMs

8.44 Regulation 261/2004 requires airlines to display at check-in a notice informing passengers that they may request information on their rights under the Regulation. To assist the promotion of awareness of rights under Regulation 1107/2006, we recommend that the Regulation be extended to include a provision requiring airports

to publish information on the rights of PRMs (including the right to complain) at accessible points within the airport, for example at check-in desks and help points.

Liability for mobility equipment

8.45 The Montreal Convention allows for compensation for damage to baggage up to 1,131 SDRs (€1,370), however this is insufficient for many technologically advanced electric wheelchairs, which can cost several thousand euros. Although most airlines we contacted for the study informed us that they waived the Montreal limits in this type of situation, several PRM organisations informed us of cases where they did not. Even in the case that an airline voluntarily waives the limit, the PRM is in a position of uncertainty. This is exacerbated by the difficulty of obtaining insurance for such wheelchairs; the high cost combined with the high probability of damage means that the PRM organisations we spoke to had been unable to find any insurers willing to provide coverage.

8.46 We therefore recommend that the Commission work with non-EU States to amend the Montreal Convention to exclude mobility equipment from the definition of baggage.

APPENDIX A

AIR CARRIERS POLICIES ON CARRIAGE OF PRMS

APPENDIX TABLE A.1 POLICY ON DENIAL OF BOARDING, ACCOMPANYING PASSENGERS AND MEDICAL CLEARANCE

Airline	Circumstances for refusal of carriage	Circumstances requiring accompanying passenger	Circumstances requiring medical clearance
Aegean Airlines	Not stated *Unpublished limit on unaccompanied PRMs*	Not stated	• PRM requires oxygen
Air Berlin	May limit number of PRMs on each flight for safety reasons	'Advised' if the following apply (although the use of 'must' in terms of the criteria for the companion suggest that this may not be optional): • PRM has severe walking disability • PRM has severe visual impairment *Also required if:* • *PRM is on stretcher* • *PRM is mentally ill / blind / deaf if unable to follow crew instructions* • *ID states that continuous accompaniment required*	• *PRM has infectious disease* • *PRM is on stretcher* • *PRM requires oxygen*
Air France	Not stated	• PRM cannot safely exit aircraft alone • PRM cannot follow safety instructions • PRM has visual or hearing impairment	• PRM is on stretcher or in incubator • PRM will need extraordinary medical equipment during flight • PRM requires oxygen
AirBaltic	To meet safety requirements If aircraft doors make boarding physically impossible If number of PRMs exceeds number of cabin crew per flight, where PRMs form a large proportion of passengers on flight	PRM requires assistance beyond that provided by cabin crew. Cabin crew will provide additional information to PRMs, but will not: • Assist with eating or personal hygiene; • Administer medication; or • Lift or carry passengers. *Also required if unable to follow safety instructions, e.g. if in stretcher, incubator, of if both blind and deaf*	• PRM has infectious disease • PRM has 'unusual condition' which could affect welfare of crew or other passengers, or could be considered a potential hazard to flight or its punctuality • PRM will require medical attention or special equipment during flight • PRM has medical condition which may worsen during, or because of, flight • PRM cannot use normal seat in upright position

Airline	Circumstances for refusal of carriage	Circumstances requiring accompanying passenger	Circumstances requiring medical clearance
			• Pregnant passengers, except when uncomplicated and with more than 4 weeks until due date.
Alitalia	Conditions of Carriage state that boarding may be denied if advance arrangements have not been made	• PRM uses wheelchair • PRM is blind or deaf • PRM is on stretcher • PRM is not self sufficient	• *PRM will require medical assistance on board*
Austrian	Not stated	• PRM cannot evacuate aircraft alone • PRM cannot follow safety instructions • PRM needs assistance in feeding or using toilet • PRM is deaf and blind • PRM requires assistance beyond that provided by cabin crew	• PRM has chronic illness or disability
British Airways	Not stated	• PRM cannot lift themselves • PRM cannot evacuate aircraft alone • PRM cannot communicate with crew on safety matters • PRM cannot unfasten seat belt • PRM cannot retrieve and fit life jacket • PRM cannot fit oxygen mask.	Not stated
Brussels Airlines	To meet safety requirements If size of doors makes boarding or alighting physically impossible Limit of PRMs of up to 31 per flight depending on aeroplane type Conditions of Carriage state that boarding may be denied if advance arrangements have not been made	• PRM is mentally disabled and does not have prior medical clearance of airline	• PRM is on stretcher or bed • PRM requires oxygen • PRM is under care of a doctor • PRM has unstable medical condition • PRM suffers from illness • PRM has recently been to hospital, or has operation

Airline	Circumstances for refusal of carriage	Circumstances requiring accompanying passenger	Circumstances requiring medical clearance
			• PRM has medical disability and cannot be accompanied • PRM is more than 34 weeks pregnant
Delta	On basis of safety, or if in violation of Federal Aviation Regulations If advance arrangements have not been made (this requirement is more stringent in the Conditions of Carriage)	• PRM requires constant monitoring at departure gate • PRM requires assistance beyond that provided by cabin crew	• PRM has infectious disease • PRM requires oxygen • PRM will require extraordinary medical assistance during flight
EasyJet	If the safety and welfare of the PRM or other passengers may be compromised *In only extreme circumstances, e.g. where special seats or torso restraints are required, or if a passenger's condition makes them potentially violent or disruptive.*	• PRM cannot evacuate aircraft alone • PRM cannot communicate with staff • PRM cannot unfasten seat belt • PRM cannot retrieve and fit life jacket • PRM cannot fit oxygen mask • PRM cannot take care of own personal needs and welfare	• PRM has infectious or chronic illness • PRM has broken limb in plaster • PRM is 28-35 weeks pregnant • PRM is a child with a chronic lung disease • PRM has severe asthma or has recently been prescribed oral steroids.
Emirates	Not stated	• PRM needs to travel in stretcher or incubator • PRM requires medical attention during flight • PRM cannot follow safety instructions • PRM cannot evacuate aircraft alone • PRM has severe hearing and visual impairments and cannot communicate with staff	• PRM is on stretcher • PRM requires oxygen • PRM requires medical escort or in-flight treatment • PRM is carrying medical equipment or instruments • PRM is 29 or more weeks pregnant
Iberia	If PRM poses a risk to themselves and other passengers for medical reasons Limit on number of PRMs per flight *May also refuse carriage for security reasons, e.g. aggression.*	• In order to meet safety requirements • *PRM is considered as a 'medical case'*	Not stated
KLM	Not stated	• PRM requires assistance beyond that provided by	• PRM has infectious disease

Airline	Circumstances for refusal of carriage	Circumstances requiring accompanying passenger	Circumstances requiring medical clearance
	Passenger cannot sit up straight *Wheelchair will not fit through aircraft door.*	cabin crew • PRM cannot move unassisted between wheelchair and seat / toilet • *PRM not compliant with normal safety rules*	• PRM requires medical care or specific equipment in-flight • PRM has medical condition that could result in a life-threatening situation or could require the provision of exceptional medical care for their safety during the flight. • PRM requires in-flight personal care • PRM cannot use normal seat in upright position • PRMs up to 36 weeks pregnant who are expecting complications
Lufthansa	Limit on number of unaccompanied limited mobility PRMs per flight	• Not stated for non-US flights	Stringent medical clearance requirements – see text
Ryanair	Limit on number of disabled or sensory or mobility impaired PRMs per flight. Conditions of Carriage state that failure to advise on special needs will result in denial of boarding. *PRM limit can be overridden at the discretion of the crew on a case-by-case basis*	• PRM cannot use toilet unaided • PRM cannot feed themselves unaided • PRM cannot administer own medication.	• PRM requires oxygen, portable dialysis machine or continuous portable airway pressure machine
SAS	Not stated *When PRMs cannot be safely carried or physically accommodated*	• Not stated • *PRM is blind, deaf; or both* • *PRM is Disabled Passenger with Intellectual or Developmental Disability Needing Assistance* • *PRM is on stretcher*	• PRM requires stretcher or other flat transportation
TAP Portugal	Not stated *Unpublished limit on unaccompanied PRMs*	• PRM is in an incubator • PRM is on trolley / stretcher • PRM requires oxygen • PRM uses wheelchair or has 'great difficulty in mobility'	• PRM uses emotional support dog • PRM is more than 36 weeks pregnant

Airline	Circumstances for refusal of carriage	Circumstances requiring accompanying passenger	Circumstances requiring medical clearance
		• PRM is reliant on others	
TAROM	Not stated	• PRM suffers from a disease • *PRM cannot self-evacuate*	• PRM has disease • PRM requires stretcher • PRM requires oxygen
Thomas Cook	Not stated	• PRM cannot lift themselves • PRM cannot use toilet unaided • PRM cannot feed themselves unaided • PRM cannot administer own medication • PRM cannot communicate or follow instructions • PRM reliant on oxygen.	Unspecified – see text
TUI (Thomsonfly)	Not stated	• PRM cannot lift themselves • PRM cannot use toilet unaided • PRM cannot feed themselves unaided • PRM cannot administer own medication • PRM cannot communicate or follow instructions • PRM reliant on oxygen • PRM requires wheelchair.	• *PRM is unaccompanied and does not meet self-sufficiency requirements* • *PRM has declared medical condition* • *PRM has requested a service for which there is a risk of abuse, e.g. extra legroom seats would normally be chargeable.*
Wizzair	If medical certification is not provided on request If airline is unable to provide for specific medical requirements Limit of 28 PRMs per flight Conditions of Carriage state that boarding may be denied if advance arrangements have not been made	• PRM unable to care for themselves • PRM cannot use toilet unaided.	Unspecified, but could be required in all cases – see text.

APPENDIX B

SERVICES PROVIDED BY AIR CARRIERS

APPENDIX TABLE A.2 SERVICE AND RESTRICTIONS

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
Aegean Airlines	Prenotification required Carried free in cabin Case / carrier required Subject to weight restriction Not carried on UK flights	Wheelchairs carried free Not subject to baggage allowance Passenger's oxygen allowed with medical certification Conditions of Carriage state that wet cell batteries are not allowed in cabin	Not stated	Not stated	Not stated
Air Berlin	Carried free in cabin Case / carrier not required Harness required	Wheelchairs carried in hold only Wet cell batteries subject to safety regulations Other medical aids carried free with medical certificate Limit of one wheelchair per passenger defined in Conditions of Carriage	Not stated	Not stated	Free seat reservation for passengers with severe disability pass (or equivalent) for 50% disability or more, and for companion PRMs cannot reserve XL / extra large seats (i.e. in exit rows) Conditions of carriage state that seating may be restricted for safety reasons
Air France	Carried free in cabin Leash required, attached to seat in front Muzzle not required	Up to two wheelchairs carried free of charge Onboard wheelchairs on most flights Stretchers accepted with medical clearance Oxygen allowed on board on payment of fee	Cannot lift passengers Cannot administer medication	Braille seat numbers in new aircraft Safety briefing in French or English Braille Some crew members able to communicate in French sign language	Additional seat may be reserved at discounted rate if needed Seats with retractable armrests Easy access toilets
AirBaltic	Carried free in cabin Excluded from weight	Carried free of charge Only collapsible wheelchairs	Will provide extra information Cannot assist with eating or	Not stated	Depending on aircraft, provide movable aisle armrest seats

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
	restrictions Prohibited from exit rows	allowed in cabin Spillable batteries accepted if removed and packed and labelled Stretchers not carried Oxygen provided free with prenotification, doctor's verification and accompanying passenger	personal hygiene Cannot lift or carry passengers Cannot administer medication		PRMs cannot obstruct crew or emergency exits Companion must travel in seat next to PRM
Alitalia	Carried free in hold, or in cabin if space available Leash required Muzzle required	Wheelchairs carried free Stretcher service offered for a fee and with authorisation and accompanying passenger, only one per aircraft. Oxygen must be booked in advance, and not available on all flights	Not stated	Not stated	Not stated
Austrian	Carried free in cabin Leash required Subject to size and weight restriction Proof of status required	Up to two wheelchairs carried free, subject to space and prenotification for electric wheelchairs Onboard wheelchairs available	Preparation for eating Use of on-board wheelchair Accessing lavatory Stowing / retrieving carry-on items	Will communicate effectively as required.	Choice of seat may be limited Some seats with moveable armrests Accessible lavatories on long haul flights
British Airways	Prenotification required Limit on no. of guide dogs per flight Carried free in cabin Carried on all UK and certain international routes	Up to two wheelchairs carried free Preparation required for certain types of electric wheelchair Onboard wheelchairs on some flights Portable Oxygen Concentrators accepted with medical clearance, included in cabin	Cannot assist with breathing apparatus Cannot assist with eating Cannot administer medication Cannot assist with going to toilet Can assist in access to and from toilet when on-board wheelchair is available	Individual safety briefings and subtitles on English safety video Braille cards on some flights	Lifting armrests on some seats Cannot be seated on emergency exit aisle due to safety regulations. Will be allocated bulkhead seat when requested, unless already allocated to PRM. Adapted toilets on 747-operated flights

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
		baggage allowance Conditions of carriage state that the airline reserves the right to refuse stretchers on any flight			
Brussels Airlines	Prenotification required Carried free in cabin Leash required Muzzle required Subject to national regulations	Electric wheelchairs carried in hold Spillable batteries accepted under certain conditions In-flight wheelchair on some flights Up to two stretchers on certain planes Can supply oxygen with prenotification and payment of fee in advance	Moving to toilet facilities Cannot lift passengers Cannot assist during visit to lavatory	Not stated	Not stated
Delta	Carried free in cabin Prohibited from exit rows Must occupy space where passenger sits No documentation required Subject to national entry requirements	One wheelchair can be carried in cabin per flight Wet cell batteries accepted with preparation One onboard wheelchair per flight Personal oxygen tanks can be transported but not used in flight Can provide oxygen on many flights, subject to medical certification Conditions of Carriage state that carriage of passengers requiring stretcher kit may be refused	Cannot assist with feeding or personal hygiene and lavatory functions. Cannot lift or carry passengers Cannot provide medical services such as giving injections.	Pre-booked passengers with hearing disabilities can be accompanied by agents who will provide updates on flight information	FAA regulations limit exit seats to certain customers Customers with service animals or immobilised leg are entitled to bulkhead seats On board aircraft with 100 seats or more, Delta provides a stowage location specifically for the first collapsible wheelchair

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
EasyJet	Carried free in cabin if space available Must occupy space where passenger sits Harness required Proof of training and status required Only allowed on routes within UK or mainland Europe	Up two to portable mobility items carried free, subject to weight restriction Wet cell batteries not accepted No onboard wheelchairs Allow up to two oxygen cylinders per passenger, with medical certification Conditions of Carriage state that stretchers are not carried	Stowing and retrieving of hand baggage Opening food packages and describing the contents Cannot lift passengers Cannot provide personal care Cannot administer medication Cannot assist with feeding or children	Can provide a verbal explanation of the safety card information and location of emergency exits	Body supports required for passengers who cannot sit upright
Emirates	All animals carried in hold, subject to IATA Live Animals and national regulations	Wheelchairs carried free of charge Do not count towards baggage allowance Battery-powered wheelchairs subject to safeguards Stretcher kit provided Oxygen provided Portable Oxygen Concentrators allowed	Cannot assist with transfer Cannot assist with feeding Cannot assist with toilet functions	Not stated	Not stated
Iberia	Carried free in cabin Must not use seat Muzzle required Does not count towards luggage allowance Deaf passengers will require medical certificate	All wheelchairs carried free in hold Wet cell batteries accepted with preparation Carriage of stretchers may be restricted on smaller aircraft Oxygen allowed in cabin subject to certain conditions	Cannot provide sanitary, hygienic or safety onboard assistance.	Not stated	'The entire fleet has been adapted to carry Passengers with Reduced Mobility, despite the space limitations that air transport normally poses.'
KLM	Carried free in cabin Must be with PRM, but not using seat or blocking aisle of	Up to two pieces of mobility equipment carried free Collapsible wheelchairs allowed	Transporting passengers using on-board wheelchair	Braille safety cards Toilets with Braille attendant call	Seats with moveable armrests Leg rests available

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
	exit Leash required Subject to national regulations	in cabin, electric wheelchairs carried in hold Wet cell batteries accepted with preparation Onboard wheelchairs on all flights Stretcher service offered, subject to medically trained companion Oxygen allowed on board on payment of fee Own oxygen not allowed Approved Portable Oxygen Concentrators allowed	Cannot assist with eating Cannot lift or carry passengers Cannot administer medication Cannot assist with personal hygiene	buttons	
Lufthansa	Carried free in cabin Limited number allowed per flight Subject to national regulations	Wheelchairs carried free in hold (small collapsible devices allowed in cabin to/from US) Non leak-proof wet cell batteries not accepted except to/from US Limit on number of wheelchairs per flight Limited oxygen available with advance payment of an unspecified fee	Assistance in boarding / disembarking Stowing hand luggage Opening of food items Getting to / from toilet Cannot provide assistance in toilet Cannot lift or carry passengers Cannot feed passengers Cannot administer medication	Will explain arrangement of meal tray to partially sighted Flights to/from US section of website also includes: Separate safety briefings Separate briefings about delays and other issues Captioning of in-flight video in English and German	Disabled toilets in long-haul aircraft Flights to/from US section of website also includes: Bulkhead seats provided if travelling with service animal Some seats with lifting armrests May not be able to sit near exit
Ryanair	Carried free in cabin Must travel on floor at passenger's feet Max of 4 per flight Not carried on some international routes	Wheelchairs carried free of charge in hold Not subject to weight limit Wet cell batteries not accepted One oxygen request per flight allowed at cost of £100.	Will provide water for taking medication Cannot administer medication Cannot lift passengers Cannot assist with personal hygiene	Not stated	Passengers with reduced mobility, or whose physical size prevents them from moving quickly cannot be seated near exit. Passengers with pre-booked special assistance will be

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
		Personal oxygen not allowed on board Conditions of carriage state that stretchers are not carried			boarded after general boarding is completed as seats will be held on board. Conditions of carriage state that seating may be restricted for safety reasons
SAS	Carried free in cabin Case / carrier not required Excluded from weight restriction	One collapsible and one power-driven wheelchair carried free of charge Wet cell batteries accepted as cargo In-flight wheelchair on some flights Personal oxygen allowed if required for transport to/from aircraft Will provide oxygen with payment of fee	Cannot lift passengers Cannot assist during visit to lavatory	Not stated	Not stated
TAP Portugal	Dogs and cats allowed in cabin Leash required Must not occupy a seat Must comply with sanitary regulations Proof of status required	Prenotification of type of wheelchair battery required On-board wheelchair on larger planes Stretchers accepted in economy class subject to medically trained companion Oxygen provided with medical certification Personal oxygen not allowed	Not obliged to provide any on-board assistance contradicting passenger statement of self-reliance, e.g. assistance in toilet, lifting, carrying or feeding.	Not stated	May request an additional seat for greater comfort in coach class only. This seat must be requested when booking and is charged as an occupied place
TAROM	Prenotification required Carried free in cabin Case / carrier not required	Wheelchairs carried free and allowed in cabin on some planes Preparation of some electric	Not stated	Not stated	Not stated

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
	Muzzle required	wheelchairs may be required Stretchers not allowed on certain planes. PRM using a stretcher is considered as 'medical case' and is consequently required to obtain a medical certificate, and to be accompanied by a medical professional. Oxygen provided free, subject to limits on no of passengers per flight Personal oxygen not allowed			
Thomas Cook	Carried on many routes	Wheelchairs carried free in hold Electric wheelchairs accepted subject to IATA Dangerous Goods Regulations Limit on no of wheelchairs Stretchers not carried One oxygen request per flight allowed at cost of £100. Personal oxygen not allowed on board	Can assist in opening food containers	Will describe catering arrangements to blind people In-flight safety video includes subtitles Also offer separate briefing about safety procedures for passengers with hearing impairments	PRMs cannot be seated near exits
TUI (Thomsonfly)	Carried on many routes Conditions of Carriage state that this will incur 'a nominal charge'	Wheelchairs carried free in addition to normal baggage allowance Electric wheelchairs accepted subject to IATA Dangerous Goods Regulations Passengers may bring their own oxygen supply onboard if authorised to do so by Special	Not stated	Not stated	Not stated

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
		Assistance Team.			
Wizzair	Not stated	Wheelchairs carried subject to weight limit Spillable batteries not accepted Do not provide additional oxygen, and passengers cannot carry their own supply Conditions of carriage state that stretchers are not carried	Free 'Meet and Assistance Service' provided to deaf and blind passengers on request	Not stated	PRMs cannot be seated on exit rows

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KOMMISSION DER EUROPÄISCHEN GEMEINSCHAFTEN

Brüssel, den 1.12.2008
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MITTEILUNG DER KOMMISSION AN DAS EUROPÄISCHE PARLAMENT, DEN RAT, DEN EUROPÄISCHEN WIRTSCHAFTS- UND SOZIALAUSSCHUSS UND DEN AUSSCHUSS DER REGIONEN

„Für eine barrierefreie Informationsgesellschaft“

MITTEILUNG DER KOMMISSION AN DAS EUROPÄISCHE PARLAMENT, DEN RAT, DEN EUROPÄISCHEN WIRTSCHAFTS- UND SOZIALAUSSCHUSS UND DEN AUSSCHUSS DER REGIONEN

„Für eine barrierefreie Informationsgesellschaft“

[SEK(2008) 2915]

[SEK(2008) 2916]

1. ZUSAMMENFASSUNG

In dem Maße, wie sich unsere Gesellschaft zur „Informationsgesellschaft“ weiterentwickelt, werden wir in unserem Lebensalltag zwangsläufig von technologiegestützten Produkten und Diensten immer abhängiger. Mangelnde Barrierefreiheit *(„e-accessibility“)* führt dazu, dass viele Europäer, die mit einer Behinderung leben müssen, noch immer von den Vorteilen der Informationsgesellschaft ausgeschlossen sind.

Das Problem des barrierefreien Zugangs hat in den letzten Jahren eine große politische Beachtung und Bedeutung erlangt. 2006 verständigten sich die europäischen Minister in ihrer „Erklärung von Riga“ auf das Ziel, in dieser Hinsicht bis 2010 wesentliche Fortschritte zu erreichen. Vergleichende Bewertungen ergaben 2007, dass sich Fortschritte noch zu langsam einstellen und dass weitere Anstrengungen nötig sind, damit die Ziele von Riga erreicht werden können. In Anbetracht der immer größeren Bedeutung des Web im heutigen Lebensalltag erweist sich die Barrierefreiheit im Web *(„web accessibility“)* und vor allem die Zugänglichkeit der Webangebote öffentlicher Verwaltungen als besonders wichtig.

Wie in der erneuerten Sozialagenda[1] angekündigt, hält es die Kommission daher heute für dringend erforderlich, ein **kohärentes, gemeinsames und wirksames Herangehen an die Barrierefreiheit und insbesondere an die Barrierefreiheit im Web zu erreichen**, um das Entstehen einer barrierefrei zugänglichen Informationsgesellschaft zu beschleunigen. In dieser Mitteilung legt die Kommission den gegenwärtigen Stand der Dinge dar, nennt die Gründe für ein europäisches Vorgehen und zeigt die nächsten notwendigen Schritte auf.

Schritte für ein gemeinsames, kohärentes **Herangehen an die Barrierefreiheit**:

- Die europäischen Normenorganisationen sollten ihre **Normungsarbeit zugunsten einer allgemeinen Barrierefreiheit fortsetzen**, um die Marktfragmentierung zu verringern und die verstärkte Einführung IKT-gestützter Waren und Dienste zu erleichtern.

- Die Mitgliedstaaten, die Beteiligten und die Kommission sollten sich für **mehr Innovation** und die **verstärkte Einführung** barrierefreier Lösungen einsetzen, vor allem im Rahmen der EU-Forschungs- und Innovationsprogramme und der Strukturfonds.

- Alle Beteiligten sollten die Möglichkeiten, die Barrierefreiheit **innerhalb des bestehenden EU-Rechts** zu verbessern, **voll ausschöpfen**. Bei der Überprüfung geltender Vorschriften und bei neuen Legislativvorschlägen wird die Kommission auch geeignete Anforderungen bezüglich der Barrierefreiheit vorsehen.

- Die Kommission wird **Maßnahmen zugunsten der Zusammenarbeit aller Beteiligten vorantreiben**, um Kohärenz, Koordinierung und Wirksamkeit der unternommenen Anstrengungen zu erhöhen. Konkret wird eine neue hochrangige Ad-hoc-Gruppe beauftragt, Leitlinien für ein kohärentes Gesamtkonzept für die Barrierefreiheit (einschließlich der Barrierefreiheit im Web) auszuarbeiten und vorrangige Maßnahmen zur Überwindung bestehender Zugangsbarrieren vorzuschlagen.

[1] KOM(2008) 412.

Besondere Schritte zur Beschleunigung der Fortschritte bei der **Barrierefreiheit im Web**:

- Nach der Neufassung der Web-Zugangsleitlinien (WCAG 2.0) durch das *World Wide Web Consortium* sollten die europäischen Normenorganisationen nun **zügig europäische Normen** für die Barrierefreiheit im Web **annehmen**.

- Die Mitgliedstaaten sollten ihre **Bemühungen** um eine leichtere **Zugänglichkeit** öffentlicher Websites **verstärken** und sich **gemeinsam auf eine reibungslose Einführung** europäischer Normen für die Barrierefreiheit im Web vorbereiten.

- Die Kommission wird die **Fortschritte beobachten und veröffentlichen** und bei Notwendigkeit zu einem späteren Zeitpunkt Legislativvorschläge unterbreiten.

2. BARRIEREFREIHEIT

Barrierefreiheit bedeutet die Überwindung technischer Hindernisse und Schwierigkeiten, die Behinderte und viele ältere Menschen erfahren, wenn sie gleichberechtigt an der Informationsgesellschaft teilhaben wollen.

Wenn alle Menschen die gleichen Chancen für eine Beteiligung an der heutigen Gesellschaft haben sollen, müssen IKT-gestützte Waren, Produkte und Dienste auch für alle zugänglich sein. Dazu zählen nicht nur Computer, Telefone, Fernseher oder elektronische Behördendienste, Online-Einkauf und Call-Center, sondern auch Selbstbedienungsterminals wie Geld- und Fahrkartenautomaten.

2.1. Gegenwärtiger Stand

Der barrierefreie Zugang stellt eine gewaltige und noch zunehmende Herausforderung dar: etwa 15 % der europäischen Bevölkerung sind Behinderte, und jeder fünfte Europäer im arbeitsfähigen Alter hat eine Behinderung, die eine barrierefreie Lösung erfordert. Sogar drei von fünf Europäern würden von mehr Barrierefreiheit profitieren, weil sich dadurch auch die allgemeine Benutzbarkeit verbessert[2].

Aus der Barrierefreiheit ergeben sich sozioökonomische Auswirkungen sowohl für den Einzelnen als auch für Europa als Ganzes. So können barrierefrei zugängliche IKT-Lösungen dabei helfen, ältere Arbeitnehmer länger in Beschäftigung zu halten und eine größere Verbreitung online erbrachter öffentlicher Dienste wie elektronischer Behörden- und Gesundheitsdienste zu erreichen. Durch eine mangelnde Barrierefreiheit werden beträchtliche Teile der Bevölkerung ausgeschlossen und in Berufsausübung, Bildung, Freizeit, demokratischer Beteiligung und sozialen Tätigkeiten behindert. Eine Stärkung der Barrierefreiheit dient deshalb sowohl den Zielen der wirtschaftlichen als auch sozialen Integration.

Viele Länder haben zumindest gewisse Vorschriften erlassen oder Unterstützungsmaßnahmen ergriffen, um die Barrierefreiheit zu fördern. Gleichzeitig unternehmen auch Teile der IKT-

[2] *The Demographic Change – Impacts of New Technologies and Information Society* (Der demografische Wandel – Auswirkungen der neuen Technologien und der Informationsgesellschaft).

Branche beträchtliche Anstrengungen, um die Zugänglichkeit ihrer Produkte und Dienste zu verbessern[3].

Die Barrierefreiheit ist auch ein Schlüsselelement der europäischen Politik zugunsten der digitalen Integration[4]. Aus übergeordneter Sicht fallen die IKT in den Anwendungsbereich der vorgeschlagenen Gleichbehandlungsrichtlinie, mit der der Zugang zu und die Versorgung mit Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen[5], angestrebt werden. Außerdem müssen die Europäische Gemeinschaft und die Mitgliedstaaten ihren Verpflichtungen nachkommen, die sie in Bezug auf die Zugänglichkeit von IKT-Waren und Dienstleistungen im Rahmen des Übereinkommens der Vereinten Nationen über die Rechte von Menschen mit Behinderungen eingegangen sind. In einigen EU-Bestimmungen sind Fragen der Barrierefreiheit bereits direkt oder indirekt aufgegriffen worden.

