

Access denied

Citation for published version (APA):

Charitakis, S. (2018). *Access denied: The Role of the European Union in Ensuring Accessibility under the United Nations Convention on the Rights of Persons with Disabilities*. [Doctoral Thesis, Maastricht University]. Maastricht University. <https://doi.org/10.26481/dis.20181011sc>

Document status and date:

Published: 01/01/2018

DOI:

[10.26481/dis.20181011sc](https://doi.org/10.26481/dis.20181011sc)

Document Version:

Publisher's PDF, also known as Version of record

Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

[Link to publication](#)

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal.

If the publication is distributed under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license above, please follow below link for the End User Agreement:

www.umlib.nl/taverne-license

Take down policy

If you believe that this document breaches copyright please contact us at:

repository@maastrichtuniversity.nl

providing details and we will investigate your claim.

ACCESS DENIED

Cover image: © heliography - Stockimo - Alamy Stock Photo

No part of this publication may be reproduced, stored in an automated data system or transmitted in any form or by any means, electronic, mechanical or photocopying, recording, or otherwise, without the prior written permission from the author/publisher.

ACCESS DENIED

The Role of the European Union in Ensuring Accessibility under the United Nations Convention on the Rights of Persons with Disabilities

DISSERTATION

to obtain the degree of Doctor at Maastricht University,
on the authority of the Rector Magnificus,
Prof.dr. Rianne M. Letschert
in accordance with the decision of the Board of Deans,
to be defended in public
on Thursday 11th of October 2018, at 14:00 hours

by
Stylianos Charitakis

Supervisors:

Prof.dr. L. Waddington

Prof.dr. B. de Witte

Assessment Committee:

Prof.dr. H. Schneider (chair)

Prof.dr. T. Degener (Protestant University of Applied Sciences RWL Bochum)

Prof.dr. A.P. van der Mei

Prof.dr. G. Quinn (University of Leeds/University of Lund)

ACKNOWLEDGMENTS

My Ph.D. research journey was a long one – albeit one that was full of happy, inspiring and life-altering moments. At the same time, it was an isolating process, and I could not have gone through it without the support and encouragement of several people, whom I would like to acknowledge.

I am deeply indebted to Lisa Waddington, for her insight, guidance and constant support. Lisa always had her door open for any questions that I had, and she devoted a lot of time to reading my drafts of this Ph.D. Her comments were always extensive and challenged me to rethink and refine my arguments.

I am also very grateful to Bruno de Witte for his wisdom and support throughout my Ph.D. research journey. I am very thankful to him for the insightful feedback that he gave me on my Ph.D. drafts. I am also thankful for his many words of wisdom, which managed to reduce my anxiety and inspire me to be the best version of myself that I could be.

Moreover, I am thankful to the members of the Reading Committee, who dedicated their time to reading this thesis and provided constructive comments: Hildegard Schneider, Theresia Degener, Anne Pieter van der Mei and Gerard Quinn.

I would also like to thank the European Commission for funding and supporting the DREAM (Disability Rights Expanding Accessible Markets) network.

I am also grateful to my fellow DREAM researchers and my co-workers at the European Disability Forum, for our wonderful collaboration and our fruitful discussions.

In addition, a special word of thanks is due to Leonard Besselink for encouraging me to apply for the position that led to my PH.D. research project and for his invaluable support and advice.

Furthermore, this book would not have been possible without the support of my good friends in the Netherlands. I am thankful to Andrea Broderick, fellow DREAM researcher, for being a great friend and for her invaluable support, particularly during the past three years. Our long phone calls devoted to discussing our research and personal matters (where she was trying to boost my self-esteem) are legendary.

I would also like to thank Emilija Dodevska, for her support and friendship, especially in the first year of my Ph.D. research. I would also like to apologise to her for the dreadful experience during our flight from Leeds to Amsterdam.

Thankfully, things have significantly improved since then regarding my experiences of flying.

In addition, I am thankful to Alexander Hoogenboom for his friendship and, particularly, for indulging my movie-going escapades.

Special thanks also go to Dersim Yabasun for being a great office-mate and friend. I really miss our lunches together.

I am really thankful to my ‘Greek family’, in the Netherlands. In particular, I would like to thank Aikaterini Argyrou for her friendship and academic advice. It was very important to talk to someone that was going through the same struggles as I was, especially during the past three years. I am also very thankful to George Skantzaris and Caroline Lubbers for their invaluable support (in so many ways) during a difficult time of my life and for all the chocolate that they furnished me with.

Last but certainly not least, I am immensely thankful to my family – my brother Manolis and my parents, Mary and Stavros. My brother has been a constant source of inspiration to me and always encouraged me to better myself.

A very special word of thanks goes to my parents for their unshakeable belief in my potential and their unconditional love. I owe you so much for helping me to become the person I am today. (Any criticisms of my character should be directed to you). This book is dedicated to you.

Stelios Charitakis

CONTENTS

<i>Acknowledgments</i>	v
Introduction	1
Research Questions and Purposes	6
Methodology.....	8
Scope and Structure.....	10
Part I, Chapter I of the Thesis	10
Accessibility and the nature of the obligations of Article 9 UNCRPD.....	10
Part II, Chapter II of the Thesis	11
The UNCRPD as a mixed agreement under EU law.....	11
Part II, Chapter III of the Thesis	11
The allocation of shared competences between the EU and the Member States when implementing Article 9 UNCRPD.....	11
Part II, Chapter IV of the Thesis	11
A mechanism for the coordination of the implementation of the UNCRPD within the EU.....	11
Part III, Chapters V, VI and VII of the Thesis.....	12
The implementation by the EU of Article 9 UNCRPD relating to accessibility of goods and services, the built environment and transport	12
The Thesis within Existing Research	12
Conclusion	13
PART I	
WHAT IS THE NATURE OF THE OBLIGATIONS GENERATED BY ARTICLE 9 UNCRPD IN RELATION TO ACCESSIBILITY?	15
Chapter I	
Accessibility and the Nature of the Obligations of Article 9 UNCRPD	
I. Introduction	17
II. Accessibility	19
A. Accessibility in international law.....	19
B. ‘Accessibility of’ and ‘access to’	22

