

STRENGTHENING THE RIGHTS OF PERSONS WITH DISABILITIES IN EUROPE TO ACCESS GOODS AND SERVICES

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Despite their key importance to the disability rights movement, European supranational legal regimes still offer only partial protections for disabled individuals who suffer discrimination when they are denied access to goods and services. This shortcoming has become particularly visible since the EU joined the United Nations Convention on the Rights of Persons with Disabilities. This article has two principal aims. First, it seeks to identify the extent to which access to goods and services for individuals with disabilities are currently protected pursuant to EU law and the European Convention on Human Rights. Second, it argues that the EU's Horizontal Directive Proposal is an effective and desirable means by which the European Union and its Member States can take steps to meet their accessibility obligations pursuant to Article 9 of the United Nation Convention on the Rights of Persons with Disabilities.

Keywords: United Nations Convention on the Rights of Persons with Disabilities; Anti-Discrimination Law; Disability Rights Law; Accessibility; European Accessibility Act

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I. INTRODUCTION

‘Accessibility’, admittedly not easily defined,¹ is a matter of enormous consequence to the disability rights movement. Jacobus tenBroek’s path-breaking 1966 article on disability rights focuses almost exclusively on (physical) access. ‘[N]othing could be more essential to personality, social existence, economic opportunity—in short, to individual well-being and integration into the life of the community’, he argued, ‘than the physical capacity, the public approval, and the legal right to be abroad in the land’.² Andrew Pulrang observes that ‘[p]retty much all disability rights manifestos mention accessibility’, and that the concept of accessibility has broadened over time to include not just building access, but ‘communications and other components of doing business and delivering services’.³

Despite their key importance to the disability rights movement, European supranational legal regimes—defined for the purposes of this article as European Union (EU) law and the European Convention on Human Rights (ECHR)—still offer, at best, only partial protections for disabled individuals who suffer discrimination when they are denied access to goods and services.⁴ This shortcoming has become particularly visible since the EU joined the United Nation Convention on the Rights of Persons with Disabilities (CRPD) in 2011 in its capacity as a regional integration

¹ Stelios Charitakis, ‘Accessibility of Goods and Services’ in Delia Ferri and Andrea Broderick (eds) *Research Handbook on EU Disability Law* (Edward Elgar 2020).

² Jacobus tenBroek, ‘The Right to Live in the World: The Disabled in the Law of Torts’ 54 *California Law Review* 841 (1966).

³ Andrew Pulrang, ‘7 Core Arguments of Disability Rights’ *Forbes*, 22 April 2021 <<https://www.forbes.com/sites/andrewpulrang/2021/04/22/7-core-arguments-of-disability-rights/?sh=548bcd5b5471>> accessed 16 March 2023.

⁴ For an early review of EU Member State laws pertaining to goods and services, see Caroline Gooding and Catherine Casserley, ‘Open for Call? Disability Discrimination Laws in Europe Relating to Goods and Services’ in Anna Lawson and Caroline Gooding (eds) *Disability Rights in Europe: From Theory to Practice* (Hart 2005).

organization.⁵ Article 9 of the CRPD obliges State Parties to take appropriate measures to ensure that persons with disabilities enjoy ‘access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public’.⁶

This article has two principal aims. First, it seeks to identify the extent to which accessibility to goods and services for individuals with disabilities is currently protected under European supranational law. Second, it seeks to argue that the EU’s Horizontal Directive Proposal⁷ is an effective and desirable means by which the EU and its Member States can take steps to meet their Article 9 CRPD accessibility obligations.⁸ Somewhat counter-intuitively, these are particularly important points to raise today because the European disability rights landscape has changed considerably since the Commission presented the Horizontal Directive Proposal in July 2008. Since that time, the EU has produced a large body of legislation that aims to improve the accessibility of goods and services for individuals with

⁵ Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] *OJ L23/25*.

⁶ Convention on the Rights of Persons with Disabilities (adopted 13 December 1966, entered into force 3 May 2008) UNGA/61/106 2515 UNTS 3 (CRDP) art 9(1).

⁷ Commission, ‘Commission Staff Working Document accompanying the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (Summary of the Impact Assessment)’ COM (2008) 426 final. See discussion of the Horizontal Directive Proposal, Part III, *infra*.

⁸ All EU Member States have ratified the CRPD. See European Union Agency for Fundamental Rights, *Putting the UN’s Disability Convention into Practice* (21 June 2019) <https://fra.europa.eu/en/publications-and-resources/infographics/putting-uns-disability-convention-practice> accessed 16 March 2023.

disabilities.⁹ Likewise, the European Court of Human Rights has made several rulings that indicate that the ECHR mandates access to goods and services for protected groups.¹⁰ In light of these new legal developments, one might reasonably believe—erroneously, I will argue—that European supranational legal regimes comply with Article 9 CRPD accessibility obligations.

It should be recognised from the outset that there is no consensus on the precise nature and scope of Article 9 CRPD accessibility obligations. Commentators have debated whether the CRPD creates new rights or merely ensures that existing human rights are made effective for persons with disabilities,¹¹ whether certain State Party accessibility obligations require immediate compliance or are subject to the doctrine of progressive realisation,¹² and whether compliance with existing and legally binding accessibility standards constitutes a *per se* defence against disability discrimination claims.¹³ These are certainly important questions, the resolution of which will provide State Parties with important guidance in how to carry out their treaty responsibilities. For present purposes, however, I will focus on two key facets of the Article 9 CRPD accessibility obligation on which there is broad agreement.

⁹ See Part II, *infra*.

¹⁰ See Part I, *infra*.

¹¹ Andrea Broderick, ‘Of Rights and Obligations: The Birth of Accessibility’ *The International Journal of Human Rights* 24.4 (2020).

¹² Anna Lawson, ‘Accessibility Obligations in the UN Convention on the Rights of Persons with Disabilities: Nyusti & Takacs v Hungary’ *South African Journal on Human Rights* 30.2 (2014).

¹³ Maria Ventegodt Liisberg, ‘Accessibility of Services and Discrimination: Concentricity, Consequence, and the Concept of Anticipatory Reasonable Adjustment’ *International Journal of Discrimination and the Law* 15.1-2 (2015): 123-144.

First, the accessibility obligation for goods and services has a large material scope.¹⁴ The Committee on the Rights of Persons with Disabilities, General Comment 2 on Accessibility (General Comment No. 2) stresses that the obligation extends to the physical environment, transportation, information and communication, and all facilities open to the public.¹⁵ The public or private nature of legal ownership has no relevance:

As long as goods, products and services are open or provided to the public, they must be accessible to all, regardless of whether they are owned and/or provided by a public authority or a private enterprise... [Denial] of access should be considered a discriminatory act, regardless of whether the perpetrator is a public or private entity.¹⁶

Second, General Comment No. 2 construes defences, exceptions, or excuses for failing to provide accessibility narrowly. It states that the ‘obligation to implement accessibility is *unconditional*’, (emphasis in original) meaning that the State Party may not use austerity measures as an excuse for avoiding the obligation to gradually ensure accessibility for individuals with disabilities.¹⁷ Similarly, entities that are responsible for providing accessibility may not be excused from their obligation by arguing that compliance is too burdensome.¹⁸

In the discussion that follows, I begin by analysing the extent to which access to goods and services for individuals with disabilities is currently protected

¹⁴ Convention on the Rights of Persons with Disabilities (adopted 13 December 1966, entered into force 3 May 2008) UNGA/61/106 2515 UNTS 3 (CRDP) art 9(1).

¹⁵ Committee on the Rights of Persons with Disabilities, General Comment 2 on Accessibility CRPD/C/GC/2 (2014), para. 13.

¹⁶ Committee on the Rights of Persons with Disabilities, General Comment 2 on Accessibility CRPD/C/GC/2 (2014), para. 13.

¹⁷ Committee on the Rights of Persons with Disabilities, General Comment 2 on Accessibility CRPD/C/GC/2 (2014), para. 26.

¹⁸ Committee on the Rights of Persons with Disabilities, General Comment 2 on Accessibility CRPD/C/GC/2 (2014), para. 26.

under European supranational law. This is explored through a review of the case law of the European Court of Human Rights and recently promulgated EU laws that have implications for access to goods and services. Thereafter, I discuss the European Commission's 2008 Horizontal Directive Proposal, which was designed to introduce greater uniformity to the EU's legal anti-discrimination regime. I argue that while some positive steps have been made at the European supranational level in recent years, the Horizontal Directive Proposal's adoption would simultaneously produce a much-needed reform to the EU anti-discrimination legal regime and provide a desirable means for the EU and the Member States to work toward meeting their Article 9 CRPD accessibility obligations.