2.2. Gründe für weitere Maßnahmen

Trotz der Vorteile und der politischen Beachtung sind die in Sachen Barrierefreiheit bislang erreichten Fortschritte unzureichend. Für die Defizite bei der Barrierefreiheit gibt es zahlreiche deutliche Beispiele. So stehen Text-Relaisdienste, die für Taube und Sprechbehinderte unverzichtbar sind, nur in der Hälfte der Mitgliedstaaten zur Verfügung. Notdienste sind nur in sieben Mitgliedstaaten direkt per Texttelefon erreichbar. Hörfunksender mit Audiobeschreibung, Fernsehprogramme mit Untertiteln und Fernsehsendungen mit Gebärdensprache sind weiterhin unzureichend. Nur 8 % der von den beiden größten europäischen Privatkundenbanken aufgestellten Geldautomaten besitzen eine Sprachausgabe[6].

Auch das bestehende EU-Recht ist in Bezug auf die Barrierefreiheit eher dürftig. In den Mitgliedstaaten gibt es große Unterschiede beim Herangehen an die Barrierefreiheit, und zwar sowohl in Bezug auf Problemgebiete (gewöhnlich Festtelefon, Fernsehen und Zugänglichkeit öffentlicher Websites), als auch die Vollständigkeit des eingesetzten politischen Instrumentariums. Die IKT-Branche leidet angesichts widersprüchlicher Anforderungen und großer Ungewissheiten unter dieser Marktfragmentierung, die es schwierig macht, die Größeneinsparungen zu erzielen, die notwendig wären, um Innovation und Marktwachstum dauerhaft und auf breiter Grundlage zu sichern. Dabei haben sich Teile der Branche aktiv engagiert und arbeiten mit den Nutzern zusammen (z. B. beim barrierefreien Digitalfernsehen), aber zu viele Akteure stehen noch abwartend am Rand.

Das Hauptproblem besteht bei der Barrierefreiheit darin, dass die derzeitigen Bemühungen wegen mangelnder Abstimmung, unklarer Prioritäten und geringer gesetzgeberischer und finanzieller Unterstützung kaum Wirkung zeigen.

Deshalb ist **ein gemeinsames und kohärentes europäisches Konzept für die Barrierefreiheit** notwendig, um erhebliche Verbesserungen erreichen zu können.

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3 Siehe Einzelheiten hierzu im beigefügten Arbeitspapier der Kommissionsdienststellen.

4 i2010-Mitteilung KOM(2005) 229, eAccessibility-Mitteilung KOM(2005) 425 und Mitteilung zur digitalen Integration KOM(2007) 694.

5 KOM(2008) 426.

6 Einzelheiten in der Studie *„Measuring progress of e-accessibility in Europe“* („MeAC-Studie“ zur Ermittlung der Fortschritte bei der Barrierefreiheit in Europa).

2.3. Vorgeschlagene Maßnahmen

(1) Herbeiführen des Wandels – Stärkung der politischen Prioritäten, der Koordinierung und der Zusammenarbeit aller Beteiligten

Auf europäischer Ebene ist in den letzten Jahren Vieles unternommen worden. Nun ist es an der Zeit, mögliche Synergien zu verstärken und einzelne Anwendungsgebiete auszubauen, um eine größere und gleichmäßigere Wirkung zu erzielen.

Die Mitgliedstaaten, die Anwender und die Branche müssen nun ihre Anstrengungen weiter verstärken, um eine größere Wirkung zu erzielen, und zwar mit Hilfe einer besseren Zusammenarbeit auf europäischer Ebene und eines besseren Einsatzes der vorhandenen EU-politischen Instrumente. Um die Kohärenz und Wirksamkeit eines gemeinsamen Konzepts zu fördern und bei der Festlegung von Prioritäten zu helfen, wird die Kommission eine hochrangige **Ad-hoc-Gruppe zur Barrierefreiheit** einsetzen, die der hochrangigen i2010-Gruppe unterstellt wird. Darin werden Verbraucherverbände und Vertreter behinderter und älterer Nutzer, aber auch IKT- und Hilfsgeräte-Hersteller und -dienstleister, Wissenschaft und zuständige Behörden vertreten sein.

Anfang 2009 wird die Kommission eine **hochrangige Ad-hoc-Gruppe** einsetzen, die Leitlinien für Prioritäten und ein kohärenteres Konzept für die Barrierefreiheit ausarbeiten soll. Alle Beteiligten werden zur Mitarbeit in dieser Gruppe aufgerufen.

Die Kommission wird **ihre bisherige Unterstützung in Bezug auf die Zusammenarbeit** mit und unter den Beteiligten **verstärken**. Vor allem die Arbeitsgruppen, die im Zuge der Umsetzung der i2010-Initiative, zu Normungs- und Telekommunikationsfragen sowie zur Durchführung des Aktionsplans für Menschen mit Behinderungen eingesetzt wurden, sollten diese Leitlinien der hochrangigen Gruppe bei der Gestaltung ihrer Prioritäten berücksichtigen. Außerdem ist es wichtig, dass Anwender, zuständige Behörden und die Branche ihr Engagement und ihrer Zusammenarbeit in Fragen der Barrierefreiheit verstärken.

Für die Barrierefreiheit müssen Prioritäten gesetzt werden. Die erste Priorität ist ein barrierefreies Web entsprechend dem vorgeschlagenen gemeinsamen und kohärenten Konzept. Die nächste Priorität ist der barrierefreie Zugang zum Digitalfernsehen und zur elektronischen Kommunikation, einschließlich der Erreichbarkeit der einheitlichen europäischen Notrufnummer. Dazu sollte die Zusammenarbeit zwischen Anwendern und Branche intensiviert und mit Hilfe der hochrangigen Gruppe besser in die auf EU-Ebene laufende Gesetzgebung und Innovationsförderung eingebunden werden.

Eine weitere wichtige Priorität sind Selbstbedingungsterminals und elektronische Bankdienstleistungen[7]. Eine engere Zusammenarbeit aller Beteiligten wird dabei helfen, Orientierungen für weitere Prioritäten und ein gemeinsames Programm für die künftige Arbeit aufzustellen.

Mit der Barrierefreiheit hat sich die Kommission bereits in ihrem Vorschlag für eine Neufassung des europäischen Interoperabilitätsrahmens für elektronische Behördendienste[8]

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[7] Siehe den Bericht über die öffentliche Konsultation.

[8] http://ec.europa.eu/idabc/en/document/7728

befasst und wird darauf in ihren Folgemaßnahmen zur i2010-Initiative und zum Aktionsplan für Menschen mit Behinderungen ebenfalls eingehen.

Die Kommission wird dafür sorgen, dass die Barrierefreiheit in den Folgemaßnahmen zur i2010-Initiative und zum Aktionsplan für Menschen mit Behinderungen weiterhin eine **politische Priorität** bleibt.

Diese engere Koordinierung und Zusammenarbeit wird durch eine bessere Ausnutzung der folgenden Tätigkeiten noch verstärkt werden.

(2) Beobachtung der Fortschritte und Verbreitung der bewährten Praxis

Zur weiteren Beobachtung der allgemeinen Fortschritte und der Umsetzung der Maßnahmen auf dem Gebiet der Barrierefreiheit und der Barrierefreiheit im Web wird die Kommission 2009 eine Untersuchung einleiten, die an zwei Studien anschließt, die 2006–2008 durchgeführt wurden[9].

Innerhalb des Rahmenprogramms für Wettbewerbsfähigkeit und Innovation (CIP) wird die Kommission ein neues thematisches Netz zur Barrierefreiheit und zur Barrierefreiheit im Web vorschlagen, um die Zusammenarbeit der Beteiligten, das Sammeln von Erfahrungen und das Zusammentragen bewährter Praktiken zu verbessern. Sie wird sich außerdem darum bemühen, das *ePractice*-Netz für den Austausch der bewährten Praxis in den Bereichen elektronische Behördendienste, elektronische Gesundheitsdienste und digitale Integration zu auszubauen, das bereits in großem Umfang Fachwissen über die Barrierefreiheit angehäuft hat.

Die Kommission wird die Fortschritte Umsetzung der Maßnahmen auf dem Gebiet der Barrierefreiheit und der Barrierefreiheit im Web beobachten sowie anhand von **Studien** und eines für 2009 geplanten **thematischen Netzes** (innerhalb des **CIP**) die Zusammenarbeit und den Austausch der bewährten Praxis unterstützen.

(3) Unterstützung der Innovation und Einführung

Die Forschung und Innovation auf dem Gebiet der Barrierefreiheit erfreut sich schon einer umfangreichen Unterstützung. Im Jahr 2008 wurden 13 neue Projekte mit Mitteln des EU-Forschungsprogramms in Höhe von 43 Mio. € gefördert. Die Kommission wird die Arbeiten zur Barrierefreiheit und zu den IKT für eine selbständige Lebensführung älterer Menschen auch weiterhin aktiv unterstützen und dazu 2009 im Rahmen der EU-Forschungsprogramme eine neue Aufforderung zur Einreichung von Vorschlägen veröffentlichen.

Die Kommission wird 2009 und danach **dafür sorgen, dass die Barrierefreiheit eine wichtige Priorität der Forschungs- und Innovationspolitik bleibt**.

Die Mitgliedstaaten und die Kommission werden das 2008 angelaufene gemeinsame Forschungsprogramm für umgebungsunterstütztes Leben (AAL) dazu nutzen, innovative IKT-gestützte Lösungen für eine selbständige Lebensführung und für die Vorbeugung und Behandlung chronischer Krankheiten bei älteren Menschen zu fördern.

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[9] Die „MeAC-Studie“ und die Studie über den Zugang von behinderten und von älteren Menschen zu IKT-Produkten und -Diensten.

Innerhalb des CIP förderte die Kommission ein Pilotprojekt zum barrierefreien Fernsehen und weitere Pilotprojekte zum Thema IKT für ältere Menschen, um die Technologieentwicklung zu beschleunigen. Im Jahr 2009 wird die Kommission ein Pilotprojekt zu „umfassenden Kommunikationssystemen“ („*total conversation*“, Kombination aus Audio-, Text- und Videokommunikation für Behinderte) finanzieren, das dazu beitragen wird, hör- und sprechbehinderten Personen den europäischen Notruf 112 zugänglich zu machen.

Die Mitgliedstaaten und alle Beteiligten sollten dringend die **Innovation und die Einführung barrierefreier Lösungen** mit Hilfe der Strukturfonds, des 7. Forschungsrahmenprogramms, des Programms für umgebungsunterstütztes Leben (AAL) und nationaler Programme vorantreiben.

Die Strukturfondsverordnung[10] sieht vor, dass die Mitgliedstaaten die Zugänglichkeit für Behinderte als eines der Finanzierungskriterien berücksichtigen müssen. In diesem Zusammenhang wird die Kommission 2009 ein „Instrumentarium für behindertengerechte IKT“ bereitstellen und die Mitgliedstaaten und Regionen dazu ermuntern, die Barrierefreiheit der IKT in ihre Beschaffungs- und Finanzierungskriterien einzuarbeiten.

Die Kommission wird 2009 ein **Instrumentarium für behindertengerechte IKT** (*disability toolkit*) zur Verwendung in Strukturfonds- und anderen Programmen bereitstellen.

(4) Erleichterung der Normung

Die Kommission wird die Barrierefreiheit auch weiterhin in ihrem Arbeitsprogramm für die Normung entschlossen fördern. Eine wichtige Normungstätigkeit zur Förderung der Barrierefreiheit ist hierbei insbesondere das den europäischen Normenorganisationen erteilte Mandat 376[11]. Die Kommission wird die Verwendung der Ergebnisse dieser Normungsarbeiten vorantreiben und auf eine schnelle Fortführung des Mandats 376 drängen, damit die eigentlichen Normen und die zugehörigen Konformitätsbewertungsprogramme möglichst bald vorliegen. Ergänzt und unterstützt wird dieser Prozess durch den Dialog mit den Beteiligten, den Austausch der bewährten Praxis und Pilotprojekte zur Einführung, wie sie in dieser Mitteilung vorgeschlagen werden.

Im Rahmen des Mandats 376 sollten die europäischen Normenorganisationen in Zusammenarbeit mit den Beteiligten im Jahr 2009 und danach **zügig europäische Normen** für die Barrierefreiheit **ausarbeiten**.

(5) Ausschöpfung des geltenden Rechts und Erlass neuer Vorschriften

Es gibt einen klaren Zusammenhang zwischen dem Bestehen von Rechtsvorschriften und den tatsächlichen Fortschritten auf dem Gebiet der Barrierefreiheit[12]. Im Mittelpunkt der

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10 Verordnung (EG) Nr. 1083/2006.

11 Mit dem Mandat 376 sollen die Voraussetzungen dafür geschaffen werden, dass die Vergabe öffentlicher Aufträge und die bewährte Praxis auf dem Gebiet der IKT dazu beitragen, die Hindernisse zu beseitigen, die der Teilhabe behinderter und älterer Menschen an der Informationsgesellschaft entgegenstehen. Darin beauftragte die Europäische Kommission die europäischen Normenorganisationen mit der Ausarbeitung einer Lösung für gemeinsame Anforderungen (z. B. für Textgröße, Bildschirmkontrast und Tastaturgröße) und die Konformitätsbewertung.

12 Siehe die „MeAC-Studie“ und die Studie über den Zugang von behinderten und von älteren Menschen zu IKT-Produkten und -Diensten.

Forschung stehen die Risiken einer rechtlichen Fragmentierung in der EU, die sich aus von einander abweichenden Vorschriften ergeben. Aufbauend auf ihren Mitteilungen von 2005 und 2007 hat die Kommission deshalb begonnen, über ein allgemeineres Gesetzgebungskonzept für die Barrierefreiheit nachzudenken.

Auf dem Gebiet der Barrierefreiheit zeichnet sich angesichts seiner Größe, Komplexität und schnellen Entwicklung noch kein eindeutiger Konsens über mögliche besondere EU-Vorschriften für die Barrierefreiheit[13] ab, z. B. über den Anwendungsbereich, Normen, Durchsetzungsmechanismen und die Einbindung in das bestehende Recht. Ferner herrscht zwar Einvernehmen über die Notwendigkeit eines gemeinsamen Vorgehens auf dem Gebiet der Barrierefreiheit, es bestehen aber unterschiedliche Ansichten darüber, welche nächsten Schritte dabei Priorität genießen. Die Kommission kommt deshalb zu dem Schluss, dass die Zeit für einen besonderen Legislativvorschlag zur Barrierefreiheit noch nicht reif ist, wird aber weiterhin dessen Durchführbarkeit und Notwendigkeit unter Berücksichtigung der tatsächlichen Fortschritte auf diesem Gebiet prüfen.

Es gibt aber durchaus Bestimmungen des geltenden EU-Rechts, die noch immer nicht ausgeschöpft werden, vor allem in Bezug auf Funk- und Telekommunikationsgeräte, die elektronische Kommunikation, die Vergabe öffentlicher Aufträge, das Urheberrecht in der Informationsgesellschaft, die Gleichbehandlung in Beschäftigung und Beruf, die Mehrwertsteuer und Ausnahmen für staatliche Beihilfen[14]. Die volle Ausnutzung dieser Bestimmungen würde bereits eine erhebliche Verbesserung der Barrierefreiheit in den Mitgliedstaaten bewirken. Die Kommission ermuntert daher die Mitgliedsaaten, zunächst diese Bestimmungen auszuschöpfen, bevor neue Vorschriften erwogen werden.

Mehrere der oben genannten Rechtsvorschriften werden derzeit oder sollen demnächst überprüft werden[15]. Die Kommission wird darauf hinwirken, dass sinnvolle Anforderungen an die Barrierefreiheit bei diesen Überprüfungen berücksichtigt und gestärkt werden. Darüber hinaus werden die Bestimmungen des derzeit geltenden Rechtsrahmens zugunsten behinderter Nutzer durch die Legislativvorschläge für die elektronischen Kommunikation erheblich gestärkt. Außerdem wird die Kommission die Umsetzung und Anwendung der Richtlinie über audiovisuelle Mediendienste[16] sorgfältig beobachten, und zwar insbesondere in Bezug auf Artikel 3c, der lautet: „Die Mitgliedstaaten bestärken die ihrer Rechtshoheit unterliegenden Mediendiensteanbieter darin, ihre Dienste schrittweise für Hörgeschädigte und Sehbehinderte zugänglich zu machen“.

Die Kommission wird **dafür sorgen, dass bei der Überprüfung** des EU-Rechts **geeignete Bestimmungen über die Barrierefreiheit eingefügt werden**. Die Mitgliedstaaten, alle Beteiligten und die Kommission sollten die **Möglichkeiten, die Barrierefreiheit innerhalb des bestehenden EU-Rechts zu verbessern, voll ausschöpfen**.

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13 In der öffentlichen Konsultation nannten 90 % der Anwenderorganisationen verbindliche Vorschriften als wichtige Priorität, wogegen nur 33 % der Branche und der Behörden diese Ansicht teilten.

14 Richtlinien 2000/78/EG, 2002/21/EG, 1999/5/EG, 2004/18/EG, 2001/29/EG, 2007/65/EG.

15 Überprüft wird gegenwärtig z. B. die Richtlinie 1999/5/EG über Telekommunikationsendeinrichtungen. In diesem Zusammenhang wird die Kommission dafür sorgen, dass die Möglichkeit des Rückgriffs auf deren Artikel 3 Absatz 3 Buchstabe f erhalten bleibt.

16 Richtlinie 2007/65/EG.

3. BARRIEREFREIES WEB

Ein barrierefrei zugängliches Web ist ein wichtiger Aspekt der Barrierefreiheit, denn dadurch erhalten behinderte Menschen die Möglichkeit, das Web wahrzunehmen, zu verstehen, sich darin zu bewegen, darin in Austausch zu treten und selbst zum Web beizutragen. Es ist aber auch nützlich für Menschen, deren Sehvermögen, Geschicklichkeit oder kognitive Fähigkeiten eingeschränkt sind, zum Beispiel für ältere Menschen. Aufgrund der gewaltigen Zunahme von Online-Informationen und interaktiven Diensten hat gerade die Barrierefreiheit im Web eine besonders große Bedeutung erlangt, sowohl beim Online-Banking und den Diensten öffentlicher Verwaltungen als auch bei der Kommunikation mit entfernt wohnenden Verwandten und Freunden.

3.1. Gegenwärtiger Stand

Trotz ihrer großen Bedeutung ist die Barrierefreiheit im Web bislang in der EU ungenügend geblieben. Mehrere nationale und europaweite Untersuchungen der letzten Jahre haben ergeben, dass die Mehrzahl der öffentlichen wie privaten Websites nicht einmal die einfachsten Grundanforderungen der international anerkannten Web-Zugangsleitlinien erfüllen. Eine aktuelle Umfrage kommt zu dem Ergebnis, dass nur 5,3 % der von Behörden betriebenen Websites und nahezu keine gewerbliche Website vollständig den grundlegenden Zugangsleitlinien entsprechen[17]. Dies erklärt, warum es viele Menschen schwierig finden, wichtige Websites zu nutzen, und dadurch Gefahr laufen, teilweise oder ganz aus der Informationsgesellschaft ausgeschlossen zu werden.

Die barrierefreie Zugänglichkeit öffentlicher Websites erfreut sich in den letzten Jahren einer wachsenden Aufmerksamkeit der Politiker in den Mitgliedstaaten[18]. Auf europäischer Ebene wurden die Mitgliedstaaten durch die Mitteilung von 2001 über den Zugang zu öffentlichen Webseiten aufgefordert, die Leitlinien für die Zugänglichkeit von Web-Inhalten (*Web Content Accessibility Guidelines*, WCAG) zu unterstützen[19]. In zwei Entschließungen[20] betonte der Rat die Notwendigkeit, das Web mit seinen Inhalten schneller barrierefrei zugänglich zu machen. Das Europäische Parlament schlug 2002 vor, dass bis 2003 alle öffentlichen Websites vollständig für Behinderte zugänglich gemacht werden sollten[21]. Die 2006 in Riga verabschiedete Ministererklärung über IKT für eine integrative Informationsgesellschaft enthielt eine Zusage, bis 2010 öffentliche Webseiten zu 100 % barrierefrei zugänglich zu machen.

Auf internationaler Ebene nahm das *World Wide Web Consortium* (W3C) 1999 die Version 1 der Web-Zugangsleitlinien WCAG an. Aufgrund von Mehrdeutigkeiten kam es jedoch zu einer fragmentierten Umsetzung in den Mitgliedstaaten, und auch angesichts der neueren Internetentwicklung sind die WCAG 1.0 nun veraltet. Das W3C arbeitet seit mehreren Jahren an einer Neufassung dieser Spezifikationen (WCAG 2.0), die nun kurz vor der Verabschiedung stehen. Diesmal wird es darauf ankommen, eine fragmentierte Umsetzung zu vermeiden.

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17 MeAC-Studie.
18 Siehe das Arbeitspapier der Kommissionsdienststellen.
19 KOM(2001) 529.
20 2002/C 86/02 und 2003/C 39/03.
21 C5-0074/2002-2002/2032(COS).

3.2. Gründe für weitere Maßnahmen

Webseiten leichter zugänglich zu machen, kann bisweilen eine schwierige Aufgabe sein, deren Lösung Kosten verursacht und besondere Sachkenntnis verlangt. Es gibt aber immer mehr Beweise und gut dokumentierte Beispiele dafür, dass es einen echten Vorteil bedeutet, eine Website barrierefrei zugänglich zu machen, und zwar nicht nur für behinderte Nutzer, sondern auch für die Website-Betreiber und die Nutzer ganz allgemein. So werden die Dienste nicht nur leichter zu benutzen und einfacher zu pflegen, sondern auch von mehr Nutzern in Anspruch genommen[22]. Folglich bedeutet eine stärker barrierefreie Website nicht nur für Behinderte, sondern auch für andere Nutzer eine Verbesserung und kommt der Wettbewerbsfähigkeit europäischer Unternehmen zugute.

Fallbeispiel: Vorteile einer barrierefrei zugänglichen Website

Nachdem er seine Website barrierefrei zugänglich gemacht hatte, stellte ein britischer Finanzdienstleister folgende Verbesserungen fest:

– Die Kunden fanden die gesuchten Informationen schneller und verweilten länger auf der Website.

– Neue Kunden nutzten die Dienste und steigerten dadurch den Online-Umsatz.

– Die Pflege der Website war einfacher, schneller und billiger.

– Die Website wurde von den Suchmaschinen erheblich höher eingestuft.

– Kompatibilitätsprobleme verschwanden und der Zugang mit mobilen Geräten verbesserte sich.

– Die Investition machte sich in weniger als 12 Monaten vollständig bezahlt.

Aber die andauernde Fragmentierung der Gesetzgebung in den Mitgliedstaaten führt in Verbindung mit dem Fehlen klarer gesetzgeberischer Vorgaben auf europäischer Ebene zur Beeinträchtigung des Binnenmarkts, stellt ein Hindernis für die Bürger und Verbraucher in diesem grenzübergreifenden Umfeld dar und behindert die Entwicklung der gesamten Branche. Das Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen sieht auch Verpflichtungen in Bezug auf das Internet vor, denen die Unterzeichnerstaaten nachzukommen haben. Ein weiteres Vorgehen auf europäischer Ebene ist daher geboten.

3.3. Vorgeschlagene Maßnahmen

Die Hauptverantwortung für die Verbesserung der Barrierefreiheit im Web liegt weiterhin bei den Mitgliedstaaten und den Diensteanbietern. Es gibt aber durchaus Maßnahmen, die die Kommission ergreifen oder erleichtern kann, um in Europa die Verbesserung der Barrierefreiheit im Web zu beschleunigen, auch wenn es dafür keine besonderen EU-Vorschriften gibt. Insgesamt wird nur ein gemeinsames und einheitliches Vorgehen zum Erfolg führen. Die wichtigsten Handlungsbereiche sind:

[22] Arbeitspapier der Kommissionsdienststellen.

(1) Förderung der schnellen Annahme und Umsetzung internationaler Leitlinien in Europa

Es besteht breites Einvernehmen darüber, dass die Herstellung der Barrierefreiheit im Web in enger Anlehnung an die technischen Spezifikationen der WCAG 2.0-Leitlinien erfolgen soll. Sobald das W3C die Leitlinien verabschiedet hat, was bald geschehen dürfte, wird es auch möglich sein, das Mandat 376 und die Harmonisierungsarbeiten auf europäischer Ebene abzuschließen. In der Zwischenzeit sollten die Mitgliedstaaten tätig werden, um dafür zu sorgen, dass die Riga-Ziele für die Zugänglichkeit öffentlicher Webseiten erreicht werden. Außerdem sollten sie Vorbereitungen treffen, damit die neuen Spezifikationen für die Zugänglichkeit des Web schnell, gemeinsam und in abgestimmter Weise in nationales Recht übernommen werden können, und zwar:

– 2009–2010 Veröffentlichung neugefasster technischer Leitlinien und gegebenenfalls Übersetzung der einschlägigen W3C-Spezifikationen;

– 2009 Festlegung der betroffenen öffentlichen Websites und Intranets[23] und Herstellung ihrer barrierefreien Zugänglichkeit bis 2010.

Die Kommission wird ihre Bemühungen fortsetzen, um die Zugänglichkeit ihrer eigenen Webangebote zu verbessern und ihre internen Vorgaben an die neuen Spezifikationen anzupassen.

Nicht-öffentliche Diensteanbieter, insbesondere die Betreiber von Websites, die Dienstleistungen von allgemeinem Interesse erbringen[24], und die Betreiber kommerzieller Websites, die für die Beteiligung in Wirtschaft und Gesellschaft unverzichtbar sind, werden ebenfalls ermuntert, die barrierefreie Zugänglichkeit des Web (ab 2008) zu verbessern.

Die Mitgliedstaaten sollten ihre öffentlichen Websites bis 2010 **100 %ig** barrierefrei machen und Vorbereitungen für einen schnellen, **gemeinsamen und kohärenten** Übergang zu den neugefassten Spezifikationen für die Zugänglichkeit des Web treffen.

Websitebetreiber, die Dienstleistungen von allgemeinem Interesse erbringen, sowie andere wichtige Websitebetreiber sollten die barrierefreie Zugänglichkeit ihrer Angebote verbessern.

Die europäischen Normenorganisationen sollten ausgehend von den WCAG 2.0-Leitlinien in Zusammenarbeit mit allen Beteiligten zügig EU-Normen für die Barrierefreiheit im Web aufstellen.

Die Kommission verbessert die Zugänglichkeit der Webseiten der Kommission und passt ihre internen Vorgaben an die neuen Spezifikationen an.

Die Kommission wird diese Entwicklungen verfolgen und unterstützen, die Mitgliedstaaten bei den Hauptaspekten der Umsetzung zum schnellen Handeln drängen sowie – hauptsächlich über die Plattform ePractice[25] – die Sammlung und den Austausch praktischer Erfahrungen erleichtern. In Abhängigkeit von den Fortschritten und sobald die Normen vorliegen wird die

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23 In Übereinstimmung mit der Richtlinie 2000/78/EG zur Gleichbehandlung in Beschäftigung und Beruf.

24 Wie in KOM(2007) 725 genannt.

25 www.epractice.eu.

Kommission prüfen, ob es notwendig ist, gemeinsame EU-Leitlinien aufzustellen und ggf. gesetzgeberisch tätig zu werden[26].

Die Kommission wird die Fortschritte verfolgen und veröffentlichen sowie die Notwendigkeit gemeinsamer EU-Leitlinien und Gesetzesinitiativen prüfen (ab 2009).

(2) Verbesserung des Verständnisses für die Barrierefreiheit im Web und deren Förderung

Es ist dringend notwendig, die Sichtbarkeit, das Verständnis und das Bewusstsein für die Anforderungen an die Barrierefreiheit im Web und für deren Lösungen zu erhöhen. Die Mitgliedstaaten sollten dabei eine Führungsrolle übernehmen:

– Breite Förderung der barrierefreien Zugänglichkeit von Websites durch Bereitstellung klarer Informationen und Leitlinien für die Barrierefreiheit im Web einschließlich entsprechender Hilfstechnologien[27] sowie Förderung der Verwendung von Erklärungen zur Barrierefreiheit[28];

– Unterstützung von Schulungsprogrammen, der Weitergabe von Wissen und des Austauschs der bewährten Praxis;

– Anschaffung barrierefreier Hilfsmittel und Websites im Rahmen der Vergabe öffentlicher Aufträge;

– Benennung einer nationalen Kontaktstelle für die Barrierefreiheit im Web im Jahr 2009, z. B. über eine Website;

– Beobachtung der Einhaltung der Leitlinien, der Zufriedenheit der Nutzer und der Kosten der Umsetzung der Barrierefreiheit in öffentlichen und anderen Websites und Berichterstattung über die Fortschritte an die hochrangige Gruppe und die Öffentlichkeit.

Die Mitgliedstaaten sollten bei der **Sensibilisierung und der Verbesserung des Verständnisses** für die Barrierefreiheit im Web in kohärenter, effizienter und wirksamer Weise **die Führung übernehmen** und der hochrangigen Gruppe **über die Fortschritte berichten**.