C.	Dimensions of accessibility	25
i.	Social or attitudinal accessibility	25
ii.	Economic accessibility or affordability	26
iii.	Physical accessibility	28
iv.	Information accessibility	29
v.	Communication accessibility	30
D.	Accessibility as a UNCRPD general principle	31
III.	The VCLT methods of interpretation	34
A.	Article 31 paragraph 1 VCLT	37
B.	Article 31 paragraph 2 VCLT	39
C.	Article 31 paragraph 3 VCLT	40
D.	Article 31 (4) VCLT	41
E.	Article 32 VCLT	41
IV.	Interpretation of Article 9 UNCRPD	42
A.	The purpose of Article 9 UNCRPD	42
To enable persons with disabilities to live independently and participate fully in all aspects of life (...)	42	
B.	The progressive realisation of Article 9 UNCRPD	45
(...) States Parties shall take appropriate measures (...)	45	
i.	Obligation to take ‘deliberate, concrete and targeted’ steps under the ICESCR and relevance for the UNCRPD	47
ii.	Obligation to use the maximum of the available resources	51
iii.	Obligation to continuously improve conditions	53
iv.	Obligation to abstain from taking deliberately retrogressive measures except under specific circumstances	54
v.	Obligation to monitor the realisation of the rights	56
vi.	Obligation to devise strategies and programmes for the implementation of rights	57
vii.	Obligation to ensure the minimum core level for each right	58
C.	The obligations of Article 9 UNCRPD	62
(...) to ensure (...)	62	
i.	The obligation to protect	63
ii.	The obligation to fulfil	66
D.	‘Accessibility of’ and ‘access to’	72
(...) access to (...)	72	
E.	Accessibility and equality	75
(...) on an equal basis with others (...)	75	
F.	The material scope of Article 9 UNCRPD	81
(...) the physical environment, to transportation (...)	81	
(...) to information and communications, including information and communications technologies and systems (...)	83	

(...)	and to other facilities and services open or provided to the public (...)	84
Goods and products in the scope of application of Article 9 UNCRPD	(...) both in urban and in rural areas (...)	85
V.	Reasonable accommodation.	87
A.	The evolution of reasonable accommodation	87
B.	Reasonable accommodation and the UNCRPD	88
C.	The differences between accessibility and reasonable accommodation	93
VI.	Universal Design	95
A.	The evolution of Universal Design.	95
B.	Defining Universal Design	96
C.	Universal Design and the UNCRPD.	99
VII.	Conclusion	101

PART II

HOW AND TO WHAT EXTENT IS THE EU COMPETENT TO IMPLEMENT THE OBLIGATIONS OF ARTICLE 9 UNCRPD WITH REGARD TO ACCESSIBILITY THROUGH LEGISLATIVE OR OTHER POLICIES?	103
---	-----

Chapter II

The UNCRPD as a Mixed Agreement under EU Law

I.	Introduction	105
II.	The negotiation and conclusion of the UNCRPD by the EU	106
III.	The UNCRPD as an international agreement under EU law	110
IV.	The competences of the EU with regard to matters governed by the UNCRPD.	115
A.	Exclusive competences.	118
B.	Shared competences.	120
C.	Complementary competences	125
V.	The challenges of the implementation of the UNCRPD by the EU	129
VI.	The duty of close cooperation	131
VII.	Conclusion	135

Chapter III

The Allocation of Shared Competences between the EU and the Member States when Implementing Article 9 UNCRPD

I.	Introduction	137
II.	Alternative ways the EU can address disability issues.	138

III.	Between the EU and the Member States: Factors that decide who is responsible for implementing the UNCRPD in a field of shared competence	143
A.	The principle of subsidiarity	144
B.	The functioning of the EU internal market	149
C.	The elimination of discrimination in the EU territory	155
D.	Path dependency and EU disability policy	159
IV.	State autonomy and the form of EU action implementing the UNCRPD	164
V.	The effective implementation of the UNCRPD by the EU	169
VI.	Conclusion	174

Chapter IV

A Mechanism for the Coordination of the Implementation of the UNCRPD within the EU

I.	Introduction	175
II.	The EU mechanism for the coordination of the implementation of the UNCRPD	176
III.	The Disability High Level Group	183
IV.	The Open Method of Coordination	185
V.	Regulations on bilateral agreements	190
VI.	A mechanism for the coordination of the implementation of the UNCRPD within the EU	194
VII.	Conclusion	199

PART III

WHAT HAS THE EU DONE SO FAR TO MEET THE ACCESSIBILITY REQUIREMENTS OF THE UNCRPD?	201
---	-----

Chapter V

The Implementation by the EU of Article 9 UNCRPD Relating to Accessibility of Goods and Services

I.	Introduction	203
II.	EU policies relevant to the accessibility of goods and services	204
i.	Disability plans and strategies	205
ii.	EU customs union	206
iii.	Internal market	208
iv.	Services of General Interest	211
v.	Consumer protection	214
vi.	Standardisation	219

III.	EU instruments and the accessibility of goods and services	221
A.	Obligation to ensure affordability of goods and services.	222
i.	EU customs union	222
ii.	Taxation.	226
iii.	Services of General Economic Interest.	231
B.	Obligations to ensure information accessibility of goods and services.	234
i.	Services of General Economic Interest.	234
ii.	Consumer protection	237
C.	Obligation to ensure communication accessibility of goods and services	244
i.	Internal market	245
ii.	Services of General Economic Interest.	245
iii.	Consumer protection	246
D.	Obligation to ensure physical accessibility of goods and services . .	250
i.	Services of General Economic Interest.	250
ii.	Consumer protection	257
E.	Obligation to ensure social accessibility of goods and services . . .	258
F.	Obligation to develop minimum standards on accessibility of goods and services	260
i.	Internal market	260
ii.	Services of General Economic Interest.	262
iii.	Consumer protection	263
IV.	The European Accessibility Act.	266
i.	Purpose	267
ii.	Accessibility requirements	270
iii.	Scope	271
iv.	Fundamental alterations and disproportionate burden	277
v.	Compliance of goods and services	279
vi.	Transposition	281
vii.	Opinion of the European Parliament.	281
viii.	Conclusion	283
V.	Conclusion	284

Chapter VI

The Implementation by the EU of Article 9 UNCRPD Relating to Accessibility of the Built Environment

I.	Introduction	287
II.	EU policies relevant to accessibility of the built environment	288
i.	Structural funds.	288
ii.	Public procurement.	291

III.	EU instruments and accessibility of the built environment	296
A.	Obligation to ensure physical accessibility of the built environment	296
i.	Structural funds	297
ii.	Public procurement	303
iii.	Internal market	308
iv.	Non-discrimination	309
B.	Obligation to develop minimum standards on accessibility of the built environment	315
i.	Public procurement	315
ii.	Internal market	317
IV.	Conclusion	319

Chapter VII

The Implementation by the EU of the Obligations of Article 9 UNCRPD Relating to Accessibility of Transport

I.	Introduction	321
II.	EU policy relevant to the accessibility of transport	322
III.	EU instruments and accessibility of transport	325
A.	Obligation not to discriminate on the ground of disability in the field of transport	325
B.	Obligation to ensure affordability of transport	336
C.	Obligation to ensure information accessibility of transport	341
D.	Obligation to ensure communication accessibility of transport	343
E.	Obligation to ensure physical accessibility of transport	344
i.	Internal market	344
ii.	Transport	347
F.	Obligation to provide assistance to people with disabilities in the field of transport	348
G.	Obligation to provide training for stakeholders on accessibility in the field of transport	354
H.	Obligation to develop minimum standards on accessibility of transport	358
i.	Transport	358
ii.	Trans-European networks	359
IV.	Conclusion	367