II. THE EUROPEAN COURT OF HUMAN RIGHTS: A VIABLE VENUE FOR ACCESS TO GOODS AND SERVICES DISABILITY RIGHTS CLAIMS?

The ECHR does not contain any direct references to disability rights. The terms 'disability' and 'persons with disabilities' do not appear in the text.¹⁹ The document was drafted in the late 1940s. It would take several decades before disability rights reached legal recognition at the domestic level and even longer until it gained protection at the international level.²⁰ Nonetheless, the European Court of Human Rights has not been inattentive or insensitive to the issues that individuals with disabilities face. Until recently, however, the Court's disability case law addressed mostly the plight of complainants living in institutional settings such as prisons and institutions.²¹ What is comparatively new is the European Court of Human

¹⁹ See Silvia Favalli, 'The United Nations Convention on the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights and in the Council of Europe Disability Strategy 2017–2023: "From Zero to Hero" (2018) 18 Human Rights Law Review 517, 522.

²⁰ See *id.* at 523.

²¹ See Constantin Cojocariu, 'Guberina and Gherghina: The Two Sides of the Court's Disability Jurisprudence' *Strasbourg Observers* (17 May 2016)

Rights' case law on disability rights outside of conditions of involuntary confinement.

The European Court of Human Rights has approached this new line of jurisprudence through Article 14, which prohibits 'discrimination on any ground', but does not explicitly refer to disability. Article 14 is a rather cumbersome legal instrument. In the words of the Court: 'It has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded thereby'.²² This means that Article 14 is not a self-standing article. It can be triggered only in conjunction with a breach of one or more of the Convention's substantive articles. Notwithstanding these hurdles, in 2009 the European Court of Human Rights held for the first time in the Court's history in *Glor v Switzerland*,²³ that a government had violated Article 14 of the European Convention on Human Rights by discriminating against a complainant on the grounds of disability.

The case involved Mr. Sven Glor, a Swiss national deemed unfit for military service by a military doctor as he was a type 1 diabetic.²⁴ Nevertheless, he was ordered to pay a military-service exemption tax.²⁵ According to Swiss law, all men of a certain age were required to perform military service, civilian service, or pay a military-service exemption tax. Men with 'major'

<<https://strasbourgobservers.com/2016/05/17/guberina-and-gherghina-the-two-sides-of-the-courts-disability-jurisprudence>>accessed 18 July 2023. (Noting that: 'The Court's disability jurisprudence generally concerns the management of compulsion in institutional settings, including with respect to detention/institutionalisation, forced medical treatment or restraint or incapacitation'); See also Andrea Broderick and Delia Ferri, *International and European Disability Law and Policy* (Cambridge University Press 2019) (reviewing the ECtHR's case-law on disability in institutionalized environments).

²² *Guberina v Croatia* App No 23682/13 (ECtHR, 22 March 2016), para 67.

²³ *Glor v Switzerland* App No 13444/04 (ECtHR, 30 April 2009).

²⁴ *Glor v Switzerland* App No 13444/04 (ECtHR, 30 April 2009), para 11.

²⁵ *Glor v Switzerland* App No 13444/04 (ECtHR, 30 April 2009), para 14.

disabilities were exempt from military service and not required to pay the tax. Civilian service was reserved for men eligible for military service who wished to express their right to be a conscientious objector. Mr. Glor did not fall into any of these categories. Although he was deemed unfit for military service, his disability was not considered to be ‘major’ for the purposes of the law. Mr. Glor did not fit into the conscientious objector category either, as he maintained that he was willing to perform his military service at all times relevant to the litigation. By forcing him to pay the tax, Mr. Glor argued, the Swiss government sought to benefit from a medical condition over which Mr. Glor had no control.²⁶

The European Court of Human Rights agreed with Mr. Glor. Significantly, the Court cited the CRPD for the first time for the proposition ‘that there is a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment’²⁷ and ruled that the Swiss authorities had ‘failed to strike a fair balance between the protection of the interest of the community and respect for the Convention rights and freedoms of the applicant . . .’.²⁸ In doing so, the domestic authorities had violated Mr. Glor’s right to ‘private life’, enshrined in Article 8 of the ECHR²⁹ and Article 14.³⁰

In *Guberina v Croatia*,³¹ the applicant challenged the interpretation of a Croatian law, which provided that citizens who were ‘buying their first real property by which they are solving their housing needs’ were entitled to a

²⁶ *Glor v Switzerland* App No 13444/04 (ECtHR, 30 April 2009), para 51.

²⁷ *Glor v Switzerland* App No 13444/04 (ECtHR, 30 April 2009), para 53. On the significance of *Glor* for ECtHR case law, see also Jill Stavert, ‘Glor v. Switzerland: Article 14 ECHR, Disability and Non-Discrimination’ 14 *Edinburgh Law Review* 141 (2010).

²⁸ *Glor v Switzerland* App No 13444/04 (ECtHR, 30 April 2009), para 96.

²⁹ *Glor v Switzerland* App No 13444/04 (ECtHR, 30 April 2009), para 54.

³⁰ *Glor v Switzerland* App No 13444/04 (ECtHR, 30 April 2009), para 98.

³¹ *Guberina v Croatia* App No 23682/13 (ECtHR, 22 March 2016).

tax exemption.³² Mr. Guberina argued that he moved to a new apartment to solve his housing needs because he required an elevator to care for a child with severe disabilities. The Croatian authorities denied Mr. Guberina application for the tax exemption, arguing, essentially, that the law was intended to benefit citizens who were moving from living conditions that were sub-standard with respect to hygiene and/or basic infrastructure, such as access to electricity and water.³³ Mr. Guberina countered that the domestic authorities had failed to recognise that in his particular case, ‘the existence of a lift in the building was the same relevant infrastructural requirement as access to water and electricity in general’.³⁴ As in *Glor*, the Court, citing the CRPD, found ‘that there was no doubt that the competent domestic authorities failed to recognise the factual specificity of the applicant’s’ housing needs,³⁵ and thereby violated Article 14.³⁶

The European Court of Human Rights has ruled in favour of students in two education cases in which accessibility needs were not sufficiently taken into account. *Çam v Turkey*³⁷ involved a music student who took part in the entrance competition for the Turkish National Music Academy. The Academy initially listed her name among the successful candidates, but withdrew its acceptance when it learned that the student was blind.³⁸ In light of the Academy’s unwillingness to even consider how the student’s needs could be met, the Court held that the respondent state had violated Article 14 in conjunction with the right to education (Article 2 of Protocol No. 1).³⁹ In *Şahin v Turkey*,⁴⁰ a first-year mechanics student at a technical university

³² *Guberina v Croatia* App No 23682/13 (ECtHR, 22 March 2016), para 14.

³³ *Guberina v Croatia* App No 23682/13 (ECtHR, 22 March 2016), para 12.

³⁴ *Guberina v Croatia* App No 23682/13 (ECtHR, 22 March 2016), para 15.

³⁵ *Guberina v Croatia* App No 23682/13 (ECtHR, 22 March 2016), para 86.

³⁶ *Guberina v Croatia* App No 23682/13 (ECtHR, 22 March 2016), paras 76–77.

³⁷ *Çam v Turkey* App No 51500/08 (ECtHR, 23 February 2016).

³⁸ *Çam v Turkey* App No 51500/08 (ECtHR, 23 February 2016), paras 1–15.

³⁹ *Çam v Turkey* App No 51500/08 (ECtHR, 23 February 2016), para 68.

⁴⁰ *Şahin v Turkey* App No 23065/12 (ECtHR, 30 January 2018).

was seriously injured in an accident that left his lower limbs paralyzed.⁴¹ He requested that the University make building adjustments that would permit him to complete his education on an equal footing with his peers. The Court concluded that the University's offer to provide a personal assistant was patently unacceptable, since it would be 'degrading' to the student and constitute an invasion of his privacy.⁴² As in *Çam*, the European Court of Human Rights concluded that Turkey had violated Article 14 in conjunction with the right to education (Article 2 of Protocol No. 1).

If the analysis were to end here, we might conclude with a fair amount of confidence that the European Court of Human Rights has seized upon the adoption of the CRPD to develop a progressive line of disability rights jurisprudence in circumstances beyond the institutional setting. The Court has shown a willingness to push domestic authorities to reassess the potentially discriminatory effects of general laws on individuals with disabilities (*Glor; Guberina*) and placed a rather heavy burden on respondent states to show that they have given serious and genuine consideration to how students with disabilities can be accommodated (*Çam; Şahin*). However, when it comes to access to goods and services, the European Court of Human Rights has taken a different tack. Though the case law in this area is small, it appears to exhibit different characteristics than the judgments discussed above.