4. FAZIT

An vielen Fronten ist ein gemeinsames, kohärentes Herangehen an die Barrierefreiheit erforderlich. Bei der Barrierefreiheit im Web kommt es insbesondere darauf an, unmittelbar schnelle Fortschritte zu erzielen. Bei der Erreichung des gemeinsamen Ziels einer integrativen Informationsgesellschaft kommt allen Beteiligten eine wichtige Rolle zu.

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[26] Siehe Folgenabschätzung zu KOM(2007) 694.

[27] IKT-Geräte, die funktionelle Fähigkeiten behinderter Menschen unterstützen.

[28] Erklärungen mit weiteren nützlichen Informationen, z. B. über Vorgaben für die Zugänglichkeit der Website, die Einhaltung der einschlägigen Spezifikationen, die Unterstützung für Behinderte und Beschwerdemöglichkeiten.

Die Kommission ersucht den Rat, das Europäische Parlament, den Ausschuss der Regionen und den Europäischen Wirtschafts- und Sozialausschuss, ihre Meinungen in Bezug auf die Maßnahmen zu äußern, die ergriffen werden müssen, um die Informationsgesellschaft für alle barrierefrei zugänglich zu machen.

Anhang – Überblick über die Maßnahmen

Barrierefreiheit

Maßnahmen	*Datum*	*Zuständigkeit*
Einsetzung einer **hochrangigen Gruppe**, die Leitlinien für Prioritäten und ein kohärenteres Konzept für die Barrierefreiheit ausarbeiten soll. Alle Beteiligten werden zur Mitarbeit in dieser Gruppe aufgerufen.	Anfang 2009	EK, Beteiligte
Aufrechterhaltung der Barrierefreiheit als **politische Priorität** in den Folgemaßnahmen zur i2010-Initiative und zum Aktionsplan für Menschen mit Behinderungen.	2009–	EK
Beobachtung der Fortschritte bei der Umsetzung der Maßnahmen auf dem Gebiet der Barrierefreiheit und der Barrierefreiheit im Web, Unterstützung der Zusammenarbeit und des Austauschs der bewährten Praxis anhand von **Studien** und eines **thematischen Netzes** innerhalb des **CIP**.	2009–	EK, Branche und Beteiligte
Aufrechterhaltung der Barrierefreiheit als eine wichtige **Priorität der Forschungs- und Innovationspolitik**.	2009–	EK
Förderung der **Innovation und Einführung barrierefreier Lösungen** mit Hilfe der Strukturfonds, des 7. Forschungsrahmenprogramms, des Programms für umgebungsunterstütztes Leben (AAL) und nationaler Programme.	2009–	MS, sonstige Beteiligte
Bereitstellung eines **Instrumentariums für behindertengerechte IKT** *(disability toolkit)* zur Verwendung in Strukturfonds- und anderen Programmen.	2009	EK
Zügige Ausarbeitung europäischer Normen für die Barrierefreiheit im Rahmen des Mandats 376 in Zusammenarbeit mit den einschlägigen Beteiligten.	2009–	ESO
Gewährleistung, **dass bei der Überprüfung** des EU-Rechts **geeignete Bestimmungen über die Barrierefreiheit eingefügt werden**.	2008–	EK
Ausschöpfung der Möglichkeiten, den barrierefreien Zugang **innerhalb des bestehenden EU-Rechts** zu verbessern.	2008–	MS, EK, Branche und Beteiligte

Barrierefreies Web

Bereitstellung von **100 %ig** barrierefreien öffentlichen Websites und Vorbereitung auf einen schnellen, **gemeinsamen und kohärenten** Übergang zu den neugefassten Spezifikationen für die Zugänglichkeit des Web.	2009–2010	MS
Zügige Aufstellung von **EU-Normen für die Barrierefreiheit im Web**, ausgehend von den WCAG 2.0-Leitlinien.	2009–	ESO (und Beteiligte)
Verbesserung der Zugänglichkeit der **Webseiten der Kommission** und Anpassung der internen Vorgaben an die neuen Spezifikationen.	2009–	EK
Verbesserung der barrierefreien Zugänglichkeit der Websites durch **Websitebetreiber, die Dienstleistungen von allgemeinem Interesse erbringen**, und andere wichtige Websitebetreiber.	2009–	Sonstige Beteiligte
Verfolgung und Veröffentlichung der Fortschritte und Prüfung der Notwendigkeit gemeinsamer EU-Leitlinien und Gesetzesinitiativen.	2009–	EK
Führungsrolle bei der **Sensibilisierung und Verbesserung des Verständnisses** für die Barrierefreiheit im Web in einer kohärenten, effizienten und wirksamen Weise und Berichterstattung an die hochrangige Gruppe über die Fortschritte.	2008–	MS

KOMMISSION DER EUROPÄISCHEN GEMEINSCHAFTEN

Brüssel, den 13.9.2005
KOM(2005)425 endgültig

MITTEILUNG DER KOMMISSION AN DEN RAT, DAS EUROPÄISCHE PARLAMENT, DEN EUROPÄISCHEN WIRTSCHAFTS- UND SOZIALAUSSCHUSS UND DEN AUSSCHUSS DER REGIONEN

eAccessibility

[SEK(2005)1095]

MITTEILUNG DER KOMMISSION AN DEN RAT, DAS EUROPÄISCHE PARLAMENT, DEN EUROPÄISCHEN WIRTSCHAFTS- UND SOZIALAUSSCHUSS UND DEN AUSSCHUSS DER REGIONEN

eAccessibility

Barrierefreie Informations- und Kommunikationstechniken (IKT) werden dazu beitragen, die Lebensqualität behinderter Menschen entscheidend zu verbessern. Ungleiche Chancen beim Zugang zu IKT können demgegenüber zu Ausgrenzung führen. In dieser Mitteilung schlägt die Kommission eine Reihe politischer Maßnahmen zur Förderung der Barrierefreiheit im Bereich der IKT (eAccessibility) vor. Sie ruft alle Mitgliedstaaten und beteiligten Kreise auf, freiwillige positive Maßnahmen zu unterstützen, mit denen barrierefreie IKT-Produkte und -Dienstleistungen in Europa in einem wesentlich größeren Ausmaß verfügbar gemacht werden.

Diese Mitteilung zur barrierefreien Informations- und Kommunikationstechnik (eAccessibility) stellt einen Beitrag zur Umsetzung der vor kurzem gestarteten Initiative „**i2010 – Eine europäische Informationsgesellschaft für Wachstum und Beschäftigung**“[1] dar, die einen neuen strategischen Rahmen und breit angelegte politische Orientierungen zur Förderung einer offenen und wettbewerbsorientierten digitalen Wirtschaft vorgibt, wobei ein Schwerpunkt auf der IKT als Motor für die gesellschaftliche Einbeziehung und zur Verbesserung der Lebensqualität gelegt wird. Die Kommission verfolgt das ehrgeizige Ziel, eine „Informationsgesellschaft für alle“ zu schaffen und zu diesem Zweck eine auf Einbeziehung ausgerichtete digitale Gesellschaft zu fördern, in der allen Menschen Chancen geboten und das Risiko einer Ausgrenzung so gering wie möglich gehalten werden.

1. EINFÜHRUNG

15 % der europäischen Bevölkerung sind Menschen mit Behinderungen, von denen viele bei der Nutzung von IKT-Produkten und -Dienstleistungen auf Hindernisse stoßen. Ältere Menschen haben in bestimmten Fällen ähnliche Probleme. Wegen des demographischen Wandels werden barrierefreie IKT-Produkte und -Dienstleistungen jetzt zu einer Priorität in Europa: Waren 1990 erst 18 % der Europäer älter als 60 Jahre, so dürfte der Anteil bis 2030 auf 30 % ansteigen.[2]

Eine vor kurzem in den USA durchgeführte Studie[3] kam zu dem Ergebnis, dass 60 % aller Erwachsenen im Erwerbsalter von barrierefreien Technologien profitieren würden, da sie leichte Behinderungen oder Schwierigkeiten bei der Benutzung der modernen Technik hätten.

Nach einer Studie aus dem Jahr 2002[4] sind mehr als 48 % aller Personen über 50 Jahre in Europa der Meinung, dass die Hersteller bei der Produktgestaltung keine ausreichende

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1 KOM(2005) 229 endg. vom 1. Juni 2005.
2 UN-Weltbevölkerungsprognose (Ausgabe 2002) und demographische Projektion von Eurostat.
3 The Wide Range of Abilities and Its Impact on Computer Technology – Forrester Research Inc., 2003.
4 Seniorwatch IST-1999-29086 www.seniorwatch.de

Rücksicht auf sie nähmen. 10 bis 12 Millionen dieser Menschen sind aber potenzielle Käufer neuer Mobilfunktelefone und Computer und potenzielle Kunden von Internetdiensten.

Der Schluss liegt auf der Hand: **Die Vorteile der Informations- und Kommunikationstechnik der größtmöglichen Zahl von Menschen zugänglich zu machen ist eine gesellschaftliche, ethische und politische Verpflichtung.** Außerdem werden dadurch auch wirtschaftlich immer wichtiger werdende Märkte geschaffen.

Die Überwindung technischer Hindernisse und Schwierigkeiten, die behinderte Menschen und andere erfahren, wenn sie gleichberechtigt an der Informationsgesellschaft teilhaben wollen, wird als Barrierefreiheit („eAccessibility") thematisiert. Dieser Aspekt ist Teil des umfassenderen Konzepts der Einbeziehung („eInclusion"), bei dem auch Hemmnisse anderer Art, etwa finanzielle, geographische oder bildungsbezogene Hindernisse, in die Betrachtung einfließen.

Diese Mitteilung baut auf den vorangehenden Arbeiten zum Thema Barrierefreiheit im Rahmen der beiden eEurope-Aktionspläne und auf den Schlussfolgerungen und Ergebnissen von Forschungs- und Entwicklungsvorhaben auf. Ebenfalls einbezogen wurden die wesentlichen Ergebnisse einer **Online-Konsultation**[5], die Anfang 2005 stattfand und bei der eine eindeutige Unterstützung (mehr als 88 % aller Teilnehmer) für Initiativen der europäischen Institutionen zur Verbesserung einer Situation zum Ausdruck kam, die nach Auffassung der großen Mehrheit (mehr als 74 %) als mangelnde Kohärenz von barrierefreien IKT-Produkten und -Dienstleistungen in Europa empfunden wird. Eine breitere Verfügbarkeit barrierefreier Produkte und Dienstleistungen wird ebenso für nötig gehalten (84 % aller Teilnehmer).

Mit dieser Mitteilung wird hauptsächlich das Ziel verfolgt, auf freiwilliger Grundlage einen schlüssigen Ansatz bezüglich Initiativen im Bereich der Barrierefreiheit (eAccessibility) in den Mitgliedstaaten ebenso wie die Selbstregulierung der Wirtschaft zu fördern.

2. PRAKTISCHE HERAUSFORDERUNGEN

Neue Technologien haben Behinderten eindeutig geholfen und es ihnen ermöglicht, selbstständig Dinge zu tun, die sie zuvor nur mit der Hilfe anderer Personen verrichten konnten. Trotz der Bemühungen der Wirtschaft klagen Behinderte jedoch noch immer über viele Probleme bei der Nutzung von Produkten und Dienstleistungen der Informationstechnik, beispielsweise:

- Mangel an aufeinander abgestimmten Lösungen, z. B. besteht in vielen Mitgliedstaaten keine Möglichkeit, die Notrufnummer 112 von Schreibtelefonen aus anzurufen;
- Mangel an interoperablen Lösungen für eine barrierefreie IKT;
- nicht mit Hilfsgeräten vereinbare Software: Bildschirmleser für Blinde sind nach einem Wechsel der Betriebssystemversion häufig nicht mehr nutzbar;

[5] Ergebnisse abrufbar unter: http://europa.eu.int/information_society/policy/accessibility/com_ea_2005/a_documents/com_consult_res.html#_Toc97028181

- Interferenzen zwischen gängigen Produkten und Hilfsgeräten, z. B. Mobilfunktelefonen und Hörgeräten;
- Fehlen europaweiter Normen; beispielsweise gibt es sieben verschiedene, untereinander unvereinbare Schreibtelefonsysteme für Taube und Schwerhörige;
- Fehlen angepasster Dienste, so sind z. B. viele Internetseiten für Menschen mit kognitiven Behinderungen oder mit wenig Erfahrung zu kompliziert oder Sehbehinderte können sie nicht lesen und sich darin zurechtfinden;
- Fehlen von Produkten und Dienstleistungen für bestimmte Gruppen, z. B. Telefonkommunikation für Nutzer von Gebärdensprache;
- Schwierigkeiten bei der Nutzung wegen der physischen Gestaltung, z. B. Tastenfelder und Anzeigen bei vielen Geräten;
- fehlende barrierefreie Inhalte;
- eingeschränkte Wahlmöglichkeiten bei elektronischen Kommunikationsdiensten, Qualität und Preis.

Die meisten dieser Probleme ließen sich in technischer Hinsicht leicht lösen, bedürfen aber der Kooperation, Koordinierung und Entschlossenheit auf europäischer Ebene, da die Marktkräfte allein bis heute anscheinend nicht ausgereicht haben.

In naher Zukunft sind beispielsweise bei folgenden neuen Techniken Aspekte der Barrierefreiheit frühzeitig zu bedenken:

- digitales Fernsehen, z. B. hinsichtlich Normen und Kompatibilität sowie Gestaltung der Dienste und Geräte;
- Mobilfunktelefone der dritten Generation, z. B. hinsichtlich der Gestaltung der Geräte und Software sowie der Dienste;
- Breitbandkommunikation, z. B. Nutzung der Möglichkeiten multimedialer Präsentationen auf eine Weise, die Barrieren abbaut statt erhöht.

Eine Behandlung dieser Themen, die bislang nur als für eine spezifische Zielgruppe in der Bevölkerung von Interesse galten, wird positive Auswirkungen für die Mehrzahl der Techniknutzer haben.

3. FRAGEN DES MARKTES UND DER WIRTSCHAFTLICHKEIT

Für einige der geschilderten Herausforderungen haben die IKT-Forschung und der Markt innovative Lösungen gefunden. Ihrer breiten Verfügbarkeit stehen jedoch hauptsächlich folgende Hindernisse entgegen:

- Bislang zielten sie auf einen kleinen Markt ab (im Wesentlichen definiert als Behinderte und in bestimmten Fälle ältere Menschen), der hauptsächlich von KMU auf nationaler oder regionaler Ebene bedient wurde.
- Es gibt keine ausreichenden anwendbaren technischen Normen und Spezifikationen.
- Die einschlägigen europäischen Rechtsvorschriften sehen erst seit kurzem ausdrücklich die Möglichkeit vor, Anforderungen zur Barrierefreiheit in die technischen Spezifikationen bei öffentlichen Ausschreibungen aufzunehmen.
- Die von manchen Mitgliedstaaten entwickelten eigenen Lösungen unterscheiden sich stark.

Aus diesen Gründen befindet sich der Markt für barrierefreie IKT-Produkte und -Dienstleistungen in Europa noch im Entwicklungsstadium, er orientiert sich im Wesentlichen an den Nationalstaaten und es fehlen harmonisierte Rechtsvorschriften und anwendbare technische Normen. Dies trägt nicht zum Funktionieren des Binnenmarkts bei und stellt eine immer größere Belastung der Wirtschaft dar, die in verschiedenen Mitgliedstaaten unterschiedliche Anforderungen erfüllen muss.

Als Verbraucherzielgruppe werden zunehmend nicht mehr nur Behinderte und in manchen Fällen ältere Menschen, sondern die ganze Bevölkerung angesehen. Diese Erkenntnis führt zu einer Marktveränderung, deren Beginn wir soeben erst erleben, da die größeren europäischen Unternehmen sich diesem Marktsektor zuwenden, auch wenn sie noch ein Stück weit davon entfernt sind, ihr ganzes Gewicht darin einzubringen.

Dies ist auch im Bereich der Telekommunikation der Fall. Die Allgegenwart von Telekommunikationsprodukten und -dienstleistungen ist mittlerweile so ausgeprägt, dass selbst diese (derzeit noch relativ kleine) Marktnische für die Differenzierung und als Wachstumsgenerator von Bedeutung ist und das Interesse der größeren Marktakteure auf sich zieht.

Somit sind Barrierefreiheit (eAccessibility) und damit im Zusammenhang stehende Produkte und Dienstleistungen unter Einsatz von Hilfsgerätetechniken jetzt auf dem „mittelfristigen Radar“ selbst der größeren Anbieter gängiger Technik, nicht nur in Europa, sondern auch in anderen Teilen der Welt, präsent.

4. RECHTLICHE UND POLITISCHE FRAGEN

Bei mehreren Gelegenheiten hat der Rat Maßnahmen auf EU-Ebene unterstützt, beispielsweise als er die Mitgliedstaaten aufforderte und die Kommission ersuchte, „*das Potenzial der Informationsgesellschaft für Menschen mit Behinderungen zu erschließen und insbesondere technische, rechtliche und andere Schranken für ihre wirkliche Beteiligung an der wissensbasierten Wirtschaft und Gesellschaft zu beseitigen*“.[6] Diese Perspektive wird auch vom Europäischen Parlament unterstützt[7].

Politik und Rechtsvorschriften der Europäischen Union tragen der Tatsache Rechnung, dass Beschäftigung und Beruf ausschlaggebend sind, um gleiche Chancen für alle zu garantieren sowie zur umfassenden Teilhabe der Bürger am wirtschaftlichen, kulturellen und gesellschaftlichen Leben und zur Verwirklichung ihres Potenzials beizutragen. Die potenziellen Auswirkungen einer breiteren Verfügbarkeit hochwertiger barrierefreier IKT-Produkte und -Dienstleistungen liegen auf der Hand. Dies wird mehr Möglichkeiten zur Einbeziehung in den Arbeitsmarkt und eine bessere gesellschaftliche Integration zur Folge haben und es den Menschen ermöglichen, ihr Leben länger selbstständig zu führen.

Die Notwendigkeit, alle Europäer in die Informationsgesellschaft einzubeziehen, wurde von den europäischen Institutionen in unterschiedlichem Zusammenhang herausgestellt. Die

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6 Entschließung des Rates zu „eAccessibility – Verbesserung des Zugangs der Behinderten zur Wissensgesellschaft“, 2.-3. Dezember 2002, http://ue.eu.int/ueDocs/cms_Data/docs/pressData/de/lsa/73890.pdf

7 Entschließung des Europäischen Parlaments zu der Mitteilung der Kommission „eEurope 2002: Zugang zu öffentlichen Webseiten und deren Inhalten“ (P5_TA(2002)0325).

Kommission hat Initiativen in den beiden eEurope-Aktionsplänen ergriffen, eine besser zugängliche Informationsgesellschaft zu schaffen. Der Aktionsplan 2002 umfasste eine eigene Maßnahme zu diesen Fragen. Darin wurde die Annahme der Leitlinien der Web-Zugangsinitiative (Web Accessibility Initiative, WAI)[8], die Entwicklung eines europäischen Curriculums des „Designs für alle" (DFA) sowie die Unterstützung von Hilfsgerätetechniken und der DFA-Normung empfohlen. Mit dem eEurope-Aktionsplan 2005 wurde beabsichtigt, die Einbeziehung („eInclusion") in allen Maßnahmen voll zur Geltung zu bringen. Ebenfalls vorgeschlagen wurde darin die Einführung von Anforderungen an die Barrierefreiheit der Informations- und Kommunikationstechnologie im öffentlichen Beschaffungswesen.

Der Rat „Telekommunikation" hat diese Arbeiten unterstützt und die Notwendigkeit ausgedrückt, die Barrierefreiheit (eAccessibility) in Europa zu verbessern[9]. Außerdem wird in der Ministererklärung[10] zu eInclusion vorgeschlagen, alle notwendigen Maßnahmen für eine offene, alle einbeziehende Wissensgesellschaft, die allen Bürgern zugänglich ist, zu treffen.

In seiner Entschließung zu eAccessibility[11] aus dem Jahr 2003 hat auch der Rat „Soziales" die Mitgliedstaaten aufgerufen, die Beseitigung technischer, rechtlicher und anderer Barrieren für die wirksame Teilhabe von Behinderten in der Wissenswirtschaft und -gesellschaft anzugehen.

In Übereinstimmung damit bekräftigte das Europäische Parlament in seiner Entschließung zur Zugänglichkeit des Internets[12] 2002 „*die Notwendigkeit, jede Form des Ausschlusses aus der Gesellschaft und somit aus der Informationsgesellschaft zu vermeiden, und fordert insbesondere die Integration behinderter und älterer Menschen*". In einer weiteren Entschließung wird die Verwendung der Gebärdensprache in der Telekommunikation in Europa[13] erwähnt.

Allgemein stellt Artikel 13 des Vertrags zur Gründung der Europäischen Gemeinschaft die Rechtsgrundlage für Maßnahmen zur Bekämpfung von Diskriminierungen, unter anderem aus Gründen einer Behinderung, dar.

Auf der Grundlage dieses Artikels bezweckt die Richtlinie 2000/78/EG[14] des Rates vom 27. November 2000 ausdrücklich (siehe Artikel 1) die „*Schaffung eines allgemeinen Rahmens zur Bekämpfung der Diskriminierung wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung in Beschäftigung und Beruf*". In der Richtlinie heißt es insbesondere: „*Es sollten geeignete Maßnahmen vorgesehen werden, d. h. wirksame und praktikable Maßnahmen, um den Arbeitsplatz der Behinderung entsprechend einzurichten, z. B. durch eine entsprechende Gestaltung der Räumlichkeiten oder eine Anpassung des* ***Arbeitsgeräts*** *...*".

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8 „eEurope 2002: Zugang zu öffentlichen Webseiten und deren Inhalten", KOM(2001) 529 endg., http://europa.eu.int/eur-lex/de/com/cnc/2001/com2001_0529de01.pdf

9 Entschließung des Rates zum eEurope-Aktionsplan 2002: Zugang zu öffentlichen Webseiten und deren Inhalten, ABl. C 86 vom 10.4.2002.

10 Ministererklärung zu eInclusion, 11. April 2003, http://www.eu2003.gr/en/articles/2003/4/11/2502/

11 Entschließung des Rates 14892/02.

12 Entschließung des Europäischen Parlaments zu der Mitteilung der Kommission „eEurope 2002: Zugang zu öffentlichen Webseiten und deren Inhalten" (2002 (0325)).

13 Entschließung des Europäischen Parlaments zur Gebärdensprache, Entschließung B4-0985/98.

14 Abrufbar im Internet unter http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/2000_78_de.pdf

Darüber hinaus weist eine Reihe europäischer Richtlinien im Zusammenhang mit der Informationsgesellschaft Bestimmungen auf, die auf die Einbeziehung von Behinderten und älteren Menschen verweisen. Dazu gehören die Richtlinien zur elektronischen Kommunikation, insbesondere die Rahmenrichtlinie[15] und die Universaldienstrichtlinie[16], die Richtlinie zu Funkanlagen und Telekommunikationsendgeräten[17], die Richtlinie zur Vergabe öffentlicher Aufträge[18] und die Richtlinie zur Gleichbehandlung in Beschäftigung und Beruf[19].

Der Aktionsplan[20] der Kommission vom Dezember 2003 im Nachgang zum Europäischen Jahr der Menschen mit Behinderungen befasst sich in einem seiner vier Themenbereiche mit dem Zugang zu neuen Techniken und deren Nutzung und legt Maßnahmen dar, mit denen der Zugang zur Informationsgesellschaft durch den Einsatz von Instrumenten auf EU-Ebene verbessert wird.

Maßnahmen auf EU-Ebene haben einen zusätzlichen Nutzen, da mehrere Mitgliedstaaten dabei sind, Rechts- und Verwaltungsvorschriften, Normen oder Leitlinien auszuarbeiten, um diese Fragen auf einzelstaatlicher Ebene anzugehen. Diese Aktivitäten führen zu ähnlichen, aber doch unterschiedlichen Anforderungen an die Barrierefreiheit von Produkten und Dienstleistungen, wodurch die europäische Wirtschaft einem hohen Risiko ausgesetzt ist, da sie sich in einem fragmentierten Markt mit einem dadurch bedingten Verlust an Wettbewerbsfähigkeit und Effektivität betätigen muss.

Das Risiko für die Verbraucher ist noch größer, besonders für Behinderte und ältere Menschen: Ein fragmentierter Markt bedeutet höhere Preise, mehr ungewohnte und nicht miteinander kompatible Produkte, größere Schwierigkeiten bei der grenzübergreifenden Einholung oder Übermittlung von Informationen usw.

EU-Maßnahmen tragen auch internationalen Erfahrungen Rechnung, etwa in den USA und Kanada, mit denen die Europäische Kommission einen Dialog eingeleitet hat, bei dem es besonders um die Nutzung von Rechtsvorschriften im Zusammenhang mit der öffentlichen Beschaffung als wirkungsvoller Hebel geht.

Somit sind die Grundvoraussetzungen für auf EU-Ebene zu ergreifende Maßnahmen erfüllt – in diesem Sinne äußerte sich auch die überwältigende Mehrheit der Teilnehmer an der öffentlichen Konsultation (84 %).

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15 Richtlinie 2002/21/EG.
16 Richtlinie 2002/22/EG.
17 Richtlinie 1999/5/EG.
18 Richtlinien 2004/17/EG und 2004/18/EG.
19 Richtlinie 2000/78/EG.
20 Chancengleichheit für Menschen mit Behinderungen: Ein Europäischer Aktionsplan, KOM(2003) 650 endg.

5. LAUFENDE AKTIVITÄTEN AUF EU-EBENE

Mehrere Maßnahmen sind auf EU-Ebene bereits angelaufen und werden verstärkt fortgesetzt.

Anforderungen und Normen für die Barrierefreiheit

Normen sind ein strategisches Instrument für die Wirtschaft und den öffentlichen Sektor und stellen auch ein Schlüsselelement zur Erschließung neuer Marktchancen dar. Wenn auch die Ausarbeitung und Umsetzung von Normen freiwillig sind, sind sie doch ein wichtiges Instrument, mit dem die Umsetzung politischer Maßnahmen unterstützt werden kann. Europäische Normen zur Barrierefreiheit (eAccessibility) würden zum ordnungsgemäßen Funktionieren des europäischen Binnenmarkts beitragen und dadurch die Entwicklung neuer Märkte, die Wettbewerbsfähigkeit und die Beschäftigung fördern. Die Kommission wird daher weiterhin Finanzhilfen für spezifische Tätigkeiten der europäischen Normungsgremien im Rahmen des Aktionsplans zur europäischen Normung oder durch die Erteilung von Mandaten an die europäischen Normungsgremien fördern[21].

Anforderungen an die Barrierefreiheit in der IKT, die durch Normen festgelegt sind, müssen den Bedürfnissen der Wirtschaft, Konstrukteure und Anbieter von Produkten und Dienstleistungen entsprechen, um zu vermeiden, dass Kreativität und Innovationsfähigkeit beeinträchtigt werden. Gleichzeitig müssen Normen auch die Bedürfnisse der Nutzer erfüllen. Die Einbeziehung der Nutzer in die Normungsarbeit ist deshalb ganz wesentlich, und dabei muss ein Ausgleich gefunden werden zwischen dem kommerziellen und dem öffentlichen Interesse. Die Normen sollten eine einfache Durchsetzbarkeit und Bezugnahme in Rechts- und Verwaltungsvorschriften und anderen Maßnahmen zur Förderung der Barrierefreiheit erlauben. . Frei oder kostengünstig verfügbare Normen würden die Normeinführung erleichtern, besonders durch KMU mit beschränkten Ressourcen für den Erwerb von Normen, und auch die Nutzer könnten leichter Kenntnis nehmen.

Bei der Förderung der Interoperabilität sollte darauf geachtet werden, dass patentierte Technologien ohne angemessene und nichtdiskriminierende Lizenzvergabe (RAND Reasonable And Non-Discrimatory) nicht als Standardlösungen gefördert werden.

Design für alle (DFA)

Bei der DFA-Methodik geht es darum, Produkte und Dienstleistungen so zu konzipieren, dass sie einer möglichst großen Bandbreite von Nutzern zugänglich sind[22]. DFA hat sich mittlerweile etabliert, auch wenn es noch nicht umfassend praktiziert wird. Maßnahmen, mit denen Bewusstsein für DFA geschaffen und DFA in Europa gefördert wird, sind daher unbedingt fortzusetzen. Zu diesem Zweck hat die Kommission ein Netz von Exzellenzzentren namens EDEAN[23] eingerichtet, das über einhundert Mitglieder umfasst.

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21 Dieses Verfahren unterliegt der Richtlinie 98/34. http://europa.eu.int/eur-lex/pri/de/oj/dat/1998/l_204/l_20419980721de00370048.pdf

22 Es gibt im Wesentlichen drei Strategien für DFA: 1) Design für die meisten Nutzer ohne Änderungen, 2) Design zur leichten Anpassbarkeit an verschiedene Nutzer (z. B. durch anpassbare Schnittstellen), 3) Design im Hinblick auf die reibungslose Verbindung zu Hilfsgeräten.