Conclusion

I.	The purpose of the thesis	369
II.	General conclusions of Part I of the thesis (Chapter I)	370

III. General conclusions of Part II of the thesis (Chapters II, III and IV) . . .	371
IV. General conclusions of Part III of the thesis (Chapters V, VI and VII) .	373
<i>Main Recommendations</i>	383
<i>Valorisation Addendum</i>	385
<i>About the Author</i>	387
<i>Bibliography</i>	389

INTRODUCTION

This thesis aims to provide an understanding of the way in which the concept of accessibility operates within the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and to identify the challenges and consequences that the EU will face after its conclusion of the UNCRPD with regard to the implementation of the Convention through EU law and policies. The research in this thesis is motivated by two factors. The first reason pertains to the adoption and entry into force of the UNCRPD, which has constituted a significant step in the field of human rights and disability law at the international, regional and national levels respectively. The implementation of this Convention must be assessed by the development of a comprehensive framework for understanding the Convention's legal concepts and States Parties' obligations. The second and most important reason for writing this thesis is as a result of the conclusion of the UNCRPD by the EU. This is the first time that the EU has concluded a human rights treaty and as a result, the conclusion of the Convention by the EU has triggered many questions with regard to the way in which the EU will implement its requirements.

Since the 1980s, and more intensely in the 1990s, there was a shift in the way theory and national policies viewed the situation of people with disabilities. The traditional legal and policy responses to people with disabilities were based on the 'medical' or 'individual' model understanding of 'disability'.¹ According to this model, people with physical, sensory or mental impairments are 'disabled' from leading 'normal' lives.² In other words, the medical model perceives disability as a deficit in the individual which in turn does not allow the individual to become what society considers as 'normal'.³ Disability is therefore seen as a personal tragedy that creates barriers which only the individual themselves can eliminate.⁴ Thus, unless that individual can be cured or somehow adapt to his

¹ M. Oliver, *The Politics of Disablement* (Macmillan, 1990); M. Oliver, *Understanding Disability: From Theory to Practice* (MacMillan, 1996); A. Lawson, 'The EU Rights Based Approach to Disability Some Strategies for Shaping an Inclusive Society', 6 *International Journal of Discrimination and the Law* (2005), p. 269.

² A. Lawson, 6 *International Journal of Discrimination and the Law* (2005), p. 269.

³ M. Jones, 'Inclusion, Social Inclusion and Participation', in M.H. Rioux, L.A. Basser and M. Jones (eds.), *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff Publishers, 2011), p. 58; on the various approaches to disability policy see, M. Jones and L.A. Basser, 'Law and people with disabilities', in N. Smesler and P. Baltes (eds.), *International encyclopaedia of social and behavioural sciences* (Elsevier, 2001).

⁴ *Ibid.*, p. 58.

or her situation, that person will not be able to fully participate in society.⁵ The medical model sees the disabled person as being the one who should be adjusted in order to fit within a society that is designed for non-disabled people.⁶ This model is associated with policies in the areas of rehabilitation and assistive technologies.⁷ Traditionally, however, such policies have promulgated the idea that disabled people are passive recipients of welfare benefits, thereby having little influence over decisions and priorities.⁸ Moreover, many people with disabilities cannot fit into a narrow conception of normality.⁹

An important consequence of a medical model understanding of disability is the segregation of disabled people that arises as a result of its application.¹⁰ If disabled persons fail to fit into what society perceives as 'normal', then they must remain abnormal outsiders.¹¹ Examples of segregation are the institutionalisation of people with disabilities, special education schools and sheltered employment schemes.¹²

Furthermore, this segregation has led to the development of social welfare systems that support disabled people that cannot be normalised.¹³ These measures have certainly guaranteed that people with disabilities will not starve or freeze.¹⁴ Nevertheless, they were frequently based on the misguided idea that disabled people were incapable of being able to work and they promoted exclusion and dependence as a result.¹⁵

In the latter years, this approach began to change as there was a shift towards a new approach to address the situation of people with disabilities: the 'social model'. The social model of disability displays a fundamentally different approach to disability and how the policies on disability should be developed. This model was developed in order to promote policies that address the societal constraints which do not allow persons with disabilities to enjoy their fundamental rights and freedoms.¹⁶ Such policies aim to identify and eliminate

⁵ A. Lawson, 6 *International Journal of Discrimination and the Law* (2005), p. 269.

⁶ *Ibid.*, p. 269.

⁷ *Ibid.*, p. 270.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*, p. 272.

¹⁴ *Ibid.*

¹⁵ *Ibid.*; see generally M. Corker and J.M. Davis, 'Disabled Children: (Still) Invisible Under the Law', in J. Cooper (ed.), *Law, Rights & Disability* (Jessica Kingsley Publishing, 2000); L. Middleton, *Disabled Children: Challenging Social Exclusion* (Blackwell Science, 1999); G. Hales, *Beyond Disability, Towards an Enabling Society* (Sage Publications, 1996).

¹⁶ M. Schulze, 'Understanding the UN Convention on the Rights of Persons with Disabilities: A handbook on the Human Rights of Persons with Disabilities, Handicap International', *Handicap International* (2010), www.hiproweb.org/uploads/tx_hidrtdocs/HICRPDManual2010.pdf, p. 14 (accessed 17 January 2018).

restrictions that prevent inclusion.¹⁷ Such barriers may be, for example, buildings that might be inaccessible to people with mobility impairments or a form of document that uses very complex language that is not understandable to people with intellectual disabilities.¹⁸ The social model of disability policy not only focuses on physical barriers, but it also focuses on the social, behavioural and attitudinal barriers that contribute towards social exclusion.¹⁹ Therefore, the implementation of this model has the effect of shifting the focus of disability policy from the transformation of the disabled person to the rearrangement of society.²⁰

On the 13th of December 2006, the UN General Assembly adopted the UNCRPD. The Convention came into force on the 3rd of May 2008. The need for such a Convention was pointed out by *Quinn and Degener*:

[A disability-specific Convention] would enable attention to be focused on disability and would tailor general human rights norms to meet the particular circumstances of persons with disabilities. It would add visibility to the disability issue within the human rights system.²¹

The UNCRPD crystallised the paradigmatic shift from the medical to the social model. In the Preamble it is recognised that ‘disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others’.²²

Importantly, the Convention does not include a definition of ‘disability’. As a result, this means that the understanding of disability is not a fixed and static concept, but rather that it can evolve based on the society’s notion of disability at any time in the future.²³ In that regard, Article 1 reads:

‘Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’.²⁴

¹⁷ M. Jones, in M.H. Rioux, L.A. Basser and M. Jones (eds.), *Critical Perspectives on Human Rights and Disability Law*, p. 59.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ T. Degener and G. Quinn, ‘Human Rights and Disability: The Current use and Future Potential of United Nations Instruments in the Context of Disability’, *United Nations* (2002), www.ohchr.org/Documents/Publications/HRDisabilityen.pdf, p. 9.

