

# **Work Activation and Rehabilitation of disabled people in Germany in the framework of European strategies – problems of coherence and policy mismatch**

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## **Introduction**

In social policy and in law there are different approaches to the subject of employment and activation of people who are disabled or have any form of health problem following the basic lines of economic and social integration and of freedoms, equality and solidarity. These different approaches lead to different political and legal instruments. In social and employment policy and even more in a legal system they have to be brought in a coherent system. Negative interaction and mismatch problems between goals and instruments have to be minimized. On the European and even more on the national German level some problems of coherence have not been solved yet.

## **Employment policy as economic policy and the individual right to work**

### **European Basis**

The first approach to the problem is to subsume it under the greater strategy of employment and labour market and the related individual rights (Oppermann 2004; Haines 2004; Welti 2004). The goal is to promote throughout the Community a harmonious, balanced and sustainable development of economic activities and a high level of employment which shall be based on the close coordination of Member states economic policies according to Article 2 and 4 of the European Treaty and to realize what Article 15 of the charter of fundamental rights of the European Union calls the right of everyone to engage in work and to pursue a freely chosen or accepted occupation. Since the beginning of modern history and modern welfare there have been designed legal instruments for the activation of the poor to work. They always required the distinction of those who were able to work and those who

were not. It is in special for this reason that health condition comes into the focus of general employment policies. On a higher level of reflection and evaluation policy and law makers will also find, that disability and health problems correlate with unemployment and with employment on a low level of qualification and payment. Then special instruments of support and activation might be developed.

### **Germany: The “Hartz-Laws”, especially SGB II**

In Germany the laws for modern services for the labour market, known as the Hartz reforms, have been the last big attempt to increase employment and to activate the unemployed, especially by creating a new system of steering the Federal Agency for work and a new system of basic security for job-seekers in the Social Security Code Book II (SGB II), in force since the beginning of 2005.

#### ***The definition of ability to work***

Integrating two former systems of social welfare and of work promotion in the responsibility of the Federal Agency on the one hand and of the local social welfare on the other hand, a new definition of the ability to work had to be found. It is now defined in § 8 of the SGB II: Able to work is everyone from 15 to 65 – and in a few years up to 67 - who is able to work under normal labour market conditions at least three hours a day. Specialists of Social Medicine say, this is really difficult to decide.

The normal labour market condition is the ideal labour market condition - which in many parts of Germany is far away from the real labour market condition. Official unemployment in 2005 amounted to 12% in Germany as a whole and to 19% in Eastern Germany. This definition declares a lot of even severely disabled people able to work. In 2002 the Federal Agency had found out that one quarter of all unemployed were limited by health condition. It can be taken for granted that those who came out of the social welfare system were even worse off in their health status.

The system is dichotomous: You are either able to work or you are not. In the Social Security Code Book VI (SGB VI) the same definition is used (§ 43), but there is to be found also the category of partially unable to work for those who can work from three to six hours a week. They are entitled to half of a invalidity pension. But this does not help most of the unemployed, because they have at least marginal claims to invalidity pensions. The definition of work-ability had been very important, because after the reform the unemployed have to be paid by the Federal Government and the invalid have to be paid by the local authorities and the Länder.

#### ***A first look: Poor results***

So the systems covers a lot of disabled people and you should expect some highly developed instruments for dealing with these persons. But the Hartz Commission was not really concerned with this problem. Their subject had been wording and

building a new bureaucratic structure – which meanwhile in 2007 has been found to be in contradiction to the constitutional guarantee of local self-government by the Federal Constitutional Court (BVerfG, 20.12.2007, Az. 2 BvR 2433/04) - and politics were occupied with discussing the amount and conditions of the basic payment and about those unemployed supposed being not willing to work. So the German employment policy today has to face poor results on behalf of unemployed people with disabilities and in bad health condition (Weber 2002, Welti 2004). Around three millions of Germans between 15 and 65 are recognised as severely disabled and only a few more than one million are official part of the labour market, including nearly 200.000 unemployed. Nearly 250.000 are occupied in sheltered workshops outside the labour market, with an increasing tendency. A special campaign had decreased the number of unemployed severely disabled in 2002 to 150.000; in the last years it has been increasing again. Only around 25% of severely disabled in 2005 left the official unemployment status for employment, 10% for qualification and most of them shifted outside the system.

### *Some explanations*

For the disabled people themselves the strict demarcation between the status of being a job-seeker able to work and of being a fully invalid welfare client has created a non-activating effect. The rigid workfare regime of the Social Security Code II is not designed for the needs of people who struggle for their ability to work. It is more attractive for them to be classified as fully invalid and to get the right to work in a sheltered workshop and some more individual support (Welti 2005a). If You first prove to be able to work for more than three hours and afterwards loose Your employment, You are worse off than before. In Social Security Code II case management is an administrative task, in Social Security Code XII - the social assistance - it is a task for social workers.

The steering mechanism inside the federal agency and the newly designed local bodies for the basic security combined from federal agency and local community also has produced some questionable effects. The federal agency hast started with the first parts of the Hartz reforms in 2003 to invent new criteria for vocational re-training and education. To improve their quality and effectiveness they demanded high quotas up to 70% of immediate reintegration of the participants in the labour market. The number of disabled participants decreased significantly, because their special integration problems had not been taken into account. This can be seen as discrimination (Davy 2002, Welti 2004).

Now the federal agency, financed by special contributions of employees and employers, has to pay an amount to the federal budget for every person being unemployed for longer than one year and then being paid out of the federal budget. This should be an incentive to bring the unemployed into work. But as the agency cannot bring all into work in fact it is an incentive to care especially for those who easily can be brought into work. Disabled people mostly do not belong to this

group. There is no incentive to do something for people with severe problems whose reintegration may take a longer time than one year.

Federal Agency, federal government and local authorities disagreed over the responsibility for vocational rehabilitation of unemployed in the system of the Social Security Code II. It could not be implemented to have the local bodies carrying out Social Security Code II responsible for vocational rehabilitation, so now the Federal Agency is responsible for it (§ 6a SGB IX). In the result, there is a divided responsibility for their case management (Welti 2007).

## **Rehabilitation and the right to integration and participation**

### **European Basis**

The second approach to the problem is more specific. It covers the traditions of vocational and medical rehabilitation which have been developed in Europe and Germany in the last 100 years especially in the context of pension and work accident insurance and of war victim support. This special policy has the double justification of avoiding the costs of social disintegration, at first of invalidity pensions, and of social integration as a reason for its own sake. In the treaty this goal is called a high level of social protection and, more precise, in the treaty for establishing a European constitution the combat of social exclusion and discrimination and the promotion of social justice and protection. The Charter of Fundamental Rights of the European Union states in Article 26 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. The “respect”-formula is taken in the charter being conscious that there is a long and manifold tradition of such measures in each of the member states.

### **The German system and the SGB IX**

“Rehabilitation has priority over pension” has been the legal slogan in this field over many decades in Germany. This is activation policy *avant la lettre* and it has worked well and still works well for some groups, especially for those whose workability is endangered by accident or by illness after long years of workplace integration (Eichenhofer 2005). Responsibility for the rehabilitation of potentially working people in Germany is shared between the bodies of pension insurance, accident insurance, federal agency for work and the integration office, which formerly was an exclusive agency for war victims and now has to promote the workplace integration of all severely disabled people. Some responsibilities are also imposed on the employers who have an employment quota of 5% severely disabled in relation to their total workforce and some duties for adapted employment.

In 2001 the system of rehabilitation and workplace participation has been regulated in a new legal system in the Social Security Code Book IX (SGB IX). The

aim of this legislation was to achieve more cooperation, coordination and convergence of the different bodies involved into the rehabilitation system including the sickness insurance and the local social welfare bodies. For the first time the obligations of all social security authorities in the field of rehabilitation and also of employers were regulated in one law (Kohte 2005). A common legal concept of disability has been established which is derived from the International Classification of Functioning, Disability and Health of the World Health Organisation (Seger et al. 2004). Disability is defined as a lack of participation in society caused by a health problem. This is an advanced definition which includes the individual condition and the social context. In Germany we say “Menschen sind nicht nur behindert, sie werden behindert.” (People are not only disabled, they are being disabled), which means: Disability is not only a personal disadvantage but also a relation between a person and its environment. This concept of disability does not fit in the concept of work-ability which does not regard the ability to work in the real labour market but in an ideal labour market.

### **Activation and employment instruments in SGB IX**

Also the instruments have been revised and improved: “Rehabilitation has priority over pension” has been generalized to “Rehabilitation has priority over each kind of benefit in cash.” (§ 8 SGB IX) This means, that all social security authorities are obliged to examine in each case of application for any benefit in cash, if any kind of rehabilitation of any authority can be taken into account. So for example after an application for sickness allowance the sickness insurance has to examine not only if medical rehabilitation as a benefit in kind from itself or from the pension insurance should be given but also if vocational rehabilitation from the pension insurance or from the federal agency could be successful. On the other side the federal agency has to take in account medical rehabilitation, if disabled people apply for job-seekers allowance. This would be some kind of revolutionary for the strictly segmented German system of welfare (Gagel/ Schian 2002; Gagel 2004). Unfortunately the new law is not properly executed in wide parts of the administration. There is no incentive for the administrative bodies to do so. Especially in the federal agency and in the sickness insurance there is a lack of competence in the direction of the other parts of the social security system

A second instrument of the Social Security Code Book IX is the new institution of common service units (Gemeinsame Servicestellen, § 22 SGB IX), for all the authorities dealing with rehabilitation. Citizens and employer should have to deal only with one single unit to get all the possible and fitting benefits in kind of medical, vocational and social rehabilitation. The common service units should also do case management. This would be a real progress in the segmented system. Unfortunately the first evaluation of the common service units found out that they are still not ready to serve their management functions and only work as normal advice centres, sometimes they are just “one-more-stop-agencies” (Shafaei 2008).

The Social Security Book IX also brought a few inventions for the rehabilitation services themselves. Strongly disabled people now can profit from a personal workplace assistance (Arbeitsassistenz, § 102 Abs. 4 SGB IX) which really is helpful for example for blind or deaf people. Also new Integration Services for special needs (Integrationsfachdienste, § 109 SGB IX) were invented. They are financed by the fund financed from the countervailing charge employers have to pay if they do not employ enough severely disabled people. Due to reforms and economic crisis the fund is lacking money although employment of disabled people has not increased. So also the services are facing a financial crisis.

At least the employers responsibilities were made more clear than before in the Social Security Book IX. The employers are obliged to carry out a Company Integration Management (Betriebliches Eingliederungsmanagement) in every case of an employee being absent from work more than six weeks a year (§ 84 Abs. 2 SGB IX). This corresponds to the beginning of sickness allowance payments after six weeks and marks a first step to a new balance of responsibility between employers and social security after two decades of a policy of early retirement and workplace disintegration carried out nearly cooperative between companies and social security system (Welti, 2006a). There are no direct sanctions if employers miss their responsibilities for a Company Integration Management, but they may face problems when trying to dismiss employees for sickness reasons (Deinert 2007). Also some companies, especially from the bigger ones, realize that it is more reasonable for them to end the policy of disintegrating employees with health problems, because for demographic reasons even today skilled workforce is more and more difficult to hold. The Company Integration Management is also an important link to workplace security and workplace environment as another main area of European social and employment strategy. It seems that Company Integration Management may work as far as it can be carried out in internal responsibility of the companies, but the link to the social security system, which should be built by the common service units, does not work properly. Employers often miss one person being the responsible partner for rehabilitation in the sense of case-management.

### **Systemic problems**

Five years after enforcement of Social Security Code IX the outcome of implementation is not very satisfying. It should not be forgotten that Germany still has in many parts an efficient rehabilitation system. But the tasks and incentives for the responsible authorities are not promoting innovation in this field. Incentives for the federal agency as mentioned had a result of creaming the unemployed. The bodies carrying out the sickness insurance are in competition with each other and so try to avoid the “bad risk” of doing a good job and being attractive for disabled and chronically sick people (Welti 2006).

## **Equality and Non-Discrimination**

### **The European Basis**

The third approach to the problem follows the principle of non-discrimination. According to Article 21 of the Charter of fundamental rights any discrimination on the ground of disability shall be prohibited. This goal of achieving equality not only before the law but also in society corresponds with both fundamental goals of the European Union: Building a common market requires a common society based on the equality of market participants, deepening the market means involving everyone in it. Building an integrated European society means giving everyone access to his fundamental needs even if markets do not satisfy these needs.

The items mentioned especially for non-discrimination in the European and national law are not equal in function and impact. Regarding the equality of sex, race, colour, language or religion in most cases we call the state as well as the actors in society to be like the goddess of justice with a blindfold on: just to ignore prejudice regarding these special topics. Regarding the equality of disabled people in many cases we want the goddess of justice to be the goddess of equity and to have a good look on the special conditions people are living and suffering with. The concept of considering disability in equality means not a formal equality of rules but a material equality of chances and even of results.

In European Law this concept of non-discrimination is broadly accepted and can be found in the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (ECJ 11/7/2006, C-13/05, Chacón Navas; Welti 2008). Going beyond the right to positive action stated in Article 7 in Article 5 of the Directive the member states are obliged to provide reasonable accommodation in relation to persons with disabilities. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment or to undergo training, unless such measures would impose a disproportional burden on the employer. The member states have the opportunity to make this burden proportional by helping the employers within the framework of their disability policy.

### **German Implementation**

In Germany this directive has been implemented with the Social Security Book IX (§§ 80-84 SGB IX) on behalf of severely disabled people and on behalf of other disabled people with the General Equal Treatment Law of 2006 (Allgemeines Gleichbehandlungsgesetz, AGG). Concerning reasonable accommodation it can be doubted that the implementation is complemented but it is possible to understand German Law in conformity with European Law.

It is prohibited for employers to discriminate anyone on the ground of his or her disability when making decisions about employment, advancement and dismissal and employers have to provide reasonable accommodation for disabled people which is proportional for them because integration office and moreover sickness, pension and accident insurance authorities support the reasonable accommodation. So some jobs for disabled people can be secured, but according to the general lack of employment chances especially for the lower qualified even an equal chance would be a little chance in many parts of Germany.

A substantial equality of chances has to start earlier for providing disabled and health impaired people with good and sustainable qualification and at the same time taking in account their special needs. In Germany between 5 and 7% of every age cohort visit special schools and are not integrated in the general education system (Cloerkes 2003). The social security system in the past provided basic qualification for many of them, compensating deficits of the educational system based on an outdated segregated school system. After the Hartz reforms vocational training and rehabilitation has changed and does not serve this basic qualification functions to the same extent.

The employment framework directive 2000/78 according to its Article 3 covers not only the conditions of employment, but also the access to all types and all levels of vocational guidance, vocational training, advanced vocational training and re-training. Germany has now in the context of the General Equal Treatment Law 2006 (AGG) implemented this principle in several parts of the Social Security Code (§ 19a SGB IV; § 33c SGB I; Welti 2008). In German social and employment policy there is a contrast between elaborated instruments of a special disability and rehabilitation policy and some kind of ignorance in the mainstream of labour market and activation policy. But the principles of equality and non-discrimination need to be integrated in the mainstream of society and legal system (Schiek 2002; Welti 2005; Welti 2006).

## **Conclusion**

European law and European coordination already have had a positive impact on German disability policy. But European and German law and policy making will have to take even more in account that the general employment strategy and the special strategy for integration and equality of disabled people have to be brought into convergence. Studying the European documents through the years it seems that also on this level the links between both areas not have been tightened.

As a first step we should discuss seriously in Germany about the impact of the employment framework directive 2000/78 on social security system and we should not repeat the mistake of disability-blind reforms in our educational system. Social security and education have to prove their performance not for those who are already healthy, wealthy and wise. Also on the European level we may need more awareness that the employment situation of disabled people is situated at the inter-



face of the employment, the social security and the educational system. Disabled people should find their place not on the fringes but in the middle of a dynamic and open and integrative German and European society.

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