23 European Design for All e-Accessibility Network, EDEAN-Internetseite http://www.e-accessibility.org/

DFA ermöglicht nicht nur **eine sorgfältige Berücksichtigung von Anforderungen an die Barrierefreiheit bei der Konzeption eines Produkts oder einer Dienstleistung**, sondern führt auch zu erheblichen **Einsparungen durch Vermeidung einer kostenträchtigen Umgestaltung oder technischer Behelfslösungen** nach ihrer Einführung.

Die grundlegende Struktur eines europäischen DFA-Curriculums für Ingenieure und Konstrukteure wurde ausgearbeitet, und verschiedene Pilot-Lehrgänge wurden in Mitgliedstaaten angeboten. Sein verstärkter Einsatz in der Hochschulausbildung und fachlichen Weiterbildung ist ein Weg, um die Barrierefreiheit der künftigen Informationsgesellschaft sicherzustellen[24]. Die Benennung eines Beauftragten für Barrierefreiheit, der für DFA in entsprechenden Organisationen zuständig ist, könnte eine Methode sein, das Thema Barrierefreiheit (eAccessibility) auf eine professionelle Basis zu stellen.

Barrierefreiheit des Internets

Auf eine Mitteilung der Kommission im Jahr 2001 über den Zugang zu öffentlichen Webseiten[25] folgten im Jahr 2002 Entschließungen des Rates und des Europäischen Parlaments. Aufgrund dessen haben sich die Mitgliedstaaten verpflichtet, ihre öffentlichen Webseiten gemäß internationalen Leitlinien[26] zugänglich zu machen.

Im Sachverständigengremium zur Barrierefreiheit (eAccessibility Expert Group) beobachtet die Kommission zusammen mit den Mitgliedstaaten neuere Entwicklungen, einschließlich neuer Evaluierungsmethoden[27] und Verfahren, Leistungsvergleiche, die Datensammlung und die Ermittlung vorbildlicher Praktiken. Die **Barrierefreiheit des Internets** macht barrierefreie Onlinedienste von öffentlichem Interesse möglich. Um diesen Prozess zu erleichtern, ist es wichtig, auf die Entwicklung von Autorenwerkzeugen hinzuwirken, die der Barrierefreiheit Rechnung tragen[28].

Da mehrere Mitgliedstaaten verbindliche Rechtsvorschriften erlassen haben, die die Barrierefreiheit vorschreiben, und für die deshalb die Bewertung der Einhaltung dieser Rechtsvorschriften nötig ist, hat sich die Notwendigkeit von Zertifizierungsregelungen zur Barrierefreiheit ergeben. In einem Workshop des Europäischen Komitees für Normung (CEN)[29] werden derzeit angemessene Lösungen hierfür geprüft.

Leistungsvergleiche und Beobachtung

Mehrere Mitgliedstaaten führen Leistungsvergleiche (Benchmarking) für die Barrierefreiheit und Beobachtungen (monitoring) ihrer einzelstaatlichen Rechtsvorschriften ein. Auf EU-Ebene wurde die Beobachtung der Barrierefreiheit des Internets vom Rat und dem Europäischen Parlament gefordert. Das Parlament hat auch die Beobachtung der Untertitelung und Audiobeschreibung beim digitalen Fernsehen gefordert.

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24 Bericht zum DFA-Curriculum des IDCnet-Projekts.

25 KOM(2001) 529 endg.

26 Die in Vorbereitung befindlichen Leitlinien (W3C/WAI/WCAG1.0 Web Content Accessibility Guidelines 1.0. Version 2) werden der inzwischen erfolgten Weiterentwicklung bei Web-Technologien Rechnung tragen und die Prüfung der Einhaltung vereinfachen.

27 Web Accessibility Benchmarking (WAB).

28 W3C/WAI/ATAG Authorising Tools Accessibility Guidelines (ATAG).

29 http://www.cenorm.be/cenorm/businessdomains/businessdomains/isss/activity/ws-wac.asp

Um eine angemessene europäische Politik in Fragen der Barrierefreiheit weiterentwickeln zu können, sind **europäische Daten, die für alle Mitgliedstaaten vergleichbar sind, unabdingbar**. Die Kommission wird auf den laufenden europäischen Beobachtungstätigkeiten aufbauen und dabei den revidierten Ansatz von Lissabon berücksichtigen.

Die Kommission führt einen Dialog mit Statistikämtern, um relevante Indikatoren zu erarbeiten und zu verbessern und besonders auch Fragen der Barrierefreiheit in bestehenden Indikatoren zur Geltung zu bringen.

Forschung

Die Forschung und technologische Entwicklung (FTE) ist ein grundlegendes Element bei der Schaffung einer barrierefreien Informationsgesellschaft. Fast 200 europäische FTE-Vorhaben seit 1991, die von der EG mit rund 200 Mio. € mitfinanziert wurden[30], haben bereits zu einer größeren Barrierefreiheit durch eine bessere Kenntnis der Zugangsprobleme und entsprechende Lösungsvorschläge beigetragen.

Spezifische Ergebnisse haben mögliche Lösungen aufgezeigt, etwa barrierefreie Dienste für die Fernbetreuung älterer Menschen daheim (u. a. Alarm- und Notfalldienste). Es wurden Lösungen entwickelt, um den Zugriff auf digitale Informationen durch Blinde und Sehbehinderte zu erleichtern (Text, Grafik, dreidimensionale Darstellungen, kodierte Musik, Fernsehprogramme). Systeme für Menschen mit motorischen Behinderungen, die die Mobilität, Handhabungsfähigkeit und Steuerung verbessern, wurden ebenso vorgeführt wie Dienste zur Verbesserung der Kommunikationsmöglichkeiten Hörbehinderter einschließlich der Generierung von Gebärdensprache und Lippenbewegungen. Andere Beispiele sind Computerumgebungen, die die integrierte Unterrichtung behinderter Kinder oder die Beschäftigung behinderter Erwachsener erleichtern sowie Beiträge zur Politikgestaltung (eEurope, d. h. Barrierefreiheit des Internets, Design für alle).

In vielen Fällen wurden die Ergebnisse von Gemeinschaftsprojekten erfolgreich weiterentwickelt und haben zu marktreifen Produkten geführt oder dank der gewonnenen Erkenntnisse zur Verbesserung der Barrierefreiheit von IKT-Produkten und -Dienstleistungen beigetragen.

In dem Maße, wie die technologische Entwicklung fortschreitet und neue technische Lösungen bietet, erlangen Forschungsinvestitionen Bedeutung, um das erhebliche Potenzial, das diese Technologien für Behinderte und ältere Menschen bietet, nutzbar zu machen. Im derzeitigen Vorschlag für das 7. Rahmenprogramm findet die **Notwendigkeit einer Weiterführung und Ausweitung der FTE zur Barrierefreiheit (eAccessibility)** Berücksichtigung, um die europäische Hilfsgerätebranche voranzubringen[31] und um die Barrierefreiheit zu einer alltäglichen Angelegenheit der Wirtschaft allgemein zu machen.

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30 Beispiele von Vorhaben siehe http://www.cordis.lu/ist/so/einclusion/home.html und http://www.cordis.lu/ist/directorate_f/einclusion/previous-research.htm

31 „Access to Assistive Technology in the EU“ (Zugang zu Hilfstechnologien in der EU), Bericht der GD EMPL, CE-V/5-03-003-EN-C.

6. VERBESSERUNG DER BARRIEREFREIHEIT (EACCESSIBILITY) VON IKT-PRODUKTEN UND -DIENSTLEISTUNGEN IN EUROPA – DREI NEUE ANSÄTZE

Zusätzlich zu den genannten laufenden Maßnahmen wird die Kommission auch drei Ansätze fördern, die bislang in Europa noch nicht in nennenswertem Ausmaß verfolgt wurden: (i) Anforderungen an die Barrierefreiheit im öffentlichen Beschaffungswesen, (ii) Zertifizierung der Barrierefreiheit und (iii) bessere Nutzung geltender Rechtsvorschriften.

Zwei Jahre nach Veröffentlichung dieser Mitteilung wird die Kommission das Ergebnis dieser Maßnahmen bewerten. Gemäß dem Grundsatz der „besseren Rechtsetzung“[32] wird die Kommission einen Meinungsaustausch mit den Mitgliedstaaten führen und vorbehaltlich einer umfassenden Folgenabschätzung möglicherweise zusätzliche Maßnahmen erwägen, wozu nötigenfalls auch Rechtsvorschriften gehören können.

1. Öffentliches Beschaffungswesen

Öffentliche Aufträge machen in Europa rund 16 % des Bruttoinlandsprodukts aus. Staatliche Stellen auf allen Ebenen können Anforderungen an die Barrierefreiheit der von ihnen eingekauften Güter und Dienstleistungen vorgeben. Die europäischen Richtlinien zur Vergabe öffentlicher Aufträge führen ausdrücklich die Möglichkeit an, DFA und Anforderungen an die Barrierefreiheit in den Ausschreibungsbedingungen (technische Spezifikationen) festzulegen.

Dies bedeutet ein eindeutiges Engagement für eine **Politik der Einbeziehung, bei der die Produkte und Dienstleistungen mehr Nutzern, Bürgern und Beschäftigten zugänglich gemacht werden**. Unternehmen der Branche werden dadurch motiviert, die Barrierefreiheit als integriertes Merkmal ihrer Produkte zu verwirklichen, wodurch ein größerer Markt für eine barrierefreie IKT entsteht. Solche Auswirkungen haben sich in den USA gezeigt, wo durch Rechtsvorschriften[33] geregelt ist, dass bei Beschaffungen des Bundes Anforderungen an die Barrierefreiheit festzulegen sind.

In der Online-Konsultation haben sich mehr als 90 % der Teilnehmer für den Grundsatz ausgesprochen, dass öffentliche Stellen bei den von ihnen beschafften IKT-Produkten und -Dienstleistungen die Barrierefreiheit vorschreiben. Einige Mitgliedstaaten haben in ihrem öffentlichen Beschaffungswesen bereits Anforderungen an die Barrierefreiheit berücksichtigt. Gemeinsame Anforderungen an die Barrierefreiheit auf EU-Ebene könnten die Marktfragmentierung verringern und die Interoperabilität stärken.

Es besteht die dringende Notwendigkeit, die Anforderungen an die Barrierefreiheit im öffentlichen Beschaffungswesen in Europa kohärent zu gestalten. Zu diesem Zweck bereitet die Kommission ein Mandat an die europäischen Normungsgremien vor, europäische Anforderungen an die Barrierefreiheit bei der Vergabe öffentlicher Aufträge für Produkte und Dienstleistungen im IKT-Bereich auszuarbeiten. Das Mandat liegt derzeit den Mitgliedstaaten zur Konsultation vor. Es soll den europäischen Normungsgremien vor Ende 2005 erteilt werden.

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[32] Europäische Kommission, „Europäisches Regieren – Ein Weißbuch“, KOM(2001) 428 endg.

[33] Paragraph 508 des Rehabilitation Act, geändert durch den Workforce Investment Act von 1998.

Die Kommission wird Erörterungen mit den Mitgliedstaaten zu diesem Thema im Rahmen der Sachverständigengruppe zur Barrierefreiheit (eAccessibility Expert Group)[34] anregen. Sie wird weiterhin Erfahrungsberichte aus Europa sammeln und den internationalen Dialog, besonders mit den USA im Rahmen der Transatlantischen Wirtschaftspartnerschaft (TEP), über die Harmonisierung von Anforderungen an die Barrierefreiheit bei öffentlichen Aufträgen fördern.

2. Zertifizierung

Beim Kauf von IKT-Produkten ist nicht immer klar ersichtlich, welche Anforderungen sie erfüllen. Besonders wichtig ist dies aber beim Kauf von barrierefreien IKT-Produkten. Einige Normen zur barrierefreien Gestaltung von Produkten und Dienstleistungen gibt es bereits oder sind in Ausarbeitung. Derzeit gibt es aber keine verlässlichen Mittel, anhand deren die Konformität von Produkten mit diesen Normen beurteilt werden könnte. Geeignete Zertifizierungsregelungen für die Barrierefreiheit von Produkten, Organisationsprozessen und Dienstleistungen (auf der Grundlage des europäischen Normenkonformitätszeichens „Key Mark“[35] und Europäischer Normen) könnten den Kunden, die barrierefreie Produkte und Dienstleistungen wünschen, zur Orientierung dienen und stellten eine gebührende Anerkennung der Bemühungen von Herstellern und Dienstleistern dar. Ebenso würde die Überwachung der Einhaltung von Rechtsvorschriften, die die Barrierefreiheit vorschreiben, vereinfacht.

In seiner Entschließung zu eAccessibility vom Januar 2003 forderte der Rat eine entsprechende Kennzeichnung von Gütern und Dienstleistungen. In der Ministererklärung zu eInclusion aus dem Jahr 2002 hieß es, dass ein europäisches Kennzeichen für die Zugänglichkeit von Internetseiten, das die Einhaltung von Leitlinien der W3C WAI[36] bescheinigt, zur Vermeidung der Marktfragmentierung in Betracht gezogen werden könnte.

Die Kommission wird gemeinsam mit den maßgebenden interessierten Kreisen **Möglichkeiten für die Entwicklung, Einführung und Umsetzung von Zertifizierungsregelungen für barrierefreie Produkte und Dienstleistungen** prüfen, einschließlich der Festlegung von Kriterien, Prüf- und Bewertungsmethoden. Die Möglichkeit der Eigenerklärung oder Zertifizierung durch Dritte wird ebenfalls geprüft werden, und die verschiedenen Optionen werden bezüglich ihrer Wirksamkeit verglichen[37]. Die Kommission wird eine Studie zu dieser Frage im letzten Vierteljahr 2005 in Auftrag geben[38].

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34 Diese Gruppe koordiniert Sachverständige aus den Mitgliedstaaten, die die Umsetzung des eEurope-Aktionsplans unterstützen.

35 http://www.cenorm.be/conf_assess/keymark/keymarktext.htm

36 World Wide Web Consortium (W3C) Web Accessibility Initiative (WAI).

37 Bei der Online-Konsultation sprach sich die Mehrheit der Teilnehmer (über 72 %) für die Zertifizierung und Kennzeichnung barrierefreier IKT-Produkte und Dienstleistungen aus, wobei erhebliche Unterschiede zwischen Zielgruppen bestanden (nur 61,4 % Zustimmung in der Gruppe *Hersteller, Dienstleister oder Anbieter von barrierefreien Produkten und Dienstleistungen*). Unter denjenigen, die sich für die Produktzertifizierung und -kennzeichnung aussprachen, befürworten die Gruppen *Privatpersonen mit Behinderung* und *Öffentliche Stellen* eindeutig verpflichtende Regelungen, während die Gruppe *Hersteller, Dienstleister oder Anbieter von barrierefreien Produkten und Dienstleistungen* freiwillige Verfahren bevorzugt und die übrigen Gruppen Standpunkte dazwischen einnehmen.

38 Siehe Abschnitt „Schlussfolgerungen und weiteres Vorgehen“.

3. Bessere Nutzung bestehender Rechtsvorschriften

Mehrere Richtlinien enthalten Bestimmungen, die zur Durchsetzung der Barrierefreiheit genutzt werden können (etwa die Richtlinie zur Gleichbehandlung in Beschäftigung und Beruf[39], die Richtlinie zu Funkanlagen und Telekommunikationsendgeräten und die Richtlinien zur Vergabe öffentlicher Aufträge). Die Zusammenarbeit mit den Mitgliedstaaten ist wichtig, um einen praktikablen Weg zur Nutzung dieser Richtlinien im Hinblick auf die Barrierefreiheit zu finden.

Besonders die Umsetzung der Empfehlungen der Inclusive Communications Group (INCOM)[40] würde einige Schwierigkeiten in Europa beheben. Empfohlen wurde beispielsweise, die einheitliche europäische Notrufnummer 112 auch für Behinderte nutzbar zu machen, die Frequenzen für funkgestützte Hilfsgeräte europaweit zu harmonisieren, Text- und Gebärdensprachkommunikation in Echtzeit über die Grenzen von Mitgliedstaaten hinaus zu ermöglichen und die Beschaffung barrierefreier Produkte durch öffentliche Stellen zu erleichtern. Eventuelle Schwierigkeiten bei der Anwendung bestehender Rechtsvorschriften in der Praxis sollten thematisiert werden.

Die Kommission wird in ihrem Dialog zur audiovisuellen Politik einheitliche oder interoperable Lösungen, etwa im Bereich des verbesserten Zugangs zu digitalen Fernsehprogrammen, fördern. Solche einheitlichen Lösungen werden es ermöglichen, Größenvorteile zu nutzen.

Das „eAccessibility-Potenzial" bestehender europäischer Rechtsvorschriften muss voll ausgeschöpft werden. Die Kommission wird 2005 eine Studie[41] zur Ermittlung vorbildlicher Praktiken in Auftrag geben und in einen Dialog mit den Mitgliedstaaten und maßgebenden interessierten Kreisen in den einschlägigen Gruppen, die mit der Umsetzung der Richtlinien befasst sind, eintreten.

7. SCHLUSSFOLGERUNGEN UND WEITERES VORGEHEN

Diese Mitteilung und die Ergebnisse der Online-Konsultation belegen und stützen die Entschlossenheit der Europäischen Kommission, Fragen der Barrierefreiheit (eAccessibility) anzugehen und Lösungen zu finden, die (i) den Mitgliedstaaten die dringende Notwendigkeit deutlich machen, gemeinsam auf einen kohärenten Ansatz zur eAccessibility hinzuarbeiten; (ii) die Wirtschaft motivieren, barrierefreie Lösungen für IKT-Produkte und -Dienstleistungen zu entwickeln; (iii) Nutzern mit Behinderungen gegenüber das aktive Engagement belegen, die Barrierefreiheit in der Informationsgesellschaft zu verbessern.

In den kommenden beiden Jahren (2005-2007) wird die Kommission weiterhin das Bewusstsein für dieses Thema stärken, die Nutzung der vorgeschlagenen Instrumente fördern, Erfahrungsberichte sammeln und die Konsultation der Beteiligten fortsetzen, um fundierte Entscheidungen im Bereich eAccessibility treffen zu können.

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39 Die Richtlinie 2000/78/EG des Rates vom 27. November 2000 untersagt die Diskriminierung von Behinderten unter anderem am Arbeitsplatz und sieht eine zumutbare Anpassung, auch der Informations- und Kommunikationstechnik, vor.

40 Diese Gruppe wurde 2003 eingerichtet und umfasst Vertreter von Mitgliedstaaten, Telekommunikationsbetreibern, Nutzerverbänden und Normungsgremien.

41 Siehe Abschnitt „Schlussfolgerungen und weiteres Vorgehen".

Zu diesem Zweck plant die Kommission die Vergabe einer Studie im letzten Vierteljahr 2005, die die Messung der Fortschritte im Bereich eAccessibility in Europa zum Gegenstand hat und politische Optionen zur Verbesserung der Barrierefreiheit ermitteln und bewerten soll. Die ersten Ergebnisse dieser Studie werden Anfang 2007 vorliegen.

Folgemassnahmen, die sich mit dem Stand der Barrierefreiheit befassen, werden zwei Jahre nach Veröffentlichung dieser Mitteilung erfolgen. Dazu gehört eine Bewertung der Ergebnisse der hier vorgeschlagenen Ansätze. Gemäß dem Grundsatz der besseren Rechtsetzung[42] und vorbehaltlich einer umfassenden Folgenabschätzung kann die Kommission möglicherweise zusätzliche Maßnahmen in Erwägung ziehen, falls nötig auch neue Rechtsvorschriften. Diese Arbeiten im Bereich eAccessibility werden wiederum zu der bereits für 2008 angekündigten europäischen Initiative zum Thema eInclusion[43] beitragen.

[42] Europäische Kommission, „Europäisches Regieren – Ein Weißbuch“, KOM(2001) 428 endg.

[43] KOM(205) 229, „i2010 - Eine europäische Informationsgesellschaft für Wachstum und Beschäftigung“.

In this list, the items in blue are still proposals, the ones marked with a "+" are instruments implementing the main legislation.

Dans cette liste, les entrées en bleu sont encore à l'état de proposition, celles marquées avec un "+" sont des instruments qui mettent en œuvre la législation principale.

Bei den blau markierten Einträgen dieser Liste handelt es sich noch um Vorschlaege. Die Instrumente zur Politikumsetzung sind mit einem "+" gekennzeichnet.

List of secondary legislation relevant to "disability"

1) **Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation**

2) **Directive 2001/85/EC (relating to special provisions for vehicles used for the carriage of passengers comprising more than eight seats in addition to the driver's seat)**

3) **Directive 1999/5/EC (on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity)**

4) **Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data**

5) **Directive 95/16/EC of the European Parliament and of the Council of 29 June 1995 on the approximation of the laws of the Member States relating to lifts (OJ L 312, 7.9.1995, p.1)**

6) **Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment**

7) **Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air Text with EEA relevance. OJ L 204, 26.7.2006 p.1-9**

8) **Regulation of the European Parliament and of the Council on rail passengers' rights and obligations**

9) **Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)**

10) **Regulation (EC) N° 1177/2003 of the EP and Council of 16 June 2003 concerning Community statistics on income and living conditions (EU-SILC)**

+ Commission Regulation (EC) N° 1981/2003 of 21 October 2003 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards definitions and updated definitions.

+ Commission Regulation (EC) N° 1982/2003 of 21 October 2003 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards the sampling and tracing rules.

+ Commission Regulation (EC) N° 1983/2003 of 7 November 2003 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards the list of target primary variables.

+ Commission regulation (EC) N° 28/2004 of 5 January 2004 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards the detailed content of intermediate and final quality reports.

+ Regulation (EC) N° 1553/2005 of the EP and Council of 7 September 2005 amending Regulation (EC) N° 1177/2003 of the EP and Council of 16 June 2003 concerning Community statistics on income and living conditions (EU-SILC).

+ Commission Regulation (EC) N° 698/2006 of 5 May 2006 amending Commission Regulation (EC) N° 1981/2003 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards definitions and updated definitions.

11) **Council Regulation (EC) 577/98 of 9 March on the organisation of the Labour Force Sample Survey in the Community (LFS):**

+ **Commission Regulation (EC) N° 1571/98 of 20 July 1998 implementing Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community (OJ L 205, 22.7.98, p.40)**

+ Commission Regulation (EC) N° 1924/1999 of 8 September 1999 implementing Council Regulation (EC) 577/98 as regards the 2000 to 2002 programme of ad hoc modules to the LFS

+ **Commission Regulation (EC) N° 1566/2001 of 12 July 2001 implementing Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community concerning the specification of the 2002 ad hoc module on employment of disabled people** *

+ **Commission Regulation (EC) N° 1575/2000 of 19 July 2000 implementing Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community concerning the codification to be used for data transmission from 2001 onwards (OJ L 181, 20.7.2000, p.16)**

+ Commission Regulation (EC) N° 1626/2000 of 24 July 2000 implementing Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community as regards the 2001 to 2004 program of ad hoc modules to the labour force survey.

+ Regulation (EC) N° 1991/2002 of the EP and of the Council of 8 October 2002 amending Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community.

+ Regulation (EC) N° 2257/2003 of the EP and of the Council of 25 November 2003 amending Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community to adapt the list of survey characteristics.

+ **Commission Regulation (EC) N° 430/2005 of 15 March 2005 implementing Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community concerning the codification to be used for data transmission from 2006 onwards and the use of a sub-sample for collection of data on structural variables (OJ L 71, 17.3.2006, p.36).**

12) **Regulation (EC) No 458/2007 of the European Parliament and of the Council of 25 April 2007 on the European system of integrated social protection statistics (ESSPROS)**

13) **Proposal for a Regulation of the European Parliament and of the Council on Community statistics on public health and health and safety at work – COM(2007) 46 final**

14) **Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax**

15) **Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty**

16) **Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes" (as amended by "Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes")**

17) **Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)**

18) **Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors**

19) **Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts**

20) **Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medical product s for human use, as amended by Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 (OJ L 136, 30.4.2004, p.34)**

21) **Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ L 149, 11.6.2005, p. 22)**

22) **Directive 2003/24/EC of the European Parliament and of the Council of 14 April 2003 amending Council Directive 98/18/EC on safety rules and standards for passenger ships - OJ L 123, 17.5.2003, p. 18-21)**

23) **Directive 96/48/EC on the interoperability of the trans-European high-speed rail system (O J L 235, 17.09.1996, p. 6-24) as amended by Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 (O J L 164, 30.4.2004, p. 114-163)**

24) **Directive 2001/16/EC of the European Parliament and of the Council on the interoperability of the trans European conventional rail system (O J L 110, 20.04.2001, p. 1-27) -as amended by Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 (O J L 164, 30.4.2004, p. 114-163)**

25) **Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (Text with EEA relevance)(O J L 263, 9.10.2007, p 1)**

26) **Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Text with EEA relevance) (OJ L 332, 18.12.2007, p. 27)**

27) **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**

28) **Decision 1720/2006/EC of the European Parliament and of the Council of 15 November 2007 establishing an action programme in the field of lifelong learning**

29) **Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD)**

30) **Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("Framework Directive").**

31) **Council Decision 2005/600/EC of 12 July 2006 on guidelines for the employment policies of the Member States**

+ Council Decision 2006/544/EC of 18 July 2006 on guidelines for the employment policies of the Member States

32) **Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December2006on establishing a financing instrument for the promotion of democracy and human rights worldwide**

33) **Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society**

34) **Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use**

35) **Proposal for a Regulation of the European Parliament and of the Council concerning the production and development of statistics on education and lifelong learning – COM(2005)625 final.**

36) **Directive 97/67/EC of the European Parliament and of the Council of 15 December on common rules for the development of the internal market of Community postal services and the improvement of quality of services**(OJ L15 of 21.01.1998), page 14) as amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (OJ, L176 of 05.07.2002, page 21).

37) **Decision No 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007 -2013)**

38) **Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin**

39) **Decision 2119/98 of the European Parliament and of the Council of 24 September 1998 setting up a network for the epidemiological surveillance and control of communicable diseases in the Community**

40) **Directive 2004/23/EC of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissue and cells**

41) **Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood components and amending Directive 2001/83/EC**

I

(Entschließungen, Empfehlungen und Stellungnahmen)

EMPFEHLUNGEN

GERICHTSHOF DER EUROPÄISCHEN UNION

Der folgende Text trägt der am 25. September 2012 in Luxemburg erlassenen neuen Verfahrensordnung des Gerichtshofs (ABl. L 265 vom 29.9.2012, S. 1) Rechnung. Er ersetzt die Hinweise zur Vorlage von Vorabentscheidungsersuchen durch die nationalen Gerichte (ABl. C 160 vom 28.5.2011, S. 1) und soll die mit dieser Verfahrensordnung eingeführten Neuerungen widerspiegeln, die sich sowohl auf die Frage, ob eine Vorlage zur Vorabentscheidung an den Gerichtshof erfolgen soll, als auch auf die Modalitäten einer solcher Vorlage auswirken können.

EMPFEHLUNGEN

an die nationalen Gerichte bezüglich der Vorlage von Vorabentscheidungsersuchen

(2012/C 338/01)

I — ALLGEMEINE BESTIMMUNGEN

Zuständigkeit des Gerichtshofs in Vorabentscheidungssachen

1. Die Vorlage zur Vorabentscheidung ist ein wichtiger Mechanismus des Rechts der Europäischen Union, der es den Gerichten der Mitgliedstaaten ermöglichen soll, eine einheitliche Auslegung und Anwendung dieses Rechts in der Union sicherzustellen.

2. Nach Art. 19 Abs. 3 Buchst. b des Vertrags über die Europäische Union (im Folgenden: EUV) und Art. 267 des Vertrags über die Arbeitsweise der Europäischen Union (im Folgenden: AEUV) entscheidet der Gerichtshof der Europäischen Union im Wege der Vorabentscheidung über die Auslegung des Unionsrechts und über die Gültigkeit der Handlungen der Organe, Einrichtungen und sonstigen Stellen der Union.

3. Nach Art. 256 Abs. 3 AEUV ist zwar in besonderen in der Satzung festgelegten Sachgebieten das Gericht für Vorabentscheidungen gemäß Art. 267 AEUV zuständig. Da die Satzung aber noch nicht entsprechend angepasst worden ist, entscheidet der Gerichtshof gegenwärtig noch immer allein im Wege der Vorabentscheidung.

4. Art. 267 AEUV räumt dem Gerichtshof zwar eine allgemeine Zuständigkeit auf diesem Gebiet ein, doch sehen verschiedene Bestimmungen des Primärrechts insoweit Ausnahmen oder vorübergehende Beschränkungen vor. Hierbei handelt es sich insbesondere um die Art. 275 und 276 AEUV sowie um Art. 10 des Protokolls (Nr. 36) über die Übergangsbestimmungen des Vertrags von Lissabon (ABl. EU C 83 vom 30. März 2010, S. 1) ([1]).