²² Preamble (e) UNCRPD.

²³ C. Harnacke and S. Graumann, ‘Core Principles of the UN Convention on the Rights of Persons with Disabilities: An Overview’, in J. Anderson and J. Philips (eds.), *Disability and Universal Human Rights, Legal, Ethical, and Conceptual Implications of the Convention on the Rights of Persons with Disabilities* (SIM Special 35, 2012), p. 36.

²⁴ Article 1 UNCRPD.

From both the Preamble and Article 1 UNCRPD it can be concluded that a person is not disabled per se. Disability results from the interaction between the individual's impairment and societal barriers.

However, Degener argues that, while, the social model of disability was supposed to be the philosophical basis for the UNCRPD, the Convention goes beyond the social model of disability and introduces a human rights model of disability.²⁵ The human rights model of disability concentrates on the promotion and implementation of equal opportunities, as well as non-discrimination on the basis of disability.²⁶ This model of disability places emphasis on the inherent dignity and autonomy of persons with disabilities. Lastly, the principles of inclusion, participation, accessibility and respect for difference and diversity are fundamental tenets for the implementation of the human rights model of disability.²⁷ The Committee on the Rights of Persons with Disabilities (CRPD Committee) has stated in *S.C. v Brazil*²⁸ that a human rights model of disability obliges States 'to take into account the diversity of persons with disabilities [...] as well as the interaction between individuals with impairments and attitudinal and environmental barriers [...]'.²⁹ In addition, Degener argues that the human rights model of disability is different from the social model of disability insofar as it acknowledges the human dignity of disabled people, by including both civil and political, as well as economic, social, and cultural rights, by taking into account the pain, deterioration of quality of life and early death of disabled people due to impairment and dependency, by recognising the importance of minority and cultural identification, by noting the possible protective effect that prevention policy can have on the rights of persons with disabilities, and finally by providing a roadmap for change for the benefit of persons with disabilities.³⁰

The drafters of the Convention were fully aware of the fact that one of the main problems in the field of disability was that persons with disabilities do not have equal and full access to their human rights. Barriers to movement and communication in the physical environment limit persons with disabilities'

²⁵ T. Degener, 'A New Human Rights Model of Disability', in V. Della Finna, R. Cera and G. Palmisano (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer, 2017), p. 42.

²⁶ A. Broderick, *The long and winding road to equality and inclusion for persons with disabilities: the United Nations convention on the rights of persons with disabilities* (Intersentia, 2015), p. 25.

²⁷ Ibid.; Office of the High Commissioner for Human Rights, 'What is Disability', OHCHR www.ohchr.org/Documents/.../Disability/.../Module1_WhatDisability.ppt (accessed 17 January 2018).

²⁸ Committee on the Rights of Persons with Disabilities Decision, *S.C. v Brazil* (Communication No. 10/2013, CRPD/C/12/D/10/2013), 2 October 2014.

²⁹ Ibid., para. 6.3; A. Broderick, *The long and winding road to equality and inclusion for persons with disabilities: the United Nations convention on the rights of persons with disabilities*, p. 25.

³⁰ T. Degener, in V. Della Finna, R. Cera, G. Palmisano (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, p. 43, 44, 47, 49, 52 and 54.

participation in economic and cultural life and in the enjoyment of their rights.³¹

The principle of accessibility, which is addressed in Article 9 UNCRPD, is the material basis for persons with disabilities to exercise and benefit from the rights that are protected by this Convention.³² Without an accessible working environment, people with disabilities will face barriers to their enjoyment of the right to work. Without accessible media, internet and in general information and communication technologies, people with disabilities will not be able to enjoy their right to information. Indeed, experience suggests that accessibility is an efficient tool for reversing exclusion and enhancing the equalisation of opportunities.³³ Within the context of the UNCRPD, accessibility aims to remove those barriers with a view to allowing persons with disabilities to live independently and fully participate in all aspects of life.³⁴

The EU's disability policy gained more visibility during the 1990s. The new disability strategy was adopted in 1996.³⁵ The New European Community (now European Union) Strategy on equality of opportunity for people with disabilities placed great emphasis on improving the situation of people with disabilities in the field of employment, while at the same time, it introduced disability mainstreaming as a policy tool at the EU level for the purposes of guaranteeing disability inclusive policies.³⁶ The most important development in the field of disability law at the EU level during that time was the inclusion of a non-discrimination legal basis in the Treaty of Amsterdam.³⁷ This legal basis gives the power to the EU to adopt legislation to combat discrimination on several grounds, including disability.³⁸ Since then, the EU has adopted several measures based on different legal bases that have addressed disability and particularly,

³¹ M. Peat, 'Attitudes and access: advancing the rights of people with disabilities', 156 *Canadian Medical Association Journal* (1997), p. 657.

³² EDF Contribution to the day of general discussion on accessibility, Committee on the Rights of Persons with Disabilities, Geneva, 7 October 2010.

³³ Report of the Secretary General, 'Issues and Emerging Trends related to Advancement of Persons with Disabilities, Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities', 1 November 2003, *United Nations* (2003), www.un.org/esa/socdev/enable/rights/a_ac265_2003_1e.htm (accessed 17 January 2018).

³⁴ Article 9 (1) UNCRPD.

³⁵ Communication of the Commission on equality of opportunity for people with disabilities – A New European Community Strategy, COM(1996) 406 final.

³⁶ *Ibid.*

³⁷ Article 13 TEC.

³⁸ Article 19 Treaty on the Functioning of the EU (TFEU).

accessibility and non-discrimination³⁹, for example, in the area of transport⁴⁰ and in the area of the internal market.⁴¹

The EU exhibited its commitment to guaranteeing the rights of people with disabilities by taking part in the drafting process of the UNCRPD. The EU was represented by the Commission throughout the negotiations. The EU signed the Convention on the 30th of June 2007 and subsequently ratified it on the 23rd of December 2010. The EU has also adopted the European Disability Strategy 2010–2020 which, amongst other things, aims to implement the requirements of the Convention, including those in relation to accessibility.⁴²

The purpose of the present thesis is to determine the nature of the obligations of Article 9 UNCRPD with regard to accessibility and to examine how and to what extent the EU is competent to implement these obligations through legislative or other forms of policy-making.

RESEARCH QUESTIONS AND PURPOSES

This thesis aims to provide an answer to three main questions. The first question relates to the interpretation of Article 9 UNCRPD and the second and third questions are connected to EU law and the implementation of the requirements under Article 9 UNCRPD. It is important to note that the second and third questions constitute the main part of this thesis. The main research questions of this thesis are as follows:

- What is the nature of the obligations generated by Article 9 UNCRPD in relation to accessibility? (Part I of the thesis)
- How, and to what extent, is the EU competent to implement the obligations of Article 9 UNCRPD with regard to accessibility through legislative or other policies? (Part II of the thesis)

³⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

⁴⁰ Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004, [2011] OJ L 55/1; Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L 315/14; Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004, [2010] OJ L 334/1.