*Botta v Italy*⁴³ involved an Italian citizen with a physical disability who alleged that he was unable to access Italian beaches while on vacation. Contrary to Italian law, many beaches lacked access ramps and specially equipped washrooms and lavatories.⁴⁴ Mr. Botta complained that as a result of the Italian government's failure to enforce private beach owners' responsibilities to make their establishments accessible for persons with

⁴¹ *Şahin v Turkey* App No 23065/12 (ECtHR, 30 January 2018), para 6.

⁴² *Şahin v Turkey* App No 23065/12 (ECtHR, 30 January 2018), para 7.

⁴³ *Botta v Italy* App No 153/1996/772/973 (ECtHR, 24 February 1998).

⁴⁴ *Botta v Italy* App No 153/1996/772/973 (ECtHR, 24 February 1998), para 9.

disabilities, he had suffered ‘impairment of his private life and the development of his personality’ in violation of Article 8 of the ECHR in conjunction with Article 14.⁴⁵ Mr. Botta’s claim did not succeed because the link between the alleged wrong and the injury to the complainant’s private life was, in the Court’s opinion, not adequately established.⁴⁶

Similarly, in *Glaisen v Switzerland*⁴⁷ a paraplegic Swiss national wanted to attend a screening of a film that was showing in only one cinema in Geneva. The cinema was inaccessible to wheelchair users without the assistance of able-bodied assistants to lift him and his wheelchair over several steps. Litigation commenced after the defendant-cinema refused to sell Mr. Glaisen a ticket to the show, claiming that the theatre was not properly equipped to ensure the safety of Mr. Glaisen and the other spectators in the event of an emergency.⁴⁸ The Court declined to extend the scope of Article 8 beyond its ruling in *Botta* and held that the ECHR did not provide the complainant with a general right to access any cinema of his choosing. It was sufficient for the purposes of Article 8 that Mr. Glaisen could access most of the cinemas in Geneva.⁴⁹

Most recently, in *Arnar Helgi Lárússon v Iceland*,⁵⁰ the Court rejected a wheelchair user’s complaint that he was denied access to two buildings operated by his local municipality that housed arts and cultural centres. The Court recognised that Article 8 of the ECHR covered ‘to a certain extent, the right to establish and develop relationships with other human beings’,⁵¹ but with regard to accessibility, the applicant has the burden of showing an ‘exceptional’ circumstance in which lack of access affects ‘life in such a way

⁴⁵ *Botta v Italy* App No 153/1996/772/973 (ECtHR, 24 February 1998), para. 27.

⁴⁶ *Botta v Italy* App No 153/1996/772/973 (ECtHR, 24 February 1998), para. 35.

⁴⁷ *Glaisen v Switzerland* App No 40477/13 (ECtHR, 25 June 2019).

⁴⁸ *Glaisen v Switzerland* App No 40477/13 (ECtHR, 25 June 2019), para 5.

⁴⁹ *Glaisen v Switzerland* App No 40477/13 (ECtHR, 25 June 2019), para 49.

⁵⁰ *Arnar Helgi Lárússon v Iceland* App No 23077/19 (ECtHR, 31 May 2022).

⁵¹ *Arnar Helgi Lárússon v Iceland* App No 23077/19 (ECtHR, 31 May 2022), para 41.

as to interfere with his or her right to personal development and right to establish and develop relationships with other human beings and the outside world'.⁵²

In practice, this is a very high bar for applicants. In *Botta and Glaisen*⁵³ the Court found that the lack of access that the wheelchair users complained of did not fall within the scope of Article 8. In *Arnar Helgi Lárússon*, the Court was satisfied that the nature of the applicant's complaint fell within the ambit of Article 8, but still ruled against him, finding that the State had a wide margin of appreciation in such matters and that, in this case, making the buildings wheelchair accessible would amount to a 'disproportionate or undue burden' on the provider.⁵⁴ That one of the buildings at issue in the litigation had been extensively renovated between 2006 and 2014, evidently without regard to the accessibility needs of individuals with mobility impairments, was insufficient to persuade the Court that the applicant had been unlawfully denied access to the buildings.⁵⁵

On the whole, a review of the case law of the European Court of Human Rights shows that while the Court has signalled a willingness to entertain disability rights claims in light of CRPD obligations, there are also clear limits. This finding largely confirms a trend that De Schutter and Waddington⁵⁶ identified many years earlier in the jurisprudence of the

⁵² *Arnar Helgi Lárússon v Iceland* App No 23077/19 (ECtHR, 31 May 2022), para 42.

⁵³ For a similar result based on similar reasoning, see also *Zehmalová Zehnal v The Czech Republic* App No 38621/97 (ECtHR, 14 May 2002).

⁵⁴ *Arnar Helgi Lárússon v Iceland* App No 23077/19 (ECtHR, 31 May 2022), para 63.

⁵⁵ *Arnar Helgi Lárússon v Iceland* App No 23077/19 (ECtHR, 31 May 2022), para 6 and para 8 of dissenting opinion.

⁵⁶ Oliver de Schutter, 'Reasonable Accommodation and Positive Obligations in the European Convention on Human Rights' in Anna Lawson and Caroline Gooding (eds) *Disability Rights in Europe: From Theory to Practice* (Hart 2005); Lisa Waddington, 'Unravelling the Knot: Article 8, Private Life, Positive Obligations and Disability. Rewriting: *Sentges v. the Netherlands*' in Eva Brems (ed) *Diversity and*

European Court of Human Rights on disability issues: The Court is more comfortable ordering State Parties to cease inappropriate interference in private life than to impose a positive duty or obligation on them to act.⁵⁷ A ruling that would create a broad requirement that providers take positive steps to ensure that individuals with disabilities have equal access to goods and services does not appear to be forthcoming.

Not only does the European Court of Human Rights' 'exceptional circumstances' test not meet Article 9 CRPD's broad requirement that those who provide services that are open to the public have an affirmative duty to provide equal access to persons with disabilities, potential plaintiffs also face substantial procedural barriers when they seek redress before the European Court of Human Rights. Most applications to the European Court of Human Rights are made by individuals against a country.⁵⁸ Before applicants can bring their claims, they must first exhaust all domestic remedies.⁵⁹ The complaint must then be filed with the Court no later than four months after the final decision of the domestic court.⁶⁰ As the number

European Human Rights: Rewriting Judgments of the ECHR (Cambridge University Press 2013): 329-351.

⁵⁷ Lisa Waddington, 'Unravelling the Knot: Article 8, Private Life, Positive Obligations and Disability. Rewriting: *Sentges v. the Netherlands*' in Eva Brems (ed) *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge University Press 2013): 329-351: 334.

⁵⁸ Inter-state complaints are possible pursuant to art 33 of the Convention, but rarely used. For a recent analysis, see Council of Europe, *Inter-State Cases under the European Convention on Human Rights - Experiences and Current Challenges* (2022) <<https://edoc.coe.int/en/european-convention-on-human-rights/11067-inter-state-cases-under-the-european-convention-on-human-rights-experiences-and-current-challenges.html>>accessed 20 July 2023. My thanks to an anonymous reviewer for bringing this point to my attention.

⁵⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 35 § 1.

⁶⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 35 § 1.

of applications to the European Court of Human Rights has gone up over time, it has become increasingly difficult for applicants to have their cases heard by the Court in a timely and efficient manner.⁶¹ The vast majority of applications (roughly 95 percent) are declared inadmissible or struck out of the list of cases rather than heard on the merits.⁶² Therefore, on procedural grounds alone, applicants may find it extremely difficult to enforce Article 9 CRPD accessibility obligations through the European Court of Human Rights.

III. EUROPEAN UNION LAW AND ACCESS TO GOODS AND SERVICES

If the ECHR does not currently provide a viable path to recourse when Article 9 CRPD accessibility obligations are not met, might legal developments within the EU hold more promise? After all, ‘accessibility’ is the first among eight ‘main areas for action’ in the EU’s European Disability Strategy 2010–2020.⁶³ Similarly, the Commission’s Union of Equality: Strategy for the Rights of Persons with Disabilities 2021–2030 places a strong

⁶¹ See Andrew Tickell, ‘More “Efficient” Justice at the European Court of Human Rights: But at Whose Expense?’ 2 Public Law 206 (2015).

⁶² European Court of Human Rights, *Practical Guide on Admissibility Criteria*, p.7 (updated on 31 August 2022) <https://www.echr.coe.int/documents/d/echr/admissibility_guide_eng> accessed 20 July 2023. (Noting that in 2020, the Court declared 37,289 of the 39,190 applications inadmissible or struck out of the list of cases.) Clements and Read hypothesise that the hurdles to filing a complaint with the European Court of Human Rights that may be particularly pronounced for disabled applicants, many of whom live in poorer and more constrained conditions than their non-disabled peers. See Luke Clements and Janet Read, ‘The Dog that Didn’t Bark’ in Anna Lawson and Caroline Gooding (eds) *Disability Rights in Europe: From Theory to Practice*, p. 23 (Hart 2005).

⁶³ Commission, European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe COM (2010) 636 final.

emphasis on the need to address disparities in accessibility.⁶⁴ The document refers to a raft of secondary legislation, including the European Accessibility Act, the Web Accessibility Directive, the Electronic Communications Code, the Audiovisual Media Services Directive, Passenger rights guarantees and copyright legislation.⁶⁵ The Charter of Fundamental Rights (the Charter), which includes several disability-related provisions,⁶⁶ could also have implications for access to goods and services.

1. *The European Accessibility Act*

Of the many pieces of EU secondary legislation that now refer—directly and indirectly—to the rights of individuals with disabilities, the European Accessibility Act (EAA) stands out as the most comprehensive in scope. The EAA, which will apply to products placed on the market after 28 June 2025, envisions the creation of a set of EU-wide accessibility requirements for selected products and services.⁶⁷

The EAA is an intriguing case study in the art of the possible. It is not, as one might expect from reading its title, primarily a human rights

⁶⁴ European Commission, Directorate-General for Employment, Social Affairs and Inclusion, *Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030* (2021) <<https://op.europa.eu/en/publication-detail/-/publication/3e1e2228-7c97-11eb-9ac9-01aa75ed71a1>> accessed 22 August 2023.

⁶⁵ European Commission, Directorate-General for Employment, Social Affairs and Inclusion, *Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030* (2021) at p.6 <<https://op.europa.eu/en/publication-detail/-/publication/3e1e2228-7c97-11eb-9ac9-01aa75ed71a1>> accessed 22 August 2023.

⁶⁶ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, arts. 21 and 26.

⁶⁷ Directive of the European Parliament and of the Council (EU) 2019/882 of 17 April 2019 on the accessibility requirements for products and services (Text with EEA relevance) [2019] OJ L51/70.

document.⁶⁸ The Commission's Impact Assessment,⁶⁹ which lays out the rationale for the EAA, focuses almost exclusively on its benefits for the business community. In a nutshell, it makes the following argument: national accessibility requirements already vary substantially between the Member States; since the Member States will need to develop more accessibility standards to comply with Article 9 of the CRPD, we can expect this pattern of divergence to accelerate in the coming years; lack of standardisation already has a negative financial impact on companies that conduct business across borders; if the EU acts sooner rather than later, businesses will benefit from operating with a single point of reference, rather than a fragmented thicket of national regulation.⁷⁰

The Impact Assessment's pitch for the EAA as primarily a business-friendly initiative produces some interesting results. The EAA's legal basis is not the Treaty on the Functioning of the European Union (TFEU)'s non-discrimination provision (Article 19 TFEU), but rather its internal market harmonization provision (114 TFEU). There are some tangible benefits to this approach. Legislation adopted under Article 19 TFEU are subject to a special legislative procedure, which requires Council unanimity. This contrasts with legislation adopted under Article 114 TFEU, which follows

⁶⁸ Delia Ferri, 'The European Accessibility Act and the Shadow of the "Social Market Economy"' 5 *European Law Review* (2020) 660–680 p. 669.

⁶⁹ Commission, 'Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards accessibility requirements for products and services' (Staff Working Document) SWD(2015) 265 final.

⁷⁰ The Commission's proposal identifies compliance with Article 9 of the CRPD as a secondary aim of the directive. My thanks to an anonymous reviewer for bringing this point to my attention. Commission, Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards accessibility requirements for products and services' COM (2015) 615 final, para. 1.3.

the less onerous majority voting rules that govern the ordinary legislative procedure. Similarly, it stands to reason that a directive that enjoys broad support amongst the business community is, on balance, more likely to become binding law. Unquestionably, the EAA has the potential to produce a substantial upgrade in the ability to access goods and services; it is a far superior outcome to no legislation at all.⁷¹ However, without diminishing the important step forward that the EAA represents, the Commission's strategy to frame the EAA as a business-friendly venture rather than an anti-discrimination initiative has important negative implications for its material scope.

The scope of the EAA was determined through a multi-step process. In the first phase, the Commission identified 87 goods and services covered by the CRPD and EU legislation that had relevance for persons with disabilities. Following a public consultation, interviews with experts, and a review of existing national legislation, the list was reduced to 23 goods and services. The list was reduced further at the proposed directive stage and again in the final draft.⁷² The adopted directive regulates computers and operating systems, payment terminals, certain self-service terminals, smartphones, smart TVs, e-readers, telephony services, audiovisual media services, certain aspects of passenger transport services, banking services, and the European emergency number 112.⁷³

⁷¹ The European Disability Forum rightly commends the Directive's adoption as a 'landmark' achievement. European Disability Forum, EDF Analysis of the European Accessibility Act (June 2019) p. 3.

⁷² Commission, 'Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards accessibility requirements for products and services' (Staff Working Document) SWD (2015) 264 final, pp. 15-18.

⁷³ Directive of the European Parliament and of the Council (EU) 2019/882 of 17 April 2019 on the accessibility requirements for products and services (Text with EEA relevance) [2019] OJ L51/70.

Notably, at the Impact Assessment stage, it was clear that the built environment and accessible transportation were major priorities for persons with disabilities. In fact, the EU commissioned a study that showed that most respondents prioritised these concerns over the main focus of the EAA; namely, access to information and communication technology.⁷⁴ In the latter stages of the Impact Assessment analysis, the Commission identified several areas related to the built environment and transportation that were ripe for EU-level coordination, including hospitality services, architect services (addressing divergent national building codes for lifts, ramps, door size, etc.) and certain services related to passenger transportation.⁷⁵ However, these topics, to the extent that the EAA refers to them at all, receive a very light touch, ostensibly because they have only modest internal market harmonisation implications.⁷⁶ Built environment standards are essentially left up to the discretion of the Member States to address as they see fit.⁷⁷ Transportation services that are designated as urban, suburban and regional in nature are largely exempt from the scope of the EAA.⁷⁸ It also provides a blanket exception for ‘microenterprises’, which are defined as enterprises that

⁷⁴ Deloitte, *Study on the socio-economic impact of new measures to improve accessibility of goods and services for people with disabilities* (2014) p. 19. <<https://ec.europa.eu/social/BlobServlet?docId=14841&langId=en>> accessed 22 March 2022.

⁷⁵ Commission, ‘Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards accessibility requirements for products and services’ (Staff Working Document) SWD (2015) 264 final.

⁷⁶ Directive of the European Parliament and of the Council (EU) 2019/882 of 17 April 2019 on the accessibility requirements for products and services (Text with EEA relevance) [2019] OJ L51/70 at recital, paras. 18 & 49.

⁷⁷ Directive of the European Parliament and of the Council (EU) 2019/882 of 17 April 2019 on the accessibility requirements for products and services (Text with EEA relevance) [2019] OJ L51/70 at recital, para. 49.

⁷⁸ Directive of the European Parliament and of the Council (EU) 2019/882 of 17 April 2019 on the accessibility requirements for products and services (Text with EEA relevance) [2019] OJ L51/70 at Art. 2(1)(2)(c).

employ fewer than 10 persons and have an annual turnover no higher than EUR 2 million.⁷⁹ Since microenterprises are estimated to comprise 93% of all businesses in the European Union, this provision may have a profoundly limiting effect on the EAA's impact.⁸⁰

2. *The EU Charter of Fundamental Rights*

The Charter of Fundamental Rights is another EU legal development with disability-rights implications. Article 21 contains a general clause that prohibits 'any discrimination' based on (among other grounds) disability.⁸¹ Article 26 contains the disability-specific statement that the EU

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.⁸²

The effects of the Charter on EU law (broadly conceived) are hotly debated. The Charter has been hailed as 'one of the most important achievements in the history of European integration'⁸³ and criticised for having only 'a muted impact on the evolution of EU equality law'.⁸⁴ It is simultaneously revered in the literature as 'an essential port of call for human rights discourse in the

⁷⁹ Directive of the European Parliament and of the Council (EU) 2019/882 of 17 April 2019 on the accessibility requirements for products and services (Text with EEA relevance) [2019] OJ L51/70 at recital, para. 23.

⁸⁰ European Disability Forum, EDF Analysis of the European Accessibility Act (June 2019).

⁸¹ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, art. 21.

⁸² Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, art. 26.

⁸³ Koen Lenaerts, 'Making the EU Charter of Fundamental Rights a Reality for All' Keynote Speech, *10th Anniversary of the Charter Becoming Legally Binding* (12 Nov. 2019)

⁸⁴ Angela Ward. 'The impact of the EU Charter of fundamental rights on anti-discrimination law: more a whimper than a bang?' *Cambridge Yearbook of European Legal Studies* 20 (2018) pp.32-60.

EU⁸⁵ and evidently infrequently evoked because ‘it is unclear what value it adds to national and international legal sources’.⁸⁶ Whichever the case may be in general,⁸⁷ I argue below that if we restrict ourselves to the narrower question that concerns us here—how best to implement Article 9 CRPD accessibility obligations at the European supranational level—there is no serious indication that the Court of Justice will interpret the Charter, on its own or in conjunction with other legal instruments, as a sound basis for a broad-based accessibility mandate.

The Charter applies to Member States only when they are implementing EU law. To simplify a very complex matter, this happens when they give direct effect to an EU regulation or decision, implement a directive, or restrict free movement.⁸⁸ As several commentators have pointed out, the question concerning what constitutes ‘implementing Union law’ is not always so straightforward.⁸⁹ There are, of course, some grey areas. Eleanor Spaventa finds that the Court of Justice’s *de facto* approach to Article 51 varies

⁸⁵ Eleni Frantziou, ‘The Binding Charter Ten Years on: More than a “Mere Entreaty”?’ *Yearbook of European Law* 38 73–118 (2019).

⁸⁶ European Agency for Fundamental Rights, *Fundamental Rights Report – 2020* (2020) at p. 19 <<https://fra.europa.eu/en/publication/2020/fundamental-rights-report-2020>> accessed 22 August 2023.

⁸⁷ In a quantitative sense, there is little doubt that the Charter has become an important fixture in EU law. Between 2010–2019, nearly 12 per cent of all preliminary references mentioned the Charter. *See* European Agency for Fundamental Rights, *Fundamental Rights Report – 2020* (2020) at p. 9.

⁸⁸ Eleanor Spaventa, ‘The interpretation of Article 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures’ *DG Internal Policies, Study for the PETI Committee* (2016) at p. 20.

⁸⁹ Koen Lenaerts, ‘Making the EU Charter of Fundamental Rights a Reality for All’ Keynote Speech, *10th Anniversary of the Charter Becoming Legally Binding* (12 Nov. 2019); *see also* H. Eklund and C. Kilpatrick, ‘Article 21 EU charter of fundamental rights’, *EUI AEL*, 2021/01 <<https://hdl.handle.net/1814/71418>> accessed 22 August 2023.

somewhat depending on the subject matter.⁹⁰ But we need not delve too deeply into the nuances of Article 51 case law to conclude that the Charter is extremely unlikely to become the motor for a broad expansion of disability rights at the supranational level.

Article 51(2) provides that the ‘Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union’. Article 6(1) second paragraph of the Treaty on the European Union similarly stresses that Charter provisions ‘shall not extend in any way the competences of the Union as defined in the Treaties’.⁹¹ The CJEU has repeatedly held that the Charter does not expand the competences of the EU.⁹²

Indeed, the balance of the evidence thus far indicates that the Charter’s influence on disability rights will be quite modest. Delia Ferri finds that with very limited exceptions, the Charter has ‘yet to play a significant role’ in the Court of Justice’s adjudication of disability rights matters.⁹³ Arguably, a significant expansion of the scope of disability rights through the Charter would involve the kind of ‘competence creep’ that Article 51 prohibits.

⁹⁰ For instance, her study suggest that the Court interprets Article 51 in a particularly rigid manner when it is applied to the fields of asylum and the European arrest warrant.

⁹¹ Consolidated Version of the Treaty on European Union [2012] OJ C326/13, art. 6(1).

⁹² Eg Case C-69/21 *Staatssecretaris van Justitie en Veiligheid* ECLI:EU:C:2022:913, para. 87 (“[T]he provisions of the Charter do not extend the scope of EU law.”)

⁹³ Delia Ferri, ‘The Unorthodox Relationship between the EU Charter of Fundamental Rights, the UN Convention on the Rights of Persons with Disabilities and Secondary Rights in the Court of Justice Case Law on Disability Discrimination’, 16 *European Constitutional Law Review* (2020).

IV. THE HORIZONTAL DIRECTIVE PROPOSAL

The case law of the European Court of Human Rights and recent developments in EU law have contributed to more robust accessibility requirements for goods and services for persons with disabilities at the European supranational level. At the same time, there are some clear gaps. The European Court of Human Rights has gradually built up a solid disability rights jurisprudence around Article 14 of the European Convention on Human Rights, but when it comes to the specific obligation to provide access to goods and services, the Court has developed a demanding ‘exceptional circumstances’ test that applicants must prove before the Court will entertain the possibility that a European Convention of Human Rights violation has occurred. EU disability legislation has also made important advances in the past few years, most notably improving access to goods and services related to technology. However, the scope of EU legislation remains quite narrow, focusing only on a few specific sectors.

The discussion below examines a third alternative. On 2 July 2008, the European Commission submitted a proposal, commonly known as the ‘Horizontal Directive Proposal’, which was intended to plug holes in the EU’s legal anti-discrimination regime. The main purpose of the Horizontal Directive Proposal was—and continues to be—to expand the scope of EU anti-discrimination law to allow victims of discrimination based on religion, disability, age and sexual orientation to enjoy the same protections that

victims of race and gender discrimination currently have under EU law.⁹⁴ In broad strokes, EU law now prohibits discrimination on the grounds of race and gender in employment and vocational training, goods and services, and social protection. The scope of EU law for the ‘other’ grounds are restricted to the fields of employment and vocational training only. A critical missing element in the coverage of protection for these ‘other’ groups, including individuals with disabilities, is the right to access goods and services.

In the following discussion, I first provide a brief introduction to EU anti-discrimination law since the Treaty of Amsterdam. I explain why EU anti-discrimination law has developed in a patchwork and uneven fashion. Next, I examine the contents of the Horizontal Directive Proposal. I show that in contrast to the fragmented and sector-specific approach that currently characterises EU disability accessibility legislation, the Horizontal Directive Proposal would create a comprehensive anti-discrimination legal framework that is far more compatible with the Article 9 CRPD accessibility obligations. Thereafter, I present the case for why, although adoption of the proposed directive has been difficult, it still provides a desirable approach for the EU and its Member States to meet their Article 9 CRPD obligations. The final section addresses the question of how we might expect the Court of Justice to interpret the proposed directive if it became law.

1. EU Anti-Discrimination Law: Pragmatism over Perfection

The trajectory of EU anti-discrimination laws is inexorably connected to politics. Article 13 of the Treaty Establishing the European Community (Article 13 EEC), as amended by the Treaty of Amsterdam, which entered into force on 1 May 1999, provided the European Commission with the legal basis it believed it needed to propose anti-discrimination legislation

⁹⁴ Commission, ‘Commission Staff Working Document accompanying the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (Summary of the Impact Assessment)’ COM(2008) 426 final.

beyond the grounds of gender and nationality. Wasting little time, the Commission submitted a package of proposals to implement Article 13 EEC on 25 November 1999. The package included two draft directives to combat discrimination. The Commission's Communication explained that the first proposal was designed to combat discrimination in the *labour market* on all grounds cited in Article 13 EEC (now Article 19 TFEU) except for sex discrimination, which had a separate legal basis that dated back to the 1970s.⁹⁵ The second proposal was designed to combat discrimination on grounds of racial and ethnic origin. The second directive covered discrimination that went beyond the labour market, including access to goods and services,⁹⁶ and called for the creation of independent bodies to promote equal treatment.⁹⁷

The reason for the distinction between race and ethnic origin and the other grounds was avowedly pragmatic. The Commission wanted to take advantage of the 'strong political will which [existed] to take action to combat as many aspects as possible of racial discrimination'.⁹⁸ The confluence of factors that made the early 2000s an auspicious moment to create a racial anti-discrimination directive is the subject of a substantial academic literature. Some scholars point to the influential efforts of the Starting Line Group (SLG), a network of more than 250 pro-migrant NGOs

⁹⁵ Commission, 'Communication from the Commission on certain Community measures to combat discrimination' COM(1999) 564 final (25 November 1999) at 8.

⁹⁶ Commission, 'Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin' COM (1999) 566 final, art. 3 (material scope).

⁹⁷ Commission, 'Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin' COM (1999) 566 final, art. 12 (independent bodies).

⁹⁸ Commission, 'Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain Community measures to combat discrimination' COM (99) 564 final, p. 8.

that was formed in 1991 following a series of racist and xenophobic events across Europe.⁹⁹ Other commentators emphasise the impending expansion of the European Union to include countries from Central and Eastern Europe, which many policymakers believed ‘posed serious problems in relation to racial, ethnic, and religious tolerance, especially as far as the Roma were concerned’.¹⁰⁰ According to this view, the Commission and the Member States were in agreement that it was critical that anti-discrimination

⁹⁹ See Isabelle Chopin, ‘The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment’ 1 *European Journal of Migration and Law* 111, 111 (1999); see also Isabelle Chopin et al., ‘Campaigning against Racism and Xenophobia: From a Legislative Perspective at European Level’ *European Network Against Racism* (1999); Jan Niessen, ‘The Amsterdam Treaty and NGO Responses’ 2 *European Journal of Migration and Law* 203 (2000); Isabelle Chopin, ‘Possible Harmonisation of Anti-Discrimination Legislation in the European Union: European and Non-Governmental Proposals’ 2 *European Journal of Migration and Law* 413 (2000); Andrew Geddes and Virginie Guiraudon, ‘The Emergence of a European Union Policy Paradigm amidst Contrasting National Models: Britain, France and EU Anti-discrimination Policy’ 27 *West European Politics* 334, 334 (2004); Rhonda Evans Case and Terri E. Givens, ‘Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive’ 48 *Journal of Common Market Studies* 221, 226 (2010).

¹⁰⁰ Evelyn Ellis, ‘The Principle of Non-Discrimination in the Post-Nice Era’ in Anthony Arnall and Daniel Wincott *Accountability and Legitimacy in the European Union* 291, 294 (OUP 2002). The European Commission’s initial draft proposal for a directive on race discrimination makes the same point, albeit a bit more diplomatically. See Commission, ‘Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin’ COM (1999) 566 final. (“Finally, the Directive will provide a solid basis for the enlargement of the European Union, which must be founded on the full and effective respect of human rights. The process of enlargement will bring into the EU new and different cultures and ethnic minorities. To avoid social strains in both existing and new Member States and to create a common Community of respect and tolerance for racial and ethnic diversity, it is essential to put in place a common European framework for the fight against racism.”)

legislation became part of the *acquis communautaire* before the aspiring entrants became full voting members.

Against this background, the tipping point was probably the entry of Joerg Haider's right-wing Freedom Party into a coalition Austrian government in February 2000. The Member States responded to Haider's ascent by imposing diplomatic bilateral sanctions on Austria, and the Portuguese Presidency fast-tracked the Commission's proposed Racial Equality Directive. According to Mark Bell, individual Member States may have agreed to the especially broad scope of the directive because they did not want to be viewed as obstructionist during a time when there was strong pressure take concrete measures to combat racism at the EU level.¹⁰¹

The politically expedient decision to adopt a separate anti-discrimination directive with a larger material scope for race and ethnic origin than for other protected groups was subsequently criticised as unjustified and inequitable in reports published by other EU institutions¹⁰² and in scholarly commentary,¹⁰³ but remained effectively unchanged in the directives' finalised versions. The Commission published an amended proposal on 12

¹⁰¹ See Mark Bell, *Anti-Discrimination Law and the European Union*, 63 (2002); see also Erica Howard, 'The EU Race Directive: Its Symbolic Value - Its Only Value?' 6 *International Journal of Discrimination and the Law* 141 (2004).

¹⁰² See, e.g. Opinion of the Committee of the Regions on: the Communication from the Commission on certain Community measures to combat discrimination, the Proposal for a Council Directive establish a general framework for equal treatment in employment and occupation, the Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and the Proposal for a Council Decision establishing a Community Action Programme to combat discrimination 2001-2006 [2000] OJ C 226 at paras.1.15 and 1.19.

¹⁰³ For academic commentary, see Lisa Waddington and Mark Bell, 'More Equal than Others: Distinguishing European Union Equality Directives', 38 *Common Market Law Review* (2001), p. 587; see also Leo Flynn, 'The Implications of Article 13 EC-After Amsterdam, Will Some Forms of Discrimination Be More Equal than Others' 36 *Common Market Law Review* (1999), p. 1127.

October 2000,¹⁰⁴ and on 29 June and 27 November of the same year, the Council adopted Directives 2000/43 and 2000/78 respectively.¹⁰⁵

Bell observed in an article which is now approaching its fourteenth publication anniversary that:

The 2000 Directives have always carried an aura of unfinished business. No coherent argument of principle was advanced as to why the prohibition of racial discrimination was much more extensive in its application than that which applies to the other grounds.¹⁰⁶

Indeed, shortly after the directives were adopted, European civil society began to press the Commission to propose a new directive that would expand the scope of EU anti-discrimination law to allow victims of discrimination based on religion, disability, age and sexual orientation to enjoy the same protections already provided to victims of race and gender discrimination.¹⁰⁷ Initially, the Commission resisted, arguing that it was preferable to give the Member States time to fully transpose the 2000 Directives.¹⁰⁸ However, in 2007, it funded a feasibility study which

¹⁰⁴ Commission, 'Amended proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation (presented by the Commission pursuant to Article 250 (2) of the EC-Treaty' COM (2000) 652 final.

¹⁰⁵ See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303.

¹⁰⁶ Mark Bell, 'Advancing EU anti-discrimination law: the European Commission's 2008 proposal for a new directive', *The Equal Rights Review* 3.7 (2009).

¹⁰⁷ Lisa Waddington, 'Future Prospects for EU Equality Law: Lessons to Be Learnt from the Proposed Equal Treatment Directive' *European Law Review* Volume 36 (2011) p. 165.

¹⁰⁸ Waddington, 'Future Prospects' p. 164

subsequently led to the publication of the ‘Horizontal Directive Proposal’ on 2 July 2008.¹⁰⁹

2. The Contents of the Horizontal Directive Proposal and Member State Resistance

The Horizontal Directive Proposal is designed to ‘complete the EU anti-discrimination legal framework’ by setting out an approach for combatting discrimination on the grounds of religion or belief, disability, age, or sexual orientation beyond the field of employment and occupation.¹¹⁰ Unlike the EEA, which is based on the EU’s internal market harmonisation provision (Article 114 TFEU), the Horizontal Directive Proposal is based on the EU’s non-discrimination provision (Article 19 TFEU).¹¹¹ Whereas Article 114 TFEU is limited to legislative measures that ‘have as their object the establishment and functioning of the internal market’,¹¹² Article 19 TFEU offers the potential for a much larger material scope: authorising ‘appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’.¹¹³

Broadly in line with Article 9 CRPD and General Comment No. 2, Article 3 of the Horizontal Directive Proposal provides that, within the limits of

¹⁰⁹ Commission, ‘Commission Staff Working Document accompanying the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Impact Assessment’ SEC(2008) 2181.

¹¹⁰ Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Impact Assessment’ COM(2008) 426 final, art. 1.

¹¹¹ To be more precise, it is based on Article 13 EC Treaty, which is now Article 19 TFEU.

¹¹² Treaty on the Functioning of the European Union [2007] OJ C 202, art. 114.

¹¹³ Treaty on the Functioning of the European Union [2007] OJ C 202, art. 19. However, as noted *supra*, it is more difficult to create EU legislation under Article 19 TFEU, which requires unanimous voting in the Council.

powers conferred on the EU, the proposed directive prohibits discrimination perpetrated in both the public and private sectors, including public bodies.¹¹⁴ Subparagraph 3(d) explicitly provides that the scope extends to ‘goods and other services which are available to the public, including housing’.¹¹⁵ Individual conduct falls within the ambit of the proposed directive if it involves engagement in a professional or commercial activity.¹¹⁶

Article 4 of the proposed directive is dedicated exclusively to the issue of compliance with the principle of equal treatment for persons with disabilities. It provides that access to goods and services available to the public, including housing and transport ‘shall be provided by anticipation through modifications or adjustments’, however the provider is not required to make changes that constitute a ‘disproportionate burden’ or ‘fundamental alteration’ to the good or service.¹¹⁷ In assessing whether a measure imposes a disproportionate burden in a specific case, courts are provided with a non-exhaustive list of actors that include ‘the size and resources of the organization, its nature, the estimated cost, the life cycle of the goods and services, and the possible benefits of increased access for persons with

¹¹⁴ Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Impact Assessment’ COM(2008) 426 final, art. 3.

¹¹⁵ Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Impact Assessment’ COM(2008) 426 final, art. 3(d).

¹¹⁶ Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Impact Assessment’ COM(2008) 426 final, art. 3(d) second paragraph.

¹¹⁷ Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Impact Assessment’ COM(2008) 426 final, art. 4(b).

disabilities'.¹¹⁸ The proposed directive excludes from its scope activities undertaken by private individuals who are acting in a private capacity.¹¹⁹ Article 7 sets forth the requirement that Member States develop appropriate judicial and/or administrative procedures to ensure the proper enforcement of the rights identified in the proposed directive.¹²⁰

The adoption of the Horizontal Directive Proposal would substantially expand the scope of EU law covering access to goods and services for persons with disabilities. As the analysis above has shown, current EU secondary legislation is characterised by fragmentation and limited application. It excludes many aspects of life, such as the built environment and accessible transportation, that persons with disabilities have repeatedly stated are amongst their highest priorities. The Horizontal Directive Proposal would regulate nearly every commercial transaction and public service provided within the EU. The scope of the proposed directive is also more in line with Article 9 CRPD accessibility obligations, which require State Parties to ensure equal access to *all* goods and services open or provided to the public.¹²¹

¹¹⁸ Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Impact Assessment' COM(2008) 426 final, art. 4(b)(2).

¹¹⁹ Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Impact Assessment' COM(2008) 426 final p. 8. *See also* Lisa Waddington, 'Future Prospects for EU Equality Law: Lessons to Be Learnt from the Proposed Equal Treatment Directive' *European Law Review* Volume 36 (2011) p. 166–169 (analysing how the material scope of the Horizontal Directive Proposal, and subsequent amendments to the proposal, differ from Directive 2000/43).

¹²⁰ Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Impact Assessment' COM(2008) 426 final, art. 7.

¹²¹ Committee on the Rights of Persons with Disabilities, General Comment 2 on Accessibility CRPD/C/GC/2 (2014), para. 13.

Unfortunately, negotiations involving the Horizontal Directive Proposal have stalled. Consulting the voluminous Interinstitutional File associated with the Horizontal Directive Proposal (2009/0140 (CNS)) reveals several recurring objections. For over a decade, the Council of the European Union has produced a progress report to coincide with the conclusion of the six-month Member State rotation of the presidency of the Council of the European Union. On each occasion, the reports repeat, verbatim, that a ‘large majority of the delegations has welcomed the proposal in principle’ to ‘complete the existing framework by addressing all four grounds of discrimination through a horizontal approach’.¹²² Following this general declaration, the reports list numerous objections to the proposal. An entry from 11 December 2014 made explicit that Spain, Austria, Poland and Slovenia preferred ‘more ambitious provisions in regard to disability’, but that Germany was strongly opposed. Germany’s list of concerns included: whether the proposal had an adequate legal basis; whether the proposal violated the subsidiarity principle; whether sufficient impact assessments and cost-benefit analyses had been carried out; the burden of the proposed directive on businesses, particularly for small and mid-size enterprises (SMEs); and the lack of legal certainty about key terms of art. The report concluded that Germany ‘has taken the view that the issues covered in the proposal could be better regulated at the national level and therefore regarded the proposal as infringing on national competence’.¹²³ This catalogue of reservations about the Horizontal Directive Proposal features,

¹²² *E.g.* Council of the European Union, Interinstitutional File 2008/0140 (CNS), Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (14 December 2004) 15705/14 ADD 1 REV 1.

¹²³ Council of the European Union, Interinstitutional File 2008/0140 (CNS), Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (14 December 2004) 15705/14 ADD 1 REV 1.

in various formulations, in almost every progress report in the Interinstitutional File.

3. The Argument for EU-Level Coordination

To be sure, the Member States are not required to meet their Article 9 CRPD accessibility obligations through EU-level coordination.¹²⁴ The EU, represented by the Commission, concluded the CRPD in December 2010.¹²⁵ As is commonly the case for the international agreements into which the EU enters, it is a ‘mixed agreement’, which involves concurrently the jurisdiction of the EU and the Member States. This leads to a rather complex division of responsibilities between the supranational and national levels. The EU’s position on the allocation of responsibilities is provided in the annex to Council Decision 2010/48/EC. The Declaration concerning the Competence of the European Community with regard to matters governed by the United Nations Convention and the Rights of Persons with Disabilities identifies areas in which the EU has exclusive competence and shared competence. According to this declaration, the EU has exclusive competence in the areas of State aid and matters that involve the common market and the Common Custom Tariff. Shared competence with the Member States extends to measures to combat discrimination on the ground of disability, free movement of goods, persons, services and capital agriculture, transport by rail, road, sea and air transport, taxation, internal market, equal pay for male and female workers, trans-European network policy and statistics. It appears, therefore, that the Horizontal Directive Proposal covers matters in the ‘shared competence’ category. On this basis, Lisa Waddington contends that:

¹²⁴ I wish to thank an anonymous reviewer for bringing this important point to my attention.

¹²⁵ Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L23.

it does not seem possible to argue that there is a legal obligation on the EU under the Convention to adopt a new directive addressing discrimination on the ground of disability, and going beyond employment. In a field in which competences are shared, strictly speaking it is the Member States that have the responsibility to comply with the Convention, as long as the EU has not acted. Any EU action that is taken must be in compliance with the Convention, but there does not seem to be a legal obligation under international law to act in fields of shared competence.¹²⁶

Nevertheless, the Commission's accompanying impact assessment, while confessing that that 'there is no obligation to use EC-level legislation to implement the rights and obligations arising from the UN Convention', suggests that 'this would be a logical step' because a directive that included a prohibition on discrimination in access to goods and services 'could help to mitigate the risk of divergent national implementation measures'.¹²⁷ As further elaborated in the assessment, if Member States opt to implement the CRPD at the national level instead of the EU level, the resulting legislation is likely to further exacerbate the differences in the levels of protection against disability discrimination across the EU. This has the potential to hinder the freedom of movement of people, goods and services, and the functioning of the internal market.¹²⁸ By contrast, a consistent and uniform set of rules across the EU 'would bring certainty and clarity to people with disabilities and economic operators'. A survey of businesses that were

¹²⁶ Lisa Waddington, 'The European Union and the United Nations Convention on the rights of persons with disabilities: a story of exclusive and shared competences' *Maastricht Journal of European and Comparative Law* 18.4 (2011): 447-448.

¹²⁷ Commission, 'Commission Impact Assessment accompanying the Proposal for Council Directive on implementing the principle of equal treatment between persons irrespective of religion, belief, disability, age or sexual orientation' SEC(2008) 2180, p. 41.

¹²⁸ Commission, 'Commission Impact Assessment accompanying the Proposal for Council Directive on implementing the principle of equal treatment between persons irrespective of religion, belief, disability, age or sexual orientation' SEC(2008) 2180, p. 52.

consulted as part of the Commission's impact assessment suggest that stakeholders recognise the advantages of EU-level coordination in this field. 63% agreed that 'it mattered' that laws protecting access to goods, services, and housing differed across the Member States. 26% of businesses thought that differences in levels of protection from discrimination would affect their ability to do business in another Member State.¹²⁹

The EU's recent experience with Directive 2000/78 has already shown that the implementation of EU-wide minimum standards can be used to achieve higher levels of disability rights protection across all Member States. Ireland provides us with an instructive example in this regard. Ireland first attempted to impose a requirement to provide reasonable accommodations for individuals with disabilities in the Employment Equality Bill 1996—a piece of legislation that was designed to outlaw employment discrimination on several protected grounds. The President referred the bill to the Supreme Court, which concluded that the duty to provide reasonable accommodations for disabled employees was repugnant to the Constitution. The Court concluded that a reasonable accommodation duty would conflict with the constitutional right to ownership of private property. As a result of this ruling, the legislation was revised (becoming the Employment Equality Act 1998) and the duty to make a reasonable accommodation was diluted significantly. Rather than requiring the employer to provide the accommodation unless it could show that doing so would impose an 'undue burden', the new bill demanded no more of employers than expenditures of a 'nominal cost' to accommodate disabled employees. This downgrading of the duty to reasonably accommodate evidently passed constitutional muster, but did so at the expense of severely limiting the effectiveness of the legislation. The Equal Status Act 2000, which, *inter alia*, extended anti-

¹²⁹ Commission, 'Commission Impact Assessment accompanying the Proposal for Council Directive on implementing the principle of equal treatment between persons irrespective of religion, belief, disability, age or sexual orientation' SEC(2008) 2180, p. 9.

discrimination protections to include access to goods and services, adopted the same ‘nominal cost’ language.¹³⁰

In all likelihood the ‘nominal cost’ standard would still be in force in Ireland today were it not for the EU’s intervention. Directive 2000/78 obliges employers to make reasonable accommodations ‘unless such measures would impose a *disproportionate burden* on the employer’—a standard that exceeds the ‘nominal cost’ burden in Irish law. Due to the primacy of EU law in cases in which a conflict exists, the duty is now defined as a ‘disproportionate burden’ in the areas in which Directive 2000/78 applies, such as employment, while the ‘nominal cost’ standard remains the legal test for those areas not currently covered by EU law, such as access to goods and services.¹³¹ However, if the Council adopted a version of the Horizontal Directive Proposal that contained a higher standard than nominal cost, the primacy of EU law would impose a heavier burden on providers of goods and services than current Irish law requires.

4. The Role of the CJEU in Assuring the Effectiveness of the Horizontal Directive Proposal

The effectiveness of a directive that requires producers of goods and services to provide equal access to persons with disabilities ultimately depends to a large extent on how flexibly courts interpret a provider’s disproportionate burden and fundamental alteration defences. As we have seen, the European Court of Human Rights acknowledges that individuals with disabilities have a right to access goods and services in Europe. But the Court is also quick to conclude that providing access in the applicant’s specific circumstances would constitute an unreasonable burden on the defendant. As a practical matter, by tipping the scales so strongly in favour of the provider, the right

¹³⁰ Mark Bell, ‘Pitfalls and Progress: Reasonable Accommodation for Workers with Disabilities in Ireland’ 41 *Dublin University Law Journal* 77 (2008).

¹³¹ Lucy-Ann Buckley and Shivaun Quinlivan, ‘Reasonable Accommodation in Irish Equality Law: An Incomplete Transformation’ 41 *Legal Studies* 19, 28 (2021).

to access goods and services is substantially weakened. If the Court of Justice interpreted the Horizontal Directive Proposal in a similar manner, its adoption would probably have a similarly muted effect on accessibility in Europe. At this time, we can only speculate about the path that the Court of Justice would take if the Horizontal Directive Proposal became binding law, but history provides some grounds for cautious optimism.

First, the Court of Justice has not hesitated to issue unequivocal rulings that prevent discriminatory practices that interfere with access to goods and services, provided that primary and secondary legislation grant it the authority to do so. For example, Directive 2000/43 prohibits discrimination in the provision of goods and services based on race. In *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*,¹³² an airline passenger of Chilean origin was subjected to an additional security check before boarding his plane in Sweden.¹³³ The Equality Ombudsman filed a lawsuit alleging that the airline had discriminated against the passenger.¹³⁴ When the case was heard in domestic court, the airline agreed, pursuant to Swedish law at the time, to pay a lump sum for the alleged discrimination without admitting that it had discriminated against the complainant.¹³⁵ The complainant objected, arguing that the Swedish law ran afoul of EU law because it did not provide him with an opportunity to obtain a court ruling on whether or not he had been discriminated against.¹³⁶ The Court of Justice agreed and held that the Swedish law fell short of the objective of providing

¹³² Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB* ECLI:EU:C:2021:269.

¹³³ Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB* ECLI:EU:C:2021:269, para. 18.

¹³⁴ Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB* ECLI:EU:C:2021:269, para. 19.

¹³⁵ Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB* ECLI:EU:C:2021:269, para. 21.

¹³⁶ Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB* ECLI:EU:C:2021:269, para. 21.

effective sanctions to induce compliance with Directive 2000/43.¹³⁷ While this ruling did not touch directly on the question of what constitutes an ‘undue burden’ in a commercial transaction, it is noteworthy that the Court of Justice took seriously the issue of effective sanctions for discriminatory behaviour in the provision of goods and services in a lawsuit against a private service provider.

Second, in the area of employment where the Court of Justice already has the authority to rule on EU-level disability discrimination provisions (Directive 2000/78), it has interpreted them in ways that broadly support, rather than hinder, the development of a pro-disability rights jurisprudence in Europe. Indeed, this jurisprudence is at least as disability-friendly as the United States’ most progressive case-law on similar issues.¹³⁸ A recent judgment, *Tartu Vangla*,¹³⁹ is indicative of the Court of Justice’s stance. The case involved a prison guard in Estonia who was dismissed from his place of employment because his hearing ability did not meet the minimum standard required by national legislation.¹⁴⁰ The Court ruled that the national legislation did not comply with Directive 2000/78 because it did not require the employer to engage in an individualized inquiry into whether passing the hearing test was necessary to perform the essential functions of the job and/or whether a reasonable accommodation could be made to allow the prison guard to perform the essential functions of the job.¹⁴¹ This result stands in sharp contrast to an approach that the United States Supreme Court adopted in the infamous *Sutton Trilogy* during the 1990s.¹⁴² In each of these

¹³⁷ Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB* ECLI:EU:C:2021:269, paras. 42–49.

¹³⁸ Jeffrey Miller, ‘The European Disability Rights Revolution’ *European Law Review* 1 (2019), pp. 66–87.

¹³⁹ Case C-795/19, *XX v Tartu Vangla* ECLI:EU:C:2021:606.

¹⁴⁰ Case C-795/19, *XX v Tartu Vangla* ECLI:EU:C:2021:606, paras. 15–17.

¹⁴¹ Case C-795/19, *XX v Tartu Vangla* ECLI:EU:C:2021:606, paras. 51–53.

¹⁴² Sarina Russotto, ‘Effects of the Sutton Trilogy’ *Tennessee Law Review* 68 (2000), p. 705.

cases, the United States Supreme Court held that plaintiffs who could not meet physical standards, such as the prison guard in *Tartu Vangla*, were not disabled, and therefore not protected by the Americans with Disabilities Act.¹⁴³ In the United States, it took an act of Congress to overturn the Supreme Court's narrow interpretation of the term 'disability'. The Court of Justice's judgment in *Tartu Vangla* effectively closes the door on that history repeating in the European Union.¹⁴⁴ The Court of Justice does not appear to be predisposed, as the United States Supreme Court once was, to interpret disability rights legislation in a manner that severely limits their effectiveness.

V. CONCLUSION

The Horizontal Directive Proposal is still an important unfinished item on the EU anti-discrimination legislative agenda. Admittedly, since the Commission proposed it in 2008, the disability rights landscape in Europe has changed substantially. The case law of the European Court of Human Rights now recognises that Article 14 of the ECHR provides protection against certain forms of disability discrimination. The European Union has also adopted several measures that strengthen the rights of persons with disabilities. These developments are certainly welcome, but they do not provide the same level of protection that the Horizontal Directive Proposal would. EU legislation still does too little to address accessibility issues related to (among other areas) the built environment and transportation. In a similar vein, Article 14 of the European Convention on Human Rights has been interpreted to require some obligations to provide access to goods and services, but only under exceptional circumstances. This not only falls short

¹⁴³ See Americans with Disabilities Amendments Act of 2008.

¹⁴⁴ A small distinction between the *Sutton Trilogy* cases and *Tartu Vangla* exists in that the *Sutton Trilogy* plaintiffs were found to be non-disabled in their "unmitigated state". The United States ruled that, for example, a vision-impaired person was non-disabled if she had good vision when she wore corrective eyeglass. In *Tartu Vangla*, it is unclear whether the complainant was capable of passing the hearing test with hearing aids or some other auxiliary aid.

of the Horizontal Directive Proposal's scope, but is also inconsistent with the Article 9 CRPD accessibility obligations. The Horizontal Directive Proposal has the potential to address more comprehensively and more coherently the accessibility inequities that divide disabled and non-disabled people.

Although the Council has been unable to reach consensus on the precise wording of the Horizontal Directive Proposal for some time now, Claire Kilpatrick notes that for the first time since the 2000 discrimination directives, several pieces of Social Europe EU legislation are moving forward.¹⁴⁵ These include the Women on Corporate Boards Directive 2022/2381/EU¹⁴⁶ (which was initially proposed in 2012), the Work-Life Balance Directive 2019/1158/EU,¹⁴⁷ the Adequate Minimum Wages Directive 2022/2041/EU,¹⁴⁸ and the Pay Transparency Directive 2023/970/EU.¹⁴⁹ Just as the European disability rights movement capitalised on the broader anti-discrimination sentiment of the 1990s to advance its own legislative agenda, perhaps it may now find a way to exploit Social Europe's 'Roaring 20s' moment to expand the scope of European supranational protections for victims of disability discrimination.

¹⁴⁵ Claire Kilpatrick, 'The Roaring 20s for Social Europe. The European Pillar of Social Rights and Burgeoning EU Legislation' *Transfer* 29.2 (2023), p. 209.

¹⁴⁶ Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures (Text with EEA relevance) [2019] OJ L315/44.

¹⁴⁷ Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ L188/79.

¹⁴⁸ Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union [2022] OJ L275/33.

¹⁴⁹ Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (Text with EEA relevance) [2023] OJ L 132/21.

For the 87 million people in the European Union living with some form of disability,¹⁵⁰ it is a milestone long overdue.

¹⁵⁰ European Council of the European Union, Infographic - Disability in the EU: facts and figures <<https://www.consilium.europa.eu/en/infographics/disability-eu-facts-figures>> visited 15 August 2023.