([1]) Nach Art. 10 Abs. 1 bis 3 des Protokolls Nr. 36 bleiben die Befugnisse des Gerichtshofs bezüglich der vor Inkrafttreten des Vertrags von Lissabon im Bereich der polizeilichen Zusammenarbeit und der justiziellen Zusammenarbeit in Strafsachen angenommenen und seither nicht geänderten Unionsrechtsakte für einen Zeitraum von höchstens fünf Jahren ab Inkrafttreten des Vertrags von Lissabon (1. Dezember 2009) unverändert. Während dieser Zeit können solche Rechtsakte daher nur Gegenstand eines Vorabentscheidungsersuchens durch die Gerichte derjenigen Mitgliedstaaten sein, die die Zuständigkeit des Gerichtshofs anerkannt haben, wobei jeder Mitgliedstaat bestimmt, ob die Möglichkeit, den Gerichtshof zu befassen, sämtlichen oder nur den letztinstanzlich entscheidenden Gerichten offensteht.

5. Da das Vorabentscheidungsverfahren auf der Zusammenarbeit zwischen dem Gerichtshof und den mitgliedstaatlichen Gerichten beruht, erscheint es im Interesse einer vollen Wirksamkeit dieses Verfahrens zweckdienlich, diesen Gerichten die folgenden Empfehlungen zu geben.

6. Diese Empfehlungen, die nicht verbindlich sind, sollen den dritten Titel der Verfahrensordnung des Gerichtshofs (Art. 93 bis 118) ergänzen und den mitgliedstaatlichen Gerichten eine Orientierung bieten, wann eine Vorlage zur Vorabentscheidung angebracht ist, und ihnen praktische Hinweise zur Form und zu den Wirkungen einer solchen Vorlage geben.

Die Rolle des Gerichtshofs im Vorabentscheidungsverfahren

7. Wie oben ausgeführt, besteht die Rolle des Gerichtshofs im Vorabentscheidungsverfahren darin, das Unionsrecht auszulegen oder über seine Gültigkeit zu entscheiden, nicht aber darin, dieses Recht auf den Sachverhalt anzuwenden, der dem Ausgangsverfahren zugrunde liegt. Dies ist vielmehr Sache des nationalen Gerichts, und der Gerichtshof hat somit weder über Tatsachenfragen, die im Rahmen des Ausgangsrechtsstreits aufgeworfen werden, noch über etwaige Meinungsverschiedenheiten bezüglich der Auslegung oder Anwendung des nationalen Rechts zu entscheiden.

8. Wenn der Gerichtshof über die Auslegung oder die Gültigkeit des Unionsrechts entscheidet, bemüht er sich darüber hinaus, eine der Entscheidung des Ausgangsrechtsstreits dienliche Antwort zu geben; die konkreten Konsequenzen daraus hat jedoch das vorlegende Gericht zu ziehen, gegebenenfalls indem es die fragliche nationale Bestimmung nicht anwendet.

Die Entscheidung, eine Frage zur Vorabentscheidung vorzulegen

Urheber des Vorabentscheidungsersuchens

9. Nach Art. 267 AEUV kann grundsätzlich jedes mitgliedstaatliche Gericht, das in einem auf den Erlass einer Entscheidung mit Rechtsprechungscharakter gerichteten Verfahren zu entscheiden hat, den Gerichtshof um Vorabentscheidung ersuchen. Dieser legt den Begriff „Gericht" als eigenständigen Begriff des Unionsrechts aus und stellt dabei auf eine Reihe von Faktoren ab, wie gesetzliche Grundlage der ersuchenden Einrichtung, ihr ständiger Charakter, obligatorischer Charakter ihrer Gerichtsbarkeit, streitiges Verfahren, Anwendung von Rechtsnormen durch diese Einrichtung sowie deren Unabhängigkeit.

10. Die Entscheidung, den Gerichtshof um Vorabentscheidung zu ersuchen, liegt unabhängig davon, ob die Parteien des Ausgangsverfahrens dies angeregt haben, allein beim nationalen Gericht.

Ersuchen um Auslegung

11. Nach Art. 267 AEUV ist jedes Gericht befugt, dem Gerichtshof ein Vorabentscheidungsersuchen zur Auslegung einer Norm des Unionsrechts vorzulegen, wenn es dies zur Entscheidung des bei ihm anhängigen Rechtsstreits für erforderlich hält.

12. Ein Gericht, dessen Entscheidungen nicht mehr mit Rechtsmitteln des innerstaatlichen Rechts angefochten werden können, ist jedoch verpflichtet, dem Gerichtshof ein solches Ersuchen vorzulegen, es sei denn, es existiert bereits eine einschlägige Rechtsprechung (und der möglicherweise neue Kontext weckt keine echten Zweifel an der Möglichkeit, diese Rechtsprechung auf den Fall anzuwenden) oder die richtige Auslegung der fraglichen Rechtsnorm ist offenkundig.

13. Demnach kann ein nationales Gericht insbesondere dann, wenn es sich durch die Rechtsprechung des Gerichtshof für ausreichend unterrichtet hält, selbst über die richtige Auslegung des Unionsrechts und seine Anwendung auf den von ihm festgestellten Sachverhalt entscheiden. Ein Vorabentscheidungsersuchen kann sich jedoch als besonders nützlich erweisen, wenn es sich um eine neue Auslegungsfrage handelt, die von allgemeiner Bedeutung für die einheitliche Anwendung des Unionsrechts ist, oder wenn die vorhandene Rechtsprechung auf einen noch nicht vorgekommenen Sachverhalt nicht anwendbar erscheint.

14. Damit der Gerichtshof den Gegenstand des Ausgangsrechtsstreits und die darin aufgeworfenen Fragen richtig erfassen kann, sollte das nationale Gericht für jede der vorgelegten Fragen darlegen, inwiefern die erbetene Auslegung zum Erlass seines Urteils erforderlich ist.

Ersuchen um Prüfung der Gültigkeit

15. Die Gerichte der Mitgliedstaaten haben zwar die Möglichkeit, die vor ihnen geltend gemachten Ungültigkeitsgründe zurückzuweisen, doch kann nur der Gerichtshof einen Rechtsakt eines Organs, einer Einrichtung oder einer sonstigen Stelle der Union für ungültig erklären.

16. Jedes nationale Gericht **muss** somit ein Vorabentscheidungsersuchen an den Gerichtshof richten, wenn es Zweifel an der Gültigkeit eines solchen Rechtsakts hat, und die Gründe angeben, aus denen dieser nach seiner Auffassung ungültig sein könnte.

17. Das nationale Gericht kann jedoch, wenn es ernsthafte Zweifel an der Gültigkeit eines Rechtsakts eines Organs, einer Einrichtung oder einer sonstigen Stelle der Union hat, auf den eine nationale Maßnahme gestützt ist, ausnahmsweise die Anwendung dieses Rechtsakts vorläufig aussetzen oder insoweit sonstige einstweilige Maßnahmen treffen. In diesem Fall ist das Gericht verpflichtet, die Gültigkeitsfrage dem Gerichtshof vorzulegen und dabei die Gründe anzugeben, aus denen es diesen Rechtsakt für ungültig hält.

Der geeignete Zeitpunkt für eine Vorlage zur Vorabentscheidung

18. Das nationale Gericht kann ein Vorabentscheidungsersuchen an den Gerichtshof richten, sobald es feststellt, dass es für die Entscheidung des Rechtsstreits auf die Auslegung oder die Gültigkeit des Unionsrechts ankommt. In welchem Verfahrensstadium das Ersuchen zu stellen ist, kann das betreffende Gericht selbst am besten beurteilen.

19. Es ist jedoch wünschenswert, dass die Entscheidung über die Vorlage zur Vorabentscheidung erst in einem Verfahrensstadium getroffen wird, in dem das vorlegende Gericht in der Lage ist, den tatsächlichen und rechtlichen Rahmen der Rechtssache zu bestimmen, damit der Gerichtshof über alle Informationen verfügt, die er benötigt, um sich gegebenenfalls davon überzeugen zu können, dass das Unionsrecht auf den Ausgangsrechtsstreit anwendbar ist. Im Interesse einer geordneten Rechtspflege kann es außerdem sinnvoll sein, wenn die Vorlage erst nach streitiger Verhandlung erfolgt.

Form und Inhalt des Vorabentscheidungsersuchens

20. Die Form der Entscheidung, mit der das Gericht eines Mitgliedstaats dem Gerichtshof eine oder mehrere Fragen zur Vorabentscheidung vorlegt, richtet sich nach den Verfahrensregeln des nationalen Rechts. Es ist jedoch zu berücksichtigen, dass dieses Dokument die Grundlage des Verfahrens vor dem Gerichtshof bilden wird und dass der Gerichtshof über Informationen verfügen muss, die es ihm ermöglichen, dem vorlegenden Gericht eine sachdienliche Antwort zu geben. Außerdem wird nur das Vorabentscheidungsersuchen den Parteien des Ausgangsrechtsstreits und den anderen Beteiligten im Sinne des Art. 23 der Satzung, insbesondere den Mitgliedstaaten, übermittelt, um ihre etwaigen schriftlichen Erklärungen einzuholen.

21. Da das Vorabentscheidungsersuchen in alle Amtssprachen der Europäischen Union übersetzt werden muss, sollte es einfach, klar und präzise abgefasst sein und keine überflüssigen Elemente enthalten.

22. Ein Text von nicht mehr als ungefähr zehn Seiten reicht oft aus, um den Rahmen eines Vorabentscheidungsersuchens angemessen darzustellen. Trotz der Knappheit muss das Ersuchen jedoch ausführlich genug sein und alle relevanten Informationen enthalten, damit der Gerichtshof und die zur Einreichung von Erklärungen Berechtigten den tatsächlichen und rechtlichen Rahmen des Ausgangsrechtsstreits richtig erfassen können. Nach Art. 94 der Verfahrensordnung muss das Vorabentscheidungsersuchen außer den dem Gerichtshof zur Vorabentscheidung vorgelegten Fragen Folgendes enthalten:

— eine kurze Darstellung des Streitgegenstands und des maßgeblichen Sachverhalts, wie er vom vorlegenden Gericht festgestellt worden ist, oder zumindest eine Darstellung der tatsächlichen Umstände, auf denen die Vorlagefragen beruhen;

— den Wortlaut der möglicherweise auf den Fall anwendbaren nationalen Vorschriften und gegebenenfalls die einschlägige nationale Rechtsprechung ([1]);

([1]) Das vorlegende Gericht sollte zu diesen Vorschriften und ihrer Veröffentlichung genaue Fundstellen, wie z. B. die Seite eines Amtsblatts oder einer bestimmten Rechtsprechungssammlung, angeben oder auf eine Internetseite verweisen.

— eine Darstellung der Gründe, aus denen das vorlegende Gericht Zweifel bezüglich der Auslegung oder der Gültigkeit bestimmter Vorschriften des Unionsrechts hat, und den Zusammenhang, den es zwischen diesen Vorschriften und dem auf den Ausgangsrechtsstreit anwendbaren nationalen Recht herstellt.

23. Die in dem Fall einschlägigen Vorschriften des Unionsrechts sind so genau wie möglich im Vorabentscheidungsersuchen anzugeben, das gegebenenfalls eine kurze Zusammenfassung des wesentlichen Vorbringens der Parteien des Ausgangsrechtsstreits enthält.

24. Schließlich kann das vorlegende Gericht, wenn es meint, dass es dazu in der Lage ist, knapp darlegen, wie die zur Vorabentscheidung vorgelegten Fragen seines Erachtens beantwortet werden sollten. Dies kann sich für den Gerichtshof insbesondere dann als nützlich erweisen, wenn er im beschleunigten Verfahren oder im Eilverfahren über das Ersuchen entscheiden soll.

25. Um die Lektüre des Vorabentscheidungsersuchens zu erleichtern, muss es maschinengeschrieben beim Gerichtshof eingehen. Damit dieser auf das Ersuchen Bezug nehmen kann, sollten die einzelnen Seiten und Absätze der Vorlageentscheidung – die datiert und unterzeichnet sein muss – nummeriert werden.

26. Die Vorabentscheidungsfragen müssen in einem gesonderten und klar kenntlich gemachten Teil der Vorlageentscheidung, vorzugsweise an deren Anfang oder Ende, aufgeführt sein. Sie müssen aus sich heraus verständlich sein, ohne dass eine Bezugnahme auf die Begründung des Ersuchens, die den notwendigen Kontext für ein sachgerechtes Verständnis der Tragweite der Rechtssache enthält, erforderlich wäre.

27. Im Rahmen des Vorabentscheidungsverfahrens übernimmt der Gerichtshof grundsätzlich die in der Vorlageentscheidung enthaltenen Angaben, einschließlich der Namensangaben und personenbezogenen Daten. Es ist daher Sache des vorlegenden Gerichts, in seinem Vorabentscheidungsersuchen, wenn es dies für erforderlich hält, bestimmte Angaben unkenntlich zu machen oder die von dem Ausgangsrechtsstreit betroffene(n) Person(en) oder Einrichtung(en) zu anonymisieren.

28. Nach Eingang des Vorabentscheidungsersuchens kann auch der Gerichtshof eine solche Anonymisierung vornehmen, und zwar von Amts wegen oder auf Ersuchen des vorlegenden Gerichts oder einer Partei des Ausgangsrechtsstreits. Ein solches Ersuchen muss allerdings, um wirksam sein zu können, so früh wie möglich im Verfahren gestellt werden, jedenfalls vor der Veröffentlichung der Mitteilung zur betreffenden Rechtssache im *Amtsblatt der Europäischen Union* und der Zustellung des Vorabentscheidungsersuchens an die in Art. 23 der Satzung genannten Beteiligten.

Die Wirkungen der Vorabentscheidungsvorlage auf das nationale Verfahren

29. Das nationale Gericht bleibt zwar, insbesondere im Rahmen eines Ersuchens um Prüfung der Gültigkeit, zuständig, einstweilige Maßnahmen zu erlassen (siehe oben, Nr. 17); die Einreichung eines Vorabentscheidungsersuchens führt jedoch dazu, dass das nationale Verfahren bis zur Entscheidung des Gerichtshofs ausgesetzt wird.

30. Im Interesse eines ordnungsgemäßen Ablaufs des Vorabentscheidungsverfahrens vor dem Gerichtshof und zur Gewährleistung seiner praktischen Wirksamkeit ist das vorlegende Gericht gehalten, den Gerichtshof über alle Verfahrensschritte zu unterrichten, die sich auf die Vorlage auswirken können, insbesondere über die Zulassung weiterer Beteiligter zum nationalen Verfahren.

Kosten und Prozesskostenhilfe

31. Das Vorabentscheidungsverfahren vor dem Gerichtshof ist gerichtskostenfrei. Der Gerichtshof entscheidet nicht über die Kosten der Parteien des beim vorlegenden Gericht anhängigen Rechtsstreits; diese Entscheidung ist Sache des vorlegenden Gerichts.

32. Verfügt eine Partei des Ausgangsrechtsstreits nicht über ausreichende Mittel, kann ihr das vorlegende Gericht, soweit dies nach nationalem Recht zulässig ist, Prozesskostenhilfe für die im Verfahren vor dem Gerichtshof entstehenden Kosten, insbesondere die Kosten der Vertretung, bewilligen. Der Gerichtshof kann ebenfalls Prozesskostenhilfe bewilligen, wenn die Partei nicht bereits auf nationaler Ebene Hilfe erhält oder diese die im Verfahren vor dem Gerichtshof entstehenden Kosten nicht – oder nur teilweise – abdeckt.

Der Schriftverkehr zwischen dem Gerichtshof und den nationalen Gerichten

33. Das Vorabentscheidungsersuchen und die relevanten Unterlagen (insbesondere gegebenenfalls die Verfahrensakten oder Kopien davon) sind dem Gerichtshof unmittelbar vom nationalen Gericht, das ihn befasst, zu übersenden. Die Sendung ist per Einschreiben an die Kanzlei des Gerichtshofs (Rue du Fort Niedergrünewald, L-2925 Luxemburg) zu richten.

34. Bis zur Zustellung der Entscheidung über das Vorabentscheidungsersuchen an das vorlegende Gericht bleibt die Kanzlei des Gerichtshofs mit diesem Gericht in Verbindung und übermittelt ihm Kopien der Verfahrensunterlagen.

35. Der Gerichtshof übermittelt dem vorlegenden Gericht seine Entscheidung. Er würde es begrüßen, wenn dieses Gericht ihn darüber informieren würde, wie es auf die Vorabentscheidung im Ausgangsrechtsstreit reagieren wird, und wenn es ihm seine Endentscheidung übermitteln würde.

II — BESONDERE BESTIMMUNGEN ÜBER VORLAGEN ZUR VORABENTSCHEIDUNG, BEI DENEN DRINGLICHKEIT BESTEHT

36. Unter den in Art. 23a der Satzung und den Art. 105 bis 114 der Verfahrensordnung genannten Voraussetzungen kann eine Vorlage zur Vorabentscheidung unter bestimmten Bedingungen einem beschleunigten Verfahren oder einem Eilverfahren unterworfen werden.

Die Voraussetzungen für die Anwendung des beschleunigten Verfahrens und des Eilverfahrens

37. Die Entscheidung, diese Verfahren durchzuführen, wird vom Gerichtshof getroffen. Sie ergeht grundsätzlich nur auf Antrag des vorlegenden Gerichts, der zu begründen ist. Ausnahmsweise kann der Gerichtshof jedoch von Amts wegen beschließen, eine Vorlage zur Vorabentscheidung dem beschleunigten Verfahren oder dem Eilverfahren zu unterwerfen, wenn die Art oder die Umstände der Rechtssache dies zu erfordern scheinen.

38. Nach Art. 105 der Verfahrensordnung kann eine Vorlage zur Vorabentscheidung einem **beschleunigten Verfahren** unter Abweichung von den Bestimmungen der Verfahrensordnung unterworfen werden, wenn die Art der Rechtssache ihre rasche Erledigung erfordert. Da dieses Verfahren alle Verfahrensbeteiligten, insbesondere die Mitgliedstaaten, die ihre schriftlichen oder mündlichen Erklärungen in erheblich kürzeren als den üblichen Fristen abgeben müssen, erheblichen Zwängen unterwirft, sollte seine Anwendung nur unter besonderen Umständen beantragt werden, die es rechtfertigen, dass sich der Gerichtshof rasch zu den Vorlagefragen äußert. Dass von der Entscheidung, die das vorlegende Gericht erlassen muss, nachdem es den Gerichtshof zur Vorabentscheidung angerufen hat, eine große Zahl von Personen oder Rechtsverhältnissen potenziell betroffen ist, stellt für sich keinen außergewöhnlichen Umstand dar, der die Anwendung des beschleunigten Verfahrens rechtfertigen könnte ([1]).

39. Dies gilt erst recht für das **Eilvorabentscheidungsverfahren** nach Art. 107 der Verfahrensordnung. Dieses Verfahren, das nur in den Bereichen statthaft ist, die von Titel V des Dritten Teils des AEUV über den Raum der Freiheit, der Sicherheit und des Rechts erfasst sind, erlegt den daran Beteiligten nämlich noch größere Zwänge auf, da insbesondere die Zahl der Beteiligten, die schriftliche Erklärungen einreichen dürfen, begrenzt wird und bei äußerster Dringlichkeit vom schriftlichen Verfahren vor dem Gerichtshof ganz abgesehen werden kann. Dieses Verfahren sollte daher nur beantragt werden, wenn es nach den Umständen absolut erforderlich ist, dass der Gerichtshof die Fragen des vorlegenden Gerichts in kürzester Zeit beantwortet.

40. Insbesondere wegen der Vielfalt und des evolutiven Charakters der Unionsvorschriften über den Raum der Freiheit, der Sicherheit und des Rechts können diese Umstände hier nicht erschöpfend aufgezählt werden. Jedenfalls könnte ein nationales Gericht einen Antrag auf Eilvorabentscheidungsverfahren z. B. in folgenden Fällen in Betracht ziehen: in dem in Art. 267 Abs. 4 AEUV vorgesehenen Fall des Freiheitsentzugs oder der Freiheitsbeschränkung, wenn die aufgeworfene Frage für die Beurteilung der Rechtsstellung des Betroffenen entscheidend ist, oder in einem Rechtsstreit über das elterliche Erziehungs- und Sorgerecht, wenn die Zuständigkeit des gemäß dem Unionsrecht angerufenen Gerichts von der Antwort auf die Vorlagefrage abhängt.

([1]) Für einen Überblick der Umstände, die zur Annahme oder zur Ablehnung eines Antrags auf Durchführung des beschleunigten Verfahrens nach Art. 104a der Verfahrensordnung des Gerichtshofs vom 19. Juni 1991 in geänderter Fassung geführt haben, vgl. Beschlüsse des Präsidenten des Gerichtshofs auf der Website www.curia.europa.eu (diese Beschlüsse sind unter der Rubrik „Rechtsprechung“ einsehbar, indem im dortigen „Suchformular“ im Suchfenster „Dokumente“ unter der Rubrik „Nicht in der amtlichen Sammlung veröffentlichte Dokumente“ im Suchfenster „Beschlüsse“ der Eintrag „Beschleunigtes Verfahren“ ausgewählt wird).

Der Antrag auf Anwendung des beschleunigten Verfahrens oder des Eilverfahrens

41. Damit der Gerichtshof schnell entscheiden kann, ob das beschleunigte Verfahren oder das Eilvorabentscheidungsverfahren durchzuführen ist, muss der Antrag die rechtlichen und tatsächlichen Umstände, aus denen sich die Dringlichkeit ergibt, und insbesondere die Gefahren genau darlegen, die bei Anwendung des gewöhnlichen Verfahrens drohen.

42. Soweit möglich, gibt das vorlegende Gericht knapp an, wie die Vorlagefragen beantwortet werden sollten. Dies erleichtert die Stellungnahme der Parteien des Ausgangsverfahrens und der sonstigen Verfahrensbeteiligten sowie die Entscheidung des Gerichtshofs und trägt damit zur Schnelligkeit des Verfahrens bei.

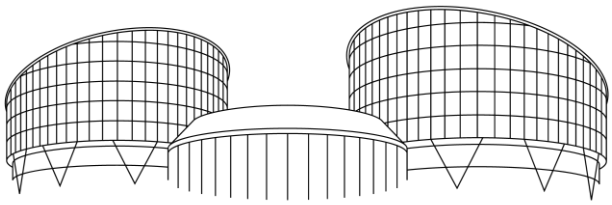
43. Der Antrag auf Anwendung des beschleunigten Verfahrens oder des Eilverfahrens ist in einer unmissverständlichen Form einzureichen, die es der Kanzlei des Gerichtshofs erlaubt, unmittelbar festzustellen, dass die Angelegenheit eine spezifische Behandlung erfordert. Zu diesem Zweck wird das vorlegende Gericht gebeten, anzugeben, welches der beiden Verfahren im konkreten Fall erforderlich ist, und in seinem Ersuchen auf den einschlägigen Artikel der Verfahrensordnung (Art. 105 über das beschleunigte Verfahren oder Art. 107 über das Eilverfahren) Bezug zu nehmen. Diese Angabe hat in seiner Vorlageentscheidung an herausgehobener Stelle zu stehen (z. B. im Kopf der Entscheidung oder in einem gesonderten gerichtlichen Schriftstück). Gegebenenfalls kann das vorlegende Gericht in einem Begleitschreiben in zweckdienlicher Weise auf diesen Antrag verweisen.

44. Zur Vorlageentscheidung selbst wird darauf hingewiesen, dass es bei Vorliegen von Dringlichkeit umso wichtiger ist, dass sie knapp gefasst ist, als dies zur Schnelligkeit des Verfahrens beiträgt.

Der Schriftverkehr zwischen dem Gerichtshof, dem vorlegenden Gericht und den Parteien des Ausgangsverfahrens

45. Um die Kommunikation mit dem vorlegenden Gericht und den Parteien des dort anhängigen Verfahrens zu beschleunigen und zu erleichtern, wird das Gericht, das die Anwendung des beschleunigten Verfahrens oder des Eilverfahrens beantragt, gebeten, die E-Mail-Adresse und gegebenenfalls die Fax-Nummer, die der Gerichtshof verwenden kann, sowie die E-Mail-Adressen und gegebenenfalls die Fax-Nummern der Parteivertreter anzugeben.

46. Eine Kopie der unterschriebenen Vorlageentscheidung und des Antrags auf Anwendung des beschleunigten Verfahrens oder des Eilverfahrens kann dem Gerichtshof vorab per E-Mail (ECJ-Registry@curia.europa.eu) oder per Fax (+352 43 37 66) übermittelt werden. Die Behandlung des Ersuchens und des Antrags kann unmittelbar nach Eingang dieser Kopie beginnen. Gleichwohl ist das Original dieser Schriftstücke dem Gerichtshof binnen kürzester Frist zu übermitteln.



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF JASINSKIS v. LATVIA

(Application no. 45744/08)

JUDGMENT

STRASBOURG

21 December 2010

FINAL

21/03/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Jasinskis v. Latvia**,**

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, *President,*
Elisabet Fura,
Corneliu Bîrsan,
Alvina Gyulumyan,
Egbert Myjer,
Ineta Ziemele,
Ann Power, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 30 November 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 45744/08) against the Republic of Latvia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Latvian national, Mr Aleksandrs Jasinskis ("the applicant"), on 25 June 2008.

2. The applicant was represented by Ms A. Dāce, a lawyer practising in Rīga. The Latvian Government ("the Government") were represented by their Agent, Mrs I. Reine.

3. The applicant alleged, in particular, that his son had died after being taken into police custody and that the police were responsible for his death. He alleged in addition that the subsequent investigation had not been effective.

4. On 27 January 2009 the President of the Third Section decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Events leading to the death of the applicant's son

5. The applicant was born in 1933 and lives in Balvi. He is the father of Mr Valdis Jasinskis ("the applicant's son"), a Latvian national who was born in 1962 and who died on 28 February 2005.

6. On 26 February 2005 the applicant's son (who had been deaf and mute since birth) and several of his friends were drinking beer in a bar in Balvi. Witness statements differ somewhat as to how much alcohol the applicant's son consumed that night. After the applicant's son's death, a forensic expert took into the account witness testimonies and used Widmark's equation to arrive at the estimate that, after finishing his last drink, the alcohol concentration in the applicant's son's blood would have been 4.52 ‰, which meant that all traces of alcohol would have left his body approximately thirty hours later. The expert, however, noted that this figure was approximate. The applicant disagreed with the estimate, noting that such a concentration of alcohol would be deadly.

7. After leaving the bar, the applicant's son and his friends walked to a nearby school where a party was taking place. In front of the school entrance M.I. – a minor – pushed the applicant's son, who fell backwards down the stairs in front of the school, hit his head against the ground and lost consciousness for several minutes. The persons present then tried to attract the attention of the security guards, who were inside the school, by knocking on the locked doors. In the process a glass pane of the entrance doors was cracked. It appears from the subsequent investigation that the glass was broken by one of the students of the school.

8. The security guards came outside and saw the applicant's son lying unconscious on the ground. They called an ambulance and the police. After the applicant's son had regained consciousness, the security guards sat him down on the stairs of the school.

9. The police arrived on the scene at 1.40 a.m. They later reported that the applicant's son had been unable to stand up on his own and had been flailing his arms. Upon their arrival the officers were informed that the applicant's son was deaf and mute and that he had fallen down the stairs. They were also told that he was probably responsible for breaking the glass of the entrance doors.

10. The policemen decided not to wait for the ambulance that had been called and took the applicant's son to the Balvi District Police station in order to initiate administrative proceedings for petty hooliganism and public drunkenness. The policemen alleged that in the car on the way to the police

station the applicant's son had behaved aggressively and had been flailing his arms and kicking.

11. The record of the administrative detention of the applicant's son indicates that the reason for the detention was to "sober up" the detainee. The only injury that was noted was a graze on his face. The same record also notes that at 5.50 p.m. on the following day the applicant's son was released from detention because he had "sobered up" (but see paragraph 16 below).

12. The policemen alleged that on the premises of the police station the applicant's son had continued to behave aggressively by flailing his arms. The applicant submits that it is probable that his son was trying to communicate with the policemen by using gestures, because they had taken away the notebook he normally used to communicate with persons who did not understand sign language.

13. Shortly afterwards the ambulance crew contacted the police station. The officer on duty informed them that no medical aid was necessary, since the applicant's son was merely intoxicated. He was then placed in the sobering-up room. For a while he kept knocking on the doors and walls but stopped doing so after a while and went to sleep.

14. At 8.40 a.m. in the morning the duty officers tried to wake the applicant's son but he only opened his eyes and, according to the conclusions of the internal investigation of the police, "did not want to wake up".