⁴¹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), [2010] OJ L 95/1.

⁴² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe, 15 November 2010, COM(2010) 636 final.

- What has the EU done so far to meet the accessibility requirements of the UNCRPD? (Part III of the thesis)

These main research questions can be divided into several sub-questions. As far as the first main question is concerned, the sub-questions are:

- What is the definition of accessibility in the context of the UNCRPD? (Chapter I)
- What is the difference between accessibility and reasonable accommodation, and universal design? (Chapter I)
- What is the content of the obligation to 'ensure' the access of people with disabilities to the physical environment, transportation, information, communication and information and communication technologies? (Chapter I)
- What is the nature of the obligations of Article 9 UNCRPD and how does that affect their implementation? (Chapter I)
- What is the scope of application of Article 9 UNCRPD? (Chapter I)

As far as the second main research question is concerned, the sub-questions are:

- What are the consequences of the UNCRPD being a mixed agreement under EU law for the implementation of the Convention's requirements on accessibility? (Chapter II)
- Which of the two, the Member States or the EU, should bear the responsibility for implementing Article 9 UNCRPD on accessibility in the areas where they share competence to act? (Chapter III)
- What are the potential mechanisms available at the EU level that could take on the role of the coordinating mechanism for the implementation of the UNCRPD within the EU and could help to determine whether the EU or the Member States should implement the UNCRPD in the areas where they share the competence to act? (Chapter IV)

As far as the third main research question is concerned, the sub-questions are:

- What legislative measures has the EU adopted to implement Article 9 UNCRPD in the fields of goods and services (Chapter V), the built environment (Chapter VI) and transport (Chapter VII)?
- What other, non-legislative measures can the EU adopt to implement Article 9 UNCRPD in the fields of goods and services (Chapter V), the built environment (Chapter VI) and transport (Chapter VII)?

METHODOLOGY

The methodology used in this thesis depends on the particular research question that needs to be addressed. To be more specific, in relation to the first main research question, and in order to discuss the conceptualisation of accessibility, I use the existing academic sources on this subject and General Comment No. 14 of the Committee on Economic, Social and Cultural Rights (CESCR) on the right to the highest attainable standard of health.⁴³ I also use the existing academic sources on reasonable accommodation and universal design so as to determine the difference between these concepts and accessibility.

To identify the nature of the obligations of Article 9 UNCRPD regarding accessibility, I interpret the text of that article based on the rules of interpretation that are contained in the Vienna Convention on the Law of the Treaties (VCLT). In particular, I use five methods of interpretation, based on the text, the context, the object and purpose, the effectiveness and the drafting history of the UNCRPD.

The literal interpretation method maintains that a treaty should be interpreted in accordance with the ordinary meaning of the terms of the treaty.⁴⁴ This thesis uses this method of interpretation in order to obtain a general understanding of the ordinary meaning of the wording of Article 9 UNCRPD and of other articles of the Convention that are relevant to the analysis of the nature of the obligations under Article 9 UNCRPD.

The contextual interpretation follows a systematic view of the whole treaty and interprets the treaty in its context, but it also does so in the broader context of international law.⁴⁵ This thesis applies this approach with regard to the wording of Article 9 UNCRPD and it includes not only the context of the Convention, but also, the case law and the General Comments of the Committee on the Rights of Persons with Disabilities (henceforth: CRPD Committee), in particular General Comment No. 2 on accessibility, and other documents published by this Committee, other international human rights instruments, such as the International Covenant on Civil and Political Rights and the International Covenant of Economic Social and Cultural Rights and several General Comments, reports and concluding observations that have been produced by the respective committees.

The interpretation of the treaty, based on its object and purpose⁴⁶, is used in this thesis to determine the meaning of the wording of Article 9 UNCRPD. This thesis uses both the object and purpose of Article 9 UNCRPD and the object and purpose of the Convention as a whole to interpret the wording of Article 9

⁴³ I chose the General Comment No. 14 because the CESCR has provided an analysis of the concept of accessibility. I did not use General Comment No. 2 of the Committee on the Rights of Persons with Disabilities on Article 9 UNCRPD, because it does not provide an analysis of the concept of 'accessibility'. It predominantly focuses on the obligations found in Article 9 UNCRPD.

⁴⁴ Article 31(1) VCLT.

⁴⁵ Article 31 VCLT.

⁴⁶ Article 31(1) VCLT.

UNCRPD and to interpret other articles of the Convention which are relevant to the analysis of the nature of the obligations of Article 9 UNCRPD.

Treaty interpretation, based on the principle of effectiveness, means that the wording of treaty articles should be interpreted in an ‘effective, real, and practical’ manner by ensuring that individuals are considered as rights-holders within the context of international law.⁴⁷ This thesis uses this method of interpretation for the specific issue of determining the scope of application of Article 9 UNCRPD.

It is important to note that all these methods are not used in this thesis in a hierarchical manner, but the interpretation performed on the wording of the UNCRPD in this thesis is a result of the combination of all these methods.

Lastly, the method of interpretation based on the drafting history of treaties uses the *travaux préparatoires* of treaties in order to confirm the interpretation resulting from the other interpretation methods, but also in cases where the result of the other interpretation methods is ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable in determining the meaning of the treaty.⁴⁸ This thesis only applies this method to interpret the terms of Article 9 UNCRPD and to confirm the interpretation performed based on the above-mentioned methods.

To address the second and third main research questions and their sub-questions, this thesis relies mainly on EU instruments, legal doctrine on the relevant subjects and reports on both the implementation of the EU instruments by the Member States and on the level of accessibility in the EU. Particularly, it uses the EU Treaties, with specific focus on the treaty articles of the Treaty on the Functioning of the European Union (TFEU), such as Article 19 TFEU (non-discrimination), 100 TFEU (transportation) and Article 114 TFEU (internal market) and the articles that define the EU competencies including, among others, Articles 2, 3, 4, 5 and 6 TFEU. It also uses existing legal (Regulations, Directives, Decisions) or non-legal (Standardization Mandates, the Open Method of Coordination, Strategies, and others) instruments addressing accessibility. In that regard, the Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities⁴⁹, the Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities, the Report on the implementation of the UN Convention on the Rights of Persons with Disabilities by the European Union and the concluding observations of the CRPD Committee with regard to the implementation of the Convention by the EU are of great significance.⁵⁰

⁴⁷ Article 31(1) VCLT.

⁴⁸ Article 32 VCLT.

⁴⁹ Council Decision 2010/48/EC of 24 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35.

