

Disabled Man as Market Man.

Toward a Stronger EU Single Market Agenda on Disability.

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1. Introduction.

I was asked to make some general comments on the interaction between fundamental rights – especially the fundamental right to equal treatment – and the necessity of maintaining and enhancing the integrity of the Single market. And in so doing I was asked to help set up the debate over the next two days.

Let me start by recalling a famous cartoon that appeared in the New Yorker magazine some years ago. It depicted two pilgrims crossing the Atlantic in the 1600s. One looks to the other and says:

“well, I am leaving the ‘ol country to escape religious persecution, but the first thing I am going to do when I reach Massachusetts is to set up a car dealership!”.

I think this says something that gets at what is at stake over these two days. It contains a mixture of the sacred with the profane, of the moral with the economic. I say 'mixture' - and not 'competition' - since to me at least, there is no necessary or intrinsic antagonism between the two.

Even Adam Smith did not justify markets solely on the basis of allocational efficiency but on the basis that markets subserved social purposes. For we, as a people, choose to place our trust in market mechanisms. And we the People of Europe have a vital stake in how markets perform. The market isn't just a vehicle for achieving the 'functional integration' of our various nation-states. It is also the primary mechanism we rely on for the allocation of resources and goods - always subject to the overriding consideration of social cohesion.

Popular assesnt lies at the heart of markets. As the recent 2007 [Communication on a single market for the 21st Century](#) puts it **“The single market is built on trust”**. I

agree. But that trust must be earned. While we all benefit in some degree from the wealth created and the opportunities opened, it has to be admitted that some benefit a lot less than others. We cannot allow that loss to lie where it falls.

As if to accentuate the importance of markets reflect for a moment on the fact that most of us spend much of our time enmeshed **not** in relations with the State but in market transactions – buying the latest mobile phone, buying the latest digital tv, getting a bus to work, negotiating coverage with our insurance companies, obtaining a loan from a bank, getting money from an ATM. Through the laws of supply and demand, mass markets evolve which allow economies of scale to emerge. And through these mass markets we gain the benefit of a broad range of goods and services at prices we can afford. We are at once beneficiaries of market opportunities by exercising our freedom of movement and establishment as well as consumers of the goods and services these markets provide.

Market man - the person who has the most opportunities to be active in the market and to gain access its goods and services - has the most options for independence and self-determination. Of course market citizenship does not exhaust citizenship. Yet, in a very real way, if you do not have access to the market you do not share in the commons.

To say that persons with disabilities were not seen in the past as market participants and consumers would be an **understatement**. They were generally seen as **non-market actors** (with attendant social costs and could therefore be portrayed as a burden) and as fairly passive consumers - but only of **public** services.

But this view of persons with disabilities has changed very dramatically in the last ten years or so. Reflect for a moment on the key premise of modern disability law and policy. The policy and legal challenges in the field of disability are no longer predicated on welfare, charity or special deals for special interest groups. Indeed, they are not even predicated on notions of **lacking or even need**. As a result the primary policy response of compensating for disability is in decline.

Rather the modern view is firmly based on notions of belonging, on a presumed ability and a willingness to contribute – yes, even on an eagerness to pay taxes – to be productive citizens, to be economically active citizens and to take part in the democratic and social life of the polity. This event today underscores just how powerful this shift in mindsets has become.

The recently adopted [United Nations Convention on the Rights of Persons with Disabilities](#) is a good indicator of how far attitudes have come as well as a powerful tool in moving reform ahead in the right direction. I have spoken at length about the convention and its relevance to the future of EU disability law and policy at the German EU Presidency conference in Berlin earlier this Summer.

In short, **Disabled man** aspires to be **market man** – *and woman* - and so share the commons with everyone else.

These ideals are not new. My background was in political philosophy and I am often struck by the resemblance between modern EU Single market policy (with its four freedoms of movement, goods, services and capital) and the idea in the Roman Republic of *res publicae* – of a public space to which all are admitted. It was a flawed idea in its execution in the Roman Republic - but the idea itself still inspires.

The Single Market has played a powerful part in creating this European public space or *res publicae*. Now the challenge is to assure access for all – and **all** really means **all** including those who were previously seen as non-market actors and passive consumers of **social** goods.

2. Growing Markets and Achieving Social Goals.

What if our trust in markets does not yield results? It follows that if we trust the market to achieve ends that could be described as social then it is incumbent on us to **structure** market relations – to **incentivise** market behaviour – so that they can spontaneously meet ‘desireable’ social goals.

And when I say ‘**desireable**’ I revert back to this tension between the moral and the economic in the cartoon of the pilgrims.

For what is generally missed in the debate is to the extent to which **structuring markets to do the right thing is generally good for markets**. Market actors tend to have what is what is termed ‘micro rationality’. They internalise a ‘worms eye’ view of the world and may often set artificial bounds to their own market opportunities. They are not naturally primed to take the ‘bird’s eye’ view and may sometimes miss new markets. That’s not their fault. They are behaving rationally after a manner.

To a certain extent then, it falls to political authorities to nudge market behaviour to higher ground from which to reveal - and then grasp - hidden market opportunities. As Cass Sunstein famously stated, markets left to their own devices cannot be completely relied upon to achieve social goals **even when to do so would be to their advantage**.

And of course what is ‘**desireable**’ also takes on a moral hue especially in Europe where – although we live in market economies we also inhabit a strong social space based on a still vital sense of social solidarity.

My bigger point here is that the traditional European response of achieving social ends **independent** of market forces and only **after** markets have worked themselves through has probably discounted the extent to which market forces can be harnessed to both do the right thing as well as expand into new areas of wealth creation.

3. Markets and People in the US - A Syngery between the Inter-State Commerce Clause and the Fourteenth Amendment.

At the eAccessibility conference in Lisbon earlier this week (2/3 December 2007) there was much discussion not merely of the relevant **deficits** in terms of accessibility to ICT goods and services across Europe but also of the **market gaps** that these deficits creates for us relative to our main economic competitors. And of course one of our main economic competitors is the United States.

Allow me to digress for a moment. There are interesting historical parallels between the evolution of the Single market in Europe and the development of inter-State commerce in the US.

Few people appreciate that before the US Federal Constitution was adopted and for a brief period after the War of Independence, the US had a loose confederal constitution – one in which there was **no national economy** and few national institutions. The initial impulse toward a Federal Constitution was in fact fueled by inter-state commercial rivalry especially over navigation rights on the Potomac river. And so the inter-state commerce clause was added to the Federal Constitution to ensure a levelling of barriers to trade, the creation of a great Commercial Republic - to use the words of Alexander Hamilton - and to confer explicit legislative competence on the national Government to regulate (Article, the so-called 'Inter-State Commerce Clause). So, in a very real way, creating an internal American market was seen as key to laying the foundations for a durable nation.

In a way, the Single European Act and the 1992 project laid the foundations for our great **Commercial Republic in Europe** which is now a reality.

What of the moral dimension? Look to something else in the US Federal system. The American Declaration of Independence declared that all men are born equal. It added the moral dimension. But it took a Civil War to enshrine hard legislative competence at the Federal level to make sure that this abstraction could be translated into meaningful action to combat unjustified treatment. Even after the addition of the Fourteenth Amendment containing a prohibition on unequal treatment, progress was slow. The so-called Reconstruction period after the Civil War led to Jim Crow laws and the Black Code that allowed State practice to continue almost as if slavery were still legitimate.

Now, flash forward to the 1950s. The Warren Supreme Court in 1954 finally took note of the original intent of the Fourteenth Amendment and began the process of dismantling badges of inferiority contained in many State laws. Section 5 of the Fourteenth Amendment explicitly allows Congress to enact civil rights legislation to give it effect. It is the functional equivalent to Article 13 of the Treaty of Amsterdam (except unanimity is not required). And so the enactment of the Civil Rights Act of 1964, the Fair Housing Act of 1968 and the Americans with Disabilities Act of 1990 which is basically a civil rights statute in the disability context.

Now heres the important point. When enacting the ADA Congress relied explicitly on **BOTH** the Inter-State Commerce clause as well as section 5 of the Fourteenth Amendment.

That is to say, Congress relied on the Inter-State Commerce clause to allow it to reach into and regulate all relevant commercial and private transactions falling within the embrace of the act. It got to those nooks and crannies in the marketplace where we all live. It maximised its Single Market constitutional powers. And Congress also relied on the Fourteenth amendment to allow the interstate commerce clause to carry the notion of equal treatment into these private relations. The one (morality) piggy backed on the other (economic regulation).

AND, just as important, when relying on the Inter-State Commerce clause to deregulate industries (such as the telecoms industry) the US authorities nevertheless insisted on accessibility for persons with disabilities. That is to say, the social goal did not have to be achieved through regulation but in the **context of de-regulation** which placed a **socially desirable floor** underneath the market which, in turn, helped the market to grow.

What was the result? Legislation premised on both the Inter-State Commerce Clause and the Fourteenth Amendment has led to economic empowerment, higher levels of consumer demand leading to increased levels of economic activity, the development of niche markets driven by higher levels of purchasing power that give US manufacturers – especially in the ICT industry – a commanding lead in world markets.

When you think globalisation, think of the commanding lead the US now has with respect to eAccessible goods and services. This did not happen as a result of legislation that took effect **after markets had worked themselves pure** – it happened because legislation **nudged markets to behave in a certain way**.

All of which has reinforced the cultural shift in thinking that disability is not about **lacking or need** – it is about belonging and playing one's part. You can see how treating persons with disabilities as market man can create a virtuous circle.

Let me emphasise this point. No contradiction is experienced between the logic of the Single market and the achievement of equality in the US. Quite the reverse. Unless the equality ideal can reach into market relationships it is largely redundant since – I stress again – most of us live most of our lives enmeshed in market transactions.

4. Where are we Now and Where should we go - The Need to develop Syngery between Article 13 and the Single Market.

We have come at the issues in Europe from another angle. Precisely because the Single Market was seen as the key to functional integration which in turn lays the foundation for an ever closer political union, the relevant legal powers were robust. So the economic levers were there. The 'moral levers' fell far behind.

The moral levers (the equivalent to the Fourteenth Amendment) were to be found in European social policy. However, throughout the 1980s and into the 1990s social policy was viewed as the 'social dimension' of the market. It was as if the **primary goal** was – through the Single Market programme – was to lay the basis through legislation for an Single Market (a major achievement) and **then secondly to regulate to control its social effects** or to put in place sufficient social supports to ensure that a Common market could function. There was nothing inherently wrong with this. But it did seem to miss opportunities both to achieve desirable social ends **through market forces** and thereby open up new markets.

Now however, it does seem as if Europe has reached a critical crossroads.

The adoption of Article 13 in the Treaty of Amsterdam was the trigger. However, unlike Section 5 of the Fourteenth Amendment to the US Constitution, Article 13 is generally invoked and used in isolation. Section 5 of the Fourteenth Amendment and the Inter-State Commerce clause are seen as organically linked in the US and are

therefore invoked as providing a dual bases for major legislation. Article 13 is Balkanised in the EU and is kept somewhat separate from a variety of substantive fields including the Single Market.

There are signs that things are changing. The **Communication issued by the Commission on 20th November on a Single Market for the 21st Century** is a breakthrough of sorts. I could not imagine such a document being issued 10 or 15 year ago. It signals that the Single Market project has come of age. It makes a genuine stab at including those who, until now, have been excluded from the benefits of the Single market. This is a promising beginning.

It aims to make the Single Market more responsive to citizens – which presumably includes citizens with disabilities. It speaks more specifically of persons with disabilities with respect to enhancing consumer rights and redress. I don't read this to mean that disability is only to be considered within this one narrow frame. It speaks of globalisation and the opportunities afforded. It mentions the necessity of not racing to the bottom. I would have thought that the UN Convention on the Rights of persons with disabilities would be a useful starting point in informing one where the floor with respect to disability lies – just like the **floor** with respect to minimum labour standards. Remember, the EU will have to review its own development aid from a disability perspective under this convention. Why wait for aid to do the job when trade can do it too! In addition to insisting on minimum labour standards prohibiting, for example, the importation of goods made by child labour, why not also insist on similar prohibitions with respect to institutions that exploit persons with disabilities.

It speaks of social impacts being factored in. It asserts that the development of the single market has gone hand in hand with the European social agenda. I would put this differently. I really don't think it is any longer a matter of factoring in social considerations **after the fact and of cushioning against market forces**. Its more a question of identifying where market forces require reinforcement to ensure that social problems are not compounded and are hopefully resolved.

Elsewhere the Communication talks of the need to take action at European level where “markets do not deliver”. That’s a better way of getting at the heart of the matter.

The Review that this Communication triggers should reveal exactly where the gaps are and inform choices about what should be done to address them – about which policy and what instruments to use. The key to this document lies in its acceptance more needs to be done to ensure that the advantages of the Single Market are experienced by all EU citizens. This is an important new beginning which I trust we will all embrace.

And the Communication issued by the Commission on 26th November containing the next iteration of its **Disability Action Plan** maintains momentum in the right direction. Its goal is to set policy priorities that respond to the equality gaps disabled people face. Among the priorities set for the next phase is the need to ‘boost accessibility of goods, services and infrastructures’. The emphasis is on accessibility – as well it might. It aims to build on recent successes in the field of air transport (incidentally nearly 20 years after the US) and rail transport.

The recent Communication of 8 November 2007 on the [Information Society](#) which is aptly named ‘Be Part of It’ promises that the Commission will come forward next year with a legislative proposal in the field of eAccessibility. Think about this. Inaccessible ICT goods and services is a classic case of market failure. And it is a classic case where appropriately crafted regulation can in fact grow markets. You only have to look at equivalent US regulations to see that this is so. And reflect on the startling assertion in the Single Market Communication to the effect that ‘knowledge and innovation could well be the fifth freedom in the single market’. I look forward to the Commission’s proposals which are surely needed if persons with disabilities are not to be left further behind.

And you will have already noticed that the [Work Programme for the Commission for 2008](#) contains a proposal to come forward with a draft Directive enshrining the principle of equal treatment, covering a variety of grounds including disability and in a variety of fields such as the supply of goods and services. Such an instrument would round-out the Framework Employment. Indeed, as far back as 1995 the

Invisible Citizens Report called for this and in 1996 even supplied a blueprint to stimulate further reflection. I do not see this as the enemy or inhibitor of innovative proposals in the field of the Single Market. Quite the opposite.

Whats does business say? Well, this is interesting and important. The responses so far have partly to do with the need to maintain the integrity of the market and partly with Corporate Social Responsibility. First of all, a patchwork quilt of laws, regulations especially with respect to accessible goods and services (e.g., a talking ATM) is not good for business. The danger of market fragmentation (which may allow concentrations of economic power to emerge and thus capture markets) is not what the Single market is all about and is inimical to business interests.

So it was no surprise to see that in 2007 89% of the [European Business Test Panel](#) – a body that acts as an independent sounding board on legislative proposal from a business point of view – there should be uniform protection against discrimination throughout Europe.

And it is also interesting to note in passing that the European Commissions' **Study on the Business Case for Diversity** reported that “diversity strategies to enhance market-related benefits aim to achieve better market segmentation and improved customer satisfaction. They also aim at an increase in repeat business and referrals to potentially new customers through existing satisfied clients and customers”.

So don't suppose that market actors are averse to appropriate regulations settling the rules of the game.

5. Conclusions.

What are my conclusions?

First of all, **Disabled man** has not yet become **market man** – or woman. Some will hesitate to label people thus. Fine. But the reality is that the market is – whether we like it or not – where we live.

It is not alright to exclude people from the market on a theory that they can be somehow compensated for it. This is a misplaced paternalism.

It is not alright to exclude people from the market on a theory that they are somehow lacking and incapable of participating and benefiting. What disables people is the lack of genuine access to markets. They don't bear responsibility for this – **you do** as policy makers who set the terms of entry into the marketplace. It is said that the Single Market has allowed 1.5 million students to cross borders and enjoy education in different Member States. I would like to know how many of them were disabled?

I know you are going to debate important equality and access gaps over a broad range of market spheres over the next two days.

I believe the Single Market Communication offers a genuine new start for persons with disabilities who have as much right as any to be productive, to help achieve the Lisbon goals and to live as equal citizens. It perhaps would have been better if the Declaration to Article 95 were binding. Short of this, the Communication presented today on the Single Market is at least a good start.

But my main conclusion is that – matching the move from disabled man to market man – the economic policy makers should not assume that the place of the disabled within the market is a social issue to be addressed after the market functions. The economic policy maker should henceforth view disabled man as economic man and proactively include his/her issues within the structuring of the Single Market. Now the question is not whether but how.