15. Approximately fourteen hours after the applicant' son had been brought to the police station (at approximately 3.30 p.m.) one of the policemen considered that he had been "sleeping for too long" and called an ambulance. The doctors apparently refused to take Valdis Jasinskis to a hospital (during the internal investigation the officers reported that the ambulance crew had indicated that he was "faking" and was healthy). The Government dispute that fact, observing that it had not been mentioned in the report on the quality of medical care provided to the applicant's son (see below, paragraph 18). Nevertheless, the fact of the ambulance crew's initial refusal is confirmed by the statements of the police officers who were present at the police station at the time, which have been recounted in several documents, such as the conclusions of the internal inquiry of 4 April 2005 (see below, paragraph 19), the report of the additional internal inquiry of 5 August 2005 (see below, paragraph 22), the 2 November 2005 decision to terminate the criminal proceedings (see below, paragraph 23) and others.

16. The applicant's son was taken to hospital only after repeated requests from his father, who had at that time been informed of his son's arrest and had arrived at the police station. From the reports of the internal investigation it appears that the transfer took place at 5.30 p.m. on 27 February 2005. Upon arrival at the hospital it was noted that the applicant's son was conscious but "non-communicative". His condition was

characterised as "serious" and he was diagnosed with severe intoxication with unknown alcohol surrogates. At 9.10 p.m. the applicant's son lost consciousness and his condition was described as "very serious". At 11.30 p.m. the medical report was updated to note that the presence of an intracranial haematoma could not be excluded but that because of his condition the patient could not be transported for a CT scan (which was only available at a hospital in Rēzekne, some eighty kilometres from Balvi). The applicant's son died at 2.00 a.m. on 28 February 2005.

17. A post-mortem examination of the applicant's son's body was carried out on 28 February 2005. It disclosed fractures of the frontal, parietal and occipital bones of the applicant's son's cranium, oedema in the brain as well as multiple other injuries to the head and brain. The expert concluded that those injuries had been the cause of death. It was further established that neither the blood nor the urine of the applicant's son contained any traces of alcohol.

B. Investigation

1. Concerning medical care

18. On 9 May 2005 an expert of the Inspectorate of Quality Control for Medical Care and Working Capability ("MADEKKI") issued a report on the quality of medical aid provided to the applicant's son before his death. The report noted several shortcomings in the treatment of the applicant's son at the police station. In particular, it was noted that no information was available concerning the health condition of the applicant's son during the time spent in the police station or when he was placed in the sobering-up room. It was further concluded that the ambulance had been called to the police station belatedly. The final conclusion of the report was that the death of the applicant's son was not attributable to any lack of professionalism on behalf of the doctor who had treated him in the hospital but rather to the severity of his injuries.

2. Concerning criminal responsibility

19. After the death of the applicant's son the Balvi District Police Department launched an internal inquiry. On 4 April 2005 the final report of the inquiry was approved by the head of that department. The report concluded that the policemen present at the police station during the night in question had acted in accordance with the internal guidelines and the legislation governing police work. The report further referred to an article in the local newspaper in which a surgeon had expressed the opinion that injuries such as the ones sustained by the applicant's son were difficult to detect, in particular if the injured person was intoxicated. The final

conclusion was that the staff of the department had committed no infractions.

20. On 26 May 2005 an investigator of the Balvi District Police Department adopted a decision to terminate the criminal proceedings against M.I., which had been initiated on 2 March 2005. In this decision several witness testimonies were recounted and some of them seemed to indicate that the security guards who had been on duty during the party at the school had hit the applicant's son in the head with a rubber truncheon. It was also found that upon the applicant's son's arrival at the police station the policemen had noted that he did not have any visible injuries and that he was heavily intoxicated. The decision further remarked that at 5.30 p.m. at the police station a doctor had observed that the applicant's son was conscious and had no traces of having been hit on his body or head. There was some dried blood in one of his nostrils. However, considering that the applicant's son was deaf and mute and thus unable to communicate orally any complaints about his health, he had been diagnosed as being intoxicated with alcohol surrogates and taken to the Balvi hospital. It was further noted that the internal inquiry of the Balvi District Police Department had established that the policemen in charge had not committed any offence. Lastly it was established that M.I.'s actions did not constitute *corpus delicti*. Therefore, the criminal proceedings concerning the death of the applicant's son were terminated.

21. On 17 June 2005 the Balvi District Public Prosecutor's Office decided to quash the decision of 26 May and remitted the case for additional investigation. Among other things, the public prosecutor indicated that it was necessary to determine whether it would have been possible to correctly diagnose the applicant's son's injuries had he been taken to hospital earlier than he was, whether the police had adequately taken into account the fact that he was deaf and mute, and whether there were any visible external signs of the injuries that eventually caused his death.

22. On 5 August 2005 the head of the Balvi District Police Department approved a report drawn up in the context of an additional internal inquiry that had been prompted by the decision of 17 June. Once again no wrongdoings on the part of the police officers were established. In particular, it was noted that even though an internal police instruction concerning sobering-up rooms prohibited the placement therein of persons with visible physical injuries, the applicant's son did not fall within that category. The report confirmed that his injuries had not been obvious, in that regard referring to the visit of the ambulance crew to the police station at 3.50 p.m. on 27 February 2005, during which no injuries had been noted.

23. On 2 November 2005 the Balvi District Police Department terminated the criminal proceedings for the second time. The decision pointed out, *inter alia*, that even if the applicant's son had been taken to hospital sooner, it was not certain that he would have received the correct

diagnosis due to the absence of a CT scanner and a specialist neurologist at Balvi hospital. It was also established that since the applicant's son's injuries were not visible, the police officers in question had not breached the law.

24. On 8 November 2005 the Balvi District Public Prosecutor's Office decided to quash the decision of 2 November 2005 on the ground that the evidence had not been examined.

25. On 10 November 2005 the Balvi District Police Department decided to terminate the criminal proceedings. The text of the decision was practically identical to that of 2 November 2005.

26. As of 19 September 2006 the applicant was represented by a lawyer. Pursuant to a request by the applicant's representative, on 1 November 2006 a prosecutor of the Office of the Prosecutor General quashed the decision of 10 November 2005 and sent the case to the Bureau of Internal Security of the State Police (*Valsts policijas Iekšējās drošības birojs*) for continued investigation. The decision of 19 September focused, *inter alia*, on the actions of the policemen before and after the applicant's son's arrest as well as on the legality and permissibility of his detention as such. It was suggested that the question of the potential liability of the policemen of the Balvi District Police Department for criminal inaction (section 319(2) of the Criminal Law, see below, paragraph 34) needed to be resolved.

27. On 18 January 2007 that Bureau decided to split the criminal proceedings into two parts, one regarding the actions of M.I. and the other concerning the inaction of the Balvi District policemen. The first part was transferred back to the Balvi District Police Department and the second remained with the Bureau of Internal Security.

28. On 7 March 2007 the Balvi District Police Department decided to terminate the criminal proceedings against M.I. due to lack of *corpus delicti*. The applicant did not appeal against that decision.

29. On 23 August 2007 the Bureau of Internal Security of the State Police decided to terminate the criminal proceedings against the officers of the Balvi District Police Department for want of *corpus delicti*. During the course of the investigation statements were taken from all five officers who had been present at the police station during the night of the applicant's son's arrest and the following day. The officers who had arrested the applicant's son confirmed that the security guards at the school had informed them that he had fallen backwards down the stairs but they had not waited for the ambulance that had been called because he had behaved in a way that was typical of an intoxicated person and had had no visible injuries. The officers who had been on duty on 27 February 2005 pointed out that they had tried to wake up the applicant's son on several occasions without success, but that after they had eventually succeeded, the applicant's son had gotten up without any help and walked to the reception area of the police station where he had been seen by a doctor who had arrived in an ambulance. The doctor had then allegedly proclaimed that the applicant's son was “faking”

and was still drunk. He had only been taken to hospital after the applicant had persuaded the doctor to do so. The decision also pointed out that it was "obvious" that a mistake had been made by the doctors, who had failed to correctly diagnose the applicant's son's injuries before his death.

30. On 26 September 2007 a public prosecutor of the Balvi District Public Prosecutor's Office dismissed the applicant's representative's appeal against the decision of 23 August 2007.

31. On 24 October 2007 a senior prosecutor of the same office rejected the applicant's representative's appeal against the decision of 26 September 2007. In addition to upholding the conclusions of the decision of 23 August 2007, it was pointed out that no causal link existed between the decision of the officers present at the scene to transport the applicant's son to the police station without waiting for the ambulance and the applicant's son's death, since the death had occurred despite the fact that the applicant's son had eventually been placed under medical supervision.

32. In a final decision of 31 January 2008 a senior prosecutor of the Public Prosecutor's Office attached to the Latgale Regional Court dismissed the applicant's complaint about the decision of 24 October 2007.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW PROVISIONS

33. The fifth paragraph of section 5 of the Law on Police provides one of the basic principles for organising the work of the police is safeguarding the health of persons in police custody, which includes carrying out emergency measures to provide medical assistance. The duty of police officers to provide medical and other assistance to injured persons is repeated in section 10(3) of the Law on Police. That section specifically provides for a duty to provide assistance to anyone, even persons who, because of their state of inebriation, have lost the ability to move or who pose a danger to themselves or others.

34. Section 319(2) of the Criminal Law provides that state officials' can be held criminally liable for intentional or negligent failure to perform acts which are compulsory by law or are part of the duties assigned to the official in question. In order to engage criminal responsibility such dereliction of duties has to have caused substantial harm to the state or to the rights and interests of individuals.

35. On 1 February 2004 the Law of Administrative Procedure entered into force. That law, among many other things, provides for a mechanism for complaining about the legality of *de facto* actions of state institutions to administrative courts.

36. The Law on Compensation for Damage Caused by State Institutions came into force on 1 July 2005. It provides for practical implementation of the rights guaranteed by the Constitution and the Law of Administrative

Procedure to receive compensation for damage caused by unlawful administrative acts issued by state institutions or for unlawful *de facto* actions of those institutions. Pursuant to section 14(3) of that law, the maximum compensation for non-pecuniary damage that can be awarded is 20,000 Latvian lati (LVL) approximately 28,200 euros (EUR).

37. As to the consequences of awarding compensation, section 32 of the Law on Compensation for Damage Caused by State Institutions provides as follows:

> "1) In order to establish the circumstances that have caused or fostered the infliction of the damage to be compensated, an authority hierarchically superior to the one which has caused the damage shall evaluate each individual case when damage has to be compensated pursuant to a decision of the authority or a court.
>
> 2) After evaluating all the circumstances pertinent to the compensation for damage, a hierarchically superior authority shall adopt a decision concerning forwarding the materials in the case file to a competent authority, which shall decide whether the official responsible for causing the damage ought to be held disciplinarily, administratively or criminally responsible."

38. Section 22 of the Law of Criminal Procedure contains a general principle according to which that Law provides for procedural opportunities for persons who have suffered harm as a result of criminal acts to request compensation for pecuniary and non-pecuniary damage. The specifics of the implementation of that principle are contained in various sections throughout the Law.

39. The general standards contained in the Second General Report [CPT/Inf (92) 3] by the Council of Europe's Committee for the Prevention of Torture (CPT) provide that persons detained by the police should have the right of access to a doctor, including the right to be examined, if the person detained so wishes, by a doctor of his own choice (in addition to any medical examination carried out by a doctor called by the police authorities) (§ 36). Persons taken into police custody should be expressly informed without delay of the above rights (§ 37). The results of the medical examination and relevant statements by the detainee and the doctor's conclusions should be formally recorded by the doctor and made available to the detainee and his lawyer (§ 38).

40. Article 14(2) of the United Nations Convention on the Rights of Persons with Disabilities ("the CRPD"), which entered into force on 3 May 2008, was signed by Latvia on 18 July 2008 and ratified on 1 March 2010, provides as follows:

> "States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation."

41. The Interim Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, submitted on 28 July 2008 by the Office of the United Nations High Commissioner for Human Rights to the 63rd session of the General Assembly of the UN (A/63/175) in its paragraphs 50 and 54 provides as follows:

> "Persons with disabilities often find themselves in ... situations [of powerlessness], for instance when they are deprived of their liberty in prisons or other places ... In a given context, the particular disability of an individual may render him or her more likely to be in a dependant situation and make him or her an easier target of abuse ..."

and

> "The Special Rapporteur notes that under article 14, paragraph 2, of the [Convention on the Rights of Persons with Disabilities], States have the obligation to ensure that persons deprived of their liberty are entitled to 'provision of reasonable accommodation'. This implies an obligation to make appropriate modifications in the procedures and physical facilities of detention centres ... to ensure that persons with disabilities enjoy the same rights and fundamental freedoms as others, when such adjustments do not impose disproportionate or undue burden. The denial or lack of reasonable accommodation for persons with disabilities may create detention ... conditions that amount to ill-treatment and torture."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

42. The applicant complained that his son's death and the subsequent failure to conduct an effective investigation in that regard were in violation of the guarantees of Article 2 § 1 of the Convention, which reads as follows:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law ..."

43. The Government contested that argument.

A. Admissibility

1. The Government

44. The Government argued that the applicant could have challenged the actions and omissions of the officials of the Balvi District Police Department in conformity with the procedure prescribed in the Law of Administrative Procedure and subsequently requested compensation in conformity with the Law on Compensation for Damage Caused by State

Institutions (see above, paragraphs 35 and 36). More specifically the Government suggested that what should have been subjected to administrative review were the *de facto* actions of the applicant's son's arrest and his placement in administrative detention. According to the Government, such a procedure was effective, accessible and offered reasonable prospects of successfully obtaining redress for the applicant's complaints about his son's death and the alleged defects of the subsequent investigation.

45. The Government referred to the Court's decision in *Caraher v. the United Kingdom* ((dec.), no. 24520/94, ECHR 2000-I) and the judgment *Branko Tomašić and Others v. Croatia* (no. 46598/06, § 38, ECHR 2009-... (extracts)) in support of their argument that in cases of use of lethal force by a State agent, as well as with regard to complaints about the failure of the State to take adequate positive measures to protect a person's life, the possibility of obtaining compensation was to be considered an adequate and sufficient remedy in respect of a substantive complaint under Article 2.

46. As for the applicant's complaint under the procedural aspect of Article 2, the Government submitted that while in principle a mechanism had to be available to the victim or the victim's family for establishing the liability of State officials or bodies for acts or omissions involving a breach of Convention rights (a reference was made to *E. and Others v. the United Kingdom*, no. 33218/96, § 110, 26 November 2002), cases of a non-intentional infringement of the right to life did not necessarily require the provision of a criminal-law remedy in every case (*Branko Tomašić and Others*, cited above, § 64). More specifically, the Government pointed out that in the sphere of negligence a civil or disciplinary remedy may suffice (referring in this regard to *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII), especially considering that the Convention does not grant to an individual a right to request conviction of third persons. The Government further alleged that pursuant to section 32(2) of the Law on Compensation for Damage Caused by State Institutions a court judgment awarding compensation for damage "trigger[ed] an obligation for a [hierarchically] superior institution to re-examine the case at hand". Taking those considerations into account, the Government submitted that the remedies provided by the Law of Administrative Procedure and the Law on Compensation for Damage Caused by State Institutions satisfied the criteria for an effective domestic remedy within the meaning of Article 35 § 1 of the Convention in that they were capable of providing redress in respect of the applicant's complaints.

47. The Government further submitted that the proposed remedy was available in theory as well as in practice. With regard to the practical availability the Government referred to a decision of the Administrative Chamber of the Senate of the Supreme Court in case SKA-259/2008. That case concerned a person who was arrested and transported to a hospital for a

narcotic intoxication test without adequate documentation. The administrative courts then proceeded *ex officio* to question the police officers involved in the incident and, upon finding that a procedural violation had been committed, ordered the police to issue a written apology. The Government considered that the approach adopted by the administrative courts attested to their capacity to conduct an independent and impartial *ex officio* investigation into the wrongdoings of police officers, which in turn attested to the fact that administrative courts were to be considered an effective and available remedy which offered reasonable prospects of success in cases where it was not compulsory to provide a criminal-law remedy.

48. Lastly, the Government submitted that the only purpose of the criminal inquiry into the fact of the applicant's son's death had been "to examine and investigate the circumstances of the death" and "under no circumstances" was the purpose of the investigation "to compensate for the losses incurred", since even if an individual responsibility on the part of the state officials had been established, the applicant would have had to initiate a claim for compensation and to substantiate his claim.

2. The applicant

49. The applicant pointed out that the Latvian law at the relevant time provided for two separate review procedures concerning complaints such as his, namely, criminal proceedings or an administrative procedure. Both of those procedures provided the possibility to find that actions of State agents had been unlawful and to request compensation in that regard. As to which of the procedures should have been used, the applicant referred to the Court's earlier finding that "it is for the individual to select which legal remedy to pursue" (*Airey v. Ireland*, 9 October 1979, § 23, Series A no. 32) and accordingly argued that he did not have an obligation to exhaust all available avenues of domestic remedies. In any event, according to the applicant, he had never been informed, either by the Prosecutor's Office or by the Ombudsman's Office, of the availability of administrative proceedings in his case. The applicant further focused on the requirement arising from the Court's case-law that in cases concerning a death in circumstances that might give rise to the State's responsibility the authorities must act of their own motion once the matter has come to their attention and that the next-of-kin could not be obliged to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (*Branko Tomašić and Others*, cited above, § 43). Lastly, the applicant argued that the administrative courts lacked the competence to evaluate the effectiveness of the investigation into the applicant's son's death, since that investigation fell within the realm of criminal law.

3. The Court's assessment

50. The Court notes that it is common ground that the applicant made full use of the remedy provided by the criminal-law procedures. The Court reiterates that, in the event of there being a number of domestic remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance. In other words, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *T.W. v. Malta* [GC], no. 25644/94, § 34, 29 April 1999; *Moreira Barbosa v. Portugal* (dec.), no. 65681/01, ECHR 2004-V; and *Jeličić v. Bosnia and Herzegovina* (dec.), no. 41183/02, 15 November 2005). Accordingly, the Court has to determine only whether the Government have submitted any arguments that would indicate that the remedy provided for in the Law of Administrative Procedure and the criminal-law remedy do not have "essentially the same objective", that is to say, whether the administrative-law remedy would add any essential elements that were unavailable through the use of the criminal-law remedy.

51. The Court observes that, for a domestic remedy to be considered an effective one in cases where a violation of Article 2 or 3 of the Convention has been alleged, it would have to provide for a legal mechanism of investigating the complaint. That conclusion is mandated by the procedural aspect of Articles 2 and 3 (see, *mutatis mutandis*, *Oğur v. Turkey* [GC], no. 21594/93, § 66, ECHR 1999-III). A remedy whose only consequence is a possibility to obtain compensation for the alleged violation would not suffice (ibid., see also *Şenses v. Turkey* (dec.), no. 24991/94, 14 November 2000; *Baysayeva v. Russia*, no. 74237/01, §§ 108 and 109, 5 April 2007; and *Dzieciak v. Poland*, no. 77766/01, § 80, 9 December 2008). The Government have submitted that administrative courts possess the power to conduct an *ex officio* investigation and have submitted an example of one domestic case where such an investigation had apparently been carried out. In the context of the present case the Court has no reason to doubt that administrative courts are capable of carrying out an investigation either of their own volition or pursuant to a request by the parties. Nevertheless, the Government have failed to explain, and the example of the domestic case submitted does not clarify how an investigation carried out by administrative courts would be more pertinent than the one carried out by police and prosecutorial authorities within the context of criminal law procedures, which provide for all the legal and practical means necessary for that purpose.

52. It appears to be common ground that both avenues – the criminal-law one and the administrative-law one – could in principle, if pursued successfully, lead to an award of monetary compensation for the alleged violation. It has furthermore not been disputed that an adequately carried out criminal investigation could lead to a decision determining the individual responsibility of any State officials who might be held accountable for the

applicant's son's death. None of the arguments advanced by the Government suggest that the administrative-law procedures would add anything to the possibilities offered by the criminal law. Even if the possibility of re-examination of the case is triggered by a an administrative act or a judgment awarding damages for a wrongdoing committed by a State institution, any individual responsibility of State officials could only be established following such re-examination, which can require additional investigation by several levels of domestic authorities. Accordingly, recourse to administrative-law procedures would not necessarily result in a more effective examination of the case.

53. Taking the above into account, the Court considers that the Government have failed to demonstrate that the remedy offered by the Law of Administrative Procedure and the Law on Compensation for Damage Caused by State Institutions would pursue objectives that are any different from the ones pursued by the criminal-law remedy.

54. The Court therefore considers that in the light of the facts pertinent to the present case there was no reason for the applicant to pursue the administrative-law remedy in addition to the criminal-law remedy, the effectiveness of which has not been disputed by the parties.

55. Accordingly the applicant has exhausted the domestic remedies. Furthermore, the complaint under Article 2 is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. The Court further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Substantive aspect

56. The applicant argued that the police officers of the Balvi District Police Department had been negligent and ignorant in the performance of their duties. In this regard he emphasised that before his son was transported from the school to the police station the officers had been alerted to the fact that he had fallen down the stairs, hit his head and had been unconscious for some time. Nevertheless, the police had chosen not to wait for the ambulance which had been on its way. According to the applicant, by making that decision the police had taken full responsibility for its consequences. Accordingly, it had been the lack of due diligence on the part of the police officers that had led to the death of the applicant's son.

57. The Government did not submit any comments on the merits of the applicant's complaints.

58. The Court reiterates that the first sentence of Article 2, which ranks as one of the most fundamental provisions in the Convention and also enshrines one of the basic values of the democratic societies making up the

Council of Europe (see, among other authorities, *McCann and Others v. the United Kingdom*, 27 September 1995, § 147, Series A no. 324), enjoins the State not only to refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36 *Reports of Judgments and Decisions* 1998-III).

59. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Where the authorities decide to place and maintain in detention a person with disabilities, they should demonstrate special care in guaranteeing such conditions as correspond to his special needs resulting from his disability (see *Price v. the United Kingdom*, no. 33394/96, § 30, ECHR 2001-VII, *Farbtuhs v. Latvia*, no. 4672/02, § 56, 2 December 2004, and international law sources mentioned in paragraphs 39 to 41 above). More broadly, the Court has held that States have an obligation to take particular measures to provide effective protection of vulnerable persons from ill-treatment of which the authorities had or ought to have had knowledge (*Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V).

60. The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies (*Salman v. Turkey* [GC], no. 21986/93, § 99, ECHR 2000 VII). Furthermore, the national authorities have an obligation to protect the health of persons who have been deprived of their liberty (see, *inter alia*, *Naumenko v. Ukraine*, no. 42023/98, § 112, 10 February 2004, and *Dzieciak v. Poland*, no. 77766/01, § 91, 9 December 2008). In the context of Article 2, the obligation to protect the life of individuals in custody also implies an obligation for the authorities to provide them with the medical care necessary to safeguard their life (see *Taïs v. France*, no. 39922/03, § 98, 1 June 2006, and *Huylu v. Turkey*, no. 52955/99, § 58, 16 November 2006). A failure to provide adequate medical care may constitute treatment in breach of the Convention (*Huylu*, cited above, § 58).

61. The Court considers that the question to be resolved first is whether the officers of the Balvi District Police Department knew or ought to have known about the danger to the applicant's son's health (see, *mutatis mutandis*, *Keenan v. the United Kingdom*, no. 27229/95, § 93, ECHR 2001-III). Subsequently the Court has to evaluate whether the officers in question displayed adequate diligence in light of the medical condition of the applicant's son and his disability in so far as they knew or ought to have known about them.

62. Turning its attention first to the moment of the applicant's son's first encounter with the police, the Court observes that it is common ground that

upon their arrival at the scene the officers were informed about the applicant's son's fall from the stairs and of his losing consciousness after hitting his head against the ground. The policemen were also told about the sensory disability of the applicant's son (see above, paragraph 9). They were further informed that an ambulance had been called and was on its way. Nevertheless, the policemen chose not to wait for the ambulance and to take the applicant's son to the police station, believing him to be merely intoxicated.

63. When the applicant's son was brought to the police station, he was observed by the officer on duty, who noted that there was a graze on his face (see above, paragraph 11). It appears that no medical examination took place. On the contrary, the police officers informed the ambulance crew that no medical assistance was necessary (see above, paragraph 13). It appears that the officers arrived at that decision without consulting the applicant, since it seems that none of the officers understood sign language and since the notepad that the applicant's son used for communication had been taken away from him.

64. From the information and the documents submitted by the parties it is not possible to establish with any certainty how many times and with what frequency the officers present at the station checked on the applicant's son's condition. What does not seem to be disputed is that for some time after being placed in the sobering-up room the applicant's son continued to knock on the doors and the walls of the cell, which did not prompt any reaction from officers present at the station.

65. The first time the police officers tried to wake up the applicant's son was some seven hours after taking him into custody (see above, paragraph 14). Almost another seven hours passed before an ambulance was called to the police station (paragraph 15).

66. The Court considers that the Government have failed to explain why the police, knowing about the applicant's son fall and having been informed about his disability, did not consider it necessary to wait for the ambulance or to have medical professionals examine the applicant's son after he was brought to the police station as specifically required by the applicable standards of the Committee for Prevention of Torture (see above, paragraph 39). What is more, it appears that the police never gave the applicant's son any opportunity to provide information about his state of health, even after he kept knocking on the doors and the walls of the sobering-up cell. Taking into account that the applicant's son was deaf and mute, the police had a clear obligation (arising at the least from sections 5 and 10(3) of the Law on Police and the above-mentioned international standards cited in paragraphs 39-41 above) to at least provide him with a pen and a piece of paper to enable him to communicate his concerns. The Court is even more concerned by the almost seven hours that passed between the time when the applicant's son “refused to wake up” in the

morning and the time when an ambulance was called. Not getting up for some fourteen hours can hardly be explained by simple drunkenness (compare with *Taïs*, cited above, § 101).

67. The foregoing considerations enable the Court to conclude that, taking into account the police's knowledge about the applicant's son's fall and his sensory disability, their failure to seek a medical opinion about his state of health coupled with their failure to react to his knocking on the doors and walls of the sobering-up cell and to call an ambulance for almost seven hours after he could not be woken up in the morning, the police failed to fulfil their duty to safeguard the life of the applicant's son by providing him with adequate medical treatment.

68. There has accordingly been a violation of the substantive aspect of Article 2 § 1 of the Convention.

2. Procedural aspect

69. The applicant pointed out that the initial investigation into the circumstances of his son's death was conducted by the Balvi District Police Department – the same institution which, in his submission, was responsible for the death. Accordingly the investigators had lacked the necessary independence. Furthermore the investigation had failed to establish whether the police officers in question had had a duty to wait for the ambulance that could have offered medical assistance to the applicant's son and whether it had been lawful to detain the applicant's son without first obtaining a medical opinion as to his state of health.

70. The Government did not submit any comments on the merits of the applicant's complaints.

71. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, *McCann and Others v. the United Kingdom*, 27 September 1995, § 161, Series A no. 324, and *Kaya v. Turkey*, judgment of 19 February 1998, § 105, *Reports* 1998-I).

72. The Court has recently found that the obligation under Article 2 to carry out an effective investigation has evolved into a "separate and autonomous duty" (see *Šilih v. Slovenia* [GC], no. 71463/01, § 159, 9 April 2009). However, it would emphasise that this obligation may differ, both in content and in terms of its underlying rationale, depending on the particular situation that has triggered it (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I, and *Banks and Others v. the United Kingdom* (dec.), no. 21387/05, 6 February 2007). The essential purpose of such an investigation is to secure the effective implementation of the

domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (*Anguelova v. Bulgaria*, no. 38361/97, § 137, ECHR 2002-IV).

73. In as much as different considerations apply in cases such as the present one in which the death has not been caused by use of force or similar direct official action, the standard against which the investigation's effectiveness is to be assessed may be less exacting. However, even in such situations those concerned are entitled to an independent and impartial official investigation procedure that satisfies certain minimum standards as to its effectiveness (see *Mikayil Mammadov v. Azerbaijan*, no. 4762/05, § 102, 17 December 2009, and the jurisprudence cited there). In this regard the Court would point out that this is not an obligation of result, but of means (see, among other authorities, *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 71, ECHR 2002-II) and that Article 2 does not entail the right to have others prosecuted or sentenced for an offence, or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence (see *Öneryıldız v. Turkey* [GC], no. 48939/99, §§ 94 and 96, ECHR 2004-XII). Nevertheless, the Court has also held that if the negligence attributable to State officials or bodies goes beyond an error of judgment or carelessness, in that the authorities in question, fully realising the likely consequences and disregarding the powers vested in them, have failed to take measures that have been necessary and sufficient to avert the risks to the victim's life, the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2 of the Convention (*Öneryıldız*, § 93).

74. One of the minimum standards of effective investigation is a hierarchical, institutional and practical independence of persons carrying out the investigation from the persons implicated in the events under investigation (see *Paul and Audrey Edwards*, cited above, § 70; *Mastromatteo v. Italy* [GC], no. 37703/97, § 91, ECHR 2002-VIII; and *Mikayil Mammadov*, cited above, § 101).