⁵⁰ Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the

SCOPE AND STRUCTURE

This thesis is divided into three main parts. The first part corresponds to the first main research question. It addresses the issue of the nature of the obligations that flow from Article 9 UNCRPD in relation to accessibility. The second part addresses the second main research question. It, in particular, examines the effects of the conclusion of the UNCRPD by the EU in the field of accessibility and the capacity of the EU to implement Article 9 UNCRPD with regard to accessibility. The third part is connected to the third main research question. It explores the legislative and non-legislative measures that the EU has adopted to implement Article 9 UNCRPD in the fields of goods and services, the built environment and transport.

PART I, CHAPTER I OF THE THESIS

Accessibility and the nature of the obligations of Article 9 UNCRPD

Chapter one is divided into two parts. The first part seeks to understand what the term ‘accessibility’ means. The purpose of this part of Chapter I is to conceptualise accessibility in the context of the UNCRPD. In that regard, this part of the chapter identifies the differences between the terms ‘access to’ and ‘accessibility of’. It also examines the function of accessibility as a stand-alone principle of the Convention and in the context of the substantive rights of the Convention. Lastly, it aims to identify the nature of the obligations generated by Article 9 UNCRPD by interpreting it in line with the rules of interpretation of the VCLT. It particularly examines the purpose of Article 9 UNCRPD, which is to enable people with disabilities to live independently and to fully participate in all aspects of life. The chapter enumerates the obligations of Article 9 UNCRPD with regard to accessibility and it explains how the concept of the progressive realisation applies in the context of the obligations generated by Article 9 UNCRPD. It explores the intention of the drafters of the Convention with regard to the use of the term ‘access to’ in the context of Article 9 UNCRPD. It also looks into the connection between accessibility and equality. Last but not least, it examines the scope of application of Article 9 UNCRPD.

The second part of Chapter I, aims to define accessibility in comparison with other legal concepts that are contained in the Convention and which accessibility is interconnected with. These legal concepts are ‘reasonable accommodation’ and ‘Universal Design’.

European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C 340/11; Commission Staff Working Document, Report on the implementation of the UN Convention on the Rights of Persons with Disabilities by the European Union, 5 June 2014, SWD(2014) 182 final; Committee on the Rights of Persons with Disabilities, Concluding observations EU CRPD/C/EU/CO/1/2015.

PART II, CHAPTER II OF THE THESIS

The UNCPRD as a mixed agreement under EU law

This chapter aims to provide an understanding of the consequences of the conclusion of the UNCPRD by the EU. In particular, this chapter examines the role that the EU played in the negotiation of the UNCPRD and the process the EU followed for the conclusion of the Convention. Moreover, this chapter explores the effects that the conclusion of the UNCPRD by the EU and its classification as an international mixed agreement has on the EU legal order and the legal orders of the Member States. This chapter also identifies the competences of the EU in relation to the matters which are governed by Article 9 of the Convention. Furthermore, this chapter points out the challenges in relation to the implementation of the UNCPRD by the EU and its Member States and it examines the way in which the duty of close cooperation can facilitate the implementation of the UNCPRD by the EU and its Member States.

PART II, CHAPTER III OF THE THESIS

The allocation of shared competences between the EU and the Member States when implementing Article 9 UNCPRD

This chapter builds on the previous chapter, and particularly the nature of the UNCPRD as a mixed agreement of the EU, and it attempts to examine which of the two, the Member States or the EU, should bear the responsibility for the implementation of Article 9 UNCPRD with regard to accessibility, in areas where they share the competence to act. In particular, this chapter attempts to identify the factors that should be taken into account in deciding whether the EU or the Member States should take action to realise Article 9 UNCPRD in fields of shared competence.

PART II, CHAPTER IV OF THE THESIS

A mechanism for the coordination of the implementation of the UNCPRD within the EU

This chapter examines four mechanisms available at the EU level that have the potential to both become the coordinating mechanism for the implementation of the UNCPRD within the EU and it determines whether the EU or the Member States should implement the requirements of the UNCPRD in the areas where they share the competence to act. The EU mechanisms that will be examined in

this chapter are the Human Rights Working Group (COHOM), the Disability High Level Group, the Regulations on Bilateral Agreements and the Open Method of Coordination (OMC).

PART III, CHAPTERS V, VI AND VII OF THE THESIS

*The implementation by the EU of Article 9 UNCRPD relating to accessibility of goods and services, the built environment and transport*⁵¹

Part III constitutes the central part of this thesis. The aim of this part is to identify the areas where the EU has taken legislative and non-legislative action to implement the requirements of Article 9 UNCRPD. In that regard, this part is divided into three chapters based on the scope of application of Article 9 UNCRPD, namely accessibility of goods and services (Chapter V); accessibility of the built environment (Chapter VI) and accessibility of transport (Chapter VII). In particular, these chapters examine the initiatives, legislative or non-legislative that the EU has taken in relation to accessibility. They also analyse the connection between those initiatives and the obligations of Article 9 UNCRPD in the field of accessibility, and specifically whether these legal instruments meet the obligations of Article 9 UNCRPD.

THE THESIS WITHIN EXISTING RESEARCH

Since the adoption of the UNCRPD there have been several scholarly comments on the way it impacts on disability policy and several analyses of its content, including article by article commentaries of the UNCRPD, have been carried out.⁵²

⁵¹ My research project will not entail an in-depth analysis of the EU law and policies addressing disability accessibility in the field of information and communication technologies and criminal law. As far as the former is concerned, another researcher within the DREAM (Disability Rights Expanding Accessible Markets) research network has addressed those issues (Anthony Giannoumis, Norwegian Social Research (NOVA)). With regard to the latter, it is my view that the provisions of EU criminal law and policy addressing disability accessibility have emanated primarily from the principles of criminal law and not from disability policy. Therefore, they might fit better in an analysis of EU criminal law than in an analysis of EU disability policy.

⁵² O.M. Arnardottir and G. Quinn, *The UN Convention on the Rights of Persons with Disabilities* (Martinus Nijhoff, 2009); A.S. Kanter, 'The promise and the challenge of the United Nations Convention on the Rights of Persons with Disabilities', 34 *Syracuse Journal of International Law and Commerce* (2007); R. Kavess and P. French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities', 8 *Human Rights Law Review* (2008); A. Lawson, 'People with Psychosocial Impairments or Conditions, Reasonable Accommodation and the Convention on the Rights of Persons with Disabilities', 26 *Law in Context* (2008); A. Broderick, *The long and winding road to equality and inclusion for persons with disabilities: the United Nations convention on the rights of persons with disabilities*; V.

Nevertheless, to my knowledge, this is the first time that the concept of disability accessibility, both in terms of its content and in terms of the obligations Article 9 entails, has been addressed in such a comprehensive and systematic manner.

Moreover, there has been some scholarly analysis on the subject of the consequences of the implementation of the UNCRPD by the EU, but this research is very much limited in scope and it does not have a particular focus on accessibility.⁵³ As far as the issue of the delimitation of competences between the EU and the Member States with regard to the implementation of Article 9 UNCRPD is concerned, to my knowledge there has been no research on this subject.

