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# The New General Block Exemption Regulation and the Rights of Persons with Disabilities: Smoke without Fire?

Delia Ferri\*

*This article examines Commission Regulation (EU) N°651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, better known as 2014 General Block Exemption Regulation (GBER) vis-à-vis the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). In particular, it frames the GBER within the context of the European disability policy and discusses whether the new GBER complies with the international obligations that the EU has undertaken by concluding the UNCRPD. This article focuses on the GBER provisions concerning aid to employment and training of workers with disabilities and aid compensating for the additional costs of employing workers with disabilities, comparing and contrasting them with those included in the former 2008 GBER. It also comments on the GBER sections related to training aid and to aid for culture and heritage conservation. Both sections contain explicit references to people with disabilities or include disability-related provisions. This article argues that, although the new GBER acknowledges the potential role of State aid in the protection and promotion of the rights of persons with disabilities, it does not mainstream disability to the extent required by the UNCRPD. All in all, this article also attempts to shed a light on the interplay between State aid law and disability policy, which is becoming an interesting and thought-provoking area of study.*

*Keywords: Disability, GBER, Aid for Employment of Workers with Disabilities, Training Aid, Aid for Culture and Heritage Conservation, UN Convention of the Rights of Persons with Disabilities*

## I. Introduction

On 21 May 2014, the Commission adopted after “two rounds” of consultations<sup>1</sup> the new and long awaited Commission Regulation (EU) N°651/2014 declaring certain categories of aid compatible with the internal

market in application of Articles 107 and 108 of the Treaty, better known as General Block Exemption Regulation (GBER).<sup>2</sup> This regulation was adopted within the framework of the State Aid Modernization (SAM) package<sup>3</sup> after the amendment of the Council Enabling Regulation.<sup>4</sup> This allowed the Com-

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1 The first consultation on the draft GBER took place in May and June 2013 and the second round on the new exemption categories between 24 July 2013 and 10 September 2013.

2 Commission Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in applica-

tion of Articles 107 and 108 of the Treaty Text with EEA relevance, OJ 2014 L 187/1.

3 European Commission, Communication of 8 May 2012, *EU State Aid Modernisation (SAM)*, COM(2012) 0209 final [20-21]. For further discussion on SAM and on recent developments of EU State Aid Law see, *inter alia*, J Derenne, P Citron, M Domecq *et al.*, ‘Recent Developments in State Aid Law’ (2014) 5 *Journal of European Competition Law & Practice* 1, 53 ff; C Q C Quigley, ‘The European Commission’s Programme for State Aid Modernization’ (2013) 20 *Maastricht Journal of European and Comparative Law* 1, 35 ff; for a critical comment see, C

mission to declare additional categories of aid compatible with the internal market, thereby exempting them from *ex ante* notifications.<sup>5</sup>

The new GBER replaced, and thoroughly revised, the former regulation which had been passed in 2008 ('2008 GBER').<sup>6</sup> Like its predecessor, it sets out the different categories of aid, the conditions under which aid measures can receive the benefit of an exemption from notification, defines the eligible beneficiaries and sets the maximum proportion of the eligible costs and expenses. However, this new GBER is notable as it significantly extends the scope for Member States to grant aid. Among the 43 exemptions, organized in 13 chapters, the new GBER includes new categories of aid: aid to make good the damage caused by certain natural disasters, social aid for transport for residents of remote regions, aid for broadband infrastructures, aid for innovation, aid for culture and heritage conservation and aid for sport and multifunctional recreational infrastructures. The revised GBER also broadens the categories of aid that were already block exempted, for example, it increases the scope to risk finance aid and includes a wider definition of disadvantaged workers in the context of employment aid.<sup>7</sup> This significant extension in the scope of the GBER affords Member States greater

flexibility and leeway in granting aid without prior notification and approval by the Commission. It should "significantly reduce the administrative burden for Member States and local authorities."<sup>8</sup> Like its predecessor, the new GBER also operates on the basis of notification thresholds, i.e. aid can only be awarded under the GBER up to the threshold amount. However, in general, these thresholds, laid down in Article 4, have been raised considerably compared to the 2008 GBER. To counterbalance the enlarged scope and higher amount of aid exempted from notification, as well as the simplification of the conditions that aid measures should meet to benefit from the exemption, Article 9 requires Member States to publish the measures on a website which are adopted under the premise that they fulfil the conditions of the GBER.<sup>9</sup> It also introduces more stringent monitoring and reporting provisions.<sup>10</sup> Overall, the goals underpinning this regulation are, on the one hand, to allow the Commission to concentrate its scrutiny on aid measures which are most likely to distort competition, and on the other hand, to boost "good aid" which stimulates economic growth, job creation and other objectives of common interest."<sup>11</sup>

In line with the social policy goals of the EU 2020 Strategy,<sup>12</sup> with the overall aims set forth in Article

Buts, 'SAM: practically perfect in every way?!' (2015) 14 ESTAL 1, 1 ff.

4 Council Regulation (EC) No 994/98 on the application of Articles 92 and 93 EC [now Articles 107 and 108 TFEU] to certain categories of horizontal State aid, OJ 1998 L142/1, amended by Council Regulation No 733/2013, OJ 2013 L204/11.

5 It is well known that Article 107(1) TFEU provides that any aid granted by a Member State or through state resources which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods, is incompatible with the internal market, insofar as it affects trade between the Member States. However, Articles 107(2) and 107(3) TFEU set out exemptions to the general ban contained in Article 107(1) TFEU under the premise that markets may occasionally need State interventions to work more effectively, i.e. not only to raise consumer welfare, but also to protect and promote specific values. The EU's supervision of State aid is based on a system of *ex ante* notification/authorisation by the Commission. This means that State aids are prohibited unless the Commission has been notified of the aid, has assessed it within the scope of Articles 107(2) or (3) TFEU and has finally approved it in compliance with Article 108 TFEU. Article 109 TFEU determines regarding the adoption of secondary legislation in the field of State aid, that it is for the Council to establish the categories of aid exempted from notification. However, according to Article 108(4) TFEU, based on a Council Regulation, it is for the Commission to lay down detailed rules relating to such exemptions. Under Article 109 TFEU, the Council adopted Regulation 994/98, amended in 2013 (n 4), empowering the Commission to adopt regulations in which it declares certain types of aid to be lawful and exempts them from the obligation of prior notification.

6 Commission Regulation (EC) No 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, General Block Exemption Regulation, OJ 2008 L214/3, amended by Commission Regulation (EU) No 1224/2013 as regards its period of application, OJ 2013 L320/2.

7 J Derenne, J Blockx, S Doudountsaki *et al.*, 'Key Developments in State Aid Law' [2015] 6 Journal of European Competition Law & Practice 3, 211.

8 European Commission Press Release of 21 May 2014 available at: <[http://europa.eu/rapid/press-release\\_IP-14-587\\_en.htm](http://europa.eu/rapid/press-release_IP-14-587_en.htm)> accessed on 29 May 2014.

9 See also on transparency requirements, European Commission, Communication of 27 June 2014 amending the Communications from the Commission on EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, on Guidelines on regional State aid for 2014-2020, on State aid for films and other audiovisual works, on Guidelines on State aid to promote risk finance investments and on Guidelines on State aid to airports and airlines, C(2014) 3349/2.

10 Article 10 GBER, ff.

11 SAM, (n 3).

12 European Commission, Communication of 3 March 2010, *Europe 2020 – A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final. The Europe 2020 Strategy states that the EU should become "a smart, sustainable and inclusive economy" and that "Europe needs to make full use of its labour potential to face the challenges of an ageing population and rising global competition."

3 of the Treaty on the European Union (TEU),<sup>13</sup> but, most notably, in line with the European Disability Strategy 2010-2020 (EDS)<sup>14</sup> and with the United Nations Convention on the Rights of Persons with Disabilities (hereinafter 'the Convention' or the 'UNCRPD'),<sup>15</sup> concluded by the EU in 2010,<sup>16</sup> the new GBER also attempts to encourage aid that protect the rights of persons with disabilities. Considering that "the recruitment/employment [...] of workers with disabilities constitutes a central objective of the economic and social policies of the Union and its Member States,"<sup>17</sup> the new GBER includes Articles on aid for employment of workers with disabilities and aid compensating for the additional costs of employing workers with disabilities. Indeed, this is not in itself a novelty, and the GBER largely follows the provisions already included in its predecessor, i.e. the 2008 GBER. However, the revised text contains innovative features.<sup>18</sup> In addition, the GBER contains novel provisions on aid aimed to increase the accessibility of audiovisuals and heritage sites.<sup>19</sup>

Against this background, this article aims to critically discuss the new GBER in the context of the cur-

rent European disability policy. It focuses on the provisions explicitly designed to enhance the rights of people with disabilities and on those articles that include an explicit reference to disability, and examines them *vis-a-vis* the UNCRPD. All in all, the article endeavours to evaluate the overall impact of the EU ratification of the Convention on the revised GBER.

This article begins by sketching out the content of the UNCRPD while highlighting the international obligations the EU has undertaken under this Convention (Section II). This overview does not contain a detailed discussion of the Convention aiming rather at giving the reader only the necessary background for the purpose of the subsequent analysis. Furthermore, State aid law and, in particular, the GBER will be put in the context of the current EU disability policy, with particular attention given to the EDS (Section III). This article goes on to discuss those GBER Articles that explicitly refer to people with disabilities or include disability-related provisions. First, it examines the Articles on aid for employment of workers with disabilities and aid compensating for the additional costs of employing workers with disabilities (Section IV.1) highlighting the changes introduced in the new regulation, comparing and contrasting the new provisions with those included in the 2008 GBER. Secondly, it examines the provisions related to training aid (Section IV.2). Thirdly, it explores the Articles related to aid for culture and heritage conservation (Section IV.3). The final section reflects on how, and to what extent, the changes introduced to the new GBER comply with the international obligations undertaken by the EU by concluding the UNCRPD. It attempts to unveil whether the new GBER exploits the full potential for State aid to enhance the rights of persons with disabilities (Section V).

## II. The United Nations Convention on the Rights of Persons with Disabilities in the EU Legal Order

### 1. The UNCRPD in a Nutshell

On 13<sup>th</sup> December 2006, the UNCRPD was approved by the UN General Assembly and it entered into force in 2008.<sup>20</sup> It is widely considered to be a landmark piece of legislation as it embodies the official recog-

13 Article 3 TEU indicates among the EU objectives the establishment of a "highly competitive social market economy." On the contested meaning of social market economy see, among others, M J Marquis, 'The Collocation of "Social" and "Market" in the Economy and Europe's Elusive Social Identity in the Stardust of the Economic Constitution' in A Caligiuri, G Cataldi N Napoletano (eds), *La tutela dei diritti umani in Europa: Tra sovranità statale e ordinamenti sovranazionali*, (Padova: CEDEM 2010), 419. Article 3(3) TEU also includes a reference to the goals of full employment and social progress. The second alinea of Art. 3(3) states that the EU "shall combat social exclusion and discrimination."

14 European Commission, Communication of 15 November 2010, *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*, SEC(2010) 1324 final .

15 UN Convention on the Rights of Persons with Disabilities, Resolution adopted by the General Assembly on 13 December 2006, Res. 61/106. See *infra* Section 2.

16 Council Decision 2010/48/EC concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ 2010 L- 23-/35. See *infra* section 2(2).

17 Recital 52 of the Preamble of the GBER.

18 Section 6 of the GBER, in particular Articles 32-34 GBER.

19 Articles 53-54 GBER.

20 The EU played an active role in the negotiation of the UNCRPD. In particular, being authorised, in accordance with former Article 300 EC (now Art. 218 TFEU) and on the basis of former Article 13 EC (now Art. 19 TFEU), the Commission participated in the negotiations on behalf of the former EC alongside its Member States. As established in the negotiations directives issued by the Council, the Commission advocated an explicit accession clause to enable the EU to become a contracting party, and ultimately it succeeded. See G De Burca, 'The EU in the Negotiation of the UN Disability Convention' (2010) 35 *European Law Review* 2, 174.

nition of disability as a human rights issue,<sup>21</sup> embracing the social model, i.e. the view that disability stems primarily from the failure of the social environment to meet the needs and aspirations of people with disabilities.<sup>22</sup>

The UNCRPD consists of a Preamble and fifty Articles, complemented by an Optional Protocol comprising eighteen Articles.<sup>23</sup> Its scope is extremely broad: the UNCRPD does not simply prohibit discrimination on the grounds of disability, but also covers civil, political, economic, cultural and social rights.<sup>24</sup> In essence, it seeks “to recast disability as a social construction and articulates protections in specific application to their human rights enjoyment.”<sup>25</sup> Article 1 UNCRPD explicitly states that disability “results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.”

The text of the UNCRPD includes an introductory set of articles outlining its purpose and providing key definitions (Articles 1-2) and general provisions recurring throughout the treaty (Articles 3-9). Article 3 enunciates the Convention’s general principles. These include respect for individual dignity, autonomy, and independence; respect for difference and acceptance of disability as human diversity; non-discrimination; equal opportunity; complete and meaningful participation; accessibility; sexual equality; and respect for children’s rights and support for their evolving capabilities. These principles are benchmarks against which national as well as European law must be assessed in order to determine their over-

all compliance with the UNCRPD. Article 4 requires Parties to take measures to abolish disability discrimination by persons, organisations or private enterprises; to engage in the research and development of accessible goods, services and technology for persons with disabilities and to encourage others to undertake such research; to provide accessible information about assistive technology to persons with disabilities; to promote professional and staff training on the Convention rights for those working with persons with disabilities; and to consult and involve persons with disabilities in developing and implementing legislation and policies and in decision-making processes concerning rights affirmed by the UNCRPD. Article 4 further requires Parties to the Convention to adopt an inclusive approach and to mainstream the rights of persons with disabilities in all policies and programmes. Among the provisions of general application, Article 9 should also be highlighted which seeks to dismantle barriers by promoting different forms of accessibility in the public and private spheres, including physical, technological, economic and social accessibility, as well as information and communication accessibility. The Convention acknowledges that accessibility is a precondition for an independent life as well as full and equal participation of persons with disabilities in society.<sup>26</sup>

Articles 10 through 30 of the UNCRPD enumerate specific rights covering the whole range of activities protecting persons with disabilities, including *inter alia*, the right to education (Article 24) and the right to work (Article 27). In particular, and for the purpose of the subsequent analysis, it is worth noting

21 The Convention is the first human rights convention adopted in the twenty-first century and constitutes one of nine core human rights conventions, as designated by the Office of the UN High Commissioner for Human Rights. See J E Lord, ‘Disability Rights and Human Rights Mainstream: Reluctant Gate-Crashers?’ C Bob (ed), *The International Struggle for New Human Rights*, (University of Pennsylvania Press 2009), 83; M Pare, ‘Convention relative aux droits des personnes handicapées: quel impact sur le droit International?’ (2009) 113 *Revue General de Droit International Public*, 497 ff; F Seatzu, ‘La Convenzione delle Nazioni unite sui diritti delle persone disabili: i principi fondamentali’ (2008) *Diritti umani e diritto internazionale* 3, 535 ff.

22 This novel conceptualization of disability was first put forward by the Union of the Physically Impaired Against Segregation (UPIAS) in 1976, but the term ‘social model’ was initially used by Mike Oliver in his seminal contribution to the following volume: J Campling, *The Handicapped Person: A New Perspective for Social Workers?* (RADAR 1981). On the social model, *ex pluribus* see C Barnes and G. Mercer, *Exploring Disability* (Polity 2010).

23 The Optional Protocol to the Convention allows for complaints to be submitted to the UNCRPD Committee by individuals and

groups of individuals, or by a third party, on behalf of individuals and groups of individuals, alleging that their rights have been violated under the UNCRPD. In addition, if the Committee receives reliable information indicating grave or systematic violations of rights set forth in the Convention by a State Party, the Committee can launch *ex officio* investigations. Among others, see F Seatzu, ‘La Convenzione di New York sulla protezione delle persone disabili: diritti garantiti, cooperazione e procedure di controllo’ (2009) *Diritti umani e Diritto internazionale* 2, 259 ff.

24 G Quinn, ‘A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities’ in L Waddington and G Quinn (eds), 1 *European Yearbook of Disability Law* (Intersentia 2009), 89 ff.

25 M A Stein, J E Lord, ‘Future prospects for the United Nations Convention on Disability’ in G Quinn and O M Amardottir (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Brill 2009), 39.

26 See in this respect, D Ferri, ‘“Subsidising Accessibility”: Using EU State Aid Law and Policy to Foster Development and Production of Accessible Technology’ (2015) 14 *EStAL* 1, 51.

that Article 24 obliges State Parties to the Convention to ensure an inclusive education system at all levels, and *inter alia* to enable persons with disabilities to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others, especially by guaranteeing that reasonable accommodation is provided. Article 27 further requires Parties to recognise and take appropriate steps, including through legislation, to protect and promote the realisation of “the right of persons with disabilities to work, on an equal basis with others.” This provision also specifically requires Parties to “[e]nable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training” and to “[p]romote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures.” The UNCRPD acknowledges the importance of cultural rights as tools to allow participation, and ultimately social inclusion.<sup>27</sup> In particular, Article 30 UNCRPD provides the right of persons with disabilities to participate in cultural life and requires Parties to the Convention to take all appropriate measures to ensure that persons with disabilities have access to cultural materials, television programmes, films, theatre and other cul-

tural activities, as well as to places for cultural performances or services, monuments and sites.<sup>28</sup>

Articles 33-40 finally set forth the monitoring and implementation mechanisms for the UNCRPD. These provisions respond to the need to translate the Convention’s provisions into hard domestic law, policies and good practices.<sup>29</sup>

## 2. The UNCRPD in the EU Legal Order

On 26 November 2009, the former European Community (now the European Union) acceded to the UNCRPD.<sup>30</sup> The process of concluding the Convention, however, was only finalized one year later, when on 23 December 2010 the instrument of ratification was officially deposited.

According to EU law, the UNCRPD is a “mixed agreement” signed and concluded by both the EU and its Member States, on the one hand, and by third parties, on the other. The legal justification for mixity is that the EU competences did not cover the broad scope of the UNCRPD. In compliance with Article 44 UNCRPD,<sup>31</sup> the final decision on the conclusion of the Convention contains a declaration of competence, specifying the areas in which the EU has exclusive, shared or supporting competence.<sup>32</sup> The declaration is meant to clarify the obligations the EU has undertaken at the international level.<sup>33</sup> Howev-

27 D Ferri, ‘Is there a ‘Cultural Dimension’ of EU Disability Policy? New Perspectives after the Accession to the UN Convention on the Rights of Persons with Disabilities’ in L Zagato, D Costantini and F Perocco (eds) *Trasformazioni e crisi della cittadinanza sociale*, (Venice University Press 2014), 241.

28 The General Comment on Article 9 of the Convention, adopted on 11 April 2014 by the UN Committee on the Rights of persons with Disabilities, emphasizes the importance of this obligation and states that “[e]veryone has the right to enjoy arts. [...] But wheelchair user cannot go to a concert if there are only stairs in the concert hall. A blind person cannot enjoy a painting if there is no description of it he can hear in the gallery. A deaf person cannot enjoy a movie if there are no subtitles. A person with intellectual disability cannot enjoy a book if there is no easy-to-read version of it.” Available at <[www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx)> accessed 25 May 2015.

29 See also, G Quinn, ‘Resisting the ‘Temptation of Elegance’: Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?’ in G Quinn and O M Arndottir (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Brill 2009), 215.

30 UNCRPD (n 15).

31 Article 44 UNCRPD focuses on “Regional integration organizations” and states as follows: “1. ‘Regional integration organization’ shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred

competence in respect of matters governed by the present Convention. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the present Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence. 2. References to ‘States Parties’ in the present Convention shall apply to such organizations within the limits of their competence. 3. For the purposes of article 45, paragraph 1, and article 47, paragraphs 2 and 3, of the present Convention, any instrument deposited by a regional integration organization shall not be counted. 4. Regional integration organizations, in matters within their competence, may exercise their right to vote in the Conference of States Parties, with a number of votes equal to the number of their member States that are Parties to the present Convention. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.”

32 Annex II to the Concluding Decision.

33 Declarations of competence are well-known in EU international practice and are intended to have an external effect, i.e. they are mainly devoted to clarify *ex ante* the distribution of competences to third Parties, and thus the sharing of international responsibility. They do not govern the relationships between the EU and its Member States in the implementation of the agreement. See P M Olson, ‘Mixity from Outside: the Perspective of a Treaty Partner’ in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited. The EU and its Member States in the World*, (Hart Publishing 2010), 335.

er, its clarity is questionable, as it does not make express reference to relevant articles of the Convention itself, and does not indicate those UNCRPD provisions to which the EU considers itself to be bound and obliged to implement. In addition, the declaration stipulates that EU competences are “subject to continuous development,” thus highlighting that the declaration itself must be considered merely indicative. The Appendix to the Declaration also lists relevant EU legislation “[referring] to matters governed by the Convention.” The relevance is irrespective of the type of EU competence to which it is ascribed and concerns areas of action identified by the UNCRPD (i.e. accessibility, independent living and social inclusion, work and employment, personal mobility, access to information, statistics and data collection and international cooperation). As Waddington notes, all the instruments listed include disability-related provisions and “are examples of mainstream instruments in which one or more references to disability, or disabled people, has been included, generally with the aim of ensuring that this group is better able to benefit from the measure in question.”<sup>34</sup> Despite the criticism raised on the Declaration which has been deemed obscure and unclear,<sup>35</sup> doubt cannot be cast on the fact that State aid is an area of exclusive competence of the EU, and hence the EU must implement the Convention. Notably, the former 2008 GBER is listed in the Appendix as an instrument illustrating EU competence “in the field of independent living and social inclusion, work and employment.” The relevance of the 2008 GBER in connection to that field lies in the text of the specific provisions on aid for the employment of disabled workers in the form of wage subsidies and for compensating the additional costs of employing these workers. However, considering Article 4 UNCRPD as well as the Declaration itself, it can be affirmed without hesitation that the plethora of rights concerning people with disabilities should be streamlined into State aid law and policy, or more precisely, State aid law should be used to the maximum extent possible to fulfil the obligations purported by the Convention.

Finally, it should be recalled that the UNCRPD has become an integral part of EU law.<sup>36</sup> By virtue of Article 216(2) TFEU, the UNCRPD is binding on the EU and its institutions as well as on the Member States. In hierarchical terms, the UNCRPD is inferior to the provisions of the Treaty on the Functioning of the

European Union (and the Treaty on European Union), but is superior to secondary EU law.<sup>37</sup> The latter point implies that provisions of EU secondary law must, as far as possible, be interpreted in a manner that is consistent with the Convention. Put simply, if the wording of secondary EU legislation is open to more than one interpretation, preference should be given, as far as possible, to the interpretation which renders the European provision consistent with the Convention.<sup>38</sup> More generally, due to its sub-constitutional status,<sup>39</sup> the UNCRPD currently represents the benchmark of the current EU disability policy.

### III. Framing State Aid Law within European Disability Policy

In the last 30 years the EU has developed a significant disability policy, which has been progressively informed to the social model of disability.<sup>40</sup> A comprehensive EU approach to disability dates back to 1996, when the former European Community launched the European Community Disability Strategy (hereafter 1996 Strategy),<sup>41</sup> which advocated the identification and removal of barriers preventing individuals with disabilities from achieving equality of opportunity and full participation in all aspects of social life. The 1996 Strategy was followed by the EU

34 L Waddington, ‘The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences’ (2011) 18 *Maastricht Journal of European and Comparative Law* 4, 444.

35 *Ibid.*

36 *Ex multis*, Case C-239/03 *Etang de Berre* [2004] ECR I-07357, [25].

37 Case C-366/10 *Air Transport Association of America and Others* [2011] I-13755, [50]; Joined cases C- 335/11 and C- 337/11 *HK Danmark*, judgement of 11 April 2013, not yet reported, [28] ff.

38 Case C-61/94 *Commission v. Germany* [1996] ECR I-3989, [52]. See F Casolari, ‘Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation’ in: E Cannizzaro, P Palchetti and R A Wessel (eds), *International Law as Law of the European Union*, (Brill 2011), 394.

39 UNCRPD (n 15), see *infra* Section 5.

40 *Inter alia*, see L Waddington, *From Rome to Nice in a Wheelchair. The Development of a European Disability Policy*, (Europa Law Publishing 2006); M Priestley, ‘In search of European Disability Policy: Between National and Global’ (2007) ALTER – 1 *Revue Européenne de recherche sur l’handicap* 1, 61 ff.

41 European Commission, Communication of 30 July 1996, *Equality of Opportunity for People with Disabilities - A New European Community Disability Strategy*, COM (96) 406 final.

Disability Action Plan (DAP) 2004-2010.<sup>42</sup> State aid was not explicitly mentioned in the 1996 Strategy. By contrast, with the introduction of the DAP, the potential role for EU State aid law, in promoting the rights of people with disabilities, began to emerge, in particular, with regard to access to employment. The mid-term evaluation of the DAP, released in June 2009,<sup>43</sup> highlighted that “a key development in the Action Plan’s second phase was the process of reviewing and revising the 2002 General Block Exemption Regulation on employment and training aids for the employment of disadvantaged categories of workers.”<sup>44</sup> It showed, further, that the preparation of the 2008 GBER was influenced by inputs from the Commission Unit for the Integration of People with Disabilities, as well as by consultation responses from other relevant NGOs and social partners. The outcome attributable to the DAP was the inclusion of Articles 41 and 42 on aid granted for the employment of disabled workers in the form of wage subsidies as well as on aid that helps to offset the additional cost of employing disabled people in the 2008 GBER. Another “result” of the DAP was the adoption of specific criteria to assess the compatibility of notified aid measures for disadvantaged and disabled workers falling outside the scope of the GBER.<sup>45</sup>

The European Disability Strategy 2010-2020 (EDS),<sup>46</sup> while being formally “soft-law” adopted in November 2010, constitutes the cornerstone of the current EU disability policy. It attempts to mainstream disability policy in all EU policy fields.<sup>47</sup> The whole content and structure of the Strategy has been

deeply influenced by the UNCRPD. This shows how the Convention has become a significant driver in setting the EU disability agenda. Indeed, the EDS itself attempts to sketch out the framework for implementing the UNCRPD at EU level between 2010 and 2020. Notably, the EDS firmly embraces the social model and explicitly refers to Article 1 UNCRPD, as follows, “people 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.” The Strategy is articulated in eight interconnected key areas of action, taking into account the relevant obligations the EU has undertaken internationally by signing and concluding the UNCRPD: accessibility, participation, equality, employment, education and training, social protection, health and external action. For each of these areas, the EDS identifies key actions. However, the role of State aid, similarly to what occurred in the DAP, is confined to the employment field. The EDS aspires to increase the number of disabled workers in the traditional labour market “by introducing active employment policies and improving accessibility to workplaces.” To achieve this goal, the EU action will “promote use of the General Block Exemption Regulation which allows the granting of state aid without prior notification to the Commission.” In the Commission Staff Working Document accompanying the EDS, which sets forth an “Initial plan to implement the European Disability Strategy 2010-2020 -List of Actions 2010-2015,”<sup>48</sup> it is envisaged to highlight the scope for action that Member States enjoy in the area of promoting employment and recruitment of persons with disabilities through the GBER. State aid is not mentioned elsewhere in the EDS, and, curiously enough, no reference to it can be found in the context of, for example, accessibility actions. The EDS only affirms that, even though the EU action will support national efforts to improve accessibility and combat discrimination through mainstream funding and Structural Funds, these “measures should be implemented in accordance with European competition law, in particular State aid rules.” State aid has not been explicitly included in the toolbox of policy options available to the Commission (and the Member States) to promote disability rights other than the right to work. This narrow approach might be due to a certain restraint of the Commission in fostering state interventions in the

42 European Commission, Communication 30 October 2003, *Equal opportunities for people with disabilities: A European Action Plan*, COM(2003) 650 final.

43 Mid-term Evaluation of the Disability Action Plan, released in June 2009, available at: <ec.europa.eu/social/BlobServlet?docId=3784&langId=en> accessed on 25 May 2015.

44 Commission Regulation (EC) No 2204/2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment, OJ 2002 L 337/1.

45 The Communication concerned individual aid targeted to combat unemployment of persons with disabilities, granted either *ad hoc* or as a part of a scheme where the grant exceeded €10 million. See European Commission, Communication of 11 August 2009 on the criteria for the analysis of the compatibility of State aid for the employment of disadvantaged and disabled workers subject to individual notification, C188/02.

46 *Europe 2020*, (n12).

47 D Hosking, 'Staying the Course: The European Disability Strategy 2010-2020', in E Flynn, G Quinn and L Waddington (eds), *European Yearbook of Disability Law*, (Intersentia 2013), 73.

48 *European Disability Strategy 2010-2020*, (n 14).

market, in order to prioritize aid which is “well-designed, targeted at identified market failures and objectives of common interest, and least distortive.”<sup>49</sup> It might simply be evidence of a conservative attitude: the Commission opted for using State aid only in the area of employment, in which state interventions were already largely allowed, and hence simply renewed a well-established commitment.

#### IV. The New GBER and the Rights of Persons with Disabilities

##### 1. Aid for Employment of Workers with Disabilities and Aid Compensating for the Additional Costs of Employing Workers with Disabilities

Recognizing that “certain categories of disadvantaged workers and workers with disabilities, still experience particular difficulties in entering and remaining in the labour market,”<sup>50</sup> the new GBER like its predecessor, includes specific rules on aid for employment of workers with disabilities and aid compensating for the additional costs of employing workers with disabilities. The exemption from notification of these measures is explicitly intended “to increase the levels of employment of these categories of workers” and reflects UNCRPD obligations. In this respect, a first prominent feature of the revised GBER is an explicit reference to the Convention.<sup>51</sup> Whilst the Preamble is not legally binding, it informs the in-

terpretation of the regulation as a whole, i.e. it has to be taken into account when applying the GBER. As noted by the European Disability Forum (EDF),<sup>52</sup> “the inclusion of the Convention’s perspective in the process of the State Aid Modernisation [...] is a crucial step forward towards implementing the Convention through EU legislation.”<sup>53</sup>

A notable change of the new text is the use of the term “worker with disabilities” rather than “disabled worker.” This linguistic change might appear minimal. In fact, it is of utmost importance because it is a clear attempt to align the GBER with the UNCRPD. While the EDF’s observations largely induced the draft GBER during the consultations,<sup>54</sup> this linguistic change might be seen as a direct consequence of the ratification.<sup>55</sup> A second, intertwined, change concerns the definition of “worker with disabilities.” Again, embracing the changes suggested by the EDF,<sup>56</sup> the new GBER explicitly repeals the definition orientated around the medical model that had featured in the previous text.<sup>57</sup> First, recital 54 of the Preamble states: “[t]his Regulation should refer to aid for workers with disabilities in the sense of Article 1 of the Convention.” Secondly, Article 2(3) of the new GBER defines “worker with disabilities” as any person who is either “recognised as worker with disabilities under national law” or “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.” This revised formulation presents both positive elements

49 SAM (n 3), [12].

50 Recital 54 of the Preamble. This recital echoes the former text, namely recital 64 of the 2008 GBER.

51 The mention of the UNCRPD in the Preamble is not a unique feature of the GBER. Several references have been included in the Preambles to EU instruments. See Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJ 2014 L 257/73; Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, [2013] OJ L 347/320.

52 The EDF is the biggest umbrella organisation representing people with disabilities at the EU level that participated in the consultation rounds. See the comment to the GBER released in February 2014, available at <[http://ec.europa.eu/competition/consultations/2013\\_consolidated\\_gber/be\\_edf\\_en.pdf](http://ec.europa.eu/competition/consultations/2013_consolidated_gber/be_edf_en.pdf)> accessed 25 May 2015.

53 An explicit reference to the UNCRPD was requested (and subsequently welcomed) by the organizations of people of disabilities that participated in the consultation on the draft GBER. See the consultation document of ONCE (Spanish National Organisation of the Blind) available at <[http://ec.europa.eu/competition/consultations/2012\\_gber/es\\_once\\_en.pdf](http://ec.europa.eu/competition/consultations/2012_gber/es_once_en.pdf)> accessed on 25 May 2015).

54 See EDF’s response to the consultation of July 2013 available at <[www.edf-feph.org/Page.asp?docid=31816&langue=EN](http://www.edf-feph.org/Page.asp?docid=31816&langue=EN)>, accessed 25 May 2015.

55 This represents a symbolic shift towards a ‘people first’ language, even though it is not fully reflective of the social model.

56 According to EDF, “[a] more comprehensive definition of disability in compliance with the UN CRPD would bring more equality in the State Aid policies at EU level and would impede country differences in the implementation of State Aid notification exemptions.”

57 The 2008 GBER defined a ‘disabled worker’ as anyone who was considered as disabled under national law or who had “a recognised limitation resulting from physical, mental or psychological impairment.”

and ambiguities. Recital 54 represents a symbolic acknowledgement of the fact the UNCRPD has become a blueprint in EU law. However, it is no more than a pleonasm. The duty of consistent interpretation is well-established in EU law and is inherent to the above mentioned sub-constitutional status of the Convention.<sup>58</sup> With particular regard to the Employment Equality Directive,<sup>59</sup> the CJEU has consistently held since the *Ring and Werge* case<sup>60</sup> in 2013, that while it is true that the concept of 'disability' is not directly defined in the Directive, it should be interpreted on the basis of the UNCRPD.<sup>61</sup> Part (b) of Article 2(3) is plainly modelled on, i.e. it reproduces, Article 1 UNCRPD. However, the reference to national law, which was also included in the former text, has remained. It acknowledges that the meaning of disability differs from one Member State to another, but it might be contradictory and somewhat misleading as several States still have definitions based on medical models, moreover, national laws frequently provide diverse assessments of disability in different areas of action that cannot be considered as fully complying with the Convention.<sup>62</sup>

In order to examine the substantive provisions on aid for employment of workers with disabilities and aid compensating for the additional costs of employing workers with disabilities, it must be noted that the changes are far less noteworthy than one may expect. The notification thresholds have remained unchanged likewise the amount of €10 million per un-

dertaking per year for both aid for the employment of workers with disabilities in the form of wage subsidies and for aid for compensating the additional costs of employing workers with disabilities.<sup>63</sup> As noted in a previous piece of research, and as highlighted by other commentators,<sup>64</sup> the threshold amount is a fully political choice that reflects a subjective ranking of the perceived gravity or importance of the aid's objective. As already established by the 2008 GBER, the new regulation stipulates, that aid for the employment of workers with disabilities in the form of wage subsidies and aid compensating for the additional costs of employing workers with disabilities is deemed to have an incentive effect.<sup>65</sup> Like its predecessor, the new GBER allows only exceptionally the employment aid in the fisheries and aquaculture sectors and for the primary production of agricultural products.<sup>66</sup> In addition, Article 8(6) of the new GBER, echoing former Article 7(6) on cumulation, states that "aid in favour of workers with disabilities, as provided for in Articles 33 and 34 may be cumulated with other aid exempted under this Regulation in relation to the same eligible costs above the highest applicable threshold under this Regulation, provided that such cumulation does not result in an aid intensity exceeding 100% of the relevant costs over any period for which the workers concerned are employed."<sup>67</sup>

With regard to aid for the employment of workers with disabilities in the form of wage subsidies,

58 The CJEU has clearly stated that "the primacy of international agreements concluded by the European Union over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements," *inter alia* Case C-363/12 *Z. v A Government Department and The Board of management of a community school* [2014], not yet published, ECLI-159, [72].

59 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

60 See (n 38).

61 See, *inter alia*, Case C-363/12 (n 59); Case C-312/11, *Commission v Italy* [2013], not yet reported, ECLI-446.

62 An accurate comparative analysis of the definitions of disability adopted throughout the EU Member States is provided in H Bolderson, D Mabbett B Hvinden, *et. al*, 'Definitions of Disability in Europe. A Comparative Analysis - Final Report 13 December 2002', a study prepared by Brunel University, available at <[www.bbk.ac.uk/politics/our-staff/academic/deborah-mabbett/documents/Definitions\\_of\\_disability.pdf](http://www.bbk.ac.uk/politics/our-staff/academic/deborah-mabbett/documents/Definitions_of_disability.pdf)> accessed 20 May 2015; See also T Degener, 'Definition of Disability', EU Network of Experts on Disability Discrimination, available at <[www.pedz.uni-mannheim.de/daten/edz-ath/gdem/04/disab-def.pdf](http://www.pedz.uni-mannheim.de/daten/edz-ath/gdem/04/disab-def.pdf)> accessed 25 May 2015. The 1992 OECD report on "Employment Policies for People with Disabilities" has already

stated "[a]s the definition of disability has moved from the medical sphere into the socioeconomic sphere, a certain conceptual confusion has been unavoidable. Therefore, the ways in which concepts are interpreted, used and operationalised by policy-makers, researchers and service-providers vary widely both within and across countries. This tendency is accentuated by the wide array of operational definitions or sub-definitions applied in the context of eligibility assessments." Available at <[www.oecd.org/employment/emp/34808105.pdf](http://www.oecd.org/employment/emp/34808105.pdf)> accessed on 25 May 2015.

63 Article 4 GBER. The notification threshold had already been increased in 2008, doubled compared to the 2002 Regulation.

64 D Ferri and M J Marquis, 'Inroads to Social Inclusion in Europe's Social Market Economy: The Case of State Aid Supporting Employment of Workers with Disabilities' (2011) *European Journal of Legal Studies*, available at <[www.ejls.eu/9/111UK.htm](http://www.ejls.eu/9/111UK.htm)> , accessed 25 May 2015, and citation referred to in that article.

65 Article 6(5) GBER.

66 Article 1(3) GBER.

67 The retention of this provision was strongly supported by the European Association of Service providers for Persons with Disabilities (EASPD). See EASPD's response to the consultation of July 2013 available at <[www.easpd.eu/en/content/easpd-final-response-gber-consultation-state-aid-measures](http://www.easpd.eu/en/content/easpd-final-response-gber-consultation-state-aid-measures)> accessed 25 May 2015.

Article 33 GBER does not introduce any remarkable amendment. Even though the formulation has been slightly adjusted, the new provision substantially reproduces former Article 41 of the 2008 GBER. The eligible costs are the wage costs over any given period during which the worker with disabilities is employed. The aid intensity shall not exceed 75% of the eligible costs. As per Article 2(31) wage costs encompass “the total amount actually payable by the beneficiary of the aid in respect of the employment concerned, comprising over a defined period of time the gross wage before tax and compulsory contributions such as social security, child care and parent care costs.” Similarly to the former text, “where the recruitment does not represent a net increase, compared with the average over the previous 12 months, in the number of employees in the undertaking concerned, the post or posts shall have fallen vacant following voluntary departure, disabilities, retirement on grounds of age, voluntary reduction of working time or lawful dismissal for misconduct and not as a result of redundancy.” Except in the case of lawful dismissal for misconduct, the workers with disabilities are entitled to continuous employment for a minimum period in compliance to national legislation or collective agreements.<sup>68</sup> The provision stating that if the period of employment is shorter than 12 months the aid needs to be reduced pro rata<sup>69</sup> has been elided.

Article 34 GBER lays down the criteria for the exemption from notification of aid which compensates the additional cost of employing workers with disabilities. Again, this provision largely follows former Article 42 of the 2008 GBER. The maximum aid intensity remains 100% of the eligible costs. The eligible costs have, however, been improved. As it was in the previous formulation, they encompass the costs of adapting premises and of employing staff for the sole purpose of assisting workers with disabilities by adapting or acquiring and/or validating specific equipment and software. In addition, the new text includes the costs of training staff to assist workers with disabilities, the costs directly linked to transport of workers with disabilities to the working place and for work related activities and the wage costs for the hours spent by a worker with disabilities on rehabilitation. The inclusion of the two latter types of eligible costs is likely to have been due to the influence of EDF.<sup>70</sup> Article 34(2)(f) also stipulates that where the beneficiary provides sheltered employment, the eligible costs include the “costs of constructing, in-

stalling or modernising the production units of the undertaking concerned, and any costs of administration and transport, provided that such costs result directly from the employment of workers with disabilities.” This provision substantially reproduces the former text. However, the meaning of sheltered employment adopted by the new regulation is slightly different. Article 2(100) refers to it as “employment in an undertaking where at least 30% of the workers are workers with disabilities” with the effect of lowering the percentage of disabled workers for an employment to fall within the category of “sheltered.”<sup>71</sup> The amendment of the definition seems to be a sort of compromise as it attempts to provide a wide definition encompassing both the variety of definitions of sheltered employment across the Member States as well as the different percentages of disabled workers needed to qualify an enterprise as a sheltered workshop.<sup>72</sup> Notably, on the one hand, the Commission chose to ignore the voices of those as EDF that wanted to mention that sheltered employment refers to an undertaking where workers with disability “are employed under comparable working conditions as workers in the same sector of activity.”<sup>73</sup> Such a word-

68 Article 33(3) and (4) GBER does not introduce any change to the previous formulation purported by Article 41.

69 Former Article 41(5) of the 2008 GBER.

70 See the EDF’s response to consultation (n 54).

71 The 2008 GBER provided a threshold of 50%. That definition was on the one hand narrower than the other definition adopted at the international level (which did not refer to any specific percentage), and wider since it did not establish any other requirement to be met other than the percentage of disabled worker. In particular, the 1992 OECD report on ‘Employment Policies for People with Disabilities’ (n 62) states that “[t]he concept of sheltered workshops or enterprises covers a wide range of facilities geared towards providing people with disabilities with jobs in a protective environment along with their disabled peers. These establishments vary with respect to administrative structure, financing, target groups, salaries, and productivity. The common feature is the content of work: with few exceptions, sheltered employment implies manufacturing industry, often on a sub-contract basis, and sometimes involves the employment of persons without disabilities to support production and improve the working environment.”

72 The Commission embraced the comments expressed by the European Confederation of Worker Cooperatives, Social Cooperatives and Social and Participative Enterprises (see the consultation document at <[http://ec.europa.eu/competition/consultations/2012\\_gber/be\\_cecop\\_en.pdf](http://ec.europa.eu/competition/consultations/2012_gber/be_cecop_en.pdf)> last accessed 25 May 2015) which suggested that the threshold of 50% of workers was to be replaced by 30% “in line with the European Commission’s proposal for a Directive on public procurement” and in order to mirror the fact that several EU countries “have set the percentage of 30% in their legal frameworks regulating the work of disabled and disadvantaged persons (e.g. Italy, Finland, and Romania).”

73 See the EDF’s response to consultation, (n 52).

ing would have had the function to discourage sheltered workshops from hiring workers with disabilities under discriminatory conditions, in accordance with Article 27 UNCRPD. On the other hand, the Commission chose to overlook those, such as EASPD,<sup>74</sup> who claimed that the definition of sheltered employment should be determined at the national level.

Overall, whilst the new GBER is noteworthy in view of remarkable changes in the terminology and in the definitions of both “workers with disabilities” and “sheltered employment”, Articles 33 and 34 do not introduce any radical change. Their text is a rewording of the previous provisions without any ground-breaking amendments. The widening of the eligible costs in Article 34 represents the only remarkable feature. The influence of the ratification of the UNCRPD on this GBER section seems to be minimal.

## 2. Training Aid

Based on the premise, that training “generates positive externalities for society as a whole since it increases the pool of skilled workers” and improves the competitiveness of EU companies,<sup>75</sup> the new GBER like its predecessor, includes a provision on training aid. The GBER retains the notification threshold of €2 million for training aid projects. Yet, to a certain extent, Article 31 simplifies and streamlines the previous provision. In the current text, the aid intensity shall not exceed 50% of the eligible costs and the distinction between specific training and general training has been elided.

The eligible costs comprise trainers’ personnel costs for the hours during which the trainers participate in the training, costs of advisory services linked to the training project, trainees’ personnel costs and general indirect costs, i.e. administrative costs, rent and overheads. In addition, eligible costs encompass trainers’ and trainees’ operating costs as in direct relation to the training project, such as travel expenses, materials and supplies directly related to the

project. The Commission sought not to include in the final text any reference to “accessibility costs,” as it was asked by EDF. Although this disability umbrella organization was certainly right in pointing out that “the provision of reasonable accommodation facilities would increase the costs of the training and [...] could be a disincentive for the undertaking to make them,” the reference to accessibility was misleading. In this respect, it is worth recalling the General Comment on Article 9 of the Convention, released by the UN Committee on the Rights of Persons with Disabilities, which clarifies that accessibility is a “group related” obligation while reasonable accommodation is related to individuals, affirming that “the duty to provide accessibility is an *ex ante* duty.” By contrast, reasonable accommodation is an individual measure that “can be used as a means of ensuring accessibility for an individual with a disability in a particular situation.” Consequently, the duty to provide reasonable accommodation is an *ex nunc* duty which arises from the moment an individual with an impairment needs it in a given situation.<sup>76</sup> It is clear that, in this case, the eligible costs could not include the cost of adopting general accessibility measures; they could just cover specific accommodations. Thus, if the actual text is to be blamed, it is, because it does not include an explicit reference to reasonable accommodation. Nonetheless, it seems likely that costs related to necessary reasonable accommodation measures, including expenditures for augmentative/alternative communication tools, hearing aids and sign interpreters, might also be understood as materials and supplies directly related to the project.

Article 31(3)(d) excludes from trainers’ and trainees’ operating costs accommodation costs but it provides a novel and noteworthy exception which is the requirement “for the minimum necessary accommodation costs for trainees’ who are workers with disabilities.” This provision is to be welcomed and can be seen as advancement compared to the 2008 formulation. In the English text, however, the wording has an equivocal backlash. The word “accommodation” echoes the concept of “reasonable accommodation,” but in this case the provision refers exclusively to lodging expenses and not to costs related to reasonable accommodation measures.

Like its predecessor, the new GBER provides the possibility to increase the aid intensity by 10 percentage points if the training is given to workers with dis-

74 See EASPD’s response to the consultation of July 2013, (n 67).

75 Recital 53 of the Preamble of GBER.

76 UN Committee on the Rights of persons with Disabilities, *General Comment on Article 9 of the Convention*, available at <[www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx)> accessed 25 May 2015.

abilities (or disadvantaged workers),<sup>77</sup> but the maximum aid intensity has been lowered to 70% (instead of 80%) of the eligible costs.<sup>78</sup>

Overall, the new GBER like the former one, acknowledges that the promotion of training of people with disabilities constitutes a meaningful tool to foster social inclusion. The text of Article 31, despite few minor amendments, does not purport any significant variation. In order to better comply with the UNCRPD obligations, in particular with Article 24 UNCRPD, the Commission could (and should) have included among the eligible costs those related to reasonable accommodation measures.

### 3. Aid for Culture and Heritage Conservation

The new GBER includes a novel section on aid for culture that contains two interrelated but distinct provisions: Article 53 on culture and heritage conservation and Article 54 on aid for audio-visuals. This novel section was included in the text for the purpose of protecting and promoting cultural diversity, as prescribed by Article 167 TFEU. Recital 72 of the Preamble clearly states that “[b]ecause of the dual nature of culture, being on the one hand an economic good that offers important opportunities for the creation of wealth and employment, and, on the other, a vehicle of identities, values and meanings that mirror and shape our societies, State aid rules should acknowledge the specificities of culture and the economic activities related to it.” This statement is reinforced by recital 73, according to which “[a]udiovisual works play an important role in shaping European identities and reflect the different traditions of Member States and regions.” In general, the rationale of these rules is to allow and possibly to encourage public funding which guarantees the protection of cultural and linguistic identities across the EU and the multiplicity of artistic expressions. The immediate underlying rationale of the section is not that of reinforcing cultural rights of persons with disabilities. However, it is remarkable that both Articles 53 and 54 contain different explicit references to persons with disabilities and accessibility.

Under Article 53, aid can be provided for cultural activities such as museums, art galleries or libraries, and cultural heritage (namely archaeological sites, monuments or historical sites), for intangible her-

itage in any form, including folklorist customs and crafts, arts events and exhibitions, as well as for the publication of music and literature. The aid may take the form of investment aid or operating aid, and is subject to the respective thresholds of €100 million per project and €50 million per undertaking per year for aid in the fields of culture and heritage conservation. Notably for the purpose of this analysis, the eligible costs for investment aid include the “costs for improving the accessibility of cultural heritage to the public, including costs for digitisation and other new technologies, costs to improve accessibility for *persons with special needs* [emphasis added] (in particular, ramps and lifts for disabled persons, braille indications and hands-on exhibits in museums).”<sup>79</sup> With regards to operating aid, the eligible costs include *inter alia* the “costs of the improvement of public access to the cultural institution or heritage sites and activities, including costs of digitisation and of use of new technologies as well as costs of improving accessibility for persons with disabilities.”<sup>80</sup> Interestingly, while the latter provision use the term “persons with disabilities,” Article 53(4)(d) adopts an unusual way of phrasing it by referring to “persons with special needs” (apparently as a synonym of persons with disabilities). Such a term does not appear elsewhere in the GBER. In addition, providing examples of accessibility measures, Article 53(4)(d) refers to “ramps and lifts for *disabled persons* [emphasis added].” They are most likely intended to indicate people having physical disabilities. These linguistic discrepancies are not *per se* problematic, nor do they, as such, violate the UNCRPD. Nevertheless, considering that the term “disabled workers” used in the former 2008 GBER was radically rejected and substituted by the term “workers with disabilities,” as defined in Article 2, it is not entirely clear why the Commission did

77 This provision was supported by different participants in the consultations. Among others, the Walloon organization of social enterprises ConcertES (Concertation des organisations représentatives de l'économie sociale asbl) states that “Les fédérations membres de ConcertES se réjouissent qu’une attention particulière soit apportée au secteur du handicap, en permettant que les coûts liés à l’aménagement de l’espace de formation puissent bénéficier de l’exemption de l’obligation de notification, pour les travailleurs handicapés”, and goes on supporting an increase of the aid intensity threshold. See the ConcertES’ consultation document, available at [http://ec.europa.eu/competition/consultations/2013\\_consolidated\\_gber/be\\_concertes\\_fr.pdf](http://ec.europa.eu/competition/consultations/2013_consolidated_gber/be_concertes_fr.pdf), accessed 25 May 2015.

78 Article 31(4) GBER.

79 Article 53(3)(d) GBER.

80 Article 53(4)(c) GBER.

not align the language of Article 53 with the UNCRPD. It is even more surprising that this inherent inconsistency of the language of the GBER went unnoticed.

Under Article 54, aid schemes to support the script-writing, development, production, distribution and promotion of audiovisual may take the form of aid to the production of audiovisual works, pre-production aid and distribution aid. As provided by Article 4, the threshold for these aid schemes is €50 million per scheme per year. Notable for the purpose of this analysis is that Article 54 lists, among the eligible costs for production, “the overall costs of production of audiovisual works, including costs to improve accessibility for persons with disabilities.” In this respect the GBER distances itself from the 2013 Communication on State aid for films and other audiovisual works (hereafter ‘2013 Cinema Communication’).<sup>81</sup> The 2013 Cinema Communication, which lays down the criteria to assess under Article 107(3)(d) State aid in the audiovisual sector, that is over the GBER threshold, does not explicitly mention accessibility, nor people with disabilities.<sup>82</sup>

Curiously enough, Articles 53 and 54 do not include any reference to Article 30 UNCRPD nor to Article 21 UNCRPD or the Convention in general. Similarly, the Preamble does not cite the UNCRPD nor does it cite the EDS in connection to aid which is aimed at fostering accessibility of cultural goods. It might be argued that the lack of a reference is due to the circumstance that the Strategy does not mention culture as a key theme or autonomous area of action. However, it cannot be overlooked that the Strategy

expressly acknowledges that the “EU action will support national activities to make sports, leisure, cultural and recreational organisations and activities accessible.”

Overall, despite the absence of explicit references to disability policy and minor linguistic “inaccuracies,” Articles 53 and 54 are significant innovations, probably the most remarkable ones in the whole GBER. They enhance compliance with the UNCRPD and show an enduring EU commitment to fostering an “accessible and inclusive culture.”<sup>83</sup>

## VI. Concluding Remarks

Compared to its predecessor, the new GBER includes several innovative disability-related provisions. It also makes express reference to the European Disability Strategy 2010-2020, which is to date, the main EU policy document in the field of disability, as well as to the UNCRPD. It is significant since the GBER creates a direct and explicit link to disability policy, placing itself within the realm of the UNCRPD implementing instruments. However, at a closer look, the changes which were introduced appear to be less dramatic and the potential for the GBER and, more generally, for State aid to enhance the rights of persons with disabilities still remains largely unexplored.

The citation of the EDS and of the UNCRPD is only confined to the field of employment and is explicitly connected to provisions on aid for employment of workers with disabilities and aid compensating for the additional costs of employing workers with disabilities. In fact, Articles 33 and 34, formerly Articles 41 and 42 of the 2008 GBER remain the most relevant disability-related provisions. In this respect, the amendments mainly consist of linguistic changes, whilst the conditions under which aid is exempted from notification have not undergone any major revision. The most notable innovation is the new definition of “workers with disabilities” which is set in Article 2 and is plainly modelled on Article 1 UNCRPD. Overall, these provisions seem to comply with the UNCRPD, and through them, the EU fulfils the obligation it has undertaken under Article 27. However, they are not totally immune to criticism. On the one hand, they confirm the persistent conception that State aid is a valuable tool to promote the right to work of people with disabilities. Such a conception mainly remains on the more general understand-

81 European Commission, Communication of 15 November 2013 on State aid for films and other audiovisual works, C 332/1. This 2013 Cinema Communication’s main goal is to create an updated framework to face the profound changes that the audiovisual sector has undergone in the last few years, especially with the introduction of digital technology in all areas of the audiovisual value chain. See I Orsich, ‘State Aid for Films and Other Audiovisual Works: The 2013 Cinema Communication’ (2014) 13 EStAL 4, 698 ff.

82 Whilst not explicitly mentioning accessibility, the Communication covers also State aid for cinemas. This includes possible aid for the modernisation for cinemas, such as their digitization. These activities might improve accessibility for people with disabilities. *Ibid.*, [53].

83 The European Agenda for Culture, which set out the national and EU level activities to be carried out in the field of culture during the period 2011-14, indicated as priority areas “cultural diversity, intercultural dialogue and accessible and inclusive culture.” See European Commission, Communication of 10 May 2007, *European agenda for culture in a globalizing world*, COM (2007) 242 final.

ing that targeted employer-side incentives are flexible and efficient means to improve employment. In fact, almost all the Member States have enacted aid schemes under the 2008 GBER.<sup>84</sup> But, on the other hand, it is not known yet whether these national schemes have actually enhanced the number of workers with disabilities and whether employers rely on the schemes to hire workers with disabilities. In addition, it cannot be underestimated that subsidies could perpetuate the perception that workers with disabilities are less competent and less productive. Ultimately, these provisions could contribute to the stigmatisation and negatively affect employment opportunities of the target group.<sup>85</sup>

Disability-related provisions are also included in Article 31, especially concerning training aid. This Article introduces few innovations compared to the former formulation. However, none of them radically change the rights of people with disabilities. A major drawback can be individuated: regrettably, the provision does not include among the eligible costs those related to reasonable accommodation measures. Such an express reference would have been in compliance with Article 24 UNCRPD and would probably incentivize the training of persons with disabilities.

Despite some language “inaccuracies,” the most remarkable innovation of the new GBER, in all respect, are the provisions related to aid to culture and heritage as well as to audiovisuals which include, among the eligible costs, those related to making cultural products and services more accessible to people with disabilities. Apparently and surprisingly, the text was not influenced by any of the associations of people with disabilities that responded to the consultation. Moreover, the new text is not explicitly connected to the implementation of the UNCRPD nor is it connected to the Strategy, which is striking, especially considering that the EDS explicitly affirms that the Commission will work to improve the accessibility of “cultural and recreational organisations, activities, events, venues, goods and services including audiovisual ones.”

Apart from the abovementioned, no other explicit references to disability or accessibility for persons with disabilities can be found. As noted elsewhere,<sup>86</sup>

the possibility of boosting R&D&I of universally designed goods and assistive technology is disregarded. Even though, the EDS sets forth in “black letter law” the Commission’s commitment to contribute to the improvement of the accessibility of sports and leisure venues, the new GBER does not embrace this objective explicitly. Article 57 on “Aid for sport and multifunctional recreational infrastructures” fails to mention accessibility. In particular, according to Article 57(5) the aid may take *inter alia* the form of investment aid, including aid for the construction or upgrade of sport and multifunctional recreational infrastructure. In this case, a reference to accessibility could have been appropriately inserted. Such a reference would have not only complied with Article 30 UNCRPD which obliges Parties to “ensure that persons with disabilities have access to sporting, recreational and tourism venues” but it would have also fit in the EDS programme. It is true that the formulation, as it now stands, does not prevent Member States from enacting schemes that also foster accessibility of sport infrastructures and events, but it does not even encourage them to do so.

All in all, the new GBER shows signs of mainstreaming disability, but appears to introduce limited innovations. The Commission takes a prudent approach and is still sticking to its traditional and long-standing attitude of allowing the use of State aid mainly within the bulk of affirmative actions to boost employment. It seems to disregard the potential for State aid to ensure the active participation of persons with disabilities in the European society.

84 To mention a few of the most recent schemes: the UK “Department for Work and Pensions Wage Incentive Scheme” (SA.34677), OJ 2012 C 207/8; the regional scheme of Friuli Venezia Giulia (Italy) “Intervento straordinario a sostegno dell’occupazione” (SA.33977), OJ 2012 C 45/30; the regional scheme of Sicily “Aiuti all’occupazione per l’assunzione a tempo indeterminato di lavoratori svantaggiati, molto svantaggiati e disabili. ex Titolo VI L.r. 9/2009 e CAPO II L.r. 11/2010 - In esenzione ex Reg. UE 800/2008” (SA.32685), OJ 2011 C 118/57; and the Maltese scheme “Employment Aid Programme” (SA.36919), OJ 2013 C 323/48.

85 Marx, “Job subsidies and cuts in employer’s social security contributions: the verdict of empirical evaluation studies” (2001) *International Labour Review*, 69 *et seq.*

86 Ferri, “Subsidising Accessibility: Using EU State Aid Law and Policy to Foster Development and Production of Accessible Technology” (2015) 14 *EStAL* 1, 51.