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Speakers' presentations

FINANCIAL INSTRUMENTS RELATED TO DISABILITY

SEMINAR FOR NATIONAL CIVIL SERVANTS, STAFF OF NGOs, DPOs
AND EQUALITY BODIES

Trier, 17-18 May 2018



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http://ec.europa.eu/justice/grants1/programmes-2014-2020/rec/index_en.htm

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Overview on the UN Convention on the Rights of Persons with Disabilities (UNCRPD)

László Lovászy

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Senior Research Fellow at SFC, Corvinus University of Budapest



Academy of European Law
Tier, 17 May



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Introduction

- Positions
 - Expert (first hearing impaired person since birth)
 - Adviser
 - Lecturer
 - Research fellow

- Research areas
 - Human rights
 - Technology
 - Social sciences, behaviour economics



Setting the rules for the presentation

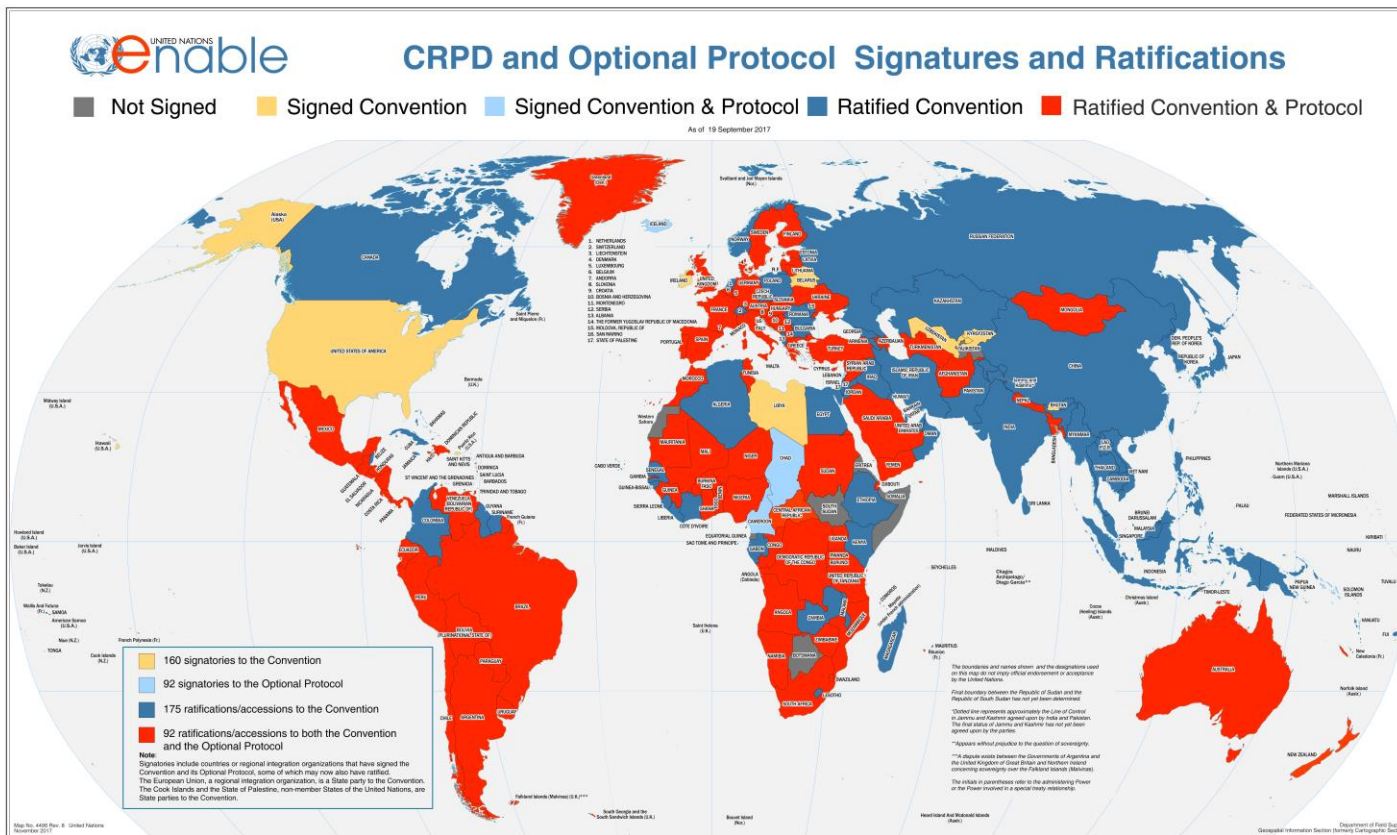
Questions in written form.
Answers at the end of presentation.



Main topics (5)

- Purpose, general principles and rights in the UNCRPD
- The monitoring role of the UN Committee on Rights of Persons with Disabilities
- State reporting and individual complaints procedures
- Main challenges and opportunities
- What will the future bring?

Current state of ratifications



Convention

- Ratifications/Accessions: 177
- Signatories*: 161

Optional Protocol

- Ratifications/Accessions: 92
- Signatories*: 92



Aims of the UNCRPD

- New individual international human rights treaty
- Providing equal rights to PwDs in the (all) areas of life
- Reinforcing/complementing the existing other human rights treaties
- Special references
- Approximation of high standards



Purpose of the UNCRPD

- Promote
- Protect
- Ensure

the full and equal enjoyment of all human rights and fundamental freedoms

+ Respect for their **inherent dignity**

*Recital e) “evolving concept” of disability
(Global Times)*



Main general principles of the UNCRPD

individual autonomy;
non-discrimination;
participation and inclusion in society;
human diversity and humanity;
equality of opportunity;
accessibility;
equality between men and women;
respect for the rights of children with disabilities.



Monitoring mechanism of the UNCRPD

- State reporting procedure
- UNCRPD Article 33 – focal point(s) + independent body
- Optional Protocol
 - *individual complaining mechanism (communication)*
 - *grave or systematic violations – confidential procedure (Art. 6)*
- RoP: formal and informal consultation with NGOs and NHRIs (Ch. XIII) – new GC on A. 4.3 and 33



State reporting procedure

- Constructive Dialogue
- Rapporteurs' tasks
 - *List of Issues*
 - *Concluding Observations*



Individual complaining mechanism

Based on OP

(Groups of) individuals / legal representatives

(lack of) legal capacity

(in)admissibility (Art 2)



Principles of our work

Clear expectations

Fair handling

Consistency

Equal evaluation



On General Comments

General Comment No 1

Article 12: **Equal recognition before the law** (adopted 11 April 2014)

General Comment No 2

Article 9: **Accessibility** (adopted 11 April 2014)

General Comment No 3

Article 6: **Women and girls with disabilities** (adopted 26 August 2016)

General Comment No 4

Article 24: **Right to inclusive education** (adopted 26 August 2016)

General Comment No 5

Article 19: **Right to independent living** (adopted 31 August 2017)

General Comment No 6

Article 5 - **Equality and non-discrimination** (adopted 9 March 2018)



Main challenges in the work of Members

Time

Limited consultations

Credibility (preparedness)



Opportunities for the NGOs

Analysis of pros and cons

Explain how the UNCRPD Committee works

Describe your next steps in advance

Direct contacts with experts



Common mistakes

- NGOs are not ready in time for the beginning of the session
- Let's have a practical example (session in August)
 - *(updated) shadow report's availability in (May-June)*
 - *NGOs' positions, speeches provided (not only just before the given specific consultation!)*
 - *controversial/critical issues are settled in advance*



Recap – how to improve the work

Identifying the problems

Cooperation

Motivation

Efficiency

Planning



What will the future bring?

- Speed of innovations, age of new (bio)technology
- Ethical issues, moral dilemmas (e.g. artificial womb - abortion)
- Human right status of enhanced humans with implanted technologies / genetic modifications

...who will be disabled in the future?



On December 3, 2016, the world celebrated the 10th anniversary of the adoption of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). As a member of the UNCRPD Committee, my job is to scrutinize the implementation of the Convention in the more than 160 states that have joined it. It is not our responsibility to extend or modify the Convention, but perhaps the time has now arrived for governments to update the human rights legislation, or even, the Convention itself, too. Why?

Ten years after the Convention was introduced, we are beginning to face

//

Humanity could soon have the ability to re-design itself biotechnologically.

What if My Disability Will not be Relevant in the Future?

On The Occasion of the 10th Anniversary of the United Nations Convention on Persons with Disabilities

I believe that robotics, biotechnology, and DNA-related scientific breakthroughs are becoming increasingly high-profile and will be industrialized for everyday consumers very soon. The consequences seem to be unknown to

When I was born, my parents were told that I would have the life of a seriously hearing impaired person and I would have to cope with that condition all my life. But what if that were not true anymore? What if my disability will not be relevant in the future and my hearing capacity (or its alteration)



Thank you for your attention

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Überblick über das UN-Übereinkommen über die Rechte von Menschen mit Behinderungen (UN-Behindertenrechtskonvention, UN-BRK)

László Lovászy

Mitglied des UN-Ausschusses für die Rechte von Menschen mit Behinderungen
Senior Research Fellow am SFC, Corvinus Universität Budapest



Europäische Rechtsakademie
Trier, 17. Mai



Diese Ausbildungsmaßnahme wird im Rahmen des Programms „Rechte, Gleichstellung und Unionsbürgerschaft“ (2014-2020) der Europäischen Kommission gefördert. Der Inhalt dieser Veröffentlichung unterliegt der alleinigen Verantwortung des Autors und kann in keiner Weise als Sichtweise der Europäischen Kommission angesehen werden.



Einführung

- Funktionen
 - Sachverständiger (erste Anhörung von Geburt an behinderter Menschen)
 - Berater
 - Dozent
 - Forschungsbeauftragter

- Forschungsbereiche
 - Menschenrechte
 - Technologie
 - Sozialwissenschaften, Verhaltensökonomie



Festlegung der Regeln für die Präsentation

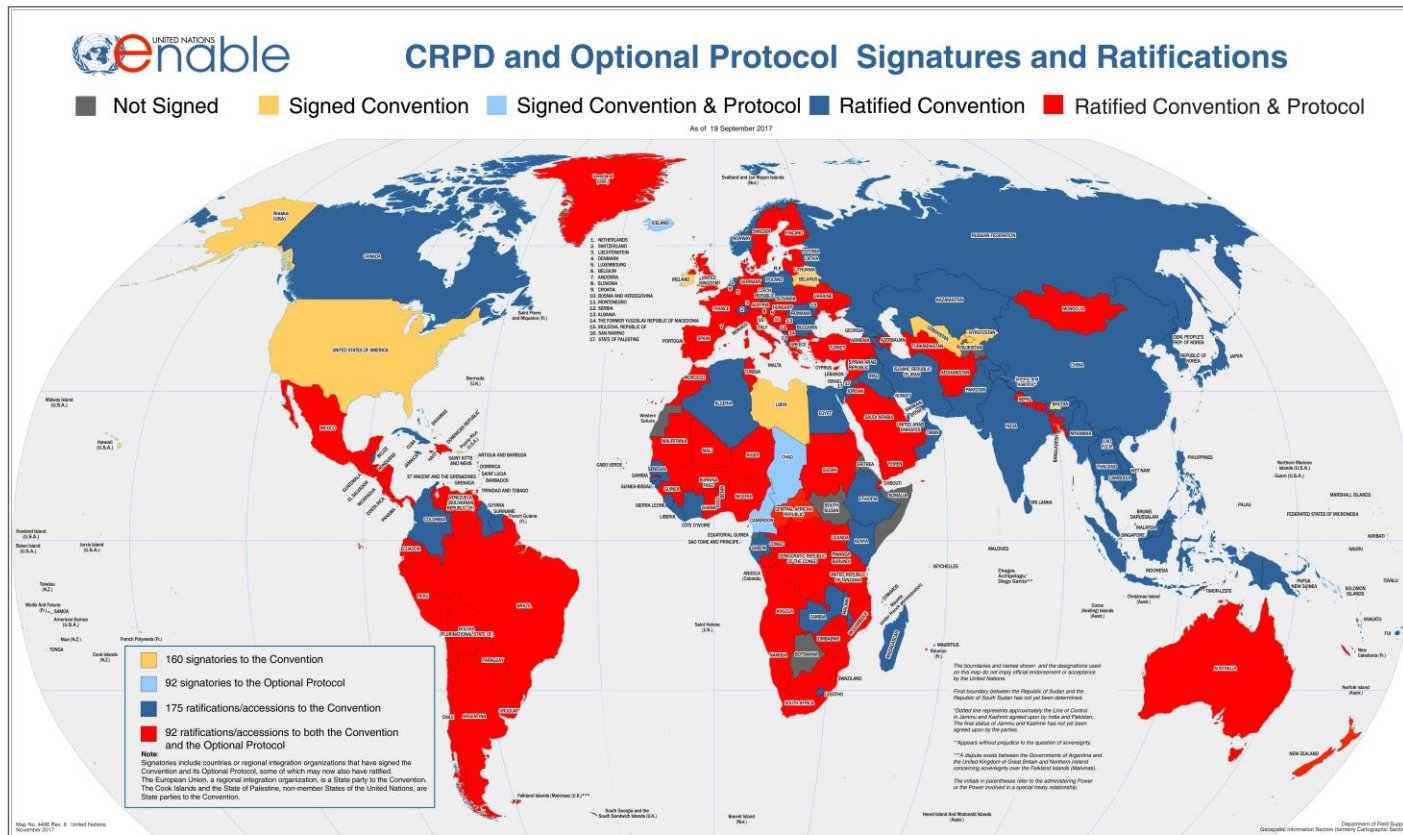
Fragen in Schriftform.
Antworten am Ende der Präsentation.



Zentrale Themen (5)

- Zweck, allgemeine Grundsätze und Rechte nach der UN-BRK
- Die Überwachungsfunktion des UN-Ausschusses für die Rechte von Menschen mit Behinderungen
- Berichterstattung der Vertragsstaaten und Individualbeschwerdeverfahren
- Größte Herausforderungen und Chancen
- Was wird die Zukunft bringen?

Derzeitiger Stand der Ratifizierungen



Convention

- Ratifications/Accessions: 177
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Ziele der UN-BRK

- Neuer, internationaler Vertrag über individuelle Menschenrechte
- Sicherung der Chancengleichheit für Menschen mit Behinderungen in den (allen) Lebensbereichen
- Stärkung/Ergänzung der bestehenden sonstigen Menschenrechtsverträge
- Besondere Bezugnahmen
- Angleichung hoher Standards



Zweck der UN-BRK

- Förderung
- Schutz
- Gewährleistung

des vollen und gleichberechtigten Genusses aller Menschenrechte und Grundfreiheiten

+ Achtung der ihnen
innewohnenden Würde

*Erwägungsgrund e) „sich weiterentwickelndes
Verständnis“ des Begriffs „Behinderung“
(Global Times)*



Wichtigste allgemeine Grundsätze der UN-BRK

Individuelle Autonomie;

Nichtdiskriminierung;

Teilhabe an der Gesellschaft und Einbeziehung in die Gesellschaft;

menschliche Vielfalt und Menschheit;

Chancengleichheit;

Zugänglichkeit;

Gleichberechtigung von Mann und Frau;

Achtung der Rechte von Kindern mit Behinderungen.



Überwachungsmechanismus der UN-BRK

- Verfahren für die Berichterstattung der Vertragsstaaten
- UN-BRK Artikel 33 – Anlaufstelle(n) + unabhängige Stelle
- Fakultativprotokoll
 - *Individualbeschwerdemechanismus (Mitteilung)*
 - *schwere oder systematische Verstöße – vertrauliches Verfahren (Art. 6)*
- Recht auf Einbeziehung: formelle und informelle Konsultationen mit NRO und nationalen Menschenrechtsinstitutionen (Kap. XIII) – neue Allgemeine Bemerkung zu Art. 4 Abs. 3 und Art. 33



Verfahren für die Berichterstattung der Vertragsstaaten

- Konstruktiver Dialog
- Aufgaben der Berichterstatter
 - *Liste zu klärender Fragen*
 - *Abschließende Bemerkungen*



Individualbeschwerdemechanismus

Basierend auf Handlungsgrundsätzen

(Gruppen von) Einzelpersonen / gesetzliche Vertreter

(Fehlen der) Rechts- und Handlungsfähigkeit

(Un-)Zulässigkeit (Art. 2)



Grundsätze unserer Arbeit

Klare Erwartungen

Faire Behandlung

Kohärenz

Gleichberechtigte Bewertung



Zu den Allgemeinen Bemerkungen

Allgemeine Bemerkung Nr. 1

Artikel 12: **Gleiche Anerkennung vor dem Recht** (angenommen am 11. April 2014)

Allgemeine Bemerkung Nr. 2

Artikel 9: **Zugänglichkeit** (angenommen am 11. April 2014)

Allgemeine Bemerkung Nr. 3

Artikel 6: **Frauen und Mädchen mit Behinderungen** (angenommen am 26. August 2016)

Allgemeine Bemerkung Nr. 4

Artikel 24: **Recht auf integrative Bildung** (angenommen am 26. August 2016)

Allgemeine Bemerkung Nr. 5

Artikel 19: **Recht auf unabhängige Lebensführung** (angenommen am 31. August 2017)

Allgemeine Bemerkung Nr. 6

Artikel 5 - **Gleichberechtigung und Nichtdiskriminierung** (angenommen am 9. März 2018)



Wichtigste Herausforderungen in der Arbeit der Mitglieder

Zeit

Begrenzte Konsultationen

Glaubwürdigkeit (Vorbereitetsein)



Chancen für die NRO

Analyse der Vor- und Nachteile

Erläuterung der Arbeit des UN-Ausschusses für die Rechte von Menschen mit Behinderungen

Beschreibung Ihrer nächsten Schritte im Vorhinein

Direkte Kontakte mit Sachverständigen



Häufige Fehler

- NRO sind nicht rechtzeitig auf den Beginn der Sitzung vorbereitet
- Lassen Sie uns ein praktisches Beispiel betrachten (Sitzung im August)
 - *Verfügbarkeit des (aktualisierten) Schattenberichts im (Mai-Juni)*
 - *Vorlage von Stellungnahmen, Redebeiträgen von NRO (nicht erst unmittelbar vor der jeweiligen spezifischen Konsultation!)*
 - *kontroverse/kritische Fragen werden im Vorhinein geklärt*



Zusammenfassung – Möglichkeiten zur Verbesserung der Arbeit

Ermittlung der Probleme

Zusammenarbeit

Motivation

Effizienz

Planung



Was wird die Zukunft bringen?

- Tempo von Innovationen, Zeitalter neuer (Bio-)Technologien
- Ethische Fragen, moralische Dilemmas (z. B. künstlicher Uterus – Schwangerschaftsabbruch)
- Menschenrechtsstatus von durch implantierte Technologien / genetische Veränderungen „weiterentwickelten“ Menschen

...wer wird in Zukunft behindert sein?



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Vielen Dank für Ihre Aufmerksamkeit

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Disability in European Union Law



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Overview of the presentation

1. Disability rights in Europe
2. The European Convention of Human rights (EHCR) and disability
3. The European Social Charter
4. Disability rights in the European Union treaties
5. The European Charter of Fundamental Rights
6. The United Convention on the Rights of Persons with Disabilities (UNCRPD) as part of the EU legal order
7. Secondary EU legislation protecting the rights of persons with disabilities
8. Issues of primacy, direct and indirect effect

1. Disability rights in Europe

- Over the last decade, the protection of the fundamental rights of persons with disabilities in Europe has evolved drastically. It is today ensured by a multilevel structure in which different overlapping legal orders intertwine.
- The rights of persons with disabilities are simultaneously protected by national, European Union and international (ECHR and UNCRPD) instruments and institutions. In addition, institutional remedies - most notably through judicial review exercised by the courts - are established at every level to ensure the protection of these rights.
- In recent years, the growth of the disability rights protection in Europe has been characterized by a continuous dynamic of mutual reinforcement between those different levels.

2. The European Convention of Human rights (ECHR) and disability

- The ECHR is acquiring a key significance as a constitutional source for the protection of basic civil and political rights of persons with disabilities throughout Europe.
- Since the enactment of the 11th Additional Protocol to the ECHR in 1998, the citizens of signatory states are able to commence legal proceedings before the European Court of Human Rights (ECtHR) when they believe that an individual right proclaimed in the ECHR has been unlawfully breached by their state, and they have unsuccessfully exhausted all national remedies. In addition, they can receive damages if the state is found guilty of the breach. The ECtHR, therefore, exercises an external and subsidiary review of the national systems of fundamental rights protection by remedying potential violations at the state level.
- Although not expressly listed among the protected grounds of discrimination, disability has been included by the ECtHR in its interpretation of 'other status' under Article 14 of the ECHR.
- In the case of *Glor v. Switzerland* (2009), the European Court of Human Rights - for the first time :
 - found a violation of the right to non-discrimination on the basis of the applicant's disability;
 - referred to the UNCRPD;
 - and used the concept of reasonable accommodation.

- Since then, the EHCtCR has delivered some landmark judgements in relation to disability rights. The Court's disability jurisprudence generally concerns the management of compulsion in institutional settings, including with respect to detention/institutionalisation, forced medical treatment or restraint or incapacitation.
- For example, in *Alajos Kiss v Hungary* (2010), the Court concluded that an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship cannot be considered compatible with the legitimate grounds for restricting the right to vote.
- In *Stanev v. Bulgaria* (2012), the EHCtCR issued a ground breaking judgement with significant implications for people with mental disabilities who have been institutionalized in Europe and beyond. The case represented the first time that the Court found that the placement of a person with a psycho-social disability in a social care institution may amount to detention under the Convention and that poor conditions in such homes may violate the right to be free from degrading treatment.
- In *Çam v. Turkey* (2016), the Court delivered a significant judgment on the inclusion of students with disabilities in the field of education by ruling that the state's refusal to enrol a blind student into a music academy violated the right to education and from non discrimination, and that the state's refusal to make reasonable accommodation to facilitate access to school facilities also constituted a discrimination.

3. The European Social Charter

- Another legal instrument constituting the general human rights framework of the Council of Europe is the European Social Charter (ESC), which was first adopted in 1961 and then substantially revised in 1996. It was the first human rights treaty to explicitly mention disability. It includes a right to equal opportunities and equal treatment in matters of employment and occupation and a protection against discrimination, inter alia, on the grounds of “other status”, which also includes disability as a protected ground.
- The main article in the European Social Charter relating to the disability rights is article 15 concerning the right of persons with disabilities to independence, social integration and participation in the life of the community. Articles 9, 10 and 17 are also relevant, since all provisions of the Charter are applicable to persons with disabilities.
- This is in particular reflected in the decision adopted in 2014 by the body monitoring the implementation of the ESC – the European Committee of Social Rights (ECSR) – in *Autism-Europe v. France* - where it was found that France failed to comply with :
 - article 15.1 the ESC with regard to the right of children and adolescents with autism to be educated primarily in mainstream schools;
 - article E taken in conjunction with Article 15 because families have no other choice than to leave the national territory in order to educate their children with autism in a specialized school, which constitutes a direct discrimination against them;
 - article E taken in conjunction with Article 15. because the limited funds in the State’s social budget for the education of children and adolescents with autism indirectly disadvantages these persons with disabilities.

4. Disability rights in the European Union treaties

- The European Union legal system is structured and hierarchical. Therefore, the starting point for considering the legal framework protecting disability rights within the European Union are the two core functional treaties, namely the Treaty on European Union (TEU), originally signed in Maastricht in 1992, and the Treaty on the Functioning of the European Union (TFEU), originally signed in Rome in 1957.
- The protection of human rights is firmly embedded in the TEU :
 - Article 2 TEU, states that “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.
 - Article 3 TEU pledges the Union to “combat social exclusion and discrimination” and to “promote social justice and protection, equality between men and women, solidarity between generations and protection of the rights of the child”.
 - Article 6(1) TEU states that : “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties”.

- Article 6(2) TEU states that: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms...”
- Article 6(3) TEU states that: “Fundamental Rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.
- Article 7 sets out procedure for dealing with a “clear risk of a serious breach” by a Member State of the values referred to in Article 2.
- Article 9 TEU mandates the EU institutions to afford all citizens equal attention, and Article 21 TEU sets forth the requirement that the EU be guided by the principle of equality in EU external action.
- Although these articles do not create any rights, their prominent position in the TEU shows that the EU is committed to human rights and allows for more substantive forms of protection to be developed in the future.
- The TFEU contains a horizontal clause on non-discrimination provides the EU with a legal basis for the EU non-discrimination legislation.
 - Article 10 TFEU specifies that “in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, **disability**, age or sexual orientation”.
 - Article 19 TFEU (former Article 13 EC) allows the EU to take action to combat discrimination on the named grounds his provides: “Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, **disability**, age or sexual

5. The European Charter of Fundamental Rights

- Since the entry into force of the Lisbon Treaty in December 2009, the Charter has acquired the same legal value as the EU Treaties and binds the EU institutions and member states when their action falls under the scope of application of EU law.
- The Charter incorporates a binding set of principles bringing together in one place all of the personal, civic, political, economic and social rights enjoyed by people within the European Union. The Charter includes the social and economic rights recognised as general principles of EU law, but also the fundamental rights adopted by the EU from the European Convention on Human Rights (ECHR) and the constitutional traditions common to the member states.
- Article 21(1) of the Charter provides for an all-embracing prohibition on discrimination states that: “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”.
- Article 26 of the Charter states that the “Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community”. These measures may concern education, vocational training, ergonomics, accessibility, mobility, means of transport and housing as well as access to cultural and leisure activities.

- Article 51 sets out the **scope of application** of the Charter:
 - Article 51(1) states that the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. Thus the Charter binds also Member states whenever they act within the scope of EU law.
 - Article 51(2) reiterates the article 6(1) provision of the TEU: “The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”. This means that the Charter cannot enter new policy domain and only attaches to EU law which is the expression of agreement between Member states that the EU has competence in conformity with the subsidiarity principle.
- Since its adoption, the ECJ mainly relied on the on the Charter :
 - to give broad interpretation to human rights: Case C-391/09 Runevi-Vardyn v. Vilnius and Case C-159/10 Fuchs and Köhler v Land Hessen.
 - to invalidate EU secondary legislation which breaches a Charter principle: Case C-92/09 Volker v Land Hessen, and Case C-236/09 Association Belge des Consommateurs Test-Achats ASBL v Conseil des Ministres,.

- In the **case C356/12** Glatzel v Freistaat Bayern, the ECJ for the first time had to assess the compatibility of EU provisions with the disability provisions of the Charter. The ECJ had to assess whether physical conditions for drivers settled in the Directive 2006/16 constitute discrimination on the grounds of disability and, hence, violate the principle of equal treatment (Article 20 of the Charter), and more specifically, the principle of non-discrimination on the grounds of discrimination (Article 21(1)) as well as the principle of integrating of integrating persons with disabilities (Article 26).
- The ECJ eventually concluded that it did not have sufficient information to conclude that the Directive should be invalidated but there are several interesting elements to notice in its judgment :
 - a) the ECJ considered that Article 26 of the Charter “does not require the EU legislature to adopt any specific measure” for persons with disabilities and that “in order for that article to be fully effective, it must be given more specific expression in EU law or national law”.
 - b) the reference to the UN Convention on the Rights of Persons with Disabilities as an integral part of the European Union legal order and the Directive 2006/126 as regard personal mobility considered as one of the legal acts of the European Union which refer to matters governed the UNCRPD.
 - c) the way in which the ECJ carefully examined whether there is an objective justification for different treatment of some disabled drivers (suitability , necessity and proportionality)
 - d) the lack of necessity to determine whether a diminished visual acuity should be considered to amount to a disability within the meaning of the Charter since a difference in treatment consisting in not issuing a driving licence for vehicles on the ground of insufficient visual acuity may be objectively justified in the light of overriding considerations of road safety.

6. The United Convention on the Rights of Persons with Disabilities (UNCRPD) as part of the EU legal order

- The European Union has acceded to the UNCRPD with Council Decision 2010/48/EC. The instrument of ratification was deposited in December 2010, after the adoption of a Code of Conduct by the Council. The Council Decision has 2 substantive legal bases, namely Article 19 TFEU (non discrimination) and article 114 TFEU (measures aiming to improve the conditions for the establishment and functioning of the internal market) , in conjunction with the procedural provision of article 218 TFEU (agreements between the Union and third countries or international organisations).
- It was the first time ever that the EU becomes a party to an international human rights treaty and it was also the first time that an intergovernmental organization join a United Nations human rights treaty.
- The UNCRPD, as other multilateral agreements that make provision for participation by regional organisations such as the EU alongside its Member States, provides for a Declaration of competence specifying which areas of the agreement fall within the competence of the Regional organization and which within that of its Member States. This Declaration is intended to specify to third Countries the distribution of competences between the European Union and the Member States and is also is relevant to determine the ultimate international responsibility for the implementation of the UNCRPD.

- The UNCRPD is a **mixed agreement**. Mixed agreements are signed and concluded by the EU and its Member States on the one hand, and by a Third Party on the other hand. The mixed nature is due to the fact that part of an international agreement falls within the scope of the EU powers and part within the scope of the powers of the Member States.
- An international agreement has legal effect in the EU legal order and does not require further acts of implementation at EU level such as a regulation or a directive. Moreover, in the hierarchy of sources of EU law, international agreements concluded between the EU and third countries or international organisations are situated below primary sources and general principles of EU law, but above secondary sources. The ECJ held that international agreements and all acts of the EU institutions adopted in relation to their conclusion prevail over secondary sources of EU law.
- As a result, all EU unilateral measures such as regulations, directives and decisions must be in conformity with international agreements in so far as their provisions fall within the scope of Community competence. Any conflicting secondary legislation may be annulled by the ECJ by virtue of Article 263 TFEU.
- The primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements (ECJ Case C-61/94). The accession to the UNCRPD creates therefore an obligation to interpret EU law in manner that is consistent with the Convention (Ring vs Dansk almennyttigt Boligselskab DAB – ECJ Case C2335/11).

- Under certain conditions (see *infra*), international agreements can be invoked before the court by an individual; there is direct effect (*Demirel* - Case 12/86).
- In ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement (Case C-239/03, *Etang de Berre*). Therefore, the Commission might bring an infringement case against Member State not properly implementing the UNCRPD insofar as its provisions are within the scope of the EU competence.

7. Secondary EU legislation protecting the rights of persons with disabilities

- There is a very broad and diverse legislation at the European level dealing with disability related issues. Disability is part of the non-discrimination EU policy together with gender, ethnic origin, religion or belief, age and sexual orientation. Disability related issues are also covered by EU legislation and programmes in the field of education, employment and training, health and safety at work, social protection, social inclusion, public procurement, state aids, transport, telecommunications, consumer protection, health services and bioethics, assistive technologies etc.
- Article 19 TFEU has been the legal basis for the Council Directive 2000/78/EC of 27 November 2000, known as the Employment Equality Directive. As provided for in Article 1, the purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation a regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.
- This directive bans both direct discrimination (differential treatment based on a specific characteristic) and indirect discrimination (any provision, criterion or practice which is apparently neutral, but is liable to adversely affect one or more specific individuals or incite discrimination). Harassment, which creates a hostile environment, is also deemed to be a form of discrimination.

- Among the substantive provisions of the Directive figures an article on reasonable accommodation. As defined by Article 2 of the UNCRPD, reasonable accommodation means that the employer has a legal duty to take measures to adapt to working place to an employee with disabilities, such as removing physical barriers by installing ramps, facilitating access of visually impaired employees to information technologies, or altering working times to accommodate the needs of workers with disabilities. Failure to provide reasonable accommodation constitutes discrimination for the purpose of the Directive.
- The Employment Equality Directive requires Member States to provide for effective judicial remedies, embed legal rules on shifting the burden of proof to the respondent where a prima facie case of discrimination is established, and provide for sanctions. Notably, the Employment Equality Directive imposes only minimum requirements, and allows Member States to apply provisions which are more favourable to the protection of equal treatment than those laid down in the Directive.
- In 2008, the Commission presented a Proposal for a new Equal Treatment Directive aiming at extending the EU's non-discrimination legislation beyond the sphere of employment and occupation, addressing discrimination in the fields of social protection, social advantages, education, and access to and supply of public goods and services. However, this proposed Directive is still subject to an ongoing discussion and negotiation in Council. As yet, it has not been possible to achieve the unanimous agreement of all Member States that is required for the adoption of directives based on Article 19 TFEU, meaning the directive is far from being approved.

- On 2 December 2015, the European Commission also adopted a proposal for a European Accessibility Act, namely a directive aiming at prescribing common accessibility requirements covering products and services across the EU. Discussions among the Member states in the European Council and in the Parliament are still underway and it is too early to say when the final adoption of the proposal could be expected.
- Article 153 of the Treaty on the Functioning of the European Union gives the EU the authority to adopt directives in the field of safety and health at work. Reference is made in the Framework Directive and individual directives to the protection of the health and safety of workers with disabilities – for instance through the provision in Directive 89/654/EEC on the minimum safety and health requirements for the workplace stipulating that employers are required to organise workplaces “to take account of handicapped workers, if necessary”. In 2015, the ECJ concluded the Fenoll case (C-316/13) that the concept of “worker” as stipulated in of Directive 2003/88 on working time and Article 31 of the Charter of Fundamental Rights must be interpreted in such a way that a person in a sheltered workplace, performing work which was not entirely marginal, should be covered by the definition of worker.
- Disability is also addressed to some extent in EU consumer law, most notably in the Unfair Commercial Practices Directive (2005/29), the Product Safety Directive (2001/95) and the Consumer Rights Directive ((2011/83). However, the conceptualisation of vulnerability under EU consumer law remains inadequate to provide the adequate protection for persons who are disadvantaged on grounds of their disability.

- Disabled passengers rights are protected at European level by a set of comprehensive regulations which covers all means of transportation: planes, trains, ships and buses or coaches.
- The Regulation 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air establishes a set of specific rights for passengers with disabilities. The basic principles of this regulation are:
 - persons with disabilities should not be discriminated against when booking a ticket or boarding an airplane;
 - persons with disabilities have the right to receive assistance at the airport at no additional charge;
 - all staff dealing directly with the traveling public must receive relevant training, including disability awareness training.
- Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, establishes rules for compensation but also regarding the liability of airlines for damaged, lost, or destroyed mobility equipment.
- Similar to the air- passengers' rights regulations, disabled passenger's rights are addressed in :
 - the Regulation 1371/2007 when travelling by train;
 - the Regulation 1177/2010 when travelling by sea and inland waterway;
 - the Regulation 181/2011 when traveling in bus and coach transport.

- Since the EU law on passengers rights is framed in regulations, it is **directly applicable**. They do not need any other acts of parliament in the member state to make them into law. These regulations are also **vertically and horizontally directly effective** : they can be used as a piece of law in a member state court against the state or another individual.

8. Issues of primacy, direct and indirect effect

- The primacy of European Union law (sometimes referred to as supremacy) is an EU law principle that when there is conflict between European law and the law of Member States, European law prevails; the norms of national law have to be set aside. This principle was developed by the European Court of Justice, and, as interpreted by that court, it means that any norms of European law always take precedence over any norms of national law, including the constitutions of Member states.
- Direct effect is another principle of the EU law developed by the ECJ. It enables individuals to immediately invoke a European provision before a national or European court. This is significant because of the consequences both within the legal order of the European Union and for its member states.
- For example, if the provisions of the UNCRPD would be directly effective in the EU legal order, they will also have direct effect within the legal orders of all member states and, as EU law, enjoy supremacy over national law. EU law thus could act as a door opener for the UNCRPD in the member states' legal orders and provides an enforcement mechanism and potentially also an hierarchical boost : the UNCRP provisions could be enforced by all mechanisms used to enforce EU law, in particular by national courts, and it will benefit from the doctrine of supremacy of EU law according to which it enjoys a higher rank than member states' legislation.

- The term ‘direct effect’ was first used by the Court of Justice of the European Union (CJEU) in a judgement on 5 February 1963 when it attributed, to specific treaty articles, the legal quality of direct effect in the case of NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen (Case 26/62). In this case, the CJEU identified three situations necessary to establish the direct effect of primary EU law. These are that:
 - the provision must be sufficiently clear and precisely stated
 - it must be unconditional and not dependent on any other legal provision;
 - it must confer a specific right upon which a citizen can base a claim.
- Taken together, the principles of direct effect and primacy mean that treaty provisions may be used to make claims before domestic courts and override domestic law. Probably the best-known example is Defrenne v. Sabena (Case 43/75), where the CJEU decided that the principle that women and men should receive equal pay, which is laid down by Article [141 EC now 157 TFEU], may be relied on before the national courts. These courts have a duty to ensure the protection of the rights, which that provision vests in individuals.
- “Vertical” effect applies when provisions have direct effect between citizen and public bodies. “Horizontal” effect’ applies when the provisions have direct effect between citizen and citizen.

- The principle of direct effect also applies to the EU secondary legislation :
 - decisions are binding in their entirety upon those to whom it is addressed (not general, but specific)
 - regulations are directly applicable in all member states. They are self-executing.
 - directives are not directly applicable-no self-executing character. Their Transposition in domestic law is in principle required but they are exceptions (non implementation by the member States, precise and clear provisions).
- The principles of direct effect also applies to mixed agreements s (Case 12/86 Demirel) insofar as the provisions of the agreement at stake:
 - address areas already largely covered by Community law (Case C-239/03 Commission v France -Etang de Berre)
 - are sufficiently clear, precise and unconditional (Case C-192/89 Sevince)
- In the case Z v The Board of management of a community school (C-363/12), the ECJ held that the provisions of the UNCRPD are not, as regards their content, provisions that are unconditional and sufficiently precise and therefore **do not have direct effect** in European Union.

Availability and access to EU Financial Instruments in line with the UNCRPD



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The duties of the European Union as party to the UNCRPD

- The European Union and its Institutions are bound, in accordance with Article 216(2) of the TFEU, by the terms of a treaty the EU has concluded. Hence the UNCRPD is binding on the EU and its institutions - including when they act to legislate - as well as on the Member States. Further, EU law must be interpreted in the light of treaties which have been signed and ratified by the EU.
- The general obligations of States Parties to the UNCRPD are set out in Article 4. They require States Parties, inter alia :
 - to repeal inconsistent laws and policies (4.1.b),
 - to refrain from any action inconsistent with the convention (4.1.d),
 - to enact new laws and policies where needed to give effect to the convention (4.1.a)
 - to take all measures to eliminate discrimination by both public and private actors (4.1.e)
 - and to mainstream disability (4.1.c).

Typology of the duties of the European Union as party to the UNCRPD

Respect



- The EU must refrain from engaging in any act or practice that is inconsistent with the UNCRPD and ensure that EU institutions act in conformity with the Convention.
- The EU must repeal all existing EU laws, regulations, and practices that constitute discrimination against persons with disabilities.

Protect



- The EU must adopt all appropriate legislative, administrative and other measures where needed for the implementation of the UNCPD.
- The EU must take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise.

Facilitate



- The EU must take into account the protection and promotion of the human rights of persons with disabilities in all its policies and programmes.
- The EU must undertake or promote research and development of universal design and assistive technologies.

The policy instruments of the European Union

- The European policy instruments are the set of tools which are available to the EU to implement its policy objectives.
- Generally speaking, there are three large categories of instruments used in European public policy:
 - Regulatory instruments : directives, regulations and decisions are instruments that are obligatory in nature, meaning that their target groups are obliged to act within some clearly defined boundaries. These obligatory measures are backed by threats of sanctions in cases of non-compliance.
 - Economic and financial instruments : the European Union can act by providing funding in a particular area in order to accomplish policy objectives involving those who receive the funds. This makes it a potentially effective instrument for encouraging particular activities that support the policy objectives.
 - Soft instruments : the EU instruments falling in this category are very diverse : recommendations, information and capacity building activities but are generally based on persuasion, on the mutual exchange of information among actors, and on less hierarchical forms of cooperation between the European Union, Member states and other public and the private actors.
- These policy instruments are not necessarily stand-alone alternatives to one another. In fact, many of them are mutually supportive or otherwise interrelated. For example, an information campaign can develop awareness of a problem and prepare the way for legislative solution, or a combination of financial support with information and education may be enough to solve an issue without turning to regulation as a solution.

The European Disability strategy 2010-2020

Areas of action : accessibility, participation, equality, employment, education and training, social protection and social inclusion, health and external action.

Examples of regulatory instruments	Examples of soft instruments	Examples of financial instruments
<ul style="list-style-type: none"> • Commission proposal for a European Accessibility Act • Directive on the accessibility of the websites and mobile applications of public sector bodies • Amendments in the European Public Procurement Directives for public authorities to require accessibility a • Revised Commission Regulation declaring certain categories of aid compatible with the internal market and providing for exemption of aid schemes for the recruitment of disadvantaged workers. 	<ul style="list-style-type: none"> • Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings • Launch of the EU Disability Card • Common European Guidelines on the Transition from Institutional to Community-based Care • EU Statistics on Income and Living Conditions (EU-SILC) • Pilot project to investigate the use of technology with parking cards • Trainings of legal and policy practitioners on the UNCRPD, which include disability discrimination 	<ul style="list-style-type: none"> • The European Social Fund • The European Regional Development Fund • The European Agricultural Fund for Rural Development • The Horizon 2020 research programme • The Rights, Equality and Citizenship programme • The EU Programme for Employment and Social Innovation • Erasmus+

Main financial instruments used to support the EU implementation of the UNCRPD

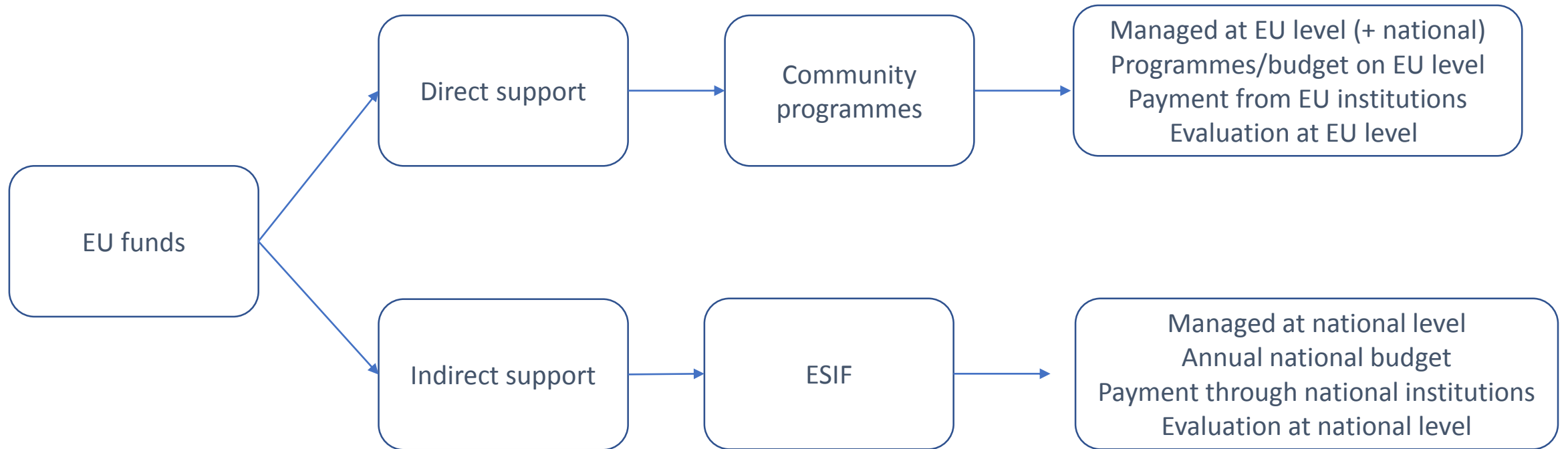
- The **European Social Fund** provides funds to numerous projects promoting concrete opportunities for people with disabilities in employment, training, accessibility, care services, social innovation and more. In total, 2 to 2.5 million disadvantaged people, including persons with disabilities, are expected to benefit from funding.
- The **European Regional Development Fund** prioritises the promotion of social inclusion, de-institutionalisation and the fight against discrimination, while taking into account the specific needs of persons with disabilities and requiring accessibility.
- The **European Agricultural Fund for Rural Development** promotes social inclusion and poverty reduction in rural areas. Measures such as basic services and local development strategies may contribute to improve the situation of persons with disabilities in the programming area.
- The **Horizon 2020 research programme** supports research projects on active and healthy ageing, mental health, personalised medicines, access to healthcare, ICTs, mobility aids, devices and assistive technologies, transport or socio-economic issues, addressing the daily needs of people with disabilities. For instance, the Commission dedicated 16M EUR for the period 2014 – 2015 to research on multimodal interfaces for assisting people with disabilities and 17M EUR to “Advanced digital games/gamification technologies”.

- **Erasmus+** (2014-2020) includes special needs support for mobility actions, but also funds disability-focused projects and organizations such as the European Forum of Sign Language Interpreters, and Telecentre Europe.
- The **Rights, Equality and Citizenship programme** promotes the rights of persons with disabilities and non-discrimination through specific funding to EU level disability organizations, research, training and awareness-raising actions.
- The **EU Programme for Employment and Social Innovation** supports quality and sustainable employment, adequate and decent social protection, the fights against social exclusion and poverty, and the improvement of working conditions, including for people with disabilities.
- The **External financing instruments** such as the European Instrument for Democracy & Human Rights provide funding of more than 336 disability-specific projects in 95 partner countries, mainly to promote the rights of persons with disabilities and their social inclusion (2010-2016).

Focus on the European Structural and Investments funds

- Over half of EU funding is channelled through the 5 European structural and investment funds (ESIF). They are jointly managed by the European Commission and the EU countries. The purpose of all these funds is to invest in job creation and a sustainable and healthy European economy and environment.
- The European structural and investment funds are the European regional development fund (ERDF), the European social fund (ESF), the Cohesion fund (CF), the European agricultural fund for rural development (EAFRD) and the European maritime and fisheries fund (EMFF)
- Adopted in December 2013, the regulatory framework governing the use of ESIF for the 2014-2020 period the Regulations recognised that Member States need to have regulatory and policy frameworks in place at national level in order to maximise the impact of the ESIF and achieve the objectives of the funds. For the first time, the Regulations introduced 'ex-ante conditionalities' designed to ensure that necessary institutional and strategic policy frameworks are in place before funding is released to the Member States.
- Activities supporting the transition from institutional care to community-based living are programmed under Thematic Objective 9 of the ESIF with the aim of "promoting social inclusion, combatting poverty and any discrimination". The condition attached to this objective (ex-ante conditionality 9.1) is that Member States must have in place and implement a "national strategic policy framework for poverty reduction, aiming at active inclusion" that "depending on identified needs, includes measures for the shift from institutional to community-based care". This need has been identified in several Member States: Bulgaria, Czech Republic, Estonia, Greece, Hungary, Lithuania, Latvia, Poland, Romania, Slovenia, Slovakia and Croatia

Access to EU funding



EU Finanzinstrumente – Verfügbarkeit und Zugang im Einklang mit der UN-BRK



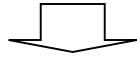
Diese Veröffentlichung wurde mit finanzieller Unterstützung des Programms „Rechte, Gleichstellung und Unionsbürgerschaft“ (2014-2020) der Europäischen Union erstellt. Der Inhalt dieser Veröffentlichung unterliegt der alleinigen Verantwortung des Autors und kann in keiner Weise als Sichtweise der Europäischen Kommission angesehen werden.

Die Verpflichtungen der Europäischen Union als Vertragspartei der UN-BRK

- Die Europäische Union und ihre Organe werden nach Artikel 216 Absatz 2 AEUV durch die von der Union geschlossenen Übereinkünfte gebunden. Somit ist die UN-BRK für die EU und ihre Organe – auch wenn sie gesetzgeberisch tätig sind – sowie für die Mitgliedstaaten bindend. Zudem muss das Unionsrecht im Lichte der von der EU unterzeichneten und ratifizierten Verträge ausgelegt werden.
- Die allgemeinen Verpflichtungen der Vertragsstaaten der UN-BRK sind in Artikel 4 dargelegt. Sie verpflichten die Vertragsstaaten unter anderem:
 - unvereinbare Gesetze und politische Maßnahmen aufzuheben (Art. 4 Abs. 1 Buchst. b),
 - Handlungen, die mit diesem Übereinkommen unvereinbar sind, zu unterlassen (Art. 4 Abs. 1 Buchst. d),
 - gegebenenfalls neue Gesetze und politische Maßnahmen zu erlassen, um das Übereinkommen umzusetzen (Art. 4 Abs. 1 Buchst. a),
 - alle Maßnahmen zur Beseitigung der Diskriminierung durch öffentliche und private Akteure zu ergreifen (Art. 4 Abs. 1 Buchst. e)
 - Behinderung in allen politischen Konzepten und Programmen zu berücksichtigen (Art. 4 Abs. 1 Buchst. c).

Typologie der Verpflichtungen der Europäischen Union als Vertragspartei der UN-BRK

Achtung



- Die EU muss Handlungen oder Praktiken, die mit der UN-BRK unvereinbar sind, unterlassen und dafür sorgen, dass die staatlichen Behörden und öffentlichen Einrichtungen im Einklang mit dem Übereinkommen handeln.
- Die EU muss alle bestehenden Gesetze, Verordnungen und Praktiken aufheben, die eine Diskriminierung von Menschen mit Behinderungen darstellen.

Schutz



- Die EU muss alle geeigneten Gesetzgebungs-, Verwaltungs- und sonstigen Maßnahmen zur Umsetzung der UN-BRK treffen.
- Die EU muss alle geeigneten Maßnahmen zur Beseitigung der Diskriminierung aufgrund von Behinderung durch Personen, Organisationen oder private Unternehmen ergreifen.

Förderung



- Die EU muss den Schutz und die Förderung der Menschenrechte von Menschen mit Behinderungen in allen politischen Konzepten und allen Programmen berücksichtigen.
- Die EU muss Forschung und Entwicklung für universelles Design und unterstützende Technologien betreiben oder fördern.

Die politischen Instrumente der Europäischen Union

- Die politischen Instrumente der Europäischen Union sind ein Instrumentarium, das der EU zur Umsetzung ihrer politischen Ziele zur Verfügung steht.
- Allgemein gesprochen gibt es drei große Kategorien von Instrumenten, die in der europäischen Politik zur Anwendung kommen:
 - **Regelungsinstrumente:** Richtlinien, Verordnungen und Entscheidungen/Beschlüsse sind Instrumente mit verpflichtendem Charakter, was bedeutet, dass ihre Zielgruppen verpflichtet sind, innerhalb klar definierter Grenzen zu handeln. Diese verpflichtenden Maßnahmen sind für den Fall der Nichtbefolgung mit der Androhung von Sanktionen bewehrt.
 - **Wirtschaftliche und finanzielle Instrumente:** Die Europäische Union kann handeln, indem sie in einem bestimmten Bereich Mittel zur Verfügung stellt, um unter Einbeziehung der Begünstigten politische Ziele zu verwirklichen. Dies macht sie zu potenziell wirksamen Instrumenten für die Förderung bestimmter Aktivitäten, die die politischen Ziele unterstützen.
 - **Weiche Instrumente:** Die in diese Kategorie fallenden EU-Instrumente sind sehr vielfältig: Empfehlungen, Informationsmaßnahmen und Maßnahmen zum Aufbau von Kapazitäten; sie basieren jedoch in der Regel auf Überzeugungsarbeit, auf einem gegenseitigen Informationsaustausch zwischen den Akteuren sowie auf weniger hierarchischen Formen der Zusammenarbeit zwischen der Europäischen Union, den Mitgliedstaaten und anderen öffentlichen sowie den privaten Akteuren.
- Diese politischen Instrumente sind nicht notwendigerweise eigenständige Alternativen füreinander. Faktisch wirken viele von ihnen gegenseitig unterstützend oder sind in anderer Weise miteinander verzahnt. Beispielsweise kann eine Informationskampagne für ein Problem sensibilisieren und den Weg für eine legislative Lösung bereiten, oder eine Kombination von Finanzhilfe mit Information und Bildung kann ausreichen, um ein Problem zu lösen, ohne dass auf eine Verordnung als Lösung zurückgegriffen werden muss.

Die Europäische Strategie zugunsten von Menschen mit Behinderungen 2010-2020

Aktionsbereiche: Zugänglichkeit, Teilhabe, Gleichstellung, Beschäftigung, allgemeine und berufliche Bildung, sozialer Schutz und soziale Eingliederung, Gesundheit und Maßnahmen im Außenbereich.

Beispiele für Regelungsinstrumente	Beispiele für weiche Instrumente	Beispiele für Finanzinstrumente
<ul style="list-style-type: none">• Vorschlag der Kommission für einen europäischen Rechtsakt zur Barrierefreiheit• Richtlinie über den barrierefreien Zugang zu den Websites und mobilen Anwendungen öffentlicher Stellen• Änderungen der europäischen Richtlinien über die Vergabe öffentlicher Aufträge, die besagen, dass Behörden Barrierefreiheit vorschreiben haben• Überarbeitete Verordnung der Kommission zur Feststellung der Vereinbarkeit bestimmter Gruppen von Beihilfen mit dem Binnenmarkt, die die Freistellung von Beihilferegulungen für die Einstellung behinderter Arbeitnehmer vorsieht.	<ul style="list-style-type: none">• Empfehlung über Verfahrensgarantien in Strafverfahren für verdächtige oder beschuldigte schutzbedürftige Personen• Einführung des EU-Behindertenausweises• Gemeinsame europäische Leitlinien für den Übergang von institutioneller Betreuung zu Betreuung in der lokalen Gemeinschaft• EU-Statistik über Einkommen und Lebensbedingungen (EU-SILC)• Pilotprojekt zur Untersuchung des Einsatzes von Technologie bei Parkausweisen• Weiterbildung von Angehörigen der Rechtsberufe und politischen Akteuren zur UN-BRK, unter Einbeziehung der Diskriminierung wegen einer Behinderung	<ul style="list-style-type: none">• Der Europäische Sozialfonds• Der Europäische Fonds für regionale Entwicklung• Der Europäische Landwirtschaftsfonds für die Entwicklung des ländlichen Raums• Das Forschungsprogramm Horizont 2020• Das Programm Rechte, Gleichstellung und Unionsbürgerschaft• Das EU-Programm für Beschäftigung und soziale Innovation• Erasmus+

Die wichtigsten Finanzinstrumente, die zur Förderung der Umsetzung der UN-BRK durch die EU zur Anwendung kommen

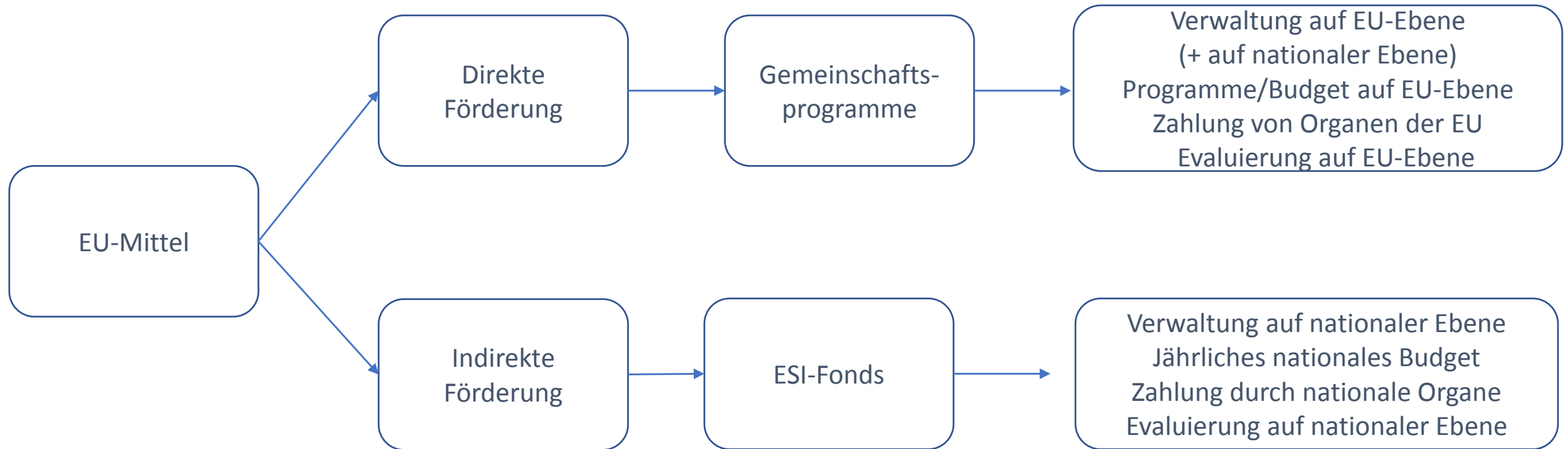
- Der **Europäische Sozialfonds** stellt Finanzmittel für zahlreiche Projekte bereit, die konkrete Chancen für Menschen mit Behinderungen in den Bereichen Beschäftigung, berufliche Bildung, Zugänglichkeit, Betreuungsdienste, soziale Innovation usw. fördern. Den Erwartungen zufolge werden insgesamt 2 bis 2,5 Millionen benachteiligte Menschen, darunter Menschen mit Behinderungen, von Finanzhilfen profitieren.
- Der **Europäische Fonds für regionale Entwicklung** hat als Prioritäten die Förderung der sozialen Eingliederung, die Deinstitutionalisierung und den Kampf gegen Diskriminierung, wobei die besonderen Bedürfnisse von Menschen mit Behinderung Berücksichtigung finden und Barrierefreiheit vorgeschrieben wird.
- Der **Europäische Landwirtschaftsfonds für die Entwicklung des ländlichen Raums** fördert die soziale Eingliederung und die Reduzierung der Armut in ländlichen Gebieten. Maßnahmen wie Basisdienstleistungen und Strategien zur lokalen Entwicklung können zur Verbesserung der Situation von Menschen mit Behinderungen im Programmgebiet beitragen.
- Das **Forschungsprogramm Horizont 2020** unterstützt Forschungsprojekte zu den Bereichen aktives und gesundes Altern, psychische Gesundheit, personalisierte Medikamenten, Zugang zum Gesundheitswesen, IKT, Mobilitätshilfen, Mobilitätsgeräte und unterstützende Technologien, verkehrspolitische oder sozioökonomische Fragen, Berücksichtigung der täglichen Bedürfnisse von Menschen mit Behinderung. Beispielsweise bewilligte die Kommission 16 Mio. EUR für den Zeitraum 2014-2015 für die Forschung zu multimodalen Schnittstellen zur Unterstützung von Menschen mit Behinderungen und 17 Mio. EUR für „Advanced digital games/gamification technologies“.

- **Erasmus+** (2014-2020) umfasst die Unterstützung bei besonderen Bedürfnissen für Mobilitätsaktionen, aber fördert auch Projekte und Organisationen mit dem Schwerpunkt „Behinderung“, zum Beispiel das European Forum of Sign Language Interpreters und Telecentre Europe.
- Das Programm **Rechte, Gleichstellung und Unionsbürgerschaft** fördert die Rechte von Menschen mit Behinderungen und die Nichtdiskriminierung durch die gezielte Finanzierung von Behindertenorganisationen, Forschung, beruflicher Bildung und Sensibilisierungsaktionen auf EU-Ebene.
- Das **EU-Programm für Beschäftigung und soziale Innovation** unterstützt qualitative und nachhaltige Beschäftigung, angemessenen Sozialschutz, die Bekämpfung von sozialer Ausgrenzung und Armut sowie die Verbesserung der Arbeitsbedingungen, auch für Menschen mit Behinderungen.
- Die **Außenfinanzierungsinstrumente**, beispielsweise das Europäische Instrument für Demokratie und Menschenrechte, stellen Finanzmittel für mehr als 336 behindertenspezifische Projekte in 95 Partnerländern bereit, überwiegend zur Förderung der Rechte von Menschen mit Behinderungen und ihrer sozialen Eingliederung (2010-2016).

Im Fokus: die Europäischen Struktur- und Investitionsfonds

- Über die Hälfte der EU-Mittel wird über die fünf europäischen Struktur- und Investitionsfonds (ESI-Fonds) vergeben. Sie werden gemeinsam von der Europäischen Kommission und den EU-Ländern verwaltet. Sie sind für Investitionen in die Schaffung von Arbeitsplätzen und einer nachhaltigen und gesunden europäischen Wirtschaft und Umwelt gedacht.
- Die europäischen Struktur- und Investitionsfonds (ESI-Fonds) sind der Europäische Fonds für regionale Entwicklung (EFRE), der Europäische Sozialfonds (ESF), der Kohäsionsfonds, der Europäische Landwirtschaftsfonds für die Entwicklung des ländlichen Raums (ELER) und der Europäische Meeres- und Fischereifonds (EMFF).
- In dem im Dezember 2013 angenommenen Regelungsrahmen für die Verwendung der ESI-Fonds für den Zeitraum 2014-2020 bzw. in den Verordnungen wurde anerkannt, dass die Mitgliedstaaten auf nationaler Ebene über regulatorische und politische Rahmenwerke verfügen müssen, um die Auswirkungen der ESI-Fonds zu maximieren und die Ziele der Fonds zu erreichen. Die Verordnungen führten erstmals „Ex-ante-Konditionalitäten“ ein, die sicherstellen sollen, dass die erforderlichen institutionellen und strategischen politischen Rahmenwerke vorhanden sind, bevor Mittel an die Mitgliedstaaten fließen.
- Die Programmplanung für Aktivitäten zur Unterstützung des Übergangs von institutioneller Betreuung zum Leben in der lokalen Gemeinschaft erfolgt unter dem Thematischen Ziel 9 der ESI-Fonds mit dem Ziel der „Förderung der sozialen Eingliederung und Bekämpfung von Armut und jeglicher Diskriminierung“. Die mit diesem Ziel verknüpfte Bedingung (Ex-ante-Konditionalität 9.1) lautet, dass die Mitgliedstaaten ein „auf die aktive Eingliederung ausgerichtetes nationales strategisches Gesamtkonzept zur Reduzierung der Armut“ vorhalten und umsetzen müssen, das „abhängig von dem ermittelten Bedarf Maßnahmen für den Übergang von institutionalisierten zu gemeindenahen Betreuungsdiensten enthält“. Dieser Bedarf wurde für mehrere Mitgliedstaaten ermittelt: Bulgarien, Tschechische Republik, Estland, Griechenland, Ungarn, Litauen, Lettland, Polen, Rumänien, Slowenien, Slowakei und Kroatien

Zugang zu EU-Mitteln



Disability assessment in light of the UNCRPD



This publication has been produced with the financial support of the European Union's REC Programme 2014-2020. The contents of this publication are the sole responsibility of the author and can in no way be taken to reflect the views of the European Commission.

THE DISABILITY PENSION ASSESSMENT PROCESS



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Terminology

- ✓ **Definition** : a statement of the meaning or significance of a word / a description of the features and limits of something
- ✓ **Assessment** : the act of judging the amount, value, quality, importance of something
- ✓ **Eligibility** : the fact of being allowed to do or receive something because you satisfy certain conditions

Purposes of assessments

- Assessments are used for a wide variety of purposes :
 - ✓ identifying needs
 - ✓ matching needs and interventions
 - ✓ measuring the outcomes and the effectiveness of a programme or an intervention
 - ✓ setting priorities
 - ✓ allocating resources

The role of disability assessments in social policy

- The redistribution of resources is at the core of welfare state objectives and the categorisation is one of the basic techniques used to determine the allocation of resources in social policy.
- Most allocation formulae in social policy refer to the concept of need. Need is the respect to which individuals are unequal and to which differentiation among individuals should be made.
- In the case of disability programmes, needs are always associated with the presence of an impairment.
- So in that perspective, the concept of disability always implies an assessment of a “disability” in order determine the eligibility to specific resources

Challenges arising for the UNCRPD

There are three types of interrelated challenges arising from the principles of the UNCRPD for disability assessments :

1. Human rights approach vs needs approach
2. Medical vs social model
3. Substantive rights and procedural rights

Disability as a human right issue

- Human rights can be described as:
 - Universal legal guarantees protecting individuals and groups against actions and omissions that affect their freedom and human dignity.
 - Basic minimum standards based on human needs universal and inalienable i.e. all people are born with the same human rights everywhere, at all times, and they cannot be taken away or given up.
 - Indivisible and interdependent, i.e. all rights are equally necessary for human life and dignity.
- One of the most fundamental dynamics of a human rights approach, is that every human being is a rights-holder and that every human right has a corresponding duty-bearer.

Needs vs Rights

- What is required/necessary/specific
 - Needs are met or satisfied
 - Needs do not necessarily imply duties
 - Needs can be met by charity and benevolence
 - Needs are often associated with non-legal commitment or promises
 - Needs can be ranked a priori in a hierarchy
- What is inherent to every human being
 - Human Rights are realized
 - Human Rights always imply correlative duties
 - Charity is seldom mandatory, rights always are
 - Rights are always associated with legal obligations
 - Rights cannot be ranked in a hierarchy

The right to have human rights cannot be assessed

- The UNCRPD does not create any “special” rights for persons with disabilities , but tries to ensure that persons with disabilities can enjoy, like everyone else, all human rights.
- Therefore, it would go against the basic principles of the UNCRPD to use disability assessments to provide or to restrict the access of persons with disabilities to civil, political, economic and social cultural rights. For example, persons with disabilities should not need a disability certificate or card to be protected against discrimination.

Social vs medical model

- The UNCRPD characterizes disability in this way: *“Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”*.
- Under the UNCRPD, disability has to be understood as the result of the interaction between some of a person’s characteristics with their physical and social environments in which people live. Consequently, the focus of intervention has to shift to changing the social, economic and environmental barriers that surround the person, and providing the person with supports needed to fully participate.
- By contrast, disability was historically seen as a deficit of a person’s intellectual, physical, sensory, communication or psychological characteristics. Disability was seen as something inside the person and the focus was exclusively on diagnosis, treatment, cure and prevention. In this model, the person deserves to be taken care of, often through segregated services, because it is assumed people with disabilities could not participate as full members of society.

Disability assessments under a medical approach

- Eligibility criteria and model of assessments are heavily reliant on the underlying medical or social approach of disability.
- In line with the principles and vision of the UNCRDP, disability assessment mechanisms should concentrate on participation restriction and on support needs of the person with a disability more than on her/his impairment or functional limitations. This implies also that these mechanisms take the environment into account, most often overlooked in assessments.
- However, because disability-related policies and programmes have evolved incrementally, in the context of a changing perspective on disability, there is a lot of inconsistency between the current eligibility criteria in place across legislations in most countries and the UNCRPD principles.

Substantive rights and procedural rights

- Substantive rights determine the substance of right (e.g. education, health). Procedural rights shape the processes by which substantive rights are created and enforced. In the contemporary human rights approach, the emphasis is on procedural rights because it is widely believed that desired outcomes are best achieved by enabling the right holders to make and enforce substantive rules, and that the role of the state is to ensure that certain minimum safeguards exist.
- From that perspective, the matter of how disability assessments are made and by whom, as well as how decisions are reviewed and their impact assessed, becomes crucial.
- There is evidence that many disability assessment processes have serious problems which limit both the assessment's fairness and effectiveness.

Basic procedural rights for ensuring the fairness of eligibility decisions based on needs assessments

- A fair hearing : persons need to be listened
- Equal and consistent treatment
- Unbiased decisions
- Structured discretion (where a decision involves an element of discretion, for example, an expert's assessment of an individual's predicament, it should follow explicit guidelines)
- Reasons for decisions (when a decision is reached, reasons should be given)
- Appeal and complaint (the person concerned should have a right to appeal),

A new approach for disability assessments

- The gatekeeper approach
 - Focus on eligibility
 - Strategy based on the uniformity of the decisions
 - Focus on control: preventing abuse
 - Focus on the respect of the rules (medico legal perspective)
 - Taxpayer centered perspective
 - Discretionary power used against the claimant

- The enabler approach
 - Focus on support needs
 - Strategy based on the use of social resources
 - Focus on broking : helping people links with resources and services
 - Focus on the fairness of the process
 - Customer centered perspective
 - Discretionary power used on behalf the claimant

Invaliditätsprüfung nach den Maßstäben der UN-BRK



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THE DISABILITY PENSION ASSESSMENT PROCESS



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Terminologie

- ✓ **Definition** : Erklärung des Sinnes oder der Bedeutung eines Wortes / Beschreibung der Merkmale und Grenzen von etwas
- ✓ **Prüfung**: Akt der Beurteilung der Bedeutung, des Wertes, der Qualität, des Stellenwerts von etwas
- ✓ **Anspruchsberechtigung**: Tatsache, etwas tun oder erhalten zu dürfen, weil bestimmte Voraussetzungen erfüllt werden

Zwecke von Prüfungen

- Prüfungen kommen für ein breites Spektrum von Zwecken zur Anwendung:
 - ✓ Bedarfsanalyse
 - ✓ Ermittlung bedarfsgerechter Interventionen
 - ✓ Messung der Ergebnisse und der Wirksamkeit eines Programms oder einer Intervention
 - ✓ Prioritätensetzung
 - ✓ Ressourcenzuteilung

Die Rolle von Invaliditätsprüfungen in der Sozialpolitik

- Die Umverteilung von Ressourcen gehört zu den zentralen Zielen des Wohlfahrtsstaates, und die Einstufung oder Klassifizierung ist eine der grundlegenden Techniken, die zur Anwendung kommen, um in der Sozialpolitik die Ressourcenzuteilung festzulegen.
- Die meisten sozialpolitischen Verteilungsschlüssel basieren auf dem Begriff des Bedarfs. Der Bedarf ist das Maß dafür, inwieweit Menschen ungleich sind und inwieweit zwischen Menschen unterschieden werden sollte.
- Im Falle von behindertenspezifischen Programmen ist der Bedarf stets mit dem Vorliegen einer Beeinträchtigung verbunden.
- In dieser Hinsicht impliziert der Begriff „Invalidität“ stets die Feststellung einer „Behinderung“, um die Anspruchsberechtigung in Bezug auf spezifische Ressourcen zu ermitteln.

Für die UN-BRK resultierende Herausforderungen

Es gibt drei Arten von miteinander verknüpften Herausforderungen, die sich aus den Grundsätzen der UN-BRK für Invaliditätsprüfungen ergeben:

1. Menschenrechtsperspektive vs. bedarfsorientiertes Konzept
2. Medizinisches Modell vs. soziales Modell
3. Substanzielle Rechte und Verfahrensrechte

Behinderung als Menschenrechtsthema

- Menschenrechte können beschrieben werden als:
 - Allgemeingültige rechtliche Garantien, die Einzelpersonen und Gruppen vor Handlungen und Unterlassungen schützen, die ihre Freiheit und Menschenwürde beeinträchtigen.
 - Auf menschlichen Bedürfnissen basierende grundlegende Mindeststandards, universell und unveräußerlich, d. h. alle Menschen werden immer und überall mit denselben Menschenrechten geboren, die ihnen nicht genommen und die nicht aufgegeben werden können.
 - Unteilbar und einander bedingend, d. h. alle Rechte sind für das Leben und die Würde des Menschen gleichermaßen notwendig.
- Eine der elementaren Dynamiken der Menschenrechtsperspektive ist, dass jeder Mensch ein Rechteinhaber ist und jedes Menschenrecht einen zugehörigen Pflichtenträger hat.

Bedürfnisse vs. Rechte

- Was ist gefordert/notwendig/spezifisch
- Bedürfnisse werden gedeckt oder befriedigt
- Bedürfnisse implizieren nicht notwendigerweise Pflichten
- Bedürfnisse können durch Wohltätigkeit und Fürsorge gedeckt werden
- Bedürfnisse sind oftmals mit rechtlich nicht bindenden Zusagen oder Zusicherungen verbunden
- Bedürfnisse können a priori hierarchisch geordnet werden
- Was jedem menschlichen Wesen inhärent ist
- Menschenrechte werden verwirklicht
- Menschenrechte implizieren stets entsprechende Pflichten
- Wohltätigkeit ist selten verpflichtend, Rechte sind es immer
- Rechte sind immer mit Rechtspflichten verbunden
- Rechte können nicht hierarchisch geordnet werden

Das Recht auf Menschenrechte kann nicht geprüft werden

- Die UN-BRK schafft keine „besonderen“ Rechte für Menschen mit Behinderungen, sondern versucht zu gewährleisten, dass Menschen mit Behinderungen – wie alle anderen – alle Menschenrechte genießen können.
- Daher liefe es den Grundprinzipien der UN-BRK zuwider, Invaliditätsprüfungen einzusetzen, um den Zugang von Menschen mit Behinderungen zu bürgerlichen, politischen, wirtschaftlichen, sozialen und kulturellen Rechten zu gewähren oder einzuschränken. Beispielsweise sollten Menschen mit Behinderungen keinen Behindertenausweis benötigen, um vor Diskriminierung geschützt zu werden.

Soziales vs. medizinisches Modell

- Die UN-BRK definiert „Behinderung“ wie folgt: *„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.“*
- Nach der UN-BRK ist Behinderung als Ergebnis der Wechselwirkung zwischen manchen der Merkmale einer Person mit der physischen und sozialen Lebensumwelt der Person zu verstehen. Infolgedessen muss sich der Interventionsschwerpunkt verlagern: auf die Veränderung der sozialen, wirtschaftlichen und umweltbedingten Barrieren, von denen die Person umgeben ist, sowie auf die Bereitstellung der Unterstützungsleistungen, die sie für die volle Teilhabe benötigt.
- Historisch wurde Behinderung dagegen als ein Defizit im Bereich der intellektuellen, physischen, sensorischen, kommunikativen oder psychischen Merkmale einer Person betrachtet. Behinderung galt als etwas im Inneren der Person, und der Fokus lag ausschließlich auf Diagnose, Behandlung, Heilung und Prävention. In diesem Modell verdient es die Person, betreut zu werden, oftmals durch segregierte Dienste, weil davon ausgegangen wird, dass eine Teilhabe von Menschen mit Behinderungen als vollwertige Mitglieder der Gesellschaft nicht möglich ist.

Invaliditätsprüfungen beim medizinischen Konzept

- Anspruchskriterien und Bewertungsmodell hängen stark von dem zugrundeliegenden medizinischen oder sozialen Konzept für Behinderung ab.
- Im Einklang mit den Grundsätzen und der Vision der UN-BRK sollten sich Mechanismen zur Invaliditätsprüfung stärker auf Einschränkungen hinsichtlich der Teilhabe und auf den Unterstützungsbedarf der behinderten Person konzentrieren, als auf ihre Beeinträchtigung oder ihre Funktionseinschränkungen. Dies impliziert auch, dass diese Mechanismen die Umgebung berücksichtigen, die bei Prüfungen meistens unberücksichtigt bleibt.
- Da sich Strategien und Programme für Menschen mit Behinderungen jedoch schrittweise entwickelt haben, besteht im Kontext einer sich ändernden Einstellung zu Behinderung ein hohes Maß an Inkohärenz zwischen den derzeit in den Rechtsvorschriften der meisten Länder zum Tragen kommenden Anspruchskriterien und den Grundsätzen der UN-BRK.

Substanzielle Rechte und Verfahrensrechte

- Substanzielle Rechte sind maßgeblich für den Wesensgehalt eines Rechts (z. B. Bildung, Gesundheit). Verfahrensrechte formen die Prozesse, durch die substanzielle Rechte geschaffen und durchgesetzt werden. In der aktuellen Menschenrechtsperspektive liegt der Fokus auf Verfahrensrechten, weil allgemein angenommen wird, dass sich erwünschte Ergebnisse am besten erreichen lassen, indem die Rechteinhaber befähigt werden, substanzielle Normen aufzustellen und durchzusetzen, und dass die Aufgabe des Staates darin besteht, für die Existenz bestimmter Mindestgarantien zu sorgen.
- Aus dieser Perspektive erhält die Frage, wie und von wem Invaliditätsprüfungen durchgeführt, wie Entscheidungen überprüft und wie deren Auswirkungen bewertet werden, entscheidende Bedeutung.
- Es gibt Hinweise darauf, dass viele Invaliditätsprüfungsverfahren mit schwerwiegenden Problemen verbunden sind, die sowohl die Fairness als auch die Wirksamkeit der Prüfung einschränken.

Grundlegende Verfahrensrechte für die Gewährleistung der Fairness von auf Bedarfsanalysen basierenden Anspruchsentscheidungen

- Rechtliches Gehör: Menschen müssen angehört werden
- Gleiche und kohärente Behandlung
- Unvoreingenommene Entscheidungen
- Strukturierte Ermessensbefugnis (wenn eine Entscheidung einen gewissen Ermessensspielraum beinhaltet, beispielsweise ein Sachverständigengutachten zu der Problematik einer Person, sollten dabei explizite Leitlinien zur Anwendung kommen)
- Entscheidungsgründe (wenn eine Entscheidung getroffen wurde, sollte sie begründet werden)
- Widerspruch und Beschwerde (die betroffene Person sollte ein Beschwerderecht haben)

Ein neuer Ansatz für Invaliditätsprüfungen

- Der „Gatekeeper“-Ansatz
 - Fokus auf Anspruchsberechtigung
 - Strategie basierend auf der Einheitlichkeit der Entscheidungen
 - Fokus auf Kontrolle: Verhinderung von Missbrauch
 - Fokus auf Einhaltung der Bestimmungen (medizinisch-rechtliche Perspektive)
 - Am Steuerzahler orientierte Perspektive
 - Ermessensbefugnis wird gegen den Anspruchsberechtigten eingesetzt
- Der „Enabler“-Ansatz
 - Fokus auf Unterstützungsbedarf
 - Strategie basierend auf der Nutzung sozialer Ressourcen
 - Fokus auf Vermittlung: Unterstützung von Menschen wird mit Ressourcen und Dienstleistungen verknüpft
 - Fokus auf Fairness des Verfahrens
 - Kundenorientierte Perspektive
 - Ermessensbefugnis wird im Sinne des Anspruchsberechtigten eingesetzt



Structural and Investment Funds 2014 – 2020



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European Structural and Investment Funds


Under the EU's 2014-2020 budget, Cohesion Policy will invest €325 billion. Taking into account the national contribution of member states, and the leverage effect of financial instruments, the overall impact is likely to be more than €500 billion.

in Europe's Member States, their regions and cities to deliver the EU-wide goals of growth and jobs, as well as tackling climate change, energy dependence and social exclusion.

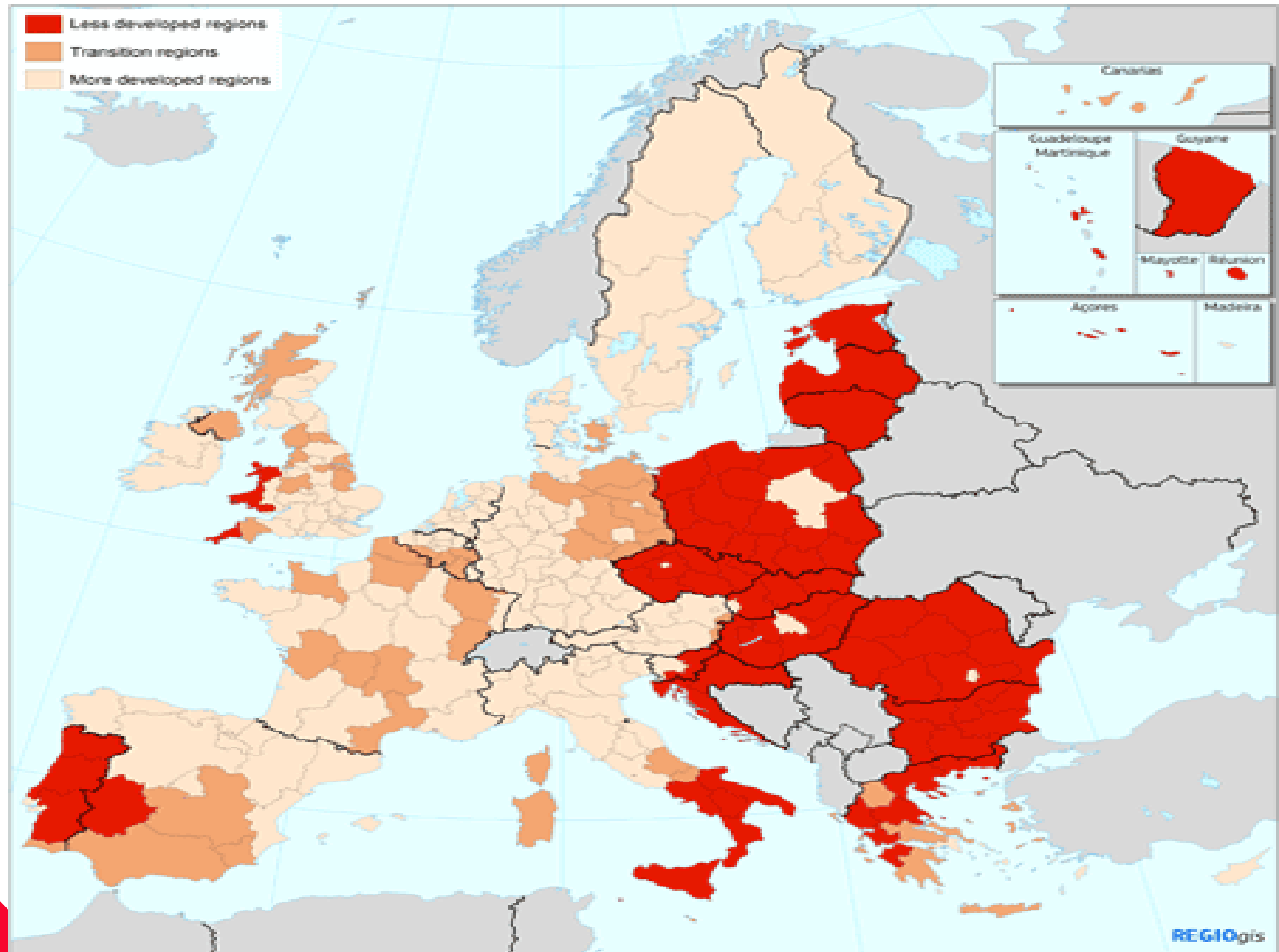
Focus on Common Provisions Regulation (CPR) , European Social Fund (ESF) and European Regional Development Fund (ERDF)




Investing in all EU regions

- *Less Developed regions*
(GDP < 75% of EU-27 average)
 - *Transition regions*
(GDP 75% to 90% of EU-27 average)
 - *More Developed regions*
(GDP > 90% of EU-27 average)
- 

Eligibility of Regions



Some important elements

- Targets
 - Conditionality
 - Coordination among the funds
 - Cooperation across borders
- 

Important reference documents

- ESIF regulations
 - Partnership agreement
 - Operational programmes
 - Code of conduct
- 

Partnership Agreements

- The Partnership Agreement is currently replacing the National Strategic Reference Framework (NSRF), which was the former reference framework for Structural Funds over the period 2007-2013
- Outline the country's strategy and framework in relation to Structural Funds



Partnership Agreements (2)

Article 15 CPR - The Partnership Agreement shall also indicate:

1 (c) arrangements for the **partnership principle** as referred in Article 5;

2 (a) an integrated approach to territorial development supported by the ESI Funds or a summary of the integrated approaches to territorial development based on the content of the programmes, setting out: (iii) ...integrated approach to addressing the specific needs of geographical areas most affected by poverty or of target groups at highest risk of discrimination or social exclusion, with special regard to marginalised communities, **persons with disabilities**, ...

Operational programmes (1)


- The Partnership Agreement will propose a list of Operational Programmes (OPs).
 - ✓ The analysis and the identification of needs
 - ✓ The definition or selection of priorities and related specific objectives
 - ✓ The allocation of funding
 - ✓ The definition of programme specific indicators

Operational Programmes (2)

CPR Article 7 - Promotion of equality between men and women and non-discrimination

...

*The Member States and the Commission shall take appropriate steps to prevent any discrimination based on sex, racial or ethnic origin, religion or belief, **disability**, age or sexual orientation during the preparation and implementation of programmes. **In particular, accessibility for persons with disabilities shall be taken into account throughout the preparation and implementation of programmes.***



Operational programmes (3)

Article 96 CPR - Content, adoption and amendment of operational programmes under the Investment for growth and jobs goal

4. In addition, the operational programme shall specify the following:


*(a) where appropriate, the identification of whether and how it addresses the specific needs of geographical areas most affected by poverty or target groups at highest risk of discrimination or social exclusion, with special regard to marginalised communities, **and persons with disabilities,** and where relevant the contribution to the integrated approach set out in the Partnership Agreement;*

Operational programmes (4)

Article 96 CPR - Content, adoption and amendment of operational programmes under the Investment for growth and jobs goal

7. Each operational programme ... shall...:


*(b) the specific actions to promote equal opportunities and prevent discrimination based on sex, racial or ethnic origin, religion or belief, **disability**, age or sexual orientation during the preparation, design and implementation of the operational programme and in particular in relation to access to funding, taking account of the needs of the various target groups at risk of such discrimination and **in particular the requirements to ensure accessibility for persons with disabilities;***



Operational programmes (5)

Article 27 CPR – Content of programmes

*5. Each programme, except those which cover exclusively technical assistance, shall include a description, in accordance with the Fund-specific rules, of the actions to take into account the principles set out in **Articles 5, 7 and 8.***




Operational Programme (5)

ERDF Programming

Article 8 - Content, adoption and amendment of cooperation programmes

7.(b) the specific actions to promote equal opportunities and prevent any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation during the preparation, design and implementation of the cooperation programme and in particular in relation to access to funding, taking account of the needs of the various target groups at risk of such discrimination and in particular the requirements to ensure accessibility for persons with disabilities;

Disability Perspective of the ESIF

- Crosscutting issues
 - ✓ Involvement – Monitoring
 - ✓ Ex-ante evaluation
 - ✓ Ex Ante Conditionality
 - ✓ Capacity Building
 - Specific issues
 - ✓ Actions: Employment, Education
 - ✓ De-institutionalisation
 - ✓ Accessibility
 - ✓ Non Discrimination
- 

Involvement (1)


Article 5 - CPR

1. *“For the Partnership Agreement and each programme, each Member StateThe partnership shall also include the following partners:*

*(c) relevant bodies representing civil society, including environmental partners, **non-governmental organisations**, and bodies responsible for promoting social inclusion, gender equality **and non-discrimination**”*

2 *“**the preparation of Partnership Agreements and progress reports and throughout the preparation and implementation of programmes; including through participation in the monitoring committees for programmes**”*

Involvement (2)

- Article 48 CPR: *“Representatives of the partners shall be delegated to be part of the monitoring committee by the respective partners through transparent processes. Each member of the monitoring committee **may have a voting right**”*
 - General Ex Ante Conditionality 3: *“Arrangements in accordance with the institutional and legal framework of Member States for the consultation and involvement of bodies in charge of protection of rights of persons with disabilities or **representative organisations of persons with disabilities** and other relevant stakeholders throughout the preparation and implementation of programmes”*
- 

Monitoring (1)

Article 110 - Functions of the monitoring committee

1. The monitoring committee shall examine in particular:

*(f) actions to promote equality between men and women, equal opportunities, **and non-discrimination, including accessibility for persons with disabilities;***



Monitoring (2)

Article 111 CPR- Implementation reports for the Investment for growth and jobs goal

3. Annual implementation reports shall set out information on:

(e) the specific actions taken to promote equality between men and women and to prevent discrimination, **in particular accessibility for persons with disabilities, ...;**

(h) progress in the implementation of measures to address the specific needs of geographical areas most affected by poverty or of target groups at highest risk of poverty, discrimination or social exclusion, with special regard ... **persons with disabilities, ...**, including, where appropriate, the financial resources used.

Monitoring (3)

ESF - ANNEX I - Common output and result indicators for ESF investments

(1) Common output indicators for participants

"Participants" (1) refers to persons benefiting directly from an ESF intervention who can be identified and asked for their characteristics, and for whom specific expenditure is earmarked. Other persons shall not be classified as participants. All data shall be broken down by gender.

The common output indicators for participants are:

*— **participants with disabilities***

Monitoring (4)

ERDF: Monitoring and evaluation

Article 14 – Implementation reports

*4. (d) the specific actions taken to promote equality between men and women and to promote non-discrimination, **in particular accessibility for persons with disabilities**, and the arrangements implemented to ensure the integration of gender perspective in the cooperation programme and operations*



Ex-ante evaluation

Article 55.3 3. Ex ante evaluation shall appraise:

(1) the adequacy of planned measures to promote equal opportunities between men and women and to prevent any discrimination, in particular as regards accessibility for persons with disabilities;

Ex- ante conditionality

PART II: General ex ante conditionalities

3. Disability

The existence of administrative capacity for the implementation and application of the United Nations Convention on the rights of persons with disabilities (UNCRPD) in the field of ESI Funds in accordance with Council Decision 2010/48/EC (1)

- *Arrangements in accordance with the institutional and legal framework of Member States for the consultation and involvement of bodies in charge of protection of rights of persons with disabilities or **representative organisations of persons with disabilities** and other relevant stakeholders **throughout the preparation and implementation of programmes;***
- *Arrangements for **training for staff of the authorities involved** in the management and control of the ESI Funds in the fields of applicable Union and national disability law and policy, **including accessibility and the practical application of the UNCRPD as reflected in Union and national legislation, as appropriate;***
- *Arrangements to ensure monitoring of the implementation of Article 9 of the UNCRPD in relation to the ESI Funds throughout the preparation and the implementation of the programmes.*

Capacity Building

Article 6 – Involvement of partners

3. To encourage the adequate participation of, and access by, non-governmental organisations in and to actions supported by the ESF,

that an appropriate amount of ESF resources is allocated to capacity building for non-governmental organisations.



Specific Issues: Actions

- **Article 8 ESF - Promotion of equal opportunities and non-discrimination**
- *The Member States and the Commission shall promote equal opportunities for all, without discrimination based on ... **disability**, through mainstreaming the principle of non-discrimination, as referred to in Article 7 of Regulation (EU) No 1303/2013. Through the ESF, the Member States and the Commission **shall also support specific actions** within any of the investment priorities Such actions shall aim to combat all forms of discrimination **as well as to improve accessibility for persons with disabilities**, with a view to **improving integration into employment, education and training**, thereby enhancing social inclusion, reducing inequalities in terms of educational attainment and health status, **and facilitating the transition from institutional to community-based care**, in particular for those who face multiple discrimination*

Specific Issues: Actions

Annex XI CPR – Thematic Conditionalities

10. Investing in education, training and vocational training for skills and lifelong learning

*-for the provision of skills development for various target groups where these are identified as priorities in national or regional strategic policy frameworks (for example young people in vocational training, adults, parents returning to the labour market, low skilled and older workers, migrants and other disadvantaged groups, **in particular people with disabilities**);*

*- to improve the **labour market relevance of education and training** and to adapt it to the needs of identified target groups, **in particular people with disabilities**.*



Transition from institutional to community-based care

Thematic Conditionality 9 CPR. Promoting social inclusion, combating poverty and any discrimination

*Investing in health and social infrastructure which contributes to national, regional and local development, reducing inequalities in terms of health status, promoting social inclusion through improved access to social, cultural and recreational services **and the transition from institutional to community-based services** (ESF and ERDF)*

9.1. The existence and the implementation of a national strategic policy framework for poverty reduction aiming at the active inclusion of people excluded from the labour market in the light of the Employment guidelines.

- depending on the identified needs, includes measures **for the shift from institutional to community based care;***

Transition from institutional to community-based care

ESF Recital (19)

- *The implementation of the priorities financed by the ESF should also contribute to promoting equal opportunities. The ESF should support the fulfilment of the Union's obligation under the UN Convention on the Rights of Persons with Disabilities with regard inter alia to education, work, employment and accessibility. The ESF should also promote the transition from institutional to community-based care. The ESF should not support any action that contributes to segregation or to social exclusion.*

Non discrimination and Accessibility

ANNEX I – Common Strategic Framework

5. HORIZONTAL PRINCIPLES REFERRED TO IN ARTICLES 5, 7 AND 8 AND CROSS-CUTTING POLICY OBJECTIVES

5.4 Accessibility

*1. Member States and the Commission shall, in accordance with Article 7, take appropriate steps to prevent any discrimination based on disability. Managing authorities shall ensure **by means of action throughout programme lifecycles that all products, goods, services and infrastructures that are open or provided to the public and are co-financed by the ESI Funds are accessible** to all citizens including those with disabilities in accordance with applicable law, thereby contributing to a **barrier-free environment for persons with disabilities and the elderly. In particular, accessibility to the physical environment, transport, ICT in order to promote inclusion of disadvantaged groups, including persons with disabilities,** shall be ensured. Actions to be undertaken may include directing investments towards accessibility in existing buildings and established services*

Non discrimination and Accessibility

CPR Annex XII 4. ELEMENTS OF THE COMMUNICATION STRATEGY

The communication strategy drawn up by the managing authority and, where appropriate, by the Member State shall include the following elements:

- *a description of materials that will be made available in formats accessible for people with disabilities;*

National Action Plan (1)

Partnership Agreements

1. Organisations of persons with disabilities should be involved in the partnership
2. An approach to address the specific needs of persons with disabilities

CPR: Article 15



National Action Plan (2)

Operational programmes

1. Under the Investment for growth and jobs goal
the operational programme shall specify the identification of whether and how it addresses the specific needs of geographical areas most affected by poverty or target groups at highest risk of discrimination or social exclusion, with special regard to persons with disabilities

National Action Plan (3)

Operational programmes

2. Each operational programme...shall...

*(b) the specific actions to promote equal opportunities and prevent discrimination based on ...**disability**, ...during the preparation, design and implementation of the operational programme and in particular in relation to access to funding, taking account of the needs ... **in particular the requirements to ensure accessibility for persons with disabilities***

CPR: Article 96.7.b

National Action Plan (4)

Operational programmes

3. It affects ESF and ERDF actions

4. Actions should include employment, education, social inclusion, transition from institutional to community-based care, transport, ICT, accessibility physical environment

CPR: Article 7, Thematic conditionality 9 and 10, General conditionality 3

ESF: Article 3.2

ERDF: Article 8

National Action Plan (5)

Training on UN CRPD for authorities

1. Arrangements for **training for staff of the authorities involved** in the management and control of the ESI Funds in the fields of applicable Union and national disability law and policy, **including accessibility and the practical application of the UNCRPD as reflected in Union and national legislation, as appropriate;**

CPR: Ex ante conditionality 3



National Action Plan (6)

Involvement

1. DPOs should be involved in preparation and be members of monitoring committees with voting rights

CPR: 5, 48, Ex ante conditionality 3

ESF: Article 6



National Action Plan (7)

Monitoring


1. The monitoring mechanisms should ensure actions to combat discrimination in the area of disability and accessibility for persons with disabilities
2. Common output and result indicators for ESF investments
3. *Arrangements to ensure monitoring of the implementation of Article 9 of the UNCRPD*

CPR:110, 111, ex ante conditionality 3

ESF: Annex I

ERDF: Article 14

EDF Strategy

1. Publication of guidelines
 2. Creation of a Helpdesk – Facilitation of meetings with EC desk officers
 3. Creation of an e-mail task force
 4. Database on good practice for Structural funds
 5. Participation in the Structured dialogue of the European Commission
- 

Thanks





The Social Services
network in Europe

Case study I: Using EU structural and investment funds in the field of disability

Alfonso Lara Montero
Chief Executive

17-18 May, 2018
Trier, Germany



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European Social Network

Our activities

- Who are we?
 - The social services Network in Europe
- What do we do?
 - Learning exchange & development in policy & practice

European Social Network Publication

- 2014 – How to access EU Structural and Investment Funds
- An ESN Guideline for public social services for 2014–2020



Case study: Czech Republic

Overview

- City of Liberec, Sokolov District
 - Community-based housing services
- Target group: people with learning disabilities
- Aim of project:
 - Maximise independence
 - Reduce need for long-term care
 - Help service users find employment

Case study: Czech Republic

Funding

- Project funding made up of:
 - EU funding received for project
 - As part of wider Karlovy Vary Region funding
 - National and regional government funding
 - Service user contributions
 - Based on income/benefits

Case study: Czech Republic

Main stakeholders

- Department of Social Affairs Karlovy Vary region
- Social Affairs Department of Sokolov municipality
- Parents of service users
 - Legal representatives

Case study: Czech Republic

Use of funds in the project

- Dolmen community housing scheme
 - 21 apartments for 1-2 residents
- Three levels of support:
 - Sheltered housing
 - Supported housing
 - Supported employment

Case study: Czech Republic

Results

- Sheltered housing – 24 residents
- Supported housing – 7 residents
- Supported employment – 12 users
- Local authority saving
 - €785 pm - €1,600 pm
- Aim: Independence and autonomy

Case study: Lithuania

Overview

- Support for social enterprises 2015 –2016
- Target group: people with disabilities
- Aim of project:
 - Increase job access and retention
 - Increase social integration
 - Help employees with work roles

Case study: Lithuania

Funding

- Division of funding:
 - European Social Fund 70%
 - Social enterprise contribution 30%
 - Total project budget: €34,846,350
- European Funds awarded to Lithuanian ministry
 - Then granted to Lithuanian Labour Exchange

Case study: Lithuania

Partnership

- Partnership:
 - 71 Social Enterprises
 - 60 Disability Enterprises
 - 9 Public Employment Offices

Case study: Lithuania

Use of funds in the project

- Partial reimbursement of wages
- Subsidies for creation of workplaces
- Adaptation of workplaces
- Specialised equipment to help carry out job role
- Subsidies for training of target groups
- Reimbursement of travel expenses
- Subsidy for reimbursement for sign language interpreter

Case study: Lithuania

Results

- 11,625 workers with disabilities were supported
- 107 assistants in social enterprises have retained jobs and they have assisted 342 disabled people

Case study: United Kingdom

Overview

- Building Better Opportunities Shropshire, Telford & Wrekin
- Target group:
 - disadvantaged people aged 19 and over
- Aim of project:
 - Poverty alleviation
 - Tackle social exclusion
 - Increase employment

Case study: United Kingdom

Funding

- European Social Fund: £80,000 per annum
- UK Lottery Fund contribution
- DWP is managing authority of ESF for project

Case study: United Kingdom Partnership

- 21 Partners led by organisation Landau
 - Example organisations:
 - Local authorities - Telford & Wrekin Council
 - Charities - Mind
 - Housing associations – Shropshire Housing Group

Case study: United Kingdom

Use of funds in the project

- Fund partnership to carry out roles:
 - Enable
 - 1 to 1 support sessions
- Telford and Wrekin Council Voluntary Service
 - Help people gain valuable work experience

Case study: United Kingdom

Results

- January 2018 milestones reached:
 - Around 700 individuals benefit so far
 - 300+ had a disability
 - 200+ were long time unemployed
 - 84 have found employment
 - 124 have found volunteering opportunity



European
Social
Network

The Social Services
network in Europe

Thank you for your attention!

Alfonso Lara Montero
Chief Executive



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National University
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***‘State aid and the protection and promotion
of the rights of persons with disabilities’***

Dr. Delia Ferri

Maynooth University Department of Law

***“EU Disability Law and the UNCRPD – Financial
Instruments Related to Disability”*** - SEMINAR FOR POLICY PRACTITIONERS

ERA - Trier 17-18 May 2017

State aid?

- Member State's financial aid to business which meets all the criteria in Article 107(1) TFEU
- Public services compensation (*Altmark* conditions) does not constitute State aid

In 2016,
Member States
spent EUR 102.8
billion, i.e.
0.69% of GDP,
on State aid

European Disability Strategy

«.. promote use of the
**General Block
Exemption Regulation**
which allows the
granting of State aid
without prior
notification to the
Commission»

«...All measures should be implemented in accordance with European competition law, in particular State aid rules»

EU State aid law

It allows MS to pursue their disability policy objectives but within the framework of exceptions laid down in the Treaty

It contributes to indirectly coordinate national economic policies and streamline national funding towards objectives of European interest



EU State aid law and policy in a nutshell

The rights of persons with disabilities in EU State aid law

Concluding Remarks



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EU State aid law and policy in a nutshell

State aid

Intervention by the State or through State resources

Advantage to the recipient undertaking

Selectivity

Intervention distorts or threatens to distort competition

Intervention is likely to affect trade between Member States

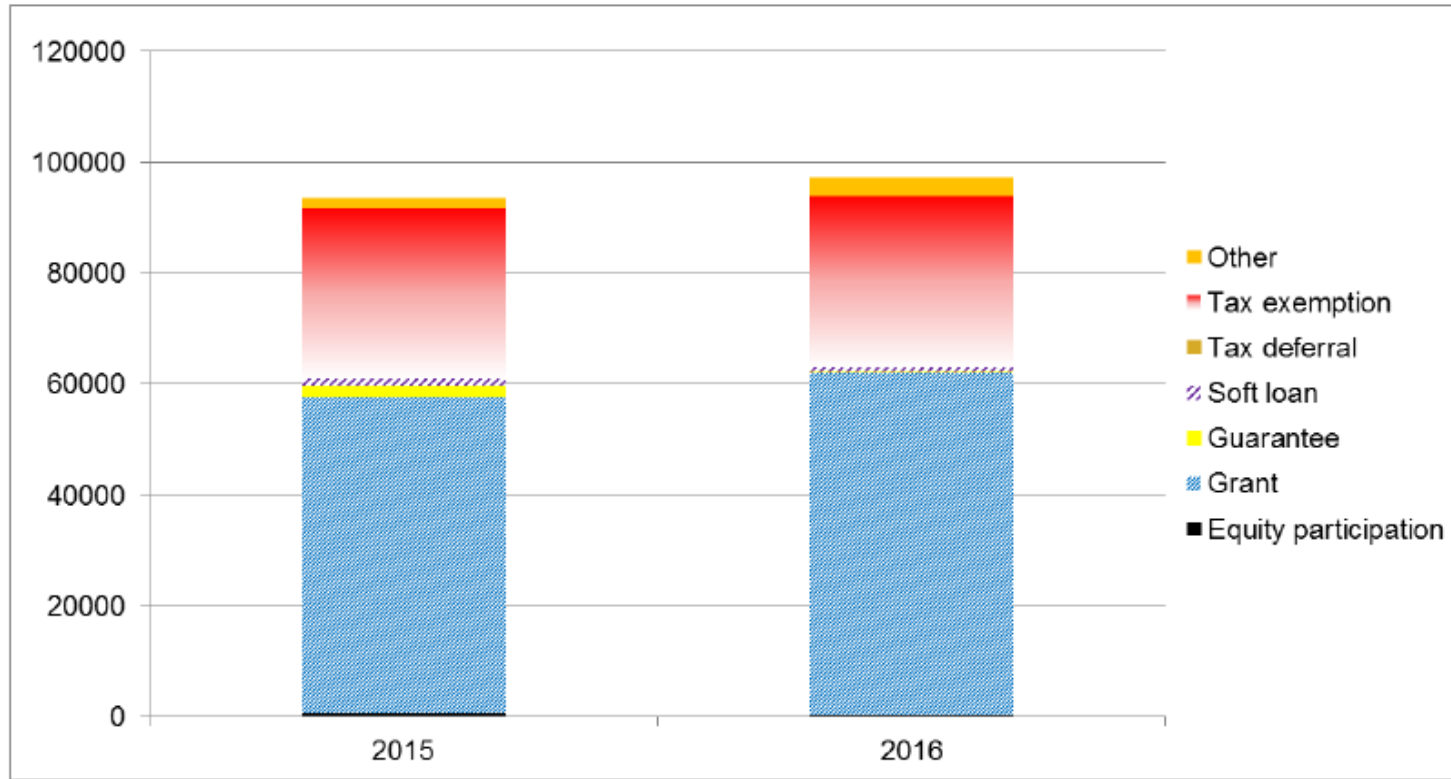
Advantage

“Whenever the financial situation of an undertaking is improved as a result of State intervention, an advantage is present. To assess this, the financial situation of the undertaking following the measure should be compared with its financial situation if the measure had not been introduced” (ex multis Case 173/73, Italy v Commission)

State Aid

*“...the notion of aid can thus encompass not only **positive benefits such as subsidies**, loans or direct investment in the capital of enterprises, but also interventions which, in various forms, **mitigate the charges** which are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict sense of the word, are of the same character and have the same effect...”*
(Case C-126/01, GEMO)

Graph 7 – Total State Aid by aid instrument, excluding Agricultural Aid, in 2015 and 2016 (in million EUR)



Source: Commission services.

Effect on Trade

When aid granted by the State strengthens or is likely to strengthen the position of an undertaking vis-à-vis other undertakings competing in intra-EU trade, the latter must be regarded as affected by that aid (Case 730/79 *Philip Morris v Commission*, paragraph 11)

State Aid

*“[Art. 107(1)] does not distinguish between the measures of State intervention concerned by reference to their **causes** or aims...” (Case 173/73 *Italy v Commission*)*



Compensation for Public Services

Public service compensation **does not** constitute State aid when four cumulative conditions (*Altmark* conditions) are met:

- the recipient undertaking must have public service obligations and the obligations must be clearly defined;
- the parameters for calculating the compensation must be objective, transparent and established in advance
- the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations
- where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs of a typical well-run company.

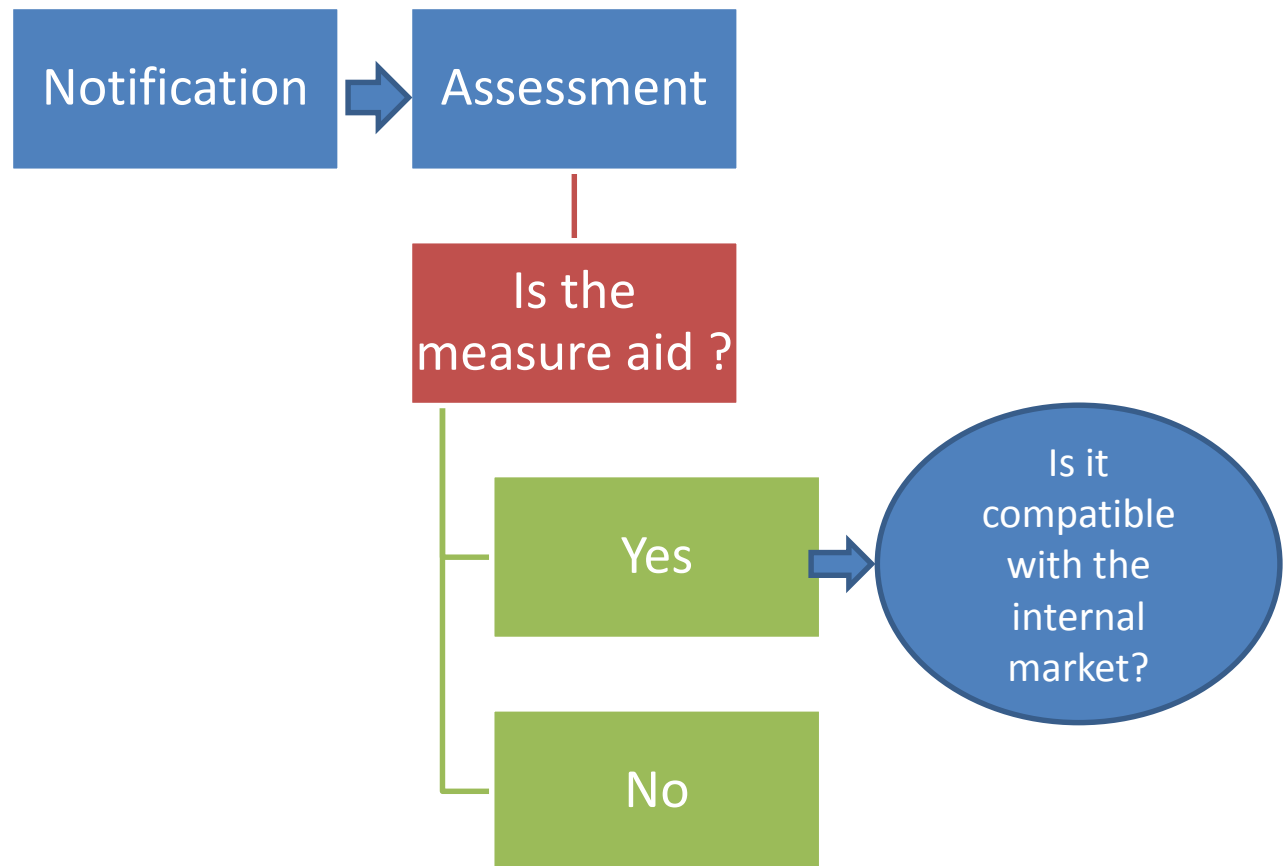
Derogations

De Jure
Derogations (Art.
107(2) TFEU)

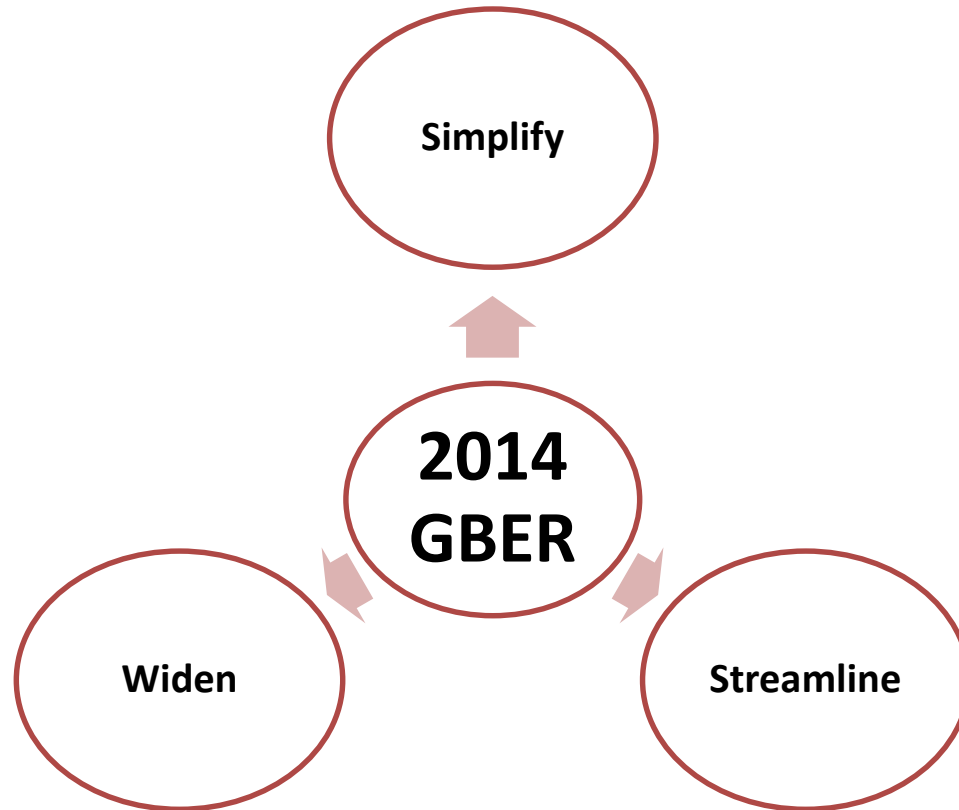
Discretionary
Derogations (Art.
107(3) TFEU)

*“...Article [107(3)], unlike article [107(2)], gives the commission a **discretion** by providing that the aid which it specifies ‘may’ be considered to be compatible with the common market” (Case 730/79 Philip Morris)*

State Aid Control



Exemption from Notification





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EU State aid law and Disability

Art. 107(2)(a) TFEU

“aid having a **social character**, granted to **individual consumers**, provided that such aid is granted **without discrimination** related to the origin of the products concerned”

Art. 107(2)(a) TFEU

Measures to switch to digital television targeting certain specific disadvantaged groups (e.g. people with disabilities)

State Aid N 31982/2010 – Spain Digital decoders for persons with visual disabilities in Spain

Art. 107(3)(b)(c) TFEU

R&D&I Aid

plurality of schemes directed to boost high tech development/nanotechnology which are relevant to assistive devices and accessible technology

Aid to audiovisual production

Schemes financing subtitling (even though the purpose is to foster linguistic diversity, it increases accessibility)

Art. 107(3)(c) TFEU

Individual measures applying to the compensation for the additional cost of employing disabled workers and additional costs incurred by social enterprises of which the grant equivalent exceeds **EUR 10 million per undertaking** per year will be assessed on the basis of Article 107(3)(c) TFEU

- Communication from the Commission — Criteria for the analysis of the compatibility of State aid for the employment of disadvantaged and disabled workers subject to individual notification 2009/C 188/02

Wage Subsidies

Ratio

- “State aid may help disadvantaged and disabled workers to enter the labour market or stay in the labour market by covering the extra costs resulting from their perceived or real lower productivity”

Incentive Effect

- “State aid for the employment of disadvantaged and disabled workers must result in the aid beneficiary changing its behaviour so that the aid results in a net increase in the number of disadvantaged or disabled employees in the undertaking concerned.

GBER

Recognizing that “certain categories of disadvantaged workers and workers with disabilities still experience particular difficulties in entering and remaining in the labour market”, the new GBER, as its predecessor did, includes specific rules on **aid for employment of workers with disabilities and aid compensating for the additional costs of employing workers with disabilities.**

Worker with Disabilities (Art. 2 GBER)

‘worker with disabilities’ means any person who:

(a) is recognised as worker with disabilities under national law; or

(b) has long-term physical, mental, intellectual or sensory impairment(s) which, in interaction with various barriers, may hinder their full and effective participation in a work environment on an equal basis with other workers;

GBER

Art. 33 - Aid for the employment of workers with disabilities in the form of **wage subsidies**

Art. 34 - Aid for compensating the **additional costs** of employing workers with disabilities

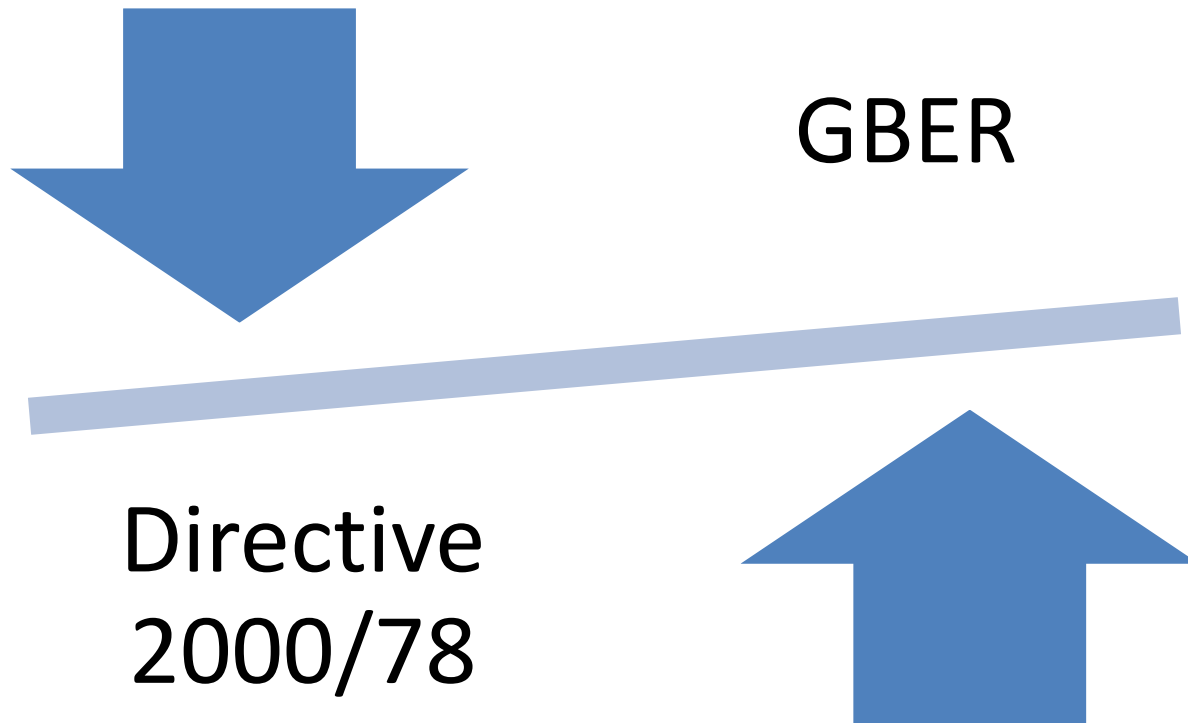
adapting the premises

Assistive devices

PA

transport of workers with disabilities

Reasonable Accommodation



Arts. 33 and 34 GBER

- The scope of the scheme may limit the benefit to one or more undertakings based on objective criteria.
- The duration will have to be limited to the GBER duration and the aid will have to be capped *ex ante* (to the notification threshold) to ensure that the aid amount remains transparent.

Aid Schemes

- English Aid for disadvantaged workers and for workers with disabilities State Aid scheme -SA.39062 (2014/X) [granted under 2008 GBER]
- *Aiuti all'occupazione di lavoratori con disabilità, sotto forma di integrazioni salariali SA.41949 (2015/X) [granted under 2008 GBER]*
- *Enclaves laborales en las empresas ordinarias para personas con discapacidad SA.31969 (2010/X)*
- *Regolamento per il reinserimento e l'integrazione lavorativa delle persone con disabilità da lavoro SA.47463 (2017/X)*

GBER

- In 2016 aid for disadvantaged workers and workers with disabilities (Arts. 32-35 GBER) represented about 4% of total cumulated GBER spending respectively

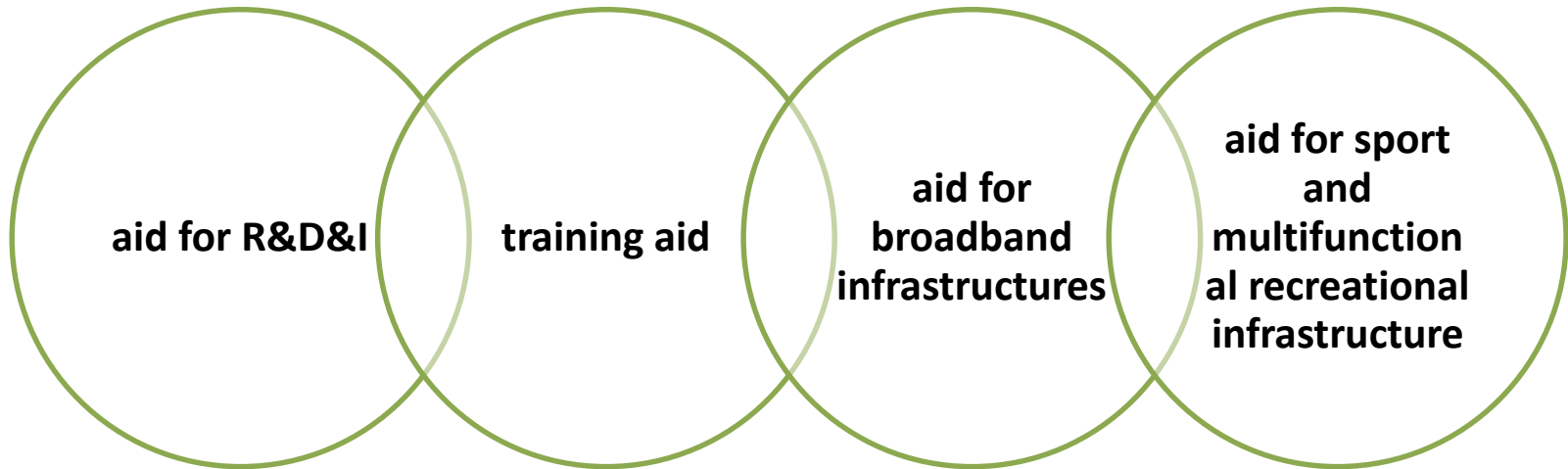
GBER

Art. 53 - Aid for
culture and
heritage
conservation

Art. 54 - Aid
schemes for
audiovisual works

ACCESSIBILITY

GBER





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Concluding Remarks

Challenges

Aid to boost
employment

Not yet
evidence of
effectiveness

Reinforcing
negative
stereotypes

The Potential of State Aid



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Thank you for your attention

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***„Staatliche Beihilfe und der Schutz und die Förderung
der Rechte von Menschen mit Behinderungen“***

Dr. Delia Ferri

Universität Maynooth, Fachbereich Rechtswissenschaft

***„EU-Recht für Menschen mit Behinderungen und die UN-BRK – Finanzinstrumente
für Menschen mit Behinderungen“*** - TAGUNG FÜR RECHTSPRAKTIKER

ERA - Trier, 17.-18. Mai 2018

Staatliche Beihilfe?

- Alle Kriterien von Art. 107 Abs. 1 AEUV erfüllende Finanzhilfen der Mitgliedstaaten
- Ausgleich für öffentliche Dienstleistungen (*Altmark*-Bedingungen) stellt keine staatliche Beihilfe dar

Im Jahr 2016 wendeten die Mitgliedstaaten 102,8 Mrd. EUR, d. h. 0,69 % des BIP, für staatliche Beihilfe auf

Europäische Strategie zugunsten von Menschen mit Behinderungen

«... die Nutzung der **Allgemeinen Gruppenfreistellungsverordnung** zu fördern, die vorsieht, dass staatliche Beihilfen ohne vorherige Anmeldung bei der Kommission gewährt werden können»

«... Alle Maßnahmen sollten in Einklang mit dem europäischen Wettbewerbsrecht, insbesondere den Vorschriften über staatliche Beihilfen, durchgeführt werden»

EU-Beihilferecht

Ermöglicht den MS die Verfolgung ihrer behindertenpolitischen Ziele, allerdings innerhalb des Rahmens der im Vertrag festgelegten Ausnahmen

Trägt indirekt zur Koordinierung der nationalen Wirtschaftspolitiken und zur Ausrichtung der nationalen Förderung auf Ziele von europäischem Interesse bei



**EU-Beihilferecht und -Beihilfepolitik
kurz gefasst**

**Die Rechte von Menschen mit
Behinderungen im EU-Beihilferecht**

Abschließende Bemerkungen



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EU-Beihilferecht und -Beihilfepolitik kurz gefasst

Staatliche Beihilfe

Eingriff durch den Staat oder durch staatliche Mitteln

Vorteil für das begünstigte Unternehmen

Selektivität

Eingriff verfälscht den Wettbewerb oder droht den Wettbewerb zu verfälschen

Eingriff könnte den Handel zwischen Mitgliedstaaten beeinträchtigen

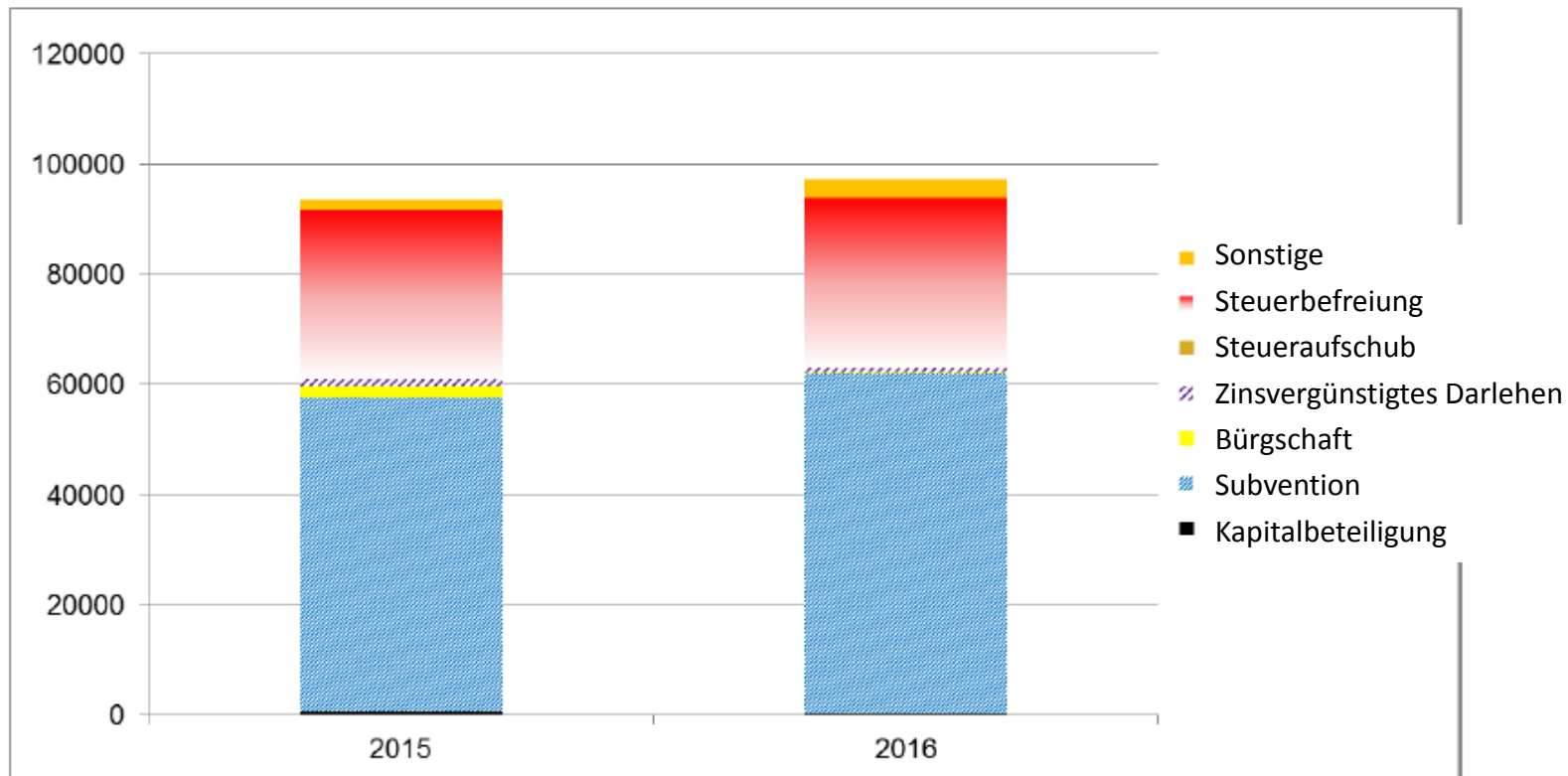
Vorteil

„Wann immer die finanzielle Lage eines Unternehmens aufgrund eines staatlichen Eingriffs verbessert wird, liegt ein Vorteil vor. Um dies zu bewerten, muss die finanzielle Lage des Unternehmens nach der Maßnahme mit der finanziellen Lage verglichen werden, die bestünde, wenn die Maßnahme nicht durchgeführt worden wäre“ (ex multis Rechtssache 173/73, Italien gegen Kommission)

Staatliche Beihilfe

*„...erfasst der Begriff der Beihilfe nicht nur **positive Leistungen wie Subventionen**, Darlehen oder Beteiligungen am Kapital von Unternehmen, sondern auch Maßnahmen, die in verschiedener Form **die Lasten verringern**, die ein Unternehmen sonst zu tragen hätte, und die somit, ohne Subventionen im strengen Sinne des Wortes darzustellen, diesen nach Art und Wirkung gleichstehen“ (Rechtssache C-126/01, GEMO)*

Schaubild 7 - Gesamtbeihilfen nach Beihilfeinstrument, ohne Agrarbeihilfen, in den Jahren 2015 und 2016 (in Mio. EUR)



Quelle: Kommissionsdienststellen

Auswirkungen auf den Handel

Verstärkt eine von einem Mitgliedstaat gewährte Finanzhilfe die Stellung eines Unternehmens gegenüber anderen Wettbewerbern im innergemeinschaftlichen Handel, muss dieser als von der Beihilfe beeinflusst erachtet werden (Rechtssache 730/79 *Philip Morris gegen Kommission*, Randnr. 11)

Staatliche Beihilfe

*„[Art. 107 Abs. 1]
berücksichtigt nicht
Gründe oder Ziele
staatlicher Eingriffe...“
(Rechtssache 173/73 *Italien
gegen Kommission*)*



Ausgleich für öffentliche Dienstleistungen

Ein Ausgleich für öffentliche Dienstleistungen stellt **keine** staatliche Beihilfe dar, wenn vier kumulative Bedingungen (*Altmark*-Bedingungen) erfüllt sind:

- Das begünstigte Unternehmen ist tatsächlich mit der Erfüllung gemeinwirtschaftlicher Verpflichtungen betraut worden, und diese Verpflichtungen sind klar definiert worden;
- die Parameter für die Berechnung des Ausgleichs sind zuvor objektiv und transparent aufgestellt worden;
- der Ausgleich geht nicht über das hinaus, was erforderlich ist, um die Kosten der Erfüllung der gemeinwirtschaftlichen Verpflichtungen ganz oder teilweise zu decken;
- die Höhe des erforderlichen Ausgleichs ist, wenn die Wahl des Unternehmens, das mit der Erfüllung gemeinwirtschaftlicher Verpflichtungen betraut werden soll, nicht im Rahmen eines Verfahrens zur Vergabe öffentlicher Aufträge erfolgt, auf der Grundlage einer Analyse der Kosten bestimmt worden, die ein durchschnittliches, gut geführtes Unternehmen hätte.

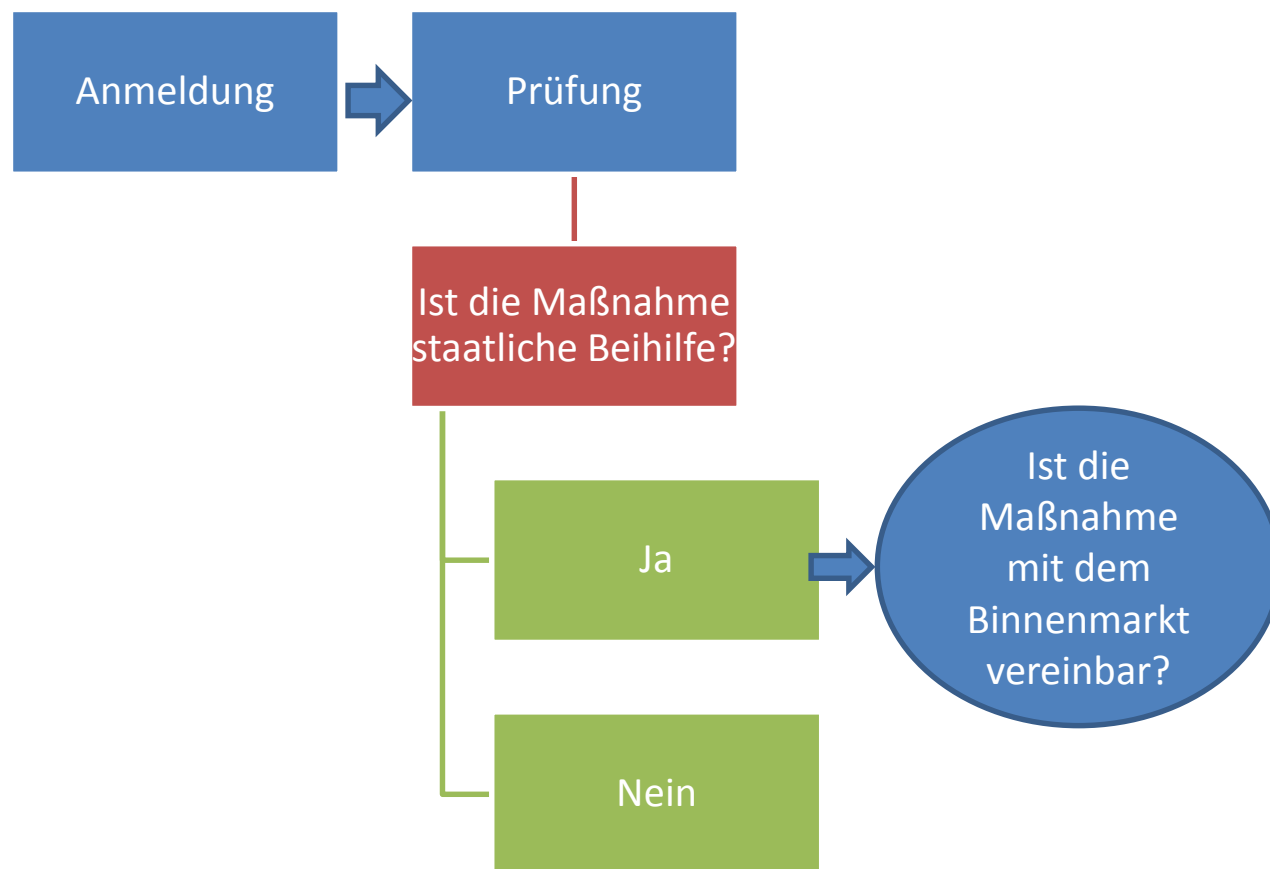
Ausnahmen

Gesetzlich
vorgeschriebene
Ausnahmen (Art. 107
Abs. 2) AEUV)

Ausnahmen aufgrund
eines Ermessens-
spielraums (Art. 107
Abs. 3) AEUV)

*„...der Kommission in
[Artikel 107 Absatz 3]
anders als in [Artikel 107
Absatz 2] ein **Ermessen**
eingeräumt wird, da die
dort aufgeführten Beihilfen
als mit dem gemeinsamen
Markt vereinbar angesehen
werden 'können' “
(Rechtssache 730/79 Philip
Morris)*

Beihilfenkontrolle



Freistellung von der





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EU-Beihilferecht und Behinderung

Art. 107 Abs. 2 Buchst. a AEUV

„Beihilfen **sozialer Art** an **einzelne Verbraucher**, wenn sie **ohne Diskriminierung** nach der Herkunft der Waren gewährt werden“

Art. 107 Abs. 2 Buchst. a AEUV

Maßnahmen zur Umstellung auf Digitalfernsehen, die auf bestimmte benachteiligte Gruppen (z. B. Menschen mit Behinderungen) ausgerichtet sind

Staatliche Beihilfe
N 31982/2010 –
Spanien
Digitaldecoder für
Menschen mit
Sehbehinderungen
in Spanien

Art. 107 Abs. 3 Buchst. b und c AEUV

FEI-Beihilfen

Vielzahl von Regelungen zur Förderung der Entwicklung von Hochtechnologie/Nanotechnologie, die für Hilfsgeräte und barrierefreie Technologien relevant sind

Beihilfen für audiovisuelle Produktionen

Regelungen zur Förderung der Untertitelung (auch wenn die Förderung der sprachlichen Vielfalt bezweckt wird, wird dadurch die Barrierefreiheit verbessert)

Art. 107 Abs. 3 Buchst. c AEUV

Einzelbeihilfen zum Ausgleich der mit der Beschäftigung behinderter Arbeitnehmer verbundenen Mehrkosten und der Mehrkosten von sozialen Unternehmen mit einem Subventionsäquivalent von mehr als 10 Mio. EUR pro Unternehmen und Jahr werden auf der Grundlage von Artikel 107 Absatz 3 Buchstabe c EG-Vertrag geprüft

- Mitteilung der Kommission — Kriterien für die Bewertung der Vereinbarkeit einzeln anzumeldender staatlicher Beihilfen für die Beschäftigung von benachteiligten und behinderten Arbeitnehmern mit dem gemeinsamen Markt 2009/C 188/02

Lohnkostenzuschüsse

Verhältnis

- „Staatliche Beihilfen können benachteiligten oder behinderten Arbeitnehmern den Eintritt in den Arbeitsmarkt oder die Aufrechterhaltung eines Beschäftigungsverhältnisses erleichtern, indem die Mehrkosten infolge der unterstellten oder tatsächlichen geringeren Leistungsfähigkeit aufgefangen werden“

Anreizeffekt

- „Staatliche Beihilfen für die Beschäftigung benachteiligter und behinderter Arbeitnehmer müssen das Verhalten der Beihilfeempfänger dahingehend beeinflussen, dass es in dem betreffenden Unternehmen zu einem Nettozuwachs an behinderten oder benachteiligten Arbeitnehmern kommt“

AGVO

In Anerkennung der Tatsache, dass es für „bestimmte Gruppen benachteiligter oder behinderter Arbeitnehmer (...) nach wie vor besonders schwierig [ist], in den Arbeitsmarkt einzutreten und sich dort zu behaupten“, enthält die AGVO, ebenso wie die Vorläuferverordnung, spezifische Vorschriften zu Beihilfen für die Einstellung benachteiligter Arbeitnehmer, **Beihilfen für die Beschäftigung von Arbeitnehmern mit Behinderungen und Beihilfen zum Ausgleich der durch die Beschäftigung von Arbeitnehmern mit Behinderungen verursachten Mehrkosten.**

Arbeitnehmer mit Behinderungen (Art. 2 AGVO)

„Arbeitnehmer mit Behinderungen“: Personen, die

a) nach nationalem Recht als Arbeitnehmer mit Behinderungen anerkannt sind oder

b) langfristige körperliche, seelische, geistige oder Sinnesbeeinträchtigungen haben, die sie in Wechselwirkung mit verschiedenen Barrieren an der vollen, wirksamen und gleichberechtigten Teilhabe am Arbeitsleben hindern können;

AGVO

Art. 33 - Beihilfen
in Form von
Lohnkosten-
zuschüssen für die
Beschäftigung von
Arbeitnehmern
mit
Behinderungen

Art. 34 - Beihilfen
zum Ausgleich der
durch die
Beschäftigung von
Arbeitnehmern mit
Behinderungen
verursachten
Mehrkosten

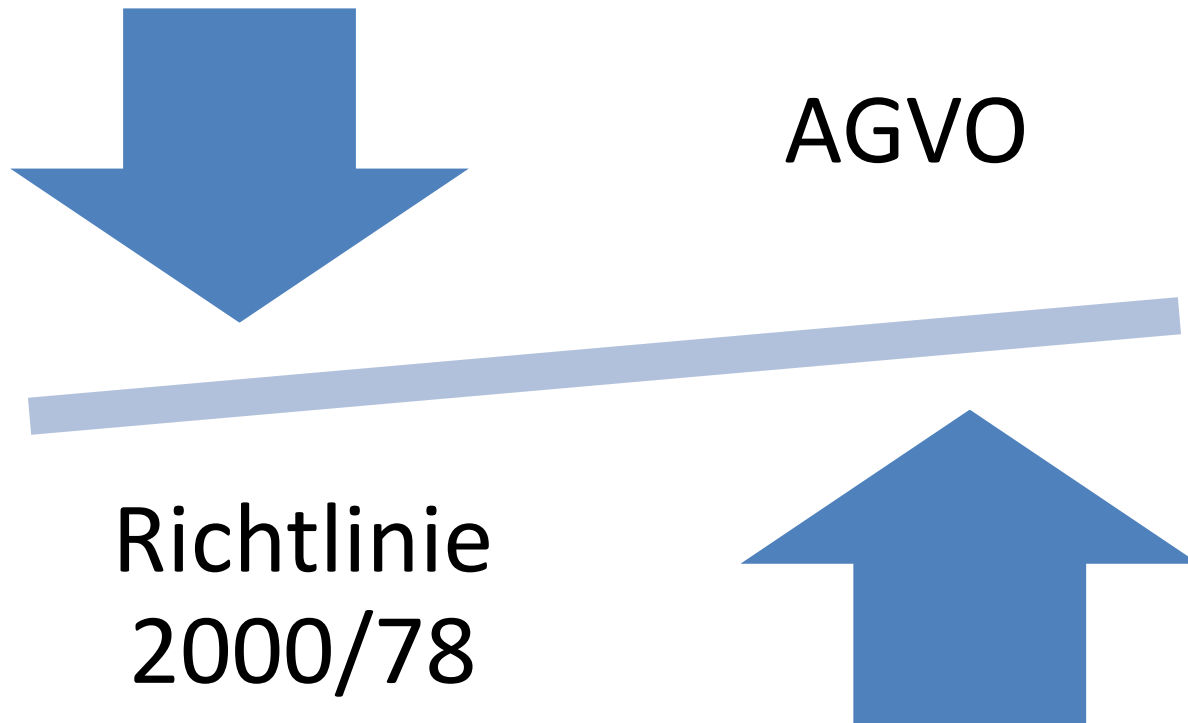
Umgestaltung
der
Räumlichkeiten

Hilfsgeräte

Persönliche
Assistenten (PA)

Beförderung von
Arbeitnehmern
mit Behinderungen

Angemessene Vorkehrungen



Art. 33 und 34 AGVO

- Der Geltungsbereich der Regelung kann den Vorteil für ein oder mehrere Unternehmen basierend auf objektiven Kriterien beschränken.
- Die Laufzeit muss auf die Geltungsdauer der AGVO begrenzt sein, und die Beihilfe muss *ex ante* (auf die Anmeldeschwelle) begrenzt werden, damit gewährleistet ist, dass der Beihilfebetrag transparent bleibt.

Beihilferegelungen

- „English Aid for disadvantaged workers and for workers with disabilities State Aid scheme“ – SA.39062 (2014/X) [gewährt nach der AGVO 2008]
- „*Aiuti all'occupazione di lavoratori con disabilità, sotto forma di integrazioni salariali*“ – SA.41949 (2015/X) [gewährt nach der AGVO 2008]
- „*Enclaves laborales en las empresas ordinarias para personas con discapacidad*“ – SA.31969 (2010/X)
- „*Regolamento per il reinserimento e l'integrazione lavorativa delle persone con disabilità da lavoro*“ – SA.47463 (2017/X)

AGVO

- Im Jahr 2016 entfielen auf Beihilfen für benachteiligte Arbeitnehmer und Arbeitnehmer mit Behinderungen (Art. 32-35 AGVO) jeweils etwa 4 % der kumulierten Gesamtausgaben nach der AGVO

AGVO

Art. 53 - Beihilfen
für Kultur und die
Erhaltung des
kulturellen Erbes

Art. 54 -
Beihilferegelnungen
für audiovisuelle
Werke

BARRIEREFREIHEIT

AGVO





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Abschließende Bemerkungen

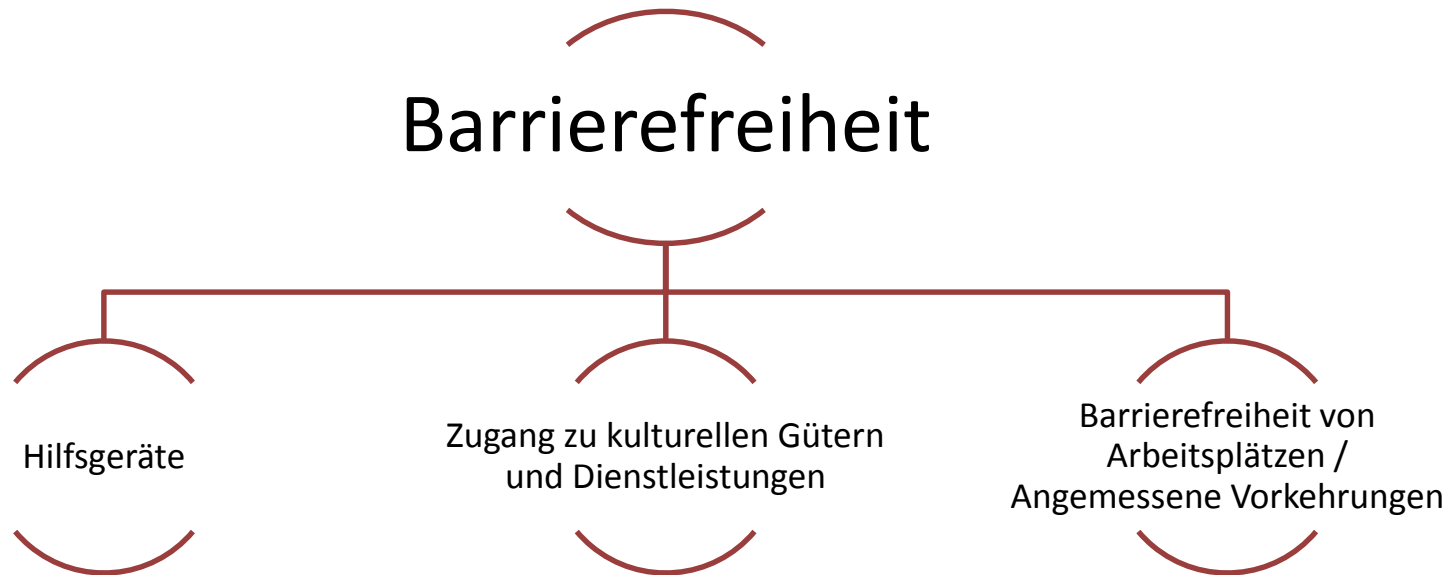
Herausforderungen

Beihilfen zur
Förderung der
Beschäftigung

Wirksamkeit
noch nicht
belegt

Stärkung
negativer
Stereotype

Das Potenzial staatlicher Beihilfen



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Vielen Dank für Ihre Aufmerksamkeit

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Accessibility Requirements and the EU Public Procurement Regime of the European Union

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EU PUBLIC PROCUREMENT LEGAL FRAMEWORK

**Utilities
Directive
2014/25/EU**

**Public Sector
Directive
2014/24/EU**

**Concessions
Directive
2014/23/EU**

**Defence
Directive
2009/81/EC**

Article 1 Public Sector Directive 2014/24/EU

Subject-matter and scope

SGEI and Public Services

- This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26.

UNCRPD Article 9 – Accessibility

Objectives

- Independent living
- Full participation in all aspects of life
- Equal treatment

Measures

- physical environment
- transportation
- information and communications systems
- public facilities and services

Public Services under EU Law

- Art 106 TFEU =
the foundation of public services
 - Public service obligations
 - Universal service obligations
 - Services of general economic interest
 - Social services of general interest

Public services as services of general interest

What is a (SGI)?

Protocol No 26 to the TFEU

The concept of SGI refers to services, whether 'economic' or not that the Member States regard as being of general interest, and are subject to specific public service obligations

- SGI cover:
 - services of general economic interest (SGEIs) [TFEU applicable]
 - non-economic services of general interest [TFEU not applicable]

The characteristics of public services

- Economic nature
 - Cost and value considerations
- Lack of industrial or commercial character
- Sui generis market place
 - Limited use of anti-trust
 - State aid regulation
 - Procurement as competition benchmark

The Conceptual premise of SGEI

Services of General Economic Interest

- Articles 14 and 106(2) TFEU
- Protocol No 26

Non-commercial nature *versus*

- Demand
- Frequency of supply
- Quality of service
- End user charges
- Profitability of operator

SGEIs

- “services of an economic nature that the public authorities in the Member States at national, regional or local level, depending on the allocation of powers between them under national law, subject to specific **public service obligations** through an act of entrustment on the basis of a general-interest criterion and in order to ensure that the services are provided under conditions which are not necessarily the same as prevailing market conditions”.
- **Examples of acts of entrustment**
 - Concession contract and tender documents
 - Ministerial programme contracts
 - Ministerial instructions
 - Laws and Acts
 - Yearly or multi-annual performance contracts
 - Legislative decrees, regulatory decisions, municipal decisions or acts.

The concept of social services of general interest (SSGI)

- SSGIs may be of an economic or non-economic nature
- SSGIs that are economic in nature are SGEIs
- health services
- statutory and complementary social security schemes
 - life assurance
 - health
 - ageing
 - occupational accidents
 - unemployment
 - retirement
 - disability

SSGIs

- other essential fundamental right services of social cohesion and social inclusion directly provided

assistance for persons faced by personal challenges or crises (debt, unemployment, drug addiction or family breakdown)

social integration activities (rehabilitation, language training for immigrants) and, in particular, return to the labour market (occupational training and reintegration).

services to integrate people with long-term health or disability problems.

social housing, housing for disadvantaged citizens or socially less advantaged groups.


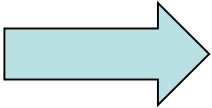

Public Service Obligations

- State financing not state aid
 - Art 14 TFEU
 - Art 106(2) TFEU
 - Altmark ruling




Case C-280/00 *Altmark* (2003)

- Public service license for regional transport services
- CJEU: PSO compensation without real financial advantage does not distort competition and is not aid if four conditions are met
 1. Entrusted with clearly defined public service obligations
 2. Parameters for compensation clearly defined in advance
 3. Compensation based on costs plus reasonable rate of return
 4. Selection by public tender or costs of efficient undertaking
- If met: no advantage → no aid
 - Compensation approach adopted
 - National courts may assess applicability of Altmark criteria

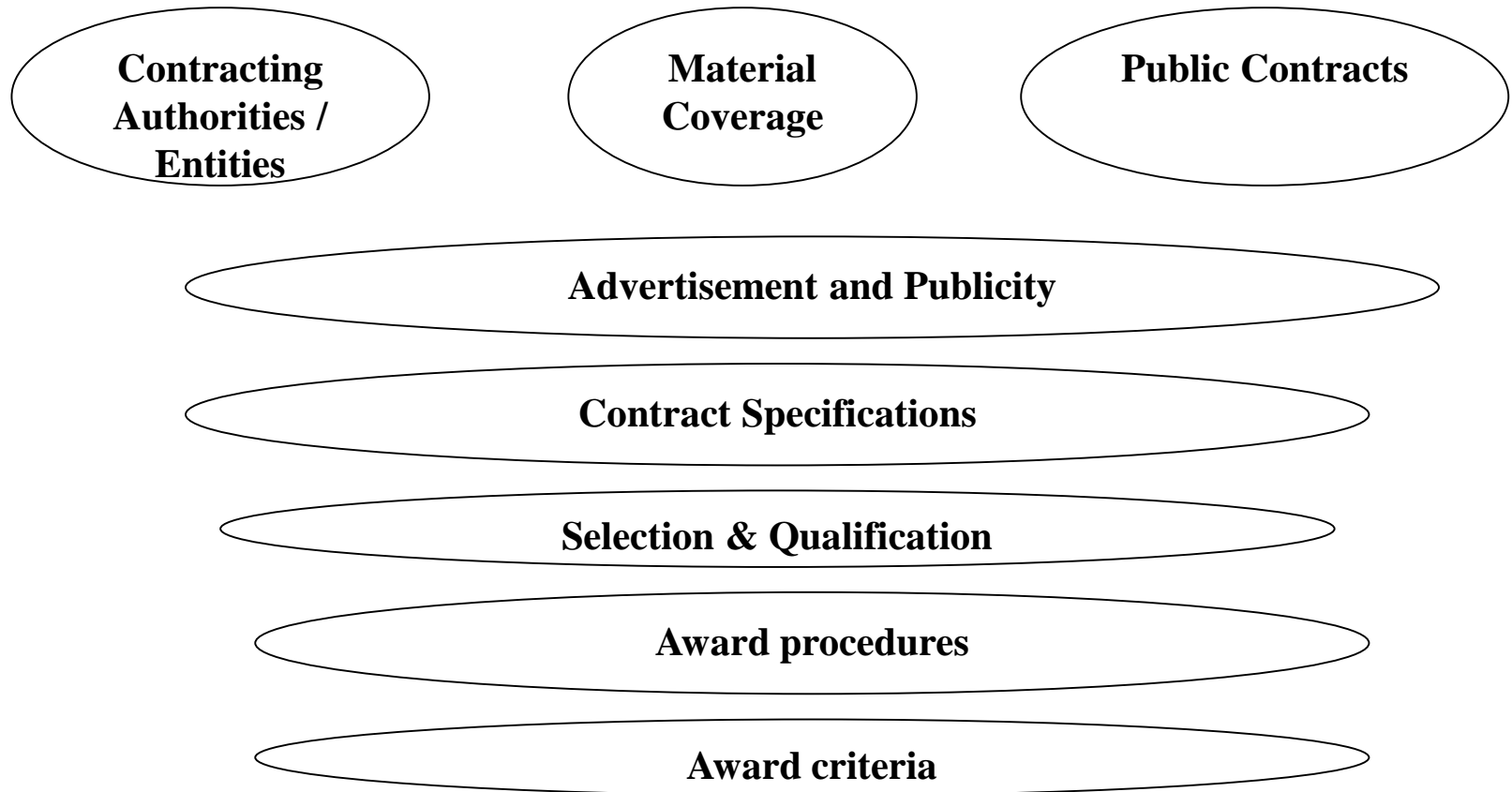
Intervention by the State

- Exclusive rights  shelters SGEI operator from competition
- Financial compensation  ensures service viability
- Definition of general rules  equalizes markets

SGEI: PSO Features

- Entrusted without competition  direct awards
- Subject to strict controls  future tendering restrictions
- Transparency requirements of public service contract  overcompensation

The Traction of EU Public Procurement Law



UNCRD Accessibility Requirements in the stages of EU Public Procurement Law

Article 20 Public Sector Directive 2014/24/EU

- Reserved contracts

- Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30 % of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

Article 62 Public Sector Directive 2014/24/EU

- Quality assurance standards and environmental management standards

- Contracting authorities shall, where they require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain quality assurance standards, including on accessibility for disabled persons, refer to quality assurance systems based on the relevant European standards series certified by accredited bodies. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures where the economic operator concerned had no possibility of obtaining such certificates within the relevant time limits for reasons that are not attributable to that economic operator provided that the economic operator proves that the proposed quality assurance measures comply with the required quality assurance standards.

Technical specifications & labels:

Articles 40 – 42, Annex VIII

- *Technical specifications: Art. 40 clarified production process or if linked, other stage of life cycle;*
- *Labels:*
 - possible require label as such where label defined in transparent, objective process and all its requirements are suitable;
 - recognition equivalent labels and other means of proof where no access (art. 41(1))
 - Where all requirements are not suitable: i.e. underlying requirements (art. 41(2))
- *Third party certification (art. 42):*
 - may be required (technical specification, award criteria and/or contract performance);
 - mutual recognition re equivalent certificates;
 - Other means where no access

Technical Specifications: Article 42

- Technical specifications may be formulated in terms of performance or functional requirements
 - Functional requirements may include environmental characteristics
 - However, such parameters must be sufficiently precise
 - to allow tenderers to determine the subject-matter of the contract and
 - to allow contracting authorities to award the contract

Award Criteria: Article 67

- The economically most advantageous tender criterion includes
- various features **linked to the subject-matter of the public contract** in question, for example, **environmental characteristics or social considerations**
- **Inherent flexibility**
 - Opens the door for policy pursuits

Contract award criteria

- **Public Sector Directive: Sole award criterion: MEAT – most economically advantageous tender -**
to be assessed on the basis of
 - price, or
 - cost, **using a cost-effectiveness approach such as life-cycle costing,**
or
 - the best price-quality ratio (***BPQR***) ***to be assessed on the basis of award criteria linked to the subject-matter of the contract.***
 - **organisation, qualification and experience of the staff delivering the contract where this can significantly impact the level of performance of the contract**
- MS can exclude or restrict the use of price or cost only as sole criterion.

Contract performance: Article 70

Contracting authorities may lay down special conditions relating to the performance of a contract:

- Provided that these are compatible with EU law and are indicated in the contract notice or in the specifications
- The performance conditions may concern social and environmental considerations

Light regime

- New specific simplified rules for social, health, cultural and other services:
 - higher threshold – EUR 750 000;
 - below threshold: typically no-cross-border interest (except if EU funding)
 - only requirements: ex-ante (and ex-post) publicity + non-discrimination principle; for the rest national rules
 - MS may impose traditional MEAT (= BPQR) criterion only
- Other services covered
 - Hotel and restaurant services
 - Certain legal services
 - Rescue, fire fighting and prison services
 - Government services and services to the community

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Barrierefreiheitsanforderungen und das öffentliche Auftragswesen der Europäischen Union

Prof. Christopher Bovis, FRSA
Universität Hull



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RECHTSRAHMEN FÜR DAS ÖFFENTLICHE AUFTRAGSWESEN IN DER EU

Sektoren -
richtlinie
2014/25/EU

Richtlinie
2014/24/EU über die
Vergabe
öffentlicher
Aufträge

Richtlinie
2014/23/EU über
die Konzessions-
vergabe

Verteidigungs-
richtlinie
2009/81/EG

Artikel 1 Richtlinie 2014/24/EU über die Vergabe öffentlicher Aufträge

Gegenstand und Anwendungsbereich

DAWI und öffentliche Dienstleistungen

- Diese Richtlinie berührt nicht das Recht der Mitgliedstaaten, im Einklang mit dem Unionsrecht festzulegen, welche Leistungen sie als von allgemeinem wirtschaftlichem Interesse erachten, wie diese Dienstleistungen unter Beachtung der Vorschriften über staatliche Beihilfen organisiert und finanziert werden sollten und welchen spezifischen Verpflichtungen sie unterliegen sollten. Gleichmaßen berührt diese Richtlinie nicht die Entscheidung öffentlicher Stellen darüber, ob, wie und in welchem Umfang sie öffentliche Aufgaben gemäß Artikel 14 AEUV und gemäß Protokoll Nr. 26 selbst wahrnehmen wollen.

UN-BRK Artikel 9 – Zugänglichkeit

Ziele

- Unabhängige Lebensführung
- Volle Teilhabe in allen Lebensbereichen
- Gleichbehandlung

Maßnahmen

- physische Umwelt
- Transportmittel
- Informations- und Kommunikationssysteme
- öffentliche Einrichtungen und Dienste

Öffentliche Dienstleistungen nach EU-Recht

- Art. 106 AEUV =
Grundlage öffentlicher Dienstleistungen
 - Gemeinwirtschaftliche Verpflichtungen
 - Universaldienstverpflichtungen
 - Dienstleistungen von allgemeinem wirtschaftlichem Interesse
 - Sozialdienstleistungen von allgemeinem Interesse

Öffentliche Dienstleistungen als Dienste von allgemeinem Interesse

Was ist ein (DAI)?

Protokoll Nr. 26 zum AEUV

Der Begriff DAI bezieht sich auf Dienste, seien sie „wirtschaftlicher“ oder anderer Art, die die Mitgliedstaaten als von allgemeinem Interesse erachten und die spezifischen gemeinwirtschaftlichen Verpflichtungen unterliegen

- Zu den DAI gehören:
 - Dienstleistungen von allgemeinem wirtschaftlichem Interesse (DAWI) [AEUV anwendbar]
 - nichtwirtschaftliche Dienste von allgemeinem Interesse [AEUV nicht anwendbar]

Die Merkmale öffentlicher Dienstleistungen

- Wirtschaftlicher Charakter
 - Kosten- und Wertüberlegungen
- Fehlender gewerblicher oder kommerzieller Charakter
- *Sui generis*-Markt
 - Begrenzter Nutzen kartellrechtlicher Bestimmungen
 - Bestimmungen über staatliche Beihilfen
 - Auftragswesen als Benchmark für den Wettbewerb

Die konzeptionelle Prämisse von DAWI

Dienstleistungen von allgemeinem wirtschaftlichem Interesse

- Art. 14 und Art. 106 Abs. 2 AEUV
- Protokoll Nr. 26

Nichtgewerblicher Charakter *versus*

- Nachfrage
- Häufigkeit der Erbringung
- Dienstleistungsqualität
- Endkundenentgelte
- Rentabilität des Betreibers

DAWI

- „Dienstleistungen wirtschaftlicher Natur, die von den Behörden der Mitgliedstaaten auf nationaler, regionaler oder lokaler Ebene, in Abhängigkeit von der Zuständigkeitsverteilung zwischen ihnen nach innerstaatlichem Recht, als im allgemeinen Interesse liegend eingestuft und durch einen Betrauungsakt auf der Grundlage eines Kriteriums des allgemeinen Interesses spezifischen **Gemeinwohlverpflichtungen** unterworfen werden, um sicherzustellen, dass die Dienstleistungen unter Bedingungen erbracht werden, die nicht notwendigerweise den marktüblichen Bedingungen entsprechen“
- **Beispiele für Betrauungsakte**
 - Konzessionsvertrag und Vergabeunterlagen
 - Verträge im Rahmen von Ministerialprogrammen
 - Ministerialanordnungen
 - Gesetze und Verordnungen
 - Jährliche oder mehrjährige Leistungsverträge
 - Gesetzesverordnungen, aufsichtsbehördliche Entscheidungen, kommunale Entscheidungen oder Rechtsakte

Der Begriff der Sozialdienstleistungen von allgemeinem Interesse (SDAI)

- SDAI können wirtschaftlicher oder nichtwirtschaftlicher Natur sein
- SDAI wirtschaftlicher Natur sind DAWI
- Gesundheitsdienstleistungen
- gesetzliche Regelungen und ergänzende Systeme der sozialen Sicherung
 - Lebensversicherung
 - Gesundheit
 - Alter
 - Arbeitsunfälle
 - Arbeitslosigkeit
 - Ruhestand
 - Behinderungen

SDAI

- andere grundlegende persönliche Dienstleistungen zur Sicherstellung des sozialen Zusammenhalts und der Integration in die Gesellschaft

Menschen dabei zu helfen, entscheidende Momente im Leben oder Krisen (Überschuldung, Arbeitslosigkeit, Drogenabhängigkeit, Auseinanderbrechen der Familie usw.) zu bewältigen.

Maßnahmen, die Menschen dabei helfen, sich wieder in die Gesellschaft zu integrieren (Rehabilitierung, Sprachkurse für Zuwanderer), und ihnen insbesondere den Wiedereinstieg ins Berufsleben erleichtern sollen (berufliche Aus- und Weiterbildung, berufliche Wiedereingliederung).

Dienstleistungen, die die Eingliederung von Personen mit langfristigen Bedürfnissen aufgrund einer Behinderung oder eines Gesundheitsproblems gewährleisten sollen.

Sozialwohnungen, die Wohnraum für sozial benachteiligte Personen oder Gruppen bieten.

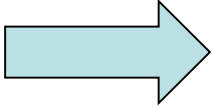

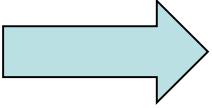
Gemeinwirtschaftliche Verpflichtungen

- Staatliche Finanzierung ist keine staatliche Beihilfe
 - Art. 14 AEUV
 - Art. 106 Abs. 2 AEUV
 - Entscheidung in der Rechtssache Altmark




Rechtssache C-280/00 *Altmark* (2003)

- Genehmigung gemeinwirtschaftlicher Leistungen für Regionalverkehrsdienste
- EuGH: Ausgleich für Erfüllung gemeinwirtschaftlicher Verpflichtungen ohne tatsächlichen finanziellen Vorteil stellt keine Wettbewerbsverfälschung und keine Beihilfe dar, wenn vier Voraussetzungen erfüllt sind
 1. Betrauung mit klar definierten gemeinwirtschaftlichen Verpflichtungen
 2. Parameter für den Ausgleich zuvor eindeutig aufgestellt
 3. Ausgleich basierend auf den Kosten und einem angemessenen Gewinn
 4. Auswahl durch Verfahren zur Vergabe öffentlicher Aufträge oder Kosten eines effizienten Unternehmens
- Wenn erfüllt: kein Vorteil → keine Beihilfe
 - Annahme des Konzepts des Ausgleichs
 - Nationale Gerichte können die Anwendbarkeit der Altmark-Kriterien prüfen

Intervention des Staates

- Ausschließliche Rechte  schützt den DAWI-Betreiber vor dem Wettbewerb
- Finanzieller Ausgleich  stellt die Verfügbarkeit der Dienstleistung sicher
- Festlegung allgemeiner Regeln 
Entzerrung der Märkte

DAWI: Merkmale gemeinwirtschaftlicher Verpflichtungen

- Betrauung ohne Wettbewerb  direkte Vergabe
- Unterliegen strengen Kontrollen 
Einschränkungen bei künftigen Ausschreibungen
- Transparenzanforderungen an Vertrag über gemeinwirtschaftliche Dienste 
Überkompensation

Die Zugkraft der EU-Rechtsvorschriften für das öffentliche Auftragswesen



Zugänglichkeitsanforderungen nach der UN-BRK in den Phasen der EU-Rechtsvorschriften für das öffentliche Auftragswesen

Artikel 20 Richtlinie 2014/24/EU über die Vergabe öffentlicher Aufträge

- Vorbehaltene Aufträge

- Die Mitgliedstaaten können das Recht zur Teilnahme an einem Vergabeverfahren geschützten Werkstätten und Wirtschaftsteilnehmern, deren Hauptzweck die soziale und berufliche Integration von Menschen mit Behinderungen oder von benachteiligten Personen ist, vorbehalten oder sie können bestimmen, dass solche Aufträge im Rahmen von Programmen mit geschützten Beschäftigungsverhältnissen durchgeführt werden, sofern mindestens 30 % der Arbeitnehmer dieser Werkstätten, Wirtschaftsteilnehmer oder Programme Menschen mit Behinderungen oder benachteiligte Arbeitnehmer sind.

Artikel 62 Richtlinie 2014/24/EU über die Vergabe öffentlicher Aufträge

- Normen für Qualitätssicherung und Umweltmanagement

- Verlangen die öffentlichen Auftraggeber zum Nachweis dafür, dass der Wirtschaftsteilnehmer bestimmte Qualitätssicherungsnormen — einschließlich des Zugangs von Menschen mit Behinderungen — erfüllt, die Vorlage von Bescheinigungen unabhängiger Stellen, so nehmen sie auf Qualitätssicherungssysteme Bezug, die den einschlägigen europäischen Normen genügen und von akkreditierten Stellen zertifiziert sind. Gleichwertige Bescheinigungen von Stellen in anderen Mitgliedstaaten sind anzuerkennen. Die öffentlichen Auftraggeber müssen auch andere Nachweise gleichwertiger Qualitätssicherungsmaßnahmen anerkennen, wenn der betreffende Wirtschaftsteilnehmer die betreffenden Bescheinigungen aus Gründen, die diesem Wirtschaftsteilnehmer nicht angelastet werden können, innerhalb der einschlägigen Fristen nicht erlangen konnte, sofern der Wirtschaftsteilnehmer nachweist, dass die vorgeschlagenen Qualitätssicherungsmaßnahmen den geforderten Qualitätssicherungsnormen entsprechen.

Technische Spezifikationen und Gütezeichen: Artikel 40 – 42, Anhang VIII

- *Technische Spezifikationen: Art. 40 enthält Klarstellung zum Produktionsprozess oder, falls ein Zusammenhang besteht, zu einer anderen Phase des Lebenszyklus;*
- *Gütezeichen:*
 - Möglichkeit, ein Gütezeichen vorzuschreiben, wenn das Gütezeichen in einem transparenten, objektiven Prozess festgelegt wurde und alle seine Anforderungen geeignet sind;
 - Anerkennung gleichwertiger Gütezeichen und anderer Nachweise, falls kein Zugang gegeben ist (Art. 41 Abs. 1)
 - Wenn alle Anforderungen nicht geeignet sind: d. h. zugrundeliegende Anforderungen (Art. 41 Abs. 2)
- *Zertifizierung durch Dritte (Art. 42):*
 - kann erforderlich sein (technische Spezifikation, Zuschlagskriterium und/oder Auftragsausführung);
 - gegenseitige Anerkennung bzw. gleichwertige Bescheinigungen;
 - andere Mittel, falls kein Zugang gegeben ist

Technische Spezifikationen: Artikel 42

- Technische Spezifikationen können in Form von Leistungs- oder Funktionsanforderungen formuliert werden
 - Funktionsanforderungen können Umweltmerkmale umfassen
 - Solche Parameter müssen jedoch hinreichend genau sein,
 - um den Bietern ein klares Bild vom Auftragsgegenstand zu vermitteln und
 - den öffentlichen Auftraggebern die Erteilung des Zuschlags zu ermöglichen

Zuschlagskriterien: Artikel 67

- Das Kriterium des wirtschaftlich günstigsten Angebots umfasst
- verschiedene Merkmale, **die mit dem Auftragsgegenstand des betreffenden öffentlichen Auftrags in Verbindung stehen, beispielsweise umweltbezogene Merkmale oder soziale Aspekte**
- **Inhärente Flexibilität**
 - Öffnet politischen Bestrebungen die Tür

Zuschlagskriterien

- **Richtlinie über die Vergabe öffentlicher Aufträge: Einziges Zuschlagskriterium: wirtschaftlich günstigstes Angebot** – zu ermitteln auf der Grundlage von
 - Preis oder
 - Kosten, **unter Zugrundelegung eines Kosten-Wirksamkeits-Ansatzes wie des Lebenszyklus-Kostenansatzes**, oder
 - des besten Preis-Leistungs-Verhältnisses, ***zu ermitteln auf der Grundlage von mit dem Gegenstand des Auftrags verbundenen Vergabekriterien.***
 - **Organisation, Qualifikation und Erfahrung der Mitarbeiter**, die für die Ausführung des betreffenden Auftrags eingesetzt werden, **wenn sich dies auf die Qualität der Vertragserfüllung auswirken kann**
- Die MS können die Verwendung von Preis oder Kosten als einziges Kriterium ausschließen oder einschränken.

Auftragsausführung: Artikel 70

Öffentliche Auftraggeber können besondere Bedingungen für die Ausführung eines Auftrags festlegen:

- sofern diese mit EU-Recht vereinbar sind und im Aufruf zum Wettbewerb oder in den Spezifikationen angegeben werden
- Die Ausführungsbedingungen können soziale und umweltbezogene Belange betreffen

Vereinfachte Regelung

- Neue spezifische vereinfachte Vorschriften für soziale, gesundheitsbezogene, kulturelle und andere Dienstleistungen:
 - höherer Schwellenwert – EUR 750 000;
 - unter dem Schwellenwert: in der Regel kein grenzüberschreitendes Interesse (ausgenommen bei Finanzierung durch die EU)
 - einzige Anforderungen: Bekanntmachung ex-ante (und ex-post) + Nichtdiskriminierungsgrundsatz; ansonsten nationale Vorschriften
 - Die MS können ausschließlich das herkömmliche Kriterium des wirtschaftlich günstigsten Angebots vorschreiben (= bestes Preis-Leistungs-Verhältnis)
- Andere erfasste Dienstleistungen
 - Beherbergungs- und Gaststättendienstleistungen
 - Bestimmte Rechtsdienstleistungen
 - Rettungsdienste, Feuerwehrdienste und Strafvollzugsdienste
 - Staatliche Dienstleistungen und Dienstleistungen für die Allgemeinheit

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Case Study

Facts of the case

A public authority in an EU Member State wants to procure a construction works contract in order to develop a fully accessible space requirement in publicly owned buildings.

The authority's mandate is that **“the contract should be reflecting value-for-money”** and that the works projects for improving accessible access for disable persons in publicly owned buildings **“they should maximise local investment”**.

The authority contemplates whether it should follow the EU Public Procurement Directives, and in particular the Public Sector Directive 2014/24. One member of the authority suggests that the correct legal framework for the procurement exercise is the EU Treaty itself. The authority has difficulties in agreeing what is the correct legal basis, so in the contract notice transmitted to the OJEU, it stipulates that both the EU Directive 2014/24 and the EU Treaty are applicable.

Questions

1. Describe the steps the Public Authority must take to comply with EU public procurement requirements.
2. What type of procurement procedures do you recommend and why?
3. What type of award criteria do you suggest being adopted for the award of the contract?
4. Can the provider of works packages for accessible access subcontract work packages for improving access for disable people in publicly owned buildings to third parties without any restrictions?
5. Can any of the contracts be awarded to local companies?

Fallstudie

Sachverhalt

Ein öffentlicher Auftraggeber in einem EU-Mitgliedstaat will einen Bauauftrag vergeben, um den Bedarf an barrierefrei zugänglichen Räumen in öffentlichen Gebäuden zu decken.

Das Mandat der Behörde besagt, dass „**der Auftrag das Preis-Leistungs-Verhältnis widerspiegeln sollte**“ und dass die Bauvorhaben zur Verbesserung des barrierefreien Zugangs für Menschen mit Behinderungen in öffentlichen Gebäuden „**lokale Investitionen maximieren sollten**“.

Die Behörde denkt darüber nach, ob sie die EU-Richtlinien über das öffentliche Auftragswesen und insbesondere die Richtlinie 2014/24/EU über die Vergabe öffentlicher Aufträge befolgen sollte. Ein Mitarbeiter der Behörde schlägt den EU-Vertrag selbst als richtigen Rechtsrahmen für das Beschaffungsvorhaben vor. Die Behörde hat Schwierigkeiten, zu einer Einigung hinsichtlich der richtigen Rechtsgrundlage zu gelangen, daher schreibt sie in dem an das Amtsblatt übermittelten Aufruf zum Wettbewerb vor, dass sowohl die EU-Richtlinie 2014/24/EU als auch der EU-Vertrag anwendbar sind.

Fragen

1. Beschreiben Sie die Schritte, die der öffentliche Auftraggeber unternehmen muss, um die Anforderungen des öffentlichen Auftragswesens der EU zu erfüllen.
2. Welche Art von Vergabeverfahren empfehlen Sie, und aus welchem Grund?
3. Welche Art von Zuschlagskriterien sollte Ihrer Empfehlung nach für die Auftragsvergabe angenommen werden?
4. Kann der Anbieter von Baulosen für barrierefreien Zugang ohne Einschränkung Baulose zur Verbesserung des Zugangs für Menschen mit Behinderungen in öffentlichen Gebäuden als Unteraufträge an Dritte vergeben?
5. Können Aufträge an lokale Unternehmen vergeben werden?