In addition, the issue of the EU competence to implement accessibility considerations has been analysed by *Waddington*.⁵⁴ This article was the basis and the inspiration for formulating this research project, which subsequently resulted in this thesis. This thesis addresses this subject in a more extensive and comprehensive manner.

Furthermore, it is important to note that this research project is situated within a broader research project entitled DREAM (Disability Rights Expanding Accessible Markets). DREAM was a training network for early stage researchers funded by the EU Marie Curie Initial Training Network Funding Programme. The purpose of this programme was to professionally develop and educate the next generation of disability policy researchers and entrepreneurs in order to provide assistance to the EU and its Member States with regard to the implementation of the obligations of the UNCRPD. It covered several research areas, amongst others, independent living, personal assistance, deinstitutionalisation, equality, non-discrimination, reasonable accommodation, accessibility, employment, intellectual property law, monitoring mechanisms, legal capacity, education and indicator development, from a multidisciplinary perspective.

CONCLUSION

The adoption and entry into force of the UNCRPD has been a tremendous development in disability law and policy and it has sparked great interest among scholars of various disciplines. The conclusion of the Convention by the EU has also triggered much discussion on the challenges and the consequences of

Della Finna, R. Cera and G. Palmisano, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*.

⁵³ L. Waddington, 'The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences', 18 *Maastricht Journal of European and Comparative Law* (2011); J.W. Reiss, 'Innovative Governance in a Federal Europe: Implementing the Convention on the Rights of Persons with Disabilities', 20 *European Law Journal* (2014).

⁵⁴ L. Waddington, 'A Disabled Market: Free Movement of Goods and Services in the EU and Disability Accessibility', 15 *European Law Journal* (2009).

its implementation by the EU. This thesis attempts to identify the nature of the obligations under Article 9 UNCRPD in relation to accessibility. It also explores the consequences of the conclusion of the Convention by the EU and the extent to which the EU is required to take measures to implement the obligations of Article 9 UNCRPD. It is important to note that the findings of this thesis reflect research that has been conducted up until the 31st of October 2017. Developments that take place after that date are not included in this thesis.

PART I

**WHAT IS THE NATURE OF
THE OBLIGATIONS GENERATED
BY ARTICLE 9 UNCRPD
IN RELATION TO ACCESSIBILITY?**

CHAPTER I

ACCESSIBILITY AND THE NATURE OF THE OBLIGATIONS OF ARTICLE 9 UNCRPD

I. INTRODUCTION

Historically, persons with disabilities were perceived as objects rather than subjects by law and thus they were not considered to be rights-holders.¹ The traditional legal and policy responses to people with disabilities have been based on the ‘medical’ or ‘individual’ model understanding of ‘disability’.² According to this model, people with physical, sensory or mental impairments are prevented or ‘disabled’ from leading normal lives because of their impairment.³ In other words, the medical model perceives disability as a deficit in the individual, which does not allow the individual to become what society considers as ‘normal’.⁴

In recent years, however, there has been a shift towards a new approach to disability, namely the ‘social model’. The social model of disability adopts a different approach to disability and the manner in which disability policies should be developed. This model promotes policies that identify and eliminate restrictions or barriers which have the effect of preventing the inclusion of people with disabilities in society.⁵ These barriers might be physical, such as steps at the entrances of buildings, or attitudinal, such as discrimination, prejudices and false assumptions about people with disabilities.

The UNCRPD has now introduced the human rights model of disability. This model of disability focuses on the application of the principles of equal opportunities and non-discrimination on the basis of disability. The drafters of

¹ M. Schulze, *Handicap International* (2010), p.16.

² M. Oliver, *The Politics of Disablement*; M. Oliver, *Understanding Disability: From Theory to Practice*; A. Lawson, 6 *International Journal of Discrimination and the Law* (2005), p. 269.

³ A. Lawson, 6 *International Journal of Discrimination and the Law* (2005), p. 269; F. Seatzu, ‘Article 9 [Accessibility]’, in V. Della Finna, R. Cera and G. Palmisano (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, p. 230.

⁴ M. Jones, in M.H. Rioux, L.A. Bassier and M. Jones (eds.), *Critical Perspectives on Human Rights and Disability Law*, p. 58; on the various approaches to disability see, M. Jones and L.A. Bassier Marks, ‘Law and people with disabilities’, in N. Smesler and P. Baltes (eds.), *International encyclopaedia of social and behavioural sciences*.

⁵ *Ibid.*

the Convention were fully aware that the main problem in the field of disability was that persons with disabilities do not have equal and full access to their human rights.⁶ Barriers, amongst other things, in the physical environment have the effect of limiting the participation of persons with disabilities in economic and cultural life and in the enjoyment of their rights.⁷ Accessibility contributes to the inclusion of people with disabilities in society. This statement is reflected in Article 9 (1) UNCRPD which states: ‘To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities 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, both in urban and in rural areas.’⁸ Accessibility is not the only concept in the UNCRPD that proposes the elimination of barriers that people with disabilities face. The concepts of ‘Universal Design’ and ‘reasonable accommodation’ can be used in a way that contributes to this goal as well.

The wording of international human rights treaties is broad, complex and sometimes vague and ‘treaty interpretation in general and human rights interpretation in particular, is a complex matter.’⁹ As a result, treaties leave significant room for differing interpretations. The UNCRPD is a human rights treaty with complex and ambiguous language throughout its text. For that reason, it is essential that this thesis employs an effective methodological process that will ensure a precise interpretation of the Convention’s provisions, such as Article 9 UNCRPD.¹⁰ In that regard, it is important to note that the UNCRPD is part of international law. As a result, the interpretation of the Convention is to be carried out in accordance with the general rules of interpretation that apply to international law. The Vienna Convention on the Law of Treaties (VCLT) is the Convention that sets out the international rules of interpretation of treaties and this will be relied upon throughout this thesis.

The purpose of this chapter is to conceptualise accessibility as a stand-alone principle of the Convention, but also to distinguish it from other norms contained in the Convention, such as ‘reasonable accommodation’ and ‘Universal Design’. This chapter also aims to analyse the normative content of Article 9 UNCRPD. To perform the latter task, I use the methods of interpretation that are provided for in the VCLT.

⁶ G. Quinn, *The interaction of Non-discrimination with article 9*, unpublished paper (on file with author), p. 1.

⁷ M. Peat, 156 *Canadian Medical Association Journal* (1997), p. 657.

⁸ Article 9 (1) UNCRPD.

⁹ B. Peters, ‘Aspects of Human Rights Interpretation by the UN Treaty Bodies’, in H. Keller and G. Ulfstein (eds.), *UN Human Rights Treaty Bodies, Law and Legitimacy* (Cambridge University Press, 2012), p. 273.

¹⁰ For example, General Comment No. 2 on Article 9 UNCRPD of the Committee on the Rights of Persons with Disabilities is a tool for the interpretation of Article 9 UNCRPD.

This chapter is divided into four parts. The first part conceptualises accessibility in the context of the UNCRPD [Section II A] and explores its role as a principle of the Convention [Section II D]. In particular, it explores the elements which constitute accessibility [Section II C] and it identifies the differences between the terms ‘accessibility of’ and ‘access to’ [Section II B]. The second part of the chapter provides an interpretation of Article 9 UNCRPD [Section IV] based on the rules of interpretation set out in the VCLT [Sections III]. It pays specific attention to the purpose of Article 9 UNCRPD [Section IV A], the nature of accessibility as a progressively realisable obligation [Section IV B] and the identification of the obligations under Article 9 UNCRPD [Section IV C]. In addition, this chapter focuses on the interpretation of the term ‘access to’ in the context of Article 9 UNCRPD [Section IV D], the connection between accessibility and equality [Section IV E] and the scope of application of this article [Section IV F]. The third part of the chapter contains an analysis of the concept of reasonable accommodation and the way in which it differs from accessibility [Section V]. The fourth part examines the concept of ‘Universal Design’ and explains the difference between this concept and that of accessibility [Section VI].

II. ACCESSIBILITY

A. ACCESSIBILITY IN INTERNATIONAL LAW

As I have noted above, accessibility constitutes a core element of the UNCRPD. Accessibility, as a concept, allows the participation of people with disabilities in society possible.¹¹ The importance of accessibility within the context of the UNCRPD is evident in many scholarly comments. *Rosemary Kayess* has stated that ‘accessibility is core as it brings to life substantive equality’¹², while *Rune Halvorsen* considers accessibility as a ‘key general principle’ and part of the ‘main normative direction’ of the Convention.¹³

¹¹ M. Jones, in M.H. Rioux, L.A. Basser and M. Jones (eds.), *Critical Perspectives on Human Rights and Disability Law*, p. 60.

¹² R. Kayess, *CRPD and Disability Discrimination*, a paper given at the ‘Strengthening EU-UN Co-operation in the Struggle against all Forms of Discrimination’ seminar organised by EU and OHCHR, 14 October 2009, Brussels; J.E. Lord, ‘Accessibility and Human Rights fusion in the CRPD: Assessing the scope and the content of the accessibility principle and duty under CRPD’, *Harvard School of Law and DARE Presentation for the General Day of Discussion on Accessibility* (2010), www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD7102010.aspx, p. 2 (accessed 17 January 2018).

¹³ R. Halvorsen, *The Accessibility Principle in the UN Convention on the Rights of Persons with Disabilities and Implication for EU Disability Law and Policy*, paper prepared for EFC CRPD Implementation Project, 2009 (on file with author); J.E. Lord, *Harvard School of Law and DARE Presentation for the General Day of Discussion on Accessibility* (2010), p. 2 (accessed 17 January 2018).

Despite the importance of accessibility as a facilitator for the participation of people with disabilities in everyday life, accessibility in the context of disability has never been mentioned in the text of any international human rights treaty before. Nevertheless, this concept has been included in several non-binding international instruments. For example, the World Programme of Action (WPA) concerning Disabled Persons, which was the guiding instrument for the United Nations Decade of Disabled Persons from 1982–1993, referred to accessibility as a disability rights’ principle.¹⁴ Accessibility was part of the third goal of this Programme: the ‘equalization of opportunities’.¹⁵ The equalisation of opportunities is defined as ‘the process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilities are made accessible to all’.¹⁶

Based on the idea of equalisation of opportunities that is found in the World Programme of Action, the UN Commitment to Advancement of the Status of Persons with Disabilities specifically referred to the built environment and technologies by stating:

‘One of the most important concerns is accessibility: to new technologies, in particular information and communications technologies, as well as to the physical environment. The notion of ‘mainstreaming’ will also be given prominence, that is, including a disability dimension in policy recommendations covering a wide spectrum of social and economic concerns’.¹⁷

Another important instrument that makes reference to accessibility is the Standard Rules on the Equalization of Opportunities for Persons with Disabilities that were adopted by the UN General Assembly in 1993.¹⁸ Accessibility is explicitly addressed in the ‘Target Areas for Equal Participation’.¹⁹

¹⁴ UN General Assembly Resolution 37/52, World Programme of Action concerning Disabled Persons, of 3 December 1982; B. Dion and C. Waddell, *Technical Paper on Accessibility and the United Nations Convention on the Rights of Persons with Disabilities, For an Inclusive and accessible society for all*, prepared for the United Nations as background documentation for the United Nations Expert Group Meeting on Accessibility: Innovative and cost-effective approaches for inclusive and accessible development, Washington D.C., 28–30 June 2010, 7 October 2010, p. 10–11.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ UN General Assembly Resolution 48/96, Standard Rules on the Equalization of Opportunities for Persons with Disabilities, of 20 December 1993.

¹⁹ B. Dion and C. Waddell, *Technical Paper on Accessibility and the United Nations Convention on the Rights of Persons with Disabilities, For an Inclusive and accessible society for all*, prepared for the United Nations as background documentation for the United Nations Expert Group Meeting on Accessibility: Innovative and cost-effective approaches for inclusive and accessible development, Washington D.C., 28–30 June 2010, 7 October 2010, p. 10–11; UN General Assembly Resolution 48/96, Standard Rules on the Equalization of Opportunities for Persons with Disabilities, of 20 December 1993.

Prior to the adoption of the UNCRPD, the Standard Rules served as an inspiration and the main source of guidance for interpreting disability rights at both the national and international level.²⁰ This is particularly evident from General Comment No. 5 of the CESCR which was rendered in 1994 and which makes direct references to the Standard Rules.²¹ This General Comment also refers to accessibility as an important factor for the implementation of the substantive rights that are contained in the International Covenant on Economic, Social and Cultural Rights.

Accessibility is mentioned several times throughout the UNCRPD. Firstly, an implicit connection is made between accessibility and the concept of disability. The Preamble to the UNCRPD states that:

‘Disability is an evolving concept and results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder full and effective participation in society on an equal basis with others.’²²

Simple things, such as using public transportation to commute to work, using the internet or domestic appliances and watching television, are activities that entail many barriers for people with disabilities as these goods and services might not be accessible to them. Thus, accessibility contributes to the eradication of such barriers and thereby enables people with disabilities to fully participate in society.

Secondly, the Preamble also makes reference to actions that are related to accessibility, such as the World Programme of Action and Standard Rules on the Equalization of Opportunities for Persons with Disabilities, mainstreaming of disability issues, barriers to participation, the need for accessible information about assistive technologies and accessibility of the physical, social, economic and cultural environment as well as to health and education and information and communication.²³

Thirdly, accessibility is considered to be a general principle of the Convention.²⁴ It contributes towards the achievement of the purpose of the

²⁰ B. Dion and C. Waddell, *Technical Paper on Accessibