An introduction to the disability strategy 2010-2020, with a focus on accessibility

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This article aims at providing an overview of the European Disability Strategy 2010-2020, with a focus on accessibility. It compares the policy objectives on disability accessibility of the current Strategy with the previous EU policies on disability. Finally, it examines the progress of the implementation of this Strategy through the analysis of two forthcoming legal instruments related to disability accessibility, the proposed Public Procurement Directives and the European Accessibility Act.

1 Introduction

On the 15th of November 2010, the Commission adopted a Communication on the European Disability Strategy 2010-2020.1 The policy described in this document is a continuation of the more comprehensive approach on disability issues that the European Union (EU) has taken since the European Action Plan 2004-2010.2 During this period, the EU showed its commitment on disability issues by participating in the preparatory works, signing and concluding the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). The EU concluded the UNCRPD in December 2010. A month later the Convention came into force. These actions signalled the first time that the EU has concluded an International Human Rights Convention. Among the provisions of the Convention is accessibility.3

The purpose of accessibility is to enable the independent living and full participation of persons with disabilities in all aspects of life.4 As a result of the conclusion of the UNCRPD the EU is obliged to fulfil the obligations of the Convention within the limits of its competence. The EU has already taken steps to implement the Convention with regard to accessibility, by proposing the revision of the Public Procurement Directives5 and the adoption of the European Accessibility Act (EAA).6

The intention of this article is to provide an overview of the European Disability Strategy 2010-2020 in relation to accessibility by focusing on the forthcoming EU legislation on public procurement and the EAA.

2 Defining Accessibility

Before I move to the analysis of the Disability Strategy 2010-2020 and how it is realised through the two policy steps that I will examine, it is essential to understand the meaning of the term ‘accessibility’. The UNCRPD does not offer a definition of accessibility either in the ‘definitions’ article or in article 9 UNCRPD, where the obligations of the State Parties of the Convention in relation to accessibility

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are stated. Although accessibility is mentioned in EU legislation, there is no definition of the content of the term in the instruments in which it is used. Therefore, instead of focusing on a definition, it is better to use a different approach. Accessibility comprises several aspects, following the analysis of Schluze in combination with General Comment 14 of the Committee on Economic Social and Cultural Rights. First, accessibility has a social or attitudinal aspect. This form of accessibility refers to the removal of the stigma and other negative forms of behaviour that people with disabilities, their families and their caretakers experience throughout their lives. Second, accessibility includes an affordability aspect. This aspect refers to the need to make everything affordable to persons with disabilities, from flight tickets to new information and communication technologies. Third, accessibility has a physical aspect that interrelates with the physical environment. This type of accessibility means that people with disabilities, while in the case of information and ideas, for example, people with disabilities should be informed about the accessibility features of a public building. This example differs from the one about the physical accessibility because in the case of the ramps, the obligation is to adjust the physical environment to accommodate people with disabilities, while in the case of information about the accessibility features of a building, the obligation is to make information available to people with disabilities. Fifth, the last aspect of accessibility is the communication aspect. This type of accessibility of goods and services concerns the supply of information in accessible formats in alternative modes and means of communication for all types of persons with disabilities.

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3 The European Disability Strategy 2010-2012

The European Disability Strategy 2010-2012 was adopted in November 2010. It aims at enabling people with disabilities to enjoy their full rights and benefit from their participation in society and in the European economy through the Single Market.\(^\text{16}\)

To eliminate the barriers of accessibility for people with disabilities, the Strategy suggests the use of legislative and other instruments, like standardisation, to modify the built environment, transport and Information and Communication Technologies (ICT). An example of such measures is the proposal of the Commission to revise the Public Procurement Directives.\(^\text{17}\) It states that the possibility of adopting regulatory measures to ensure accessibility of goods and services, including measures to set up the use of public procurement, should be examined.\(^\text{18}\) The forthcoming EAA is a perfect realisation of this policy direction. The Act might also include detailed standards for specific sectors with a view to improve the internal market’s function with regards to the accessibility of goods and services for persons with disabilities.\(^\text{19}\)

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Another aspect of accessibility covered by the Strategy is assistive technologies.\(^\text{20}\) The EU aims at stimulating an EU market for assistive technologies and will take action to support and supplement national actions for the implementation of accessibility, the removal of barriers and the improvement of the availability and choice of assistive technologies.\(^\text{21}\) Finally, the Strategy aims at raising awareness and training on all the dimensions of accessibility and ‘design for all’\(^\text{22}\) in educational curricula and training of relevant professions.\(^\text{23}\)

As far as participation is concerned, the Strategy introduces several initiatives in relation to accessibility of people with disabilities. The Strategy, with a view to improve the participation of people with disabilities in society, pursues the raising of accessibility levels in the fields of sports venues, goods and services and cultural and recreational activities.\(^\text{24}\) The accessibility to voting in the form of facilitation of the procedures of the exercise of the electoral rights of EU citizens and the promotion of cross-border transfer of copyright works in accessible formats, are, also, measures included in the Strategy.\(^\text{25}\)

In the field of health the Strategy proposes the adoption of EU measures to support national actions to provide accessible facilities and services.\(^\text{26}\) Finally, the EU will focus, pursuant to the Strategy, on raising the awareness of society on disability issues, informing people with disabilities of their rights and using structural funds and public procurement to support and supplement national policies that aim to improve all the aspects of accessibility for people with disabilities.\(^\text{27}\)

This Strategy is not the first comprehensive policy framework on disability that the EU has designed. Before the Strategy, the EU had developed a Disability Action Plan that covered the period between 2004 and 2010. The purpose of this plan was to mainstream disability into relevant Community actions and design measures to improve the life of people with disabilities.\(^\text{28}\) The Action Plan was developed in three biennial phases. The first one, proposed policies in relation to accessibility that focused on access to and remaining in employment through the promotion of barrier free use of new ICT’s, the lifelong learning via the monitoring of the e-accessibility of websites and media for lifelong learning, using potential new technologies by the means of the initiation of dialogue and guidelines for accessibility of ICT’s, awareness raising and support activities, the promotion of accessibility standards, and the accessibility of the built environment through the promotion of the Principle of ‘design for all’, standardisation and others.\(^\text{29}\) The second period followed the priority of fostering accessibility of goods and services by focussing on accessibility of services, transport and ICT’s, including access to the new generation of assistive technologies.\(^\text{30}\) The last phase focused on boosting accessibility of goods, services and infrastructures via the development of legislative frameworks on accessibility in the fields of transport and ICT’s and the mandate of EU standards for public procurement.\(^\text{31}\)

In comparison to the Disability Action Plan, the Disability Strategy shows more
interest in the accessibility of goods and services. Whereas the Action Plan aimed at the improvement of accessibility of the built environment and transport for people with disabilities, a policy which took the form of standards and legislation, the Strategy is putting more emphasis on accessibility of goods and services in the Internal Market, including but not limited to public procurement. This establishes a new perspective on the approach of the EU on disability accessibility legislation. However, the Strategy does not disregard the work that has been done before, but it tries to make the existing EU policies stronger with regard to accessibility by revising them.

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This Strategy, though, also includes measures in fields other than accessibility. In the field of participation, the EU aims at enabling the enjoyment of all the benefits of EU citizenship by people with disabilities. It will also attempt to provide quality community-base services. Moreover, the EU will make an effort towards the removal of administrative and attitudinal barriers to full and equal participation. With respect to equality, the EU will make an effort to eliminate discrimination in relation to disability in the EU. In the field of education the EU intends to promote inclusive education and lifelong learning for people with disabilities. As far as social protection is concerned, the EU aims at promoting decent living conditions for people with disabilities through the European Platform against Poverty. In the area of employment, the EU will supplement the efforts of the national governments to enable many more people with disabilities to be part of the labour market and earn their living, through the use of the European Social Fund, state aid and other policy options.

4 Public Procurement

The Directives on Public Procurement set out the regulatory framework for the conduct of public procurement. The main purpose of these Directives is to combat corruption in public contracting. The current regime of the Public Procurement Directives will change after the adoption of the currently proposed Public Procurement Directives, which provide a more significant and effective approach towards accessibility for people with disabilities than the previous ones.
The Directive applies also to all contracting entities which are not either public undertaking or contracting authorities, which pursue activities in one of the above mentioned fields and are holders of special or exclusive rights provided by a competent authority of a Member State, as stated in the Directive. These rights are granted by a Member State. They limit the exercise of a given activity to one or more entities, and affect the ability of other entities to carry out such activity.

The scope of the General Public Procurement Directive includes public works contracts, public supply contracts and public service contracts. Public contracts are contracts with commercial intent between one or more contractors and one or more economic operators whose object is the completion of works, the supply of products or the provision of services. According to these Directives it is possible, but not obligatory, for the contracting authorities to consider accessibility requirements for people with disabilities or design for all users, when they design the technical specifications in the contract documentation. The suggestion that whenever possible accessibility should be considered when drafting the technical specifications in the contract documentation, takes the form of an obligation in the proposed Public Procurement Directives. Thus, in case of procurement that is intended for use by people, the technical specifications in the procurement documents shall take into account accessibility requirements for people with disabilities or design for all users, with the exception of duly justified cases. These accessibility requirements of the technical specifications should be designed in accordance with the mandatory accessibility standards in the instance that they are provided by a legislative act of the EU. For example, the public procurement of a new lift should follow the accessibility standards of the Directive on lifts. European standards certified by accredited bodies should also be used by the contracting authorities as a reference in the case that they require a proof from the economic operators that they comply with certain quality requirements.

In that respect, since the adoption of the previous set of Public Procurement Directives, the EU has been working on the development of EU accessibility standards that can be used in public procurement. In the year 2005, the EU issued a Mandate supporting the European accessibility requirements for products and services in the ICT domain.

The purpose of this Mandate is to harmonise and simplify the public procurement of accessible ICT services and products and to provide a mechanism through which the public procurers have access to a toolkit that will enable them to use these requirements throughout the process of public procurement. The Commission issued a second Mandate on Public Procurement in 2007. Mandate 420 focuses on accessibility requirements for public procurement in the built environment. It aims at facilitating the public procurement of accessible built environment in accordance with the ‘design for all’ principle through the development of a set of standards that will include a set of functional European accessibility requirements of the built environment and a minimum of technical data to comply with those requirements. It also aims, as the ICT Mandate does, at providing a mechanism to facilitate the procurers’ access to a toolkit on accessibility requirements. The standardisation procedure for both Mandates is in development.

The proposed Directives on Public Procurement also refer to accessibility for people with disabilities in other instances than the ones analysed above. When the contract authorities decide on the award of public contracts, they can use two criteria disjunctively. The first criterion is the criterion of the most advantageous tender and the second is the criterion of the lowest cost. In case the authorities choose the first criterion they should refer to criteria that are connected with the subject matter, which might include other criteria such as accessibility. Furthermore, accessibility is considered a principle of awarding contracts. Therefore, the Member States should ensure that the procedures for the award of contracts are fully compliant with, among others, accessibility. They should take into account the specific needs of different categories of users and the involvement and empowerment of users. In other words, accessibility is not just an award criterion, but it is a principle that should be respected throughout the procedure for the award of contracts.

The last important development in the field of public procurement that has been provided by these Directives is the establishment of a monitoring body that will be responsible for the oversight and coordination of implementation activities relating to these Directives. Among their other tasks, these monitoring bodies will be responsible for issuing an annual report on a global overview of the implementation of sustainable procurement.
The proposed Directives on Public Procurement show signs of a significant development in the field of accessibility for people with disabilities.

5 The European Accessibility Act

The EU has been developing policies on accessibility of goods and services in the form of soft law for years. The Disability Strategy gave the green light to the Commission to begin the procedures in order to propose a legal instrument that will regulate the accessibility of goods and services. On the 12th of December 2011, the public consultation on the EAA was opened by the Commission and it eventually closed on the 29th of February 2012. Currently the EAA is at the phase of impact assessment.

The EAA has many objectives. It aims at improving the functioning of the Internal Market in creating economies of scale and remediating market failures with regard to accessible goods and services. Another objective of the EAA is the harmonisation of accessibility requirements in Europe by eliminating the barriers to accessibility because of the different national legislations. It also pursues the stimulation of innovation in accessibility by developing and using European standards, the boost of effectiveness of the existing accessibility legislation in the EU and the increase of the incentives to provide accessibility. Finally, it aims at improving the availability of accessible goods and services in the internal market and enhancing the inclusion and participation of disabled people in the European society and economy.

The legal basis for the adoption of the EAA is article 114 TFEU on the Internal Market. Article 114 TFEU authorises the European Parliament and the Council to adopt harmonising measures which aim at the establishment and the functioning of the internal market. The most comprehensive analysis of article 114 TFEU was provided by the European Court of Justice (now, Court of Justice of the EU) in the first judgment on Tobacco Advertising. In that case the Court provided a set of rules that governs the interpretation of Article 114 TFEU (art. 100a EEC at the time of the judgment). The Court stated that the EU legislator is not provided with a general power to regulate the internal market, but only to improve the conditions for its establishment and functioning. If the legislator was allowed a general power to regulate the internal market, it would have been considered as a violation of the article and of the principle of the conferred powers. Furthermore the Court indicated that a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition is not adequate enough to justify EU legislative action in the field of the Internal Market.

The court further stated that the use of this legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from diverse development of national laws. Nevertheless, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them. Lastly, in the case of a measure that aims at removing a distortion of competition, the distortion that it is meant to eliminate must be appreciable.

Therefore, in order for the EU to enact the EAA in accordance with Article 114 TFEU, which means that the EU will harmonise laws on disability accessibility of goods and services, it must follow the requirements of the settled case-law of the CJEU, which are the following. First, there must be national laws that dictate disability accessibility requirements for each good and service that is intended to be regulated through the Act. Second, it must be examined whether these national laws can cause barriers to the movement of goods and services in the internal market or significant distortions of competition. Nevertheless, the EU does not need to wait for the Member States to adopt disability accessibility legislation that will create barriers to the movement of goods and services. The EU is able to include any good or
service in the EAA, as long as it can provide evidence that it is likely that barriers in the movement of that good or service will emerge due to the development of diverse national legislation and that the EAA is designed to prevent them. If some goods and services are not regulated in the national legal orders of the Member States of the EU and there is no likelihood that new legislation on disability accessibility of these goods and services will cause barriers to their free movement in the internal market, these goods and services will not be included in the Act. The same applies in the case of the second set of requirements. If the national laws on certain goods or services do not cause trade barriers or distortions of competition, these goods and services will not be part of the EAA. Therefore, it is quite evident, that the Commission faces a great challenge with respect to the impact assessment of the EAA. It must discover every national law that might be related to disability accessibility of each good and service that the Commission intends to include in the Act and examine whether the national legislation of the Member States for each good and service causes trade barriers or distortion of competition.

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There are several possibilities for the form that the EAA will take. The roadmap on the EAA has examined three alternatives. The first is to introduce a legal instrument on public procurement, services. It would also name a number of purchase of disability accessible goods and services that would impose a compulsory first is to introduce a legal instrument on pub-

The choice has not been made yet. However, the choice of an Internal Market Directive, the second option, seems most likely. The choice of a public procurement legal instrument is unnecessary in the sense that the Commission has already proposed a new set of Directives on Public Procurement that include an obligation to provide accessibility for people with disabilities. The choice between a Directive and a Regulation is based on the fact that Directives are not directly applicable, but they need to be transposed and the Member States are given a certain amount of time to implement them. Moreover, due to their nature, Directives provide the Member States with discretion on the approach that they will employ in order to transpose them in their national legislation. In conclusion, the Directives offer flexibility on their implementation to the Member States, which is important especially when the Directive carries a financial burden both on the manufacturers and the Member States. This option seems to be the most appropriate too. Accessibility of goods and services is a matter that relates to both the public and the private sector. The obligation for the states to provide accessible goods and services is a great step towards a more accessible market for persons with disabilities, but it is not enough. The private sector should also contribute to the achievement of an accessible market. In that respect, this option attempts to involve both the public and the private sector, by obliging them to follow several accessibility standards for each good and service that is included in the Act. This leads to my second point. Standardisation is of paramount importance for the implementation of the obligation to provide accessible goods and services for people with disabilities. In that regard, the second option is on the right track, because it intends to focus on the development of European Standards for goods and services. That is why the option of a Directive, as described above, seems the most appropriate option considering that it provides flexibility and a margin of appreciation to the Member States in transposing and implementing the obligations that it will entail.

6 Conclusion
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ity Act: legislative initiative to improve accessibility of goods and services in the Internal Market.

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6 Conclusion
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ability and accessibility. It also revises the
priorities of the EU in relation to disability accessibility by putting more emphasis on accessibility of goods and services in the Internal Market. This approach is visible in the examples of the forthcoming legislation of the EU that were examined in this article, because both the EAA and the public procurement legislation are related to the Internal Market of the EU.

The European Disability Strategy 2010-2020 reaffirms the commitment of the EU on disability and accessibility

The proposed Directives on Public Procurement constitute a significant step towards the fulfilment of this Strategy. They provide for mandatory inclusion of disability accessibility in the technical specifications of the public procurement works, which is really significant for people with disabilities, particularly if we consider that before this proposal there was no obligation mandating such action. In addition, the issue of the ICT and Built environment Standards will aid the realisation of the Public Procurement Directives with regard to accessibility.

Finally, the EAA is a very ambitious idea for EU legislation, because of the amount of goods and services that can possibly be included in the Act due to the immense scope of the internal market. For the same reason the adoption of this Act will be of great importance for people with disabilities. The EU legal instrument that will be used to adopt this Act has not been decided yet. In my opinion the most probable choice, at least from the ones that are provided in the roadmap on the EAA, is a Directive, mostly due to its flexible nature. However, we must be aware of the difficulties every legal instrument based on article 114 TFEU has to face, because of the article’s requirements. For the EAA, the challenge will be bigger, because of its massive initial scope. This means that many products of the EU Internal Market will be eliminated from the scope of the EAA because they do not fulfil the requirements of this article.

It will be interesting to see what will be the outcome of the proposed Directives on Public Procurement, the content of the EAA and what other measures the EU will adopt to implement this Strategy in the forthcoming years

To sum up, the EU has taken steps towards the implementation of the European Disability Strategy 2010-2020. It will be interesting to see what will be the outcome of the proposed Directives on Public Procurement, the content of the EAA and what other measures the EU will adopt to implement this Strategy in the forthcoming years.