75. With regard to the independence of the investigative authorities in the present case the Court notes that the applicant is correct in pointing out that the initial as well as additional inquiry was carried out by the Balvi District Police Department, that is, the same authority that was implicated in the death of his son (see above, paragraphs 19 and 20). In this respect the Court has previously held that an internal inquiry cannot be regarded as adequate in cases concerning allegations of ill-treatment in contravention of Article 3 of the Convention (see *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, §§ 333-341, ECHR 2007-... with further references, *Jašar v. "the former Yugoslav Republic of Macedonia"* (dec.), no. 69908/01, 11 April 2006, and *Kopylov v. Russia*, no. 3933/04, § 138,

29 July 2010). The Court considers that the same conclusion is applicable to complaints under Article 2 of the Convention. Furthermore, the Balvi District Police Department was the same institution which on four occasions decided to terminate the criminal proceedings regarding the events surrounding the death of Valdis Jasinskis (see above, paragraphs 20, 23, 25 and 28). The first time the investigation went outside the recursive route between the Balvi District Police Department and the Balvi District Public Prosecutor's Office was after the applicant's representative sought help from the Office of the Prosecutor General. As a result, the first time anyone outside the Balvi District had access to the case file was more than a year and a half after the applicant's son's death.

76. The Court therefore considers that the investigation that was carried out by the Balvi District Police Department cannot be said to have been effective since it did not comply with the minimum standard of independence of the investigators. What remains to be seen then is whether that defect was cured when the investigative role was later taken over by the Bureau of Internal Security of the State Police, whose findings were then confirmed on three occasions by public prosecutors' offices.

77. In this regard the Court notes that the investigation conducted by the Bureau of Internal Investigation was not limited to merely reviewing the documentary evidence accumulated in the course of prior investigation. Instead, the investigators questioned the five police officers who had been present at the police station during the days prior to the death of the applicant's son and drew their own conclusions which coincided with the ones reached by the Balvi District Police Department's internal inquiry.

78. The Court does not find it necessary in the particular context of the present case to draw general conclusions about the independence or lack thereof of the Bureau of Internal Investigation, since it considers that the investigation carried out by that Bureau was defective for several reasons. At the outset the Court reiterates that a prompt response by the authorities in investigating suspicious deaths may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see, for example, *Mikayil Mammadov*, cited above, § 105). In the present case the investigation left the confines of the institution implicated in the events under investigation only more than eighteen months after the events. The Bureau of Internal Investigation adopted its decision almost one more year later.

79. The requirement of promptness of investigation, apart from the considerations mentioned previously, also follows from the necessity to promptly gather evidence and perform other investigative actions which could become impossible or excessively burdensome with the passage of time. For instance, in the present case it would have been opportune to question the witnesses of the circumstances the applicant's son's death soon

after the respective events, while their memories were still fresh. In addition, a prompt investigation would have given the investigator an opportunity to ask supplementary questions to the expert who performed the autopsy and to observe the scene of the applicant's fall as well as the sobering-up cell where he had been detained.

80. The Court furthermore observes that the investigation that was carried out by the Bureau of Internal Investigation failed to provide answers to several questions that would have been crucial in determining the individual responsibility of the police officers of the Balvi District Police Department. For example, the fact that MADEKKI had identified several significant shortcomings with regard to the treatment of the applicant's son that may have contributed to his demise (see above, paragraph 18) was left without any assessment. What is more, it does not appear that any effort was made to evaluate whether the police officers' actions when not waiting for the ambulance, when informing the ambulance crew that the applicant did not need any medical assistance and when delaying seeking medical help for some fourteen hours had been compatible with their duties, which derive from sections 5 and 10 of the Law on Police (see above, paragraph 33), and the special needs of persons with disabilities like the applicant's son. Since no such assessment was made, the Bureau reached the conclusion that no crime had been committed and the police officers' responsibility was never weighed by a court (see, by contrast, *Douglas-Williams v. the United Kingdom* (dec.), no. 56413/00, 8 January 2002).

81. Lastly, the Court cannot but decry the lack of effectiveness and expediency of the investigation, epitomised by the fact that responsibility for the investigation was passed back and forth between the police and various prosecutors' offices three times (see, *mutatis mutandis*, *Denis Vasilyev v. Russia*, no. 32704/04, § 103, 17 December 2009, and *Mikheyev v. Russia*, no. 77617/01, § 120, 26 January 2006). The blame for this defect is to be shared by the police, whose investigation was consistently inadequate, and the prosecutors' offices, who failed to provide adequate instructions to the police with a view to remedying the defects identified in the investigation.

82. The foregoing considerations are sufficient to enable the Court to conclude that the investigation into the circumstances of the applicant's son's death was not effective.

83. There has accordingly been a violation of the procedural aspect of Article *2* § 1 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

84. Lastly, the applicant also complained that there was no effective investigation, referring to the procedural aspect of Article 3. Taking into account the conclusions reached above with regard to the applicant's

complaints under Article 2 § 1, the Court finds that there is no need to examine the same complaints under Article 3 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

85. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

86. The applicant claimed EUR 50,000 in respect of non-pecuniary damage.

87. The Government considered that the amount requested was unjustified, excessive and exorbitant. They submitted that the award, if such were to be made, ought to be commensurate to compensation awarded in comparable recent cases (the Government mentioned *Juozaitienė and Bikulčius v. Lithuania*, nos. 70659/01 and 74371/01, 24 April 2008, *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, 20 December 2007 and other judgments).

88. Taking into account the seriousness of the violations it has found in this case, the Court awards the applicant EUR 50,000 in respect of non-pecuniary damage.

B. Costs and expenses

89. The applicant did not formulate a claim in respect of costs.

C. Default interest

90. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning Article 2 § 1 of the Convention admissible;

2. *Holds* that there has been a violation of the substantive aspect of Article 2 § 1 of the Convention;

3. *Holds* that there has been a violation of the procedural aspect of Article 2 § 1 of the Convention;

4. *Holds* that there is no need to examine the complaint under Article 3 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 50,000 (fifty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Latvian lati at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 21 December 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President

Committee on the Rights of Persons with Disabilities

Draft General comment on Article 12 of the Convention- Equal Recognition before the Law*

* Adopted by the Committee at its tenth session (2 – 13 September 2013).

Justification of the General Comment

1. Equality before the law is a basic and general principle of human rights protection and is indispensable for the exercise of other human rights. The Universal Declaration of Human Rights (UDHR) and The International Covenant on Civil and Political Rights (ICCPR) specifically guarantee the right to equality before the law. Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) provides further description of the content of this civil right and focuses on the areas in which people with disabilities have traditionally been denied the right. It does not provide additional rights to people with disabilities; it simply describes the specific elements required to ensure the right to equality before the law for people with disabilities on an equal basis with others.

2. Given the importance of this Article, the Committee has provided interactive fora for discussions on legal capacity. Arising from these very useful deliberations on the provisions of Article 12 by experts, State Parties, disabled people's organizations (DPOs), non-governmental organisations (NGOs), treaty monitoring bodies, national human rights institutions and UN Agencies, the Committee found it imperative to give further guidance in a General Comment.

3. In the consideration of the initial reports of the different States Parties that have been reviewed so far, the Committee has observed that there is a general misunderstanding of the exact scope of the obligations of States Parties under Article 12. Until now there has been a general failure to understand that the human rights-based model of disability implies the shift from a substitute decision-making paradigm to one that is based in supported decision-making. The present general comment has the purpose of exploring the general obligations that are derived from the different components of Article 12.

4. This General Comment reflects an interpretation of Article 12 which is premised on the General Principles of the CRPD outlined in Article 3, including: respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; and respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

5. The UDHR, the ICCPR, and the CRPD each specify that the right to equal recognition before the law is operative 'everywhere'; in other words there are no circumstances permissible under international human rights law where a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited. This is reinforced by the terms of Article 4(2) of the ICCPR, which provides that no derogation of this right is permissible even in circumstances of public emergency. Although an equivalent prohibition on derogation of the right is not included in the CRPD, the ICCPR parent article provides this protection by virtue of Article 4(4) of the CRPD, which provides that the provisions of the CRPD do not derogate from existing international law.

6. The right to equality before the law is also reflected in other core international and regional human rights treaties. Article 15 of the Convention on the Elimination of Discrimination against Women (CEDAW) also guarantees women equality before the law and requires the recognition of women's legal capacity on an equal basis with men, including the legal capacity to enter contracts, administer property and exercise their rights in the justice system. Article 3 of the African Charter of Human and Peoples Rights (ACHPR) enumerates the right to be equal before the law and enjoy equal protection of the law. Article 3 of the American Convention on Human Rights (ACHR) enshrines the right to

juridical personality and requires that everyone have a right to recognition as a person before the law.

7. States must holistically examine all areas of law to ensure that persons with disabilities are not having their right to legal capacity restricted on an unequal basis with others. Historically, persons with disabilities have been discriminatorily denied their right to legal capacity in many areas via substitute decision-making regimes such as guardianship, conservatorship, mental health laws that permit forced treatment, and others. These practices need to be abolished to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.

8. Article 12 affirms a permanent presumption that all persons with disabilities have full legal capacity. Legal capacity has been prejudicially denied to many groups throughout history, including women (particularly upon marriage), and ethnic minorities. However, persons with disabilities remain the group whose legal capacity is most commonly denied in our legal systems. The right to equal recognition before the law requires that legal capacity is a universal attribute, which inheres in all persons by virtue of their humanity, and applies to persons with disabilities on an equal basis with others. Legal capacity is indispensable for the exercise of economic, social and cultural rights. It acquires a special significance for the fundamental decisions persons with disabilities take in their lives in the areas of health, education and work. The denial of legal capacity to persons with disabilities has also in many cases led to the deprivation of many fundamental rights, including the following: the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment and the right to liberty.

9. All persons with disabilities including those with physical, mental, intellectual or sensory impairments can be affected by denials of legal capacity and substitute decision-making. However, persons with cognitive or psycho-social disabilities were, and are, disproportionately affected by substituted decision-making regimes and denials of legal capacity. The Committee reaffirms that an individual's status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) can never be the basis for a denial of legal capacity or of any of the rights in Article 12. All practices that in purpose or effect violate Article 12 need to be abolished to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.

Normative Content of Article 12

Article 12 (1)

10. Article 12(1) reaffirms the right of individuals with disabilities to be persons before the law. This guarantees that every human being is respected as a person possessing legal personality, which is a prerequisite for the recognition of an individual's legal capacity.

Article 12 (2)

11. Article 12(2) recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all areas of life. Legal capacity includes both the capacity to be a holder of rights and an actor under the law. Legal capacity to be a holder of rights entitles the individual to the full protection of her rights by the legal system. Legal capacity to act under the law recognizes the individual as an agent who can perform acts with legal effect. The right to recognition as a legal agent is also reflected in Article 12(5) CRPD, which outlines the duty of states to "take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial

credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property."

12. Legal capacity and mental capacity are distinct concepts. Legal capacity is the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of an individual, which naturally vary among individuals and may be different for a given individual depending on many factors, including environmental and social factors. Article 12 does not permit perceived or actual deficits in mental capacity to be used as justification for denying legal capacity.

13. In most of the state reports the Committee has examined so far, the concepts of mental and legal capacity have been conflated so that where an individual is thought to have impaired decision-making skills, often because of a cognitive or psychosocial disability, her legal capacity to make a particular decision is consequentially removed. This can be done simply based on the diagnosis of a disability (status approach), or where an individual makes a decision that is thought to have negative consequences (outcome approach), or where an individual's decision-making skills are thought to be deficient (functional approach). In all these approaches, an individual's disability and or decision-making skills are accepted as a legitimate basis for denying her legal capacity and lowering her status as a person before the law. Article 12 does not permit this discriminatory denial of legal capacity and instead requires that support be provided for the exercise of legal capacity.

Article 12 (3)

14. Article 12(3) recognizes the right of persons with disabilities to support for the exercise of legal capacity. States must refrain from denying legal capacity, and instead must provide access to the support that may be necessary to make decisions that have legal effect.

15. Support for the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making. Article 12(3) does not specify the form of assistance that must be provided. 'Support' is a broad term capable of encompassing both informal and formal support arrangements, and arrangements of varying type and intensity. For example, persons with disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for various types of decisions, or may use other forms of support, such as peer support, advocacy (including self advocacy support), or assistance in communication. Support for the legal capacity of persons with disabilities might include measures encompassing universal design and accessibility, for example, the burden of providing understandable information from private and public actors such as banks and financial institutions in order to enable persons with disabilities to perform the legal acts required to open a bank account, enter into contracts, or other social transactions. (Support can also constitute the development and recognition of diverse and unconventional methods of communication, especially for those who use non-verbal communication to express their will and preferences.)

16. The type and intensity of support desired will vary significantly between individuals due to the diversity of persons with disability. This is in accordance with Article 3(d) CRPD, which sets out 'respect for difference and acceptance of persons with disabilities as part of human diversity and humanity' as a general principle of the Convention. At all times including crisis situations, the individual autonomy and capacity of persons with disabilities to make decisions must be respected.

17. Some persons with disabilities only seek the recognition of their right to legal capacity on an equal basis with others in Article 12(2), and may not wish to exercise their right to support enumerated in Article 12(3).

Article 12 (4)

18. Article 12(4) outlines the safeguards that must be present in a system of support for the exercise of legal capacity. Article 12(4) must be read holistically with the rest of Article 12 and the whole of the Convention. It requires States Parties to create appropriate and effective safeguards for the exercise of legal capacity. The primary purpose of these safeguards must be to ensure the respect of the individual's rights, will and preferences. In order to accomplish this, the safeguards must provide protection from abuse on an equal basis with others.

Article 12 (5)

19. Article 12(5) requires that States Parties take measures legislative and otherwise (administrative, judicial and other practical measures) to ensure the equal right of persons with disabilities with respect to financial and economic affairs. Access to finance and property has traditionally been denied to persons with disabilities based on the medical model of disability. This approach of denying legal capacity for financial matters must be replaced with support to exercise legal capacity, in accordance with Article 12(3). Just as gender may not be used as basis for discrimination in this field, (Article 13(b) CEDAW) neither may disability.

Obligations of States Parties

20. State Parties have the obligation to respect, protect and fulfil the right to equal recognition before the law of persons with all disabilities. In this regard, the Committee recommends that States should refrain from any action that deprives persons with disabilities of the right to equal recognition before the law. They should take action to prevent non-state actors and private individuals from interfering with the ability of persons with disabilities to realise and enjoy their human rights, including the right to legal capacity. One aim of support to exercise legal capacity is to build the confidence and skills of individuals so that they can exercise their legal capacity with less assistance in the future if they wish. States Parties are obliged to provide training for those receiving support so that the individual can decide when to reduce support, or when they no longer require support for the exercise of legal capacity.

21. In order to recognise 'universal legal capacity,' whereby all individuals (regardless of disability or decision-making skills) inherently possess legal capacity, states must abolish denials of legal capacity that are discriminatory on the basis of disability in their purpose *or* effect (CRPD Article 2, in conjunction with Article 5). Status-based systems for the denial of legal capacity violate Article 12 because they are facially discriminatory, as they permit the imposition of a substituted decision-maker solely on the basis of the individual having a particular diagnosis. Similarly, functional tests of mental capacity, or outcome-based approaches that lead to denials of legal capacity violate Article 12 if they are either -discriminatory or disproportionately affect the right of persons with disabilities to equality before the law.

22. This Committee has repeatedly stated in its Concluding Observations on Article 12 that States Parties must "review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will and preferences."

23. Regimes of substitute decision-making can take many different forms, including plenary guardianship, judicial interdiction, and partial guardianship. However, these regimes have some common characteristics. Substitute decision-making regimes can be defined as systems where 1) legal capacity is removed from the individual, even if this is just in respect of a single decision, 2) a substituted decision-maker can be appointed by someone other than the individual, and this can be done against the person's will, and 3) any decision made by a substitute decision-maker is bound by what is believed to be in the objective 'best interests' of the individual – as opposed to the individual's own will and preferences.

24. The obligation to replace regimes of substitute decision-making by supported decision-making requires both the abolishment of substitute decision-making regimes, and the development of supported decision-making alternatives. The development of supported decision-making systems in parallel with the retention of substitute decision-making regimes is not sufficient to comply with Article 12.

25. A supported decision-making regime is a cluster of various support options which give primacy to a person's will and preferences and respect human rights norms. It should provide protection for all rights, including those related to autonomy (right to legal capacity, right to equal recognition before the law, right to choose where to live, etc.) and rights related to freedom from abuse and ill-treatment (right to life, right to bodily integrity, etc.). While supported decision-making regimes can take many forms, they should all incorporate some key provisions to ensure compliance with Article 12. These conditions include the following:

(a) Supported decision-making must be available to all. An individual's level of support needs (especially where these are high), should not be a barrier to obtaining support in decision-making.

(b) All forms of support to exercise legal capacity (including more intensive forms of support) must be based on the will and preference of the individual, not on the perceived/objective best interests of the person.

(c) An individual's mode of communication must not be a barrier to obtaining support in decision-making, even where this communication is unconventional, or understood by very few people.

(d) Legal recognition of the supporter(s) formally chosen by the individual must be available and accessible, and the State has an obligation to facilitate the creation of these supports, particularly for people who are isolated and may not have access to naturally-occurring supports in the community. This must include a mechanism for third parties to verify the identity of a support person as well as a mechanism for third parties to challenge a decision of a supporter if s/he believes the supporter is not acting based on the will and preference of the individual.

(e) In order to comply with the Article 12(3) requirement that States Parties take measures to 'provide access' to support, States Parties must ensure support measures are available at nominal or no cost to persons with disabilities and that a lack of financial resources is not a barrier to accessing support for the exercise of legal capacity.

(f) The use of support in decision-making must not be used as a justification for limiting other fundamental rights of persons with disabilities. This is especially so for the right to vote, right to marry (or establish a civil partnership) and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment and the right to liberty.

(g) The person must have the right to refuse support and end or change the support relationship at any time they choose.

(h) There must be safeguards for all processes connected to legal capacity and supports to exercise legal capacity. The goal of these safeguards must be to ensure that the person's will and preferences are being respected.

26. The right to equality before the law has a long history of recognition as a civil and political right, with roots in the ICCPR. As such, rights within Article 12 attach at the moment of ratification. States Parties have an obligation to take steps to immediately realize the rights within Article 12, including the right to support for the exercise of legal capacity. The doctrine of progressive realization (Article 4(2)) does not apply to legal capacity.

Interrelationship of Article 12 with other Provisions of the Convention

27. Recognition of legal capacity is also inextricably linked to the enjoyment of many other human rights contained in the CRPD. These include, but are not limited to, the right to access justice (Article 13), to be free from involuntary detention in a mental health facility and forced mental health treatment (Article 14), respect for physical and mental integrity (Article 17), liberty of movement and nationality (Article 18), to choose where and with whom to live (Article 19 CRPD), freedom of expression (Article 21), to marry and found a family (Article 23 CRPD), to consent to medical treatment (Article 25 CRPD), and to vote and stand for election (Article 29 CRPD). Without the recognition of the individual as a person before the law, the ability to assert, exercise, and enforce these, and many other Convention rights, is significantly compromised.

Article 5 Equality and Non-discrimination

28. To achieve *equal* recognition before the law, legal capacity must not be denied discriminatorily. Article 5 CRPD guarantees that all people are equal under and before the law and have a right to equal protection of the laws. It also prohibits all discrimination on the basis of disability. Article 2 CRPD defines discrimination as "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms." Legal capacity denials that have the purpose or effect of interfering with the right of persons with disabilities to equal recognition before the law are a violation of CRPD Articles 5 and 12. The state might have the ability to restrict the legal capacity of individuals based on certain circumstances, e.g. bankruptcy or criminal conviction. The rights to equal recognition before the law and freedom from discrimination require that when the state is permitted to remove legal capacity it must be on the same basis for all individuals. Thus, it must not be based on a personal trait such as gender, race, or disability or have the purpose or effect of treating such persons differently.

29. Freedom from discrimination in the recognition of legal capacity restores autonomy and respects the human dignity of the person in accordance with the principles enshrined in Article 3 (a) CRPD. Freedom to make one's own choices most often requires legal capacity. Independence and autonomy include the power to have decisions legally respected. The need for support and reasonable accommodation in making decisions cannot be used to question legal capacity. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity (Article 3(d)) is incompatible with granting legal capacity on an assimilationist basis.

30. Non-discrimination includes the right to reasonable accommodation in the exercise of legal capacity (Article 5(3)). Article 2 defines reasonable accommodation as any

necessary and appropriate modification and adjustments which do not impose a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. The right to reasonable accommodation in the exercise of legal capacity is separate from and complementary to the right to support for exercising legal capacity. States are required to make any modifications or adjustments to allow individuals with disabilities to exercise legal capacity, unless it is a disproportionate or undue burden. This may include, but is not limited to: access to essential buildings such as courts, banks, social benefit offices, voting venues, etc.; accessible information regarding decisions which have legal effect; and personal assistance. The right to support for the exercise of legal capacity is not limited by the claim of disproportionate or undue burden. The state has an absolute obligation to provide access to support for the exercise of legal capacity.

Article 6 Women with Disabilities

31. Article 15 CEDAW restored legal capacity to women on an equal basis with men, acknowledging that recognition of legal capacity is integral to equal recognition before the law. Paragraph 2 states that: "States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals." This applies to all women, including women with disabilities. The CRPD acknowledges in Article 6 that women with disabilities may be subject to multiple and intersectional forms of discrimination based on gender and disability. For example, women with disabilities experience high rates of forced sterilisation, and are often denied control of their reproductive health and decision-making, including being assumed not to be capable of consenting to sex. Certain jurisdictions also have higher rates of imposing substitute decision-makers on women than men. Therefore, it is particularly important to reaffirm that the legal capacity of women with disabilities should be recognised on an equal basis with all others.

Article 7 Children with Disabilities

32. Article 12 protects equality before the law for all persons, regardless of age. The Convention also recognizes the developing capacities of children in Article 7(2&3) where it acknowledges that in 'all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.' To comply with Article 12, states must examine their laws to ensure that the will and preferences of children with disabilities are respected on an equal basis with children without disabilities.

Article 9 Accessibility

33. The rights in Article 12 are closely tied to the right to accessibility in Article 9 because the right to equal recognition before the law is necessary to enable persons with disabilities to live independently and participate fully in all aspects of life. The right to accessibility guarantees the identification and elimination of barriers to facilities or services open to or provided to the public. To the extent that these barriers include the recognition of legal capacity, the right to accessibility overlaps and is sometimes dependent upon the realization of the right to legal capacity. States must examine their laws and practices to ensure that both the rights to legal capacity and accessibility are being realized.

Article 13 Access to Justice

34. State parties must ensure that persons with disabilities have access to justice on an equal basis with others. The recognition of the right to legal capacity is essential for access

to justice in many respects. Persons with disabilities must be recognized as persons before the law with equal standing in courts and tribunals, in order to seek enforcement of their rights and obligations on an equal basis with others. States must also ensure that persons with disabilities have access to legal representation on an equal basis with others. This has been identified as a problem in many jurisdictions and must be remedied – including ensuring that individuals who experience interferences with their right to legal capacity have the opportunity to challenge these interferences (on their own behalf or with legal representation) and to defend their rights in court. (Persons with disabilities have often been excluded from key roles in the justice system, such as the ability to be a lawyer, judge, witness, or member of a jury.)

35. Police, social workers, and other first responders must be trained to recognize persons with disabilities as full persons before the law and to give the same weight to complaints and statements from persons with disabilities as they would give to non-disabled persons. This entails training and awareness raising in these important professions. Persons with disabilities must also be granted legal capacity to testify on an equal basis with others. Article 12 guarantees support for the exercise of legal capacity, including the capacity to testify in judicial, administrative and other adjudicative proceedings. This support could take various forms, including recognizing diverse communication methods, allowing video testimony in certain situations, procedural accommodations and other assistive methods. In addition, the judiciary must be trained and made aware of their obligation to respect the legal personhood of persons with disabilities, including legal agency and standing.

Articles 14 and 25 Liberty and Consent

36. Respecting the right to legal capacity on an equal basis includes respecting the right of persons with disabilities to liberty and security of the person. It is an on-going problem that people with disabilities are denied legal capacity and are detained in institutions against their will, either without regard to obtaining consent or on the consent of a substitute decision maker. This practice constitutes arbitrary deprivation of liberty and violates Articles 12 and 14 and States must refrain from such actions. It is recommended that States Parties provide a mechanism to review cases of persons with disabilities placed in any residential setting without specific consent from the individual.

37. The right to health in Article 25 includes the right to health care on the basis of free and informed consent. This obligates States Parties to require all health and medical professionals (including psychiatric professionals) to obtain free and informed consent from persons with disabilities. In conjunction with the right to legal capacity on an equal basis with others, this also obligates States to refrain from permitting substitute decision-makers to provide consent on behalf of persons with disabilities. All health and medical personnel should ensure the use of appropriate consultation skills that directly engage the person with disabilities and ensure, to the best of their abilities, that assistants or support persons do not substitute or have undue influence over the decisions of persons with disabilities.

Articles 15, 16, and 17 Respect for Personal Integrity and Freedom from Torture, Violence, Exploitation, and Abuse

38. As has been established in numerous concluding observations, forced treatment by psychiatric and other health and medical professionals is a violation of the right to equal recognition before the law and an infringement upon the rights to personal integrity (Article 17), freedom from torture (Article 15), and freedom from violence, exploitation and abuse (Article 16). This practice denies the right to legal capacity to choose medical treatment and is therefore a violation of Article 12. States Parties must, instead, provide access to support for decisions about psychiatric and other medical treatment. Forced treatment has been a

particular problem for persons with psycho-social, intellectual, and other cognitive disabilities. Policies and legislative provisions that allow or perpetrate forced treatment must be abolished. This is an on-going violation in mental health laws across the globe, despite empirical evidence indicating its lack of effectiveness as well as views of people using mental health systems who have expressed deep pain and trauma as a result of forced treatment. The Committee recommends that State parties should ensure that decisions that involve a person's physical or mental integrity can only be taken with the free and informed consent of the person with disability concerned.

Article 18 Nationality

39. Persons with disabilities have the right to a name and registration of their birth as part of the right to recognition everywhere as a person before the law (Article 18(2)). States Parties must take the necessary measures to ensure that children with disabilities are registered at birth. This right is contained in the Convention on the Rights of the Child (CRC) (Article 7), but children with disabilities are disproportionately likely not to be registered. This denies them citizenship, often also denies them access to health care and education, and can even lead to their death with relative impunity, because there is no official record of their existence.

Article 19 Independent Living

40. To fully implement Article 12, it is imperative that persons with disabilities have opportunities to develop and express their will and preferences, in order to exercise their legal capacity in conditions equal to others. This means that persons with disabilities must have the opportunity to live independently in the community, and have choice and control over their everyday lives, on an equal basis with others, as enshrined in Article 19.

41. Interpreting Article 12(3) in light of the right to community living in Article 19 means that supports for the exercise of legal capacity should be provided using a community-based approach. Communities must be recognized by States as assets and partners in the learning process on the types of supports needed to exercise legal capacity, including raising awareness about different support options. States Parties must recognize persons with disabilities' own social networks and naturally-occurring community supports (including friends, family and schools, among others), as key to supported decision-making. This is consistent with the emphasis of the CRPD on full inclusion and participation in the community.

42. The segregation of persons with disabilities into institutions continues to be a pervasive and insidious problem in violation of a number of Convention rights. The problem is exacerbated by the widespread denial of legal capacity to persons with disabilities, which allows others to consent to their placement in institutional settings. The directors of institutions themselves are also commonly vested with the legal capacity of the individuals that reside there. This places all power and control over the individual in the hands of the institution. In order to comply with the CRPD and respect the human rights of persons with disabilities, deinstitutionalization must be achieved and legal capacity returned to the individuals who must be able to choose where and whom to live (CRPD Article 19). The individual's choice of where and with whom to live should not interfere with their right to access support for the exercise of legal capacity.

Article 22 Privacy

43. Substitute decision-making regimes, in addition to being incompatible with Article 12, also potentially violate the right to privacy of persons with disabilities, as substitute decision-makers gain access to a wide range of personal and health information regarding persons with disabilities. In establishing supported decision-making systems, States Parties

must ensure that those providing support for the exercise of legal capacity fully respect the right to privacy of persons with disabilities.

Article 29 Political Participation

44. Denial or restriction of legal capacity has been used to deny political participation, especially the right to vote, for certain persons with disabilities. In order to fully realise the equal recognition of legal capacity in all aspects of life, it is important to recognise the legal capacity of persons with disabilities in public and political life (Article 29). This means that the person's decision-making ability cannot be used to justify any exclusion of persons with disabilities from exercising their political rights, including the right to vote, to stand for election, and to serve as a member of a jury.

45. States parties should therefore protect and promote the right of persons with disabilities to access support of their choosing in voting by secret ballot, and to participate in all elections and referenda without discrimination of any kind. The Committee recommends further that the State parties should guarantee the right of persons with disabilities to stand for elections, to effectively hold office and to perform all public functions at all levels of government, with reasonable accommodation, and support, where desired, to exercise legal capacity.

Implementation at the national level and main implementation gaps

46. In view of the previously outlined normative content and obligations, States Parties should take the following steps to ensure the full implementation of Article 12.

1. Recognize individuals with disabilities as persons before the law, having legal personality and legal capacity in all aspects of life on an equal basis with others. This requires the abolition of substitute decision-making regimes, and any mechanisms for deprivation of legal capacity which discriminate in purpose or effect against persons with disabilities.

2. Establish, legally recognise, and provide access for persons with disabilities to a broad range of supports for the exercise of legal capacity. These supports must be safeguarded to ensure they are premised on respect for the rights, will and preferences of persons with disabilities. Such supports should meet the criteria set out above in the section on the obligations on States Parties to comply with Article 12(3).

3. In the development and implementation of legislation, policies and other decision-making processes to implement Article 12, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

47. The Committee encourages States Parties to undertake or to devote resources to the development of research on best practices respecting the right to equal recognition of legal capacity and support to exercise legal capacity.

Committee on the Rights of Persons with Disabilities

Draft General Comment on Article 9 of the Convention- Accessibility

I. Introduction

1. Accessibility is pre-condition for independent life and full and equal participation of persons with disabilities in society. Without the access to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, persons with disabilities would not have the equal opportunities for participation in their respective societies. It is not surprising that CRPD establishes accessibility as 1 of the principles on which this instrument of international law is based (Article 3, section (f),). Historically, the movement of persons with disabilities argued that access to the physical environment and public transport is a pre-condition for freedom of movement for persons with disabilities, guaranteed in Article 13 of Universal Declaration of Human Rights and Article 12 of the ICCPR. Similarly, access to information and communication was seen as pre-condition for freedom of opinion and expression, guaranteed in Article 19 of Universal Declaration of Human Rights and Article 19 (2) of the ICCPR.

2. International Covenant on Civil and Political Rights prescribes in article 25 lit. c the right of every citizen to have access, on general terms of equality, to public service in his/her country. Provisions of this article could serve as basis to incorporate the right of access in the core human rights treaties.

3. International Convention on Elimination of All Forms of Racial Discrimination guarantees everyone the right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks (ICERD, Article 5, paragraph (f).). In this way a precedent for viewing the right to access as a right *per se* has been established in the international human rights legal framework. Admittedly, the barriers to free access of members of different racial, ethnic minority groups to places and services open to the public stemmed from prejudicial attitudes accompanied by the will to use the force in preventing access to spaces that were physically accessible. On the other hand, persons with disabilities faced the technical barriers such as staircases at the entrance of buildings and absence of lifts in multi- floor buildings, or lack of information in accessible formats. Such barriers often stemmed from lack of information and technical know- how, rather than from explicit will to exclude persons with disabilities from accessing places or services intended for use by the general public.

4. ICCPR and ICERD clearly establish the right to access as part of international human rights law. One should view accessibility as a disability/specific reaffirmation of the right to access CRPD further elaborate accessibility as one of its key underlined principles, vital pre-condition for effective and equal enjoyment of different civil, political, economic, social and cultural rights by persons with disabilities. Accessibility should be viewed in the context of equality and non-discrimination.

5. The Committee on Economic, Social and Cultural Rights in its General Comment Number 5 evoked the duty of the State parties to implement the United Nations' Standard Rules for Equalization of Opportunities. The Standard Rules also stress the significance of accessibility of physical environment, transport and information and communication for equalization of opportunities for persons with disabilities. The concept is elaborated in Rule No. 5, where accessibility to physical environment, and information and communication are targeted as areas for priority actions for states. The Committee on the Rights of the Child adopted a General Comment on No. 9 (2006) on the rights of children with disabilities, stressing that physical inaccessibility of public transportation and other facilities, including governmental buildings, shopping areas, recreational facilities among others, is a major factor in the marginalization and exclusion of children with disabilities and markedly compromises their access to services, including health and education. The importance of

the accessibility was reiterated by the Committee on the Rights of the Child throughout is General Comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31).

6. World Disability Report (2011) of World Health Organization and the World Bank stresses that built environment, transport and information and communication are often inaccessible to persons with disabilities (World Disability Report, Summary, p. 10). Persons with disabilities are prevented from enjoying some of their basic rights, like the right to seek employment or the right to health care, due to lack of accessible transport. Levels of implementation of accessibility laws in many countries remains low and persons with disabilities are often denied their freedom of expression due to inaccessible information and communication. Even in countries where sign language interpretation services for deaf persons exist, the number of qualified interpreters is usually too low to meet the needs for interpretation as demands exceed the supply of services.

7. The Committee on the Rights of Persons with Disabilities considered the issue of accessibility as one of the key issues in each of the ten dialogues held so far with State parties in examination of their initial reports before the Committee. In each of the Concluding Observations points have been made pertaining to the accessibility. One of the common challenges was lack of adequate monitoring mechanism to ensure the implementation of the accessibility standards and relevant legislation in practice. In some of the State parties, the monitoring was in the competence of local authorities that lacked the technical knowledge, human and material resources for effective implementation. Lack of training to the relevant stakeholders and insufficient involvement of persons with disabilities and their representative organizations in the process of ensuring access to physical environment, transport, information and communication, services offered to the public was a common challenge.

8. The Committee on the Rights of Persons with Disabilities also dealt with the issue of accessibility in its jurisprudence. In the case of Szilvia Nyusti, Péter Takács and Tamás Fazekas v. Hungary, the Committee decided that all services open to the public have to be accessible in accordance with the provisions of article 9 of the CRPD. The State party was called upon to ensure access to ATM for blind persons. The Committee *inter alia* made the recommendations to the State party to establish "minimum standards for the accessibility of banking services provided by private financial institutions for persons with visual and other types of impairments" (paragraph 10.2 (a)) and "to create a legislative framework with concrete, enforceable and time-bound benchmarks for monitoring and assessing the gradual modification and adjustment by private financial institutions of previously inaccessible banking services provided by them into accessible ones. The State party should also ensure that all newly procured ATMs and other banking services are fully accessible for persons with disabilities" (paragraph 10.2 (a)).

[CRPD Committee expert proposed the deletion of paragraph 8 of Draft general comment on article 9 of CRPD, since the Committee "does not have an established practice in terms of the CRPD jurisprudence to cite or refer to only very few cases (actually, one) the Committee has dealt so far". Committee could refer to specific cases in more details only once it has already covered most aspects of accessibility-related services and products and not only one by one case in a certain and specific service in a given State Party]

9. Bearing in mind all the above mention activities pertaining to the issue of accessibility and the fact that accessibility indeed is a vital pre-condition for full and equal participation of persons with disabilities in the society, and the effective enjoyment of all their human rights and fundamental freedoms, the Committee finds it necessary to adopt a general comment on article 9 of CRPD on accessibility, in accordance with its Rules of Procedure and the established practice of human rights treaty bodies.

II. Normative content

10. Article 9 of CRPD prescribes that in order to enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. It is important that accessibility is approached in all its' complexity, encompassing the physical environment, transportation, information and communication, and services. The focus is no longer on legal personality and public/ private nature of those who own buildings, transport infrastructure and vehicles, information and communication services. As long as goods, products, services are open or provided to the public, they must be accessible to all, regardless whether they are owned and/ or provided by a public authority or by a private enterprise. Persons with disabilities should be able to access equally all goods, products and services that are open to the public in a manner that ensures effective and equal access, in a way that respects the dignity of persons with disabilities. Such an approach stems from the concept of prohibition of discrimination, and denial of access should be considered as a discriminatory act regardless of the perpetrator- whether a public or a private entity. The accessibility should be provided to all persons with disabilities, regardless of the type of their impairment, legal status, social condition, gender, and age. Accessibility should take into account the gender and the age perspective for persons with disabilities.

11. Article 9 of CRPD clearly envisages accessibility as the pre- condition for independent living, full and equal participation of persons with disabilities in the society and unrestricted enjoyment of all their human rights and fundamental freedoms on basis of equality with the others. CRPD does not create any new rights, and indeed accessibility should not be viewed as a new right. Some of the core human rights instruments and human rights treaties recognize the right to access: ICCPR article 25 (c) and ICERD article 5 (f). Therefore one should consider accessibility in the context of the right to access, seen from the specific disability perspective. This is an approach widely accepted in the comparative law and applied in different national laws on equalisation of opportunities, and prevention of disability- based discrimination.

(Alternative text: 11. Although during the negotiations of the treaty it was said that the intention was not to create new rights, if we read the text of article 9 in accordance with the general guidelines for the interpretation of treatises set forth in article 31 of the Vienna Convention on the Law of Treaties, we can arrive to the conclusion that we are fact in the presence of a new right. If we read the text plainly, in conformity with the ordinary use of language, we can see that it establishes binding obligations for states and consequently rights for persons with disabilities that are not yet included in the other core human rights treatises, although there are important precedents to this effect in ICCPR article 25 (c) and ICERD article 5 (f).)

12. Strict application of the universal design to all new goods, products, facilities, technologies, services should ensure full, equal and unrestricted access for all potential consumers, including persons with disabilities, in a manner that fully takes into account the inherent dignity and diversity of the above- mentioned persons. It should contribute to the creation of an unrestricted chain of movement for an individual from one space to another, including the movement inside particular objects, without any barriers in-between. Persons with disabilities, and other users, move in barrier- free streets, enter accessible low floor vehicles, can access information and communication, enter into and move inside universally designed buildings, using technical aids and live assistance, when that is necessary for an individual. The application of the universal design does not automatically exclude the necessity for the use of technical aids. One should bear in mind that application

of the universal design to a building from the initial stage of design contributes to making construction much less costly: Making a building accessible *ab initio* may increase the total cost of construction for up to 0, 5 percent maximum (or not at all, in many cases), while the cost of subsequent adaptations in order to make a building accessible in some cases may rise up to 1/3 of the total cost of the construction. Accessibility of information and communication, including ICT, should also be achieved *ab initio* because subsequent adaptations of Internet and ICT may increase costs, so it is more economic to incorporate mandatory accessibility features of ICT from the earliest stages of designing and construction.

13. It is also significant that Article 9 explicitly imposes the duty to ensure accessibility both in urban and in rural areas. The practice shows situation with accessibility is usual better in bigger cities than in remote rural areas, though extensive urbanisation can sometimes also create barriers that prevent access for persons with disabilities, in particular to the built environment, transport and services in the heavily populated, bustling urban areas.

14. Paragraph 1 of Article 9 prescribes for the State Parties identify and eliminate obstacles and barriers to accessibility. The above- mentioned measures shall apply, inter alia, to:

(a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;

(b) Information, communications and other services, including electronic services and emergency services.

15. Paragraph 2 of article 9 furthermore prescribes the measures which State Parties have to take in order to develop, promulgate and monitor the minimum national standards of accessibility of facilities and services open or provided to the public. State Parties also have to take measures ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities (Art. 9, paragraph 2 (b).).

16. As lack of awareness and technical know- how is 1 of the key sources for lack of accessibility, Article 9 prescribes that State Parties should provide training to all stakeholders on accessibility for persons with disabilities (paragraph 2 (c)). In order to avoid the trap of exhaustive listing, Article 9 does not attempt to offer any list of relevant stakeholders, but one should include authorities that issue building permits, broadcasting boards, chambers of engineers, designers, architects, urban planners, transport authorities, service providers, members of academic community, and persons with disabilities as some of those stakeholders. Training should be provided not just to those designing goods, services, products, but also to those who actually produce them. Eventually, it is the builders on the construction site who make a building accessible or not. It is important to put in place training and monitoring systems for all these groups that will ensure application of accessibility standards in practice.

17. Movement and orientation in the buildings and places opened to the public can be a challenge for some persons with disabilities if there are no adequate signage, accessible information and communication, and support services. Paragraph 2 of Article 9, sections (d) and (e), therefore prescribe for signage in Braille and in easy to read and understand forms in buildings and spaces open to the public, as well as for the provision of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public. Without such signage, accessible information and communication, and support services, orientation and movement inside and through buildings may become impossible for many persons with disabilities, especially those who are facing cognitive fatigue.

18. Without the access to information and communication persons with disabilities cannot enjoy freedom of thought and expression, and many other basic rights and freedoms. Thus Paragraph 2 of Article 9 of CRPD prescribes that State Parties should promote live assistance and intermediaries, including guides, readers and professional sign language interpreters (section (e)), the other appropriate forms of assistance and support to persons with disabilities to ensure their access to information (section (f)), and access for persons with disabilities to new information and communications technologies and systems, including the Internet (section (g)) through application of mandatory accessibility standards

19. New technologies can be used for promotion of full and equal participation of persons with disabilities in the society, but only if they are designed and produced in a way that would ensure their accessibility. New investments, new research and production should contribute to elimination of inequality, and shouldn't contribute to the creation of the new barriers. Therefore section (h) of Paragraph 2 of Article 9 calls upon State parties to promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

20. Since accessibility is pre-condition for independent life as prescribed for in article 19 of the Convention, and full and equal participation of persons with disabilities in society, denial of access to the physical environment, transportation, information and communication, and services opened to the general public should be viewed in the context of discrimination. Taking "all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities" (Article 4, Paragraph 1 (b) of CRPD) constitutes of the main general obligations of all State Parties. States Parties shall "prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds" (Article 5, Paragraph 2 of CRPD). In order to promote equality and eliminate discrimination, States Parties shall "take all appropriate steps to ensure that reasonable accommodation is provided" (Article 5, Paragraph 3 of CRPD). "Reasonable accommodation" means "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms" (Article 2 of CRPD).

21. One should make clear distinction between the obligation to ensure the access to all newly designed, built, produced objects, infrastructure, goods, products, services and the obligation to remove the barriers and ensure access to already existing physical environment, transportation, information and communication, services opened to the general public on the other hand. It is one of State Party's general obligations to "undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines" (Article 4, Paragraph 4 (f) of CRPD). All new objects, infrastructure, facilities, goods, products, services have to be designed in a way that makes them fully accessible for persons with disabilities, in accordance with the principles of the universal design. State Parties are under obligation to ensure the access to already existing physical environment, transportation, information and communication, services opened to the general public, but as this obligation is to be implemented gradually, state parties should set definite, fixed time frames, and allocate adequate resources for the removal of the existing barriers.

22. Accessibility is group related, whereas reasonable accommodation is individual related. This means that the duty to provide accessibility is an *ex ante* duty. That means the State party has the duty to provide accessibility before individual request to enter or use a place or service. State parties need to set accessibility standards which have to be negotiated with organizations of persons with disabilities, and these standards need to be prescribed to service providers, builders, and other relevant stakeholders. Accessibility standards need to be broad and standardized. In addition, in particular cases, when a person with disability has a rare impairment that was not included in the elaboration of the accessibility standards or simply do not use some of modes, methods or means offered to achieve the accessibility (for example, they don't read Braille print), even the application of disability standards may not be sufficient to ensure access for that particular persons with disability. In such cases, reasonable accommodation may apply.

23. In contrast, the duty to provide reasonable accommodation is an *ex nunc* duty, which means from the moment an individual with an impairment needs it in a given situation (work place, school, etc.) in order to enjoy her or his rights on basis of equality in a particular context. Here accessibility standards can be a help or even an indicator but may not be taken as prescriptive. Reasonable accommodation can be used as a mean to ensure accessibility for an individual whit disability in a particular situation. Reasonable accommodation seeks to achieve individual justice in the sense that non-discrimination or equality is provided taking the dignity, autonomy and choices of the person into account. Thus, a person with disability, who has a rare impairment might ask for accommodation that falls outside the scope of any accessibility standard. If it has to be provided depends on if it is reasonable and not imposing a disproportionate or undue burden.

24. Inherent dignity of persons with disabilities is a crucial element to be considered, including in the context of reasonable accommodation, In adapting the existing buildings one must balance the reasonableness of costs with the respect for the inherent dignity of persons with disabilities. For example, a private entrepreneur owning a restaurant located in an old building should make effort to make its' main entrance accessible for customers with disability, even if more costly and technically challenging, instead of adapting the back door entrance to the restaurant.

III. State party obligations

25. Even though ensuring access to physical environment, transportation, information and communication, and services open to the public is often pre-condition for the effective enjoyment of different civil and political rights by persons with disabilities, State Parties can ensure that access is achieved through gradual implementation when necessary as well as through the use of international cooperation. An analysis of the situation, and identification of obstacles and barriers that should be removed, can be carried out in an efficient manner and within short to mid- term framework. The removal of barriers should be carried in a continuous and systematic way, with a gradual yet steady realization.

26. State Parties are obliged to adopt, promulgate and monitor the national accessibility standards. Adoption of adequate legal framework, if such legislation is lacking, is the first step. State parties should undertake a comprehensive review of the laws on accessibility to identify, monitor and address gaps in legislation and its' implementation. It is important that the review and the adoption of the above- mentioned laws and regulations is carried out in the process of consultation with persons with disabilities and their representative organizations (Article 4, Paragraph 3 of CRPD), as well as with all other relevant stakeholders, such as academic community, expert associations of architects, urban planners, engineers, designers and others. Legislation should incorporate and be based on the principles of the Universal design, as prescribed for by the CRPD (Article 4, paragraph

4 (f)), and prescribe for mandatory application of accessibility standards, as well as for sanctions, including fines, for those who fail to apply them. One should also strive to achieve interoperability of goods and services, especially in the field of transport, information and communication, including the Internet and other ICT through promotion of internationally recognized accessibility standards.

27. On one hand, it is good to mainstream accessibility standards that prescribe for various areas that have to be accessible- physical environment in laws on construction and planning, transportation in laws on public aerial, railway, road, water transport, information and communication, services open to the public. On the other hand, accessibility should be encompassed in the general and specific laws prescribing for equal opportunities, equality and participation in the context of prohibition of disability- based discrimination. Denial of access should be clearly defined as a prohibited act of discrimination, and persons with disabilities whose access to physical environment, transportation, information and communication, and services open to the public had been denied should have efficient legal remedies at their disposal. When defining accessibility standards, the State Parties have to take into account the diversity of persons with disabilities and ensure that accessibility is provided to all persons of both genders and all ages and types of disability. Part of encompassing the diversity of persons with disability in the provision of accessibility is recognition that some persons with disability need human or animal assistance to enjoy full accessibility (such as personal assistance, sign language interpretation, tactile sign language interpretation, guide dogs etc.). It is necessary to prescribe that for example a ban on entry of guide dogs in a particular building or open space would constitute a prohibited act of disability- based discrimination.

28. It is necessary to establish the minimum standards for the accessibility of different services provided by public and private entities for persons with different types of impairments. The State Parties should create a legislative framework with concrete, enforceable and time-bound benchmarks for monitoring and assessing the gradual modification and adjustment by private entities of previously inaccessible services provided by them into accessible ones. The State party should also ensure that all newly procured goods and other services are fully accessible for persons with disabilities. The above-mentioned minimum standards must be developed in collaboration with persons with disabilities and their representative organisations in accordance with article 4 (3) of CRPD. Such standards can also be developed in collaboration with other states parties and international organizations and agencies, through international cooperation in accordance with article 32. The above mentioned cooperation can be used for development and promotion of international standards that would contribute to interoperability of goods and services. In the field of communication- related services, State Parties must ensure at least minimum quality of services, especially for the relatively new types of services such as personal assistance and sign language interpretation, aiming at their standardization.

29. Public procurement procedures should be used in a way to encourage the removal of the existing barriers and to prevent the creation of the new barriers. It is inacceptable to use public funds to perpetuate new inequalities. All new objects, infrastructure, facilities, goods, products, services have to be fully accessible for all persons with disabilities. Public procurements should be used for carrying out of the affirmative actions in line with the provisions of article 5 (4) of CRPD, in order to ensure accessibility and *de facto* equality for persons with disabilities.

30. State Parties should adopt action plans and strategies for the identification of the existing barriers to access, set time- frames with concrete deadlines and provide for both human and material resources for the removal of the barriers. Once adopted, such strategies and action plans should be strictly implemented. State Parties should strengthen the monitoring mechanisms additionally in order to ensure accessibility and to continue

providing sufficient funds for the removal of accessibility barriers and the continued training of relevant monitoring staff. As accessibility standards are often implemented locally, continuous capacity- building of the local authorities competent for the monitoring of implementation of the standards is of paramount significance. State parties are under obligation to develop effective monitoring framework and set up efficient monitoring bodies with adequate capacities and appropriate mandates to make sure that plans, strategies and standardisation are implemented and enforced.

IV. Inter-sectional issues

31. As already elaborated, one should view State Party's duty of ensuring access to the physical environment, transportation, information and communication, and services open to the public for the persons with disabilities in the context of equality and non-discrimination. Denial of access to physical environment, transportation, information and communication, and services open to the public constitutes an act of disability- based discrimination that is prohibited by article 5 of CRPD. Ensuring the accessibility *pro futuro* should be viewed in the context of implementation of the general obligation of development of universally designed goods, services, equipment and facilities (Article 4, Paragraph 1 (f) of CRPD).

32. Awareness-raising is one of the pre- conditions for effective implementation of CRPD. Since accessibility has often viewed in a narrow way, as accessibility of the built environment (which is significant, but only one aspect of access for persons with disabilities), State Parties should put effort into systematic and continuous awareness-raising on accessibility for all relevant stakeholders. One should cover all- encompassing nature of accessibility, providing for access to physical environment, transportation, information and communication, and services. Awareness-raising should also stress that duty to observe accessibility standards applies equally to the public and the private sector. It should promote the application of universal design and the idea that designing and building in an accessible way from the earliest stages is cost- effective and economical too. Awareness-raising should be carried out in cooperation with persons with disabilities, their representative organizations and technical experts. Special attention should be paid to capacity- building for application and monitoring of implementation of the accessibility standards. Media should not only take into account accessibility of their own programmes and services for persons with disabilities but should also take an active role in promotion of accessibility and contribute to the awareness raising.

33. Ensuring full access to physical environment, transportation, information and communication, services opened to the public is indeed vital pre-condition for effective enjoyment of many rights covered by CRPD. Emergency services in situations of risk, natural disasters and armed conflict must be accessible to persons with disabilities, or their lives cannot be saved and well- being protected (Article 11). There can be no effective access to justice if buildings of law- enforcement organs and judiciary aren't physically accessible, if the services they provide, information and communication aren't accessible (Article 13). One has to have accessible safe houses, accessible support services and procedures if one wants to provide effective and meaningful protection from violence, abuse and exploitation to persons with disabilities, especially women, girls and boys with disabilities (Article 16). Accessible environment, transportation, information and communication, and services are a pre-condition for inclusion of persons with disabilities in their respective local communities and independent life (Article 19).

34. Articles 9 and 21 cross over in the field of information and communication. Article 21 prescribes that States Parties shall "take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the

freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice". In fact, Article 21 elaborates in more detail how the accessibility of information and communication can be ensured in practice. *Inter alia,* the State Parties shall provide information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities. Article 21 furthermore prescribes for facilitation of the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions (section (b)). Private entities providing services to the general public, including through the Internet, are urged to provide information and services in accessible and usable formats for persons with disabilities (section (c)), and mass media, including providers of information through the Internet, are encouraged to make their services accessible to persons with disabilities (section (d)). Indeed, Article 21 elaborates the issue of accessibility of information and communication further in more detail. It also provides for promotion and recognition of the sign languages, in accordance with articles 24, 27, 29 and 30 of the CRPD.

35. Without accessible transport to the schools, without accessible school buildings, accessible information and communication, persons with disabilities would have no chance to realize their right to education (article 24 of CRPD). Thus schools have to be accessible, as it is explicitly prescribed for in Section (a) of Paragraph 1 of Article 9 of CRPD. But the entire process of inclusive education must be accessible, not just buildings but also all information and communication, support services and reasonable accommodations in school. In order to foster accessibility, education should promote and be carried out in sign language, the Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation (Paragraph 3 of Article 24 of CRPD). Modes and means of teaching should be accessible and carried out in accessible environments. The complete environment of students with disabilities has to be designed in a way that fosters inclusion and guarantees equality of students with disabilities in the entire process of their education. One should consider the full implementation of article 24 of CRPD in connection to other core human rights instruments, as well as the provisions on UNESCO Convention against Discrimination in Education, *inter alia.*

36. Health care and social protection would remain unattainable for persons with disabilities without accessible premises where above- mentioned services are being provided. Even if the buildings where the health care and social protection services are provided are accessible themselves, without accessible transportation persons with disabilities won't be able to arrive to the places where the above- mentioned services are being provided. It is specially significant to take into account the gender dimension of accessibility when ensuring health care, specially reproductive health care for women and girls with disabilities.

37. Persons with disabilities cannot effectively realize their right to work and related rights, prescribed for in Article 27 of CRPD, if the work place itself is not accessible. Thus the work places have to be accessible, as it is explicitly prescribed for in Section (a) of Paragraph 1 of Article 9 of CRPD. Denial of the work place adaptation constitutes a prohibited act of disability- based discrimination. Besides the physical accessibility of the work place, a person with disability would need accessible transportation and support services to get to his/ her work place. All information pertaining to work, advertisements of job offers, process of selection for the work place and communication at the work place, during the process of work has to be accessible through the use of sign language, Braille print, accessible electronic formats, alternative script, augmentative and alternative modes, means and formats of communication. Training and qualification for a job have to be accessible as well, just like the realization of all trade unions and related labour rights. For

example, foreign language or computer courses for employees and trainees have to be conducted in an accessible environment in accessible forms, modes, means and formats.

38. Article 29 of CRPD guarantees the persons with disabilities the right to participate in political and public life, to take part in running of public affairs. Persons with disabilities wouldn't be able to exercise the above- mentioned rights equally and effectively if the State Parties fail to ensure that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use. It is also important that political meetings and materials used by and produced by political parties or individual candidates participating in the public elections are accessible. Without that, the persons with disabilities are deprived of their right to participate in the political process in an equal manner. The persons with disabilities who get elected to a public office must have equal opportunities to carry that office out in a fully accessible environment. 38. Everyone has the right to enjoy arts. Everybody has the right to take part in sports. Everyone has the right to go to hotels, restaurants, bars. But wheelchair user cannot go to a concert if there are only stairs in the concert hall. A blind person cannot enjoy a painting if there is no description of it he can hear in the gallery. A deaf person cannot enjoy a movie if there are no subtitles. A person with intellectual disability cannot enjoy a book if there is no easy- to- read version of it. Article 30 of the CRPD prescribes that States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:

(a) Enjoy access to cultural materials in accessible formats;

(b) Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats;

(c) Enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance.

Provision of access to cultural and historical monuments considered patrimonial may indeed be a challenge in some circumstances; however State Parties are indeed under obligation to strive to provide access to those sites as far as possible. Many monuments and sites of national cultural importance have been made accessible in a way that preserved their cultural and historical identity and uniqueness.

39. States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential"(Article 30, Paragraph 2). States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials"(Article 30, Paragraph 3). The international WIPO Copyright Treaty to facilitate access to publish works that was adopted in June 2013 should ensure the access to cultural material without unreasonable or discriminatory barriers for persons with disabilities, especially those facing challenges accessing classical print materials. CRPD provides for recognition and support of their specific cultural and linguistic identity of persons with disabilities on an equal basis with others. Paragraph 4 of Article 30 specially stresses the recognition of and support for sign languages and deaf culture.

40. Paragraph 5 of Article 30 of CRPD prescribes that, in order to enable persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:

(a) To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels;

(b) To ensure that persons with disabilities have an opportunity to organize, develop and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;

(c) To ensure that persons with disabilities have access to sporting, recreational and tourism venues;

(d) To ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system;

To ensure that persons with disabilities have access to services from those involved in the organization of recreational, tourism, leisure and sporting activities.

41. The international cooperation, as envisaged in Article 32 of CRPD should become a significant tool in promotion of accessibility and the universal design. All new investments carried out in the framework of international cooperation should be used in a way to encourage the removal of the existing barriers and to prevent the creation of the new barriers. It is inacceptable to use public funds to perpetuate new inequalities. All new objects, infrastructure, facilities, goods, products, services have to be fully accessible for all persons with disabilities. International cooperation should be used not merely for investments into accessible goods, products, services but it also should foster the exchange of know- how, information on examples of good practice of achieving accessibility in ways that will make concrete changes for better in the lives of millions of persons with disabilities world- wide. It is important that the international cooperation in relation to standardisation is also mentioned in the context article 32. And in relation to this issue, it is important to highlight the fact that organisations of persons with disabilities must be supported so that they can participate in the process of national and international developing, implementing, and monitoring of accessibility standards.

42. Monitoring of accessibility is a crucial aspect of the national and international monitoring of the Convention. The processes of national and international monitoring of the implementation of the Convention should also be performed in an accessible manner that would promote and ensure participation of persons with disabilities and their representative organizations in the above- mentioned process in an effective way. Article 49 of CRPD prescribes that the text of the present Convention shall be made available in accessible formats. This is a novel solution in an international human rights treaty and CRPD should be seen as setting a precedent in that respect for the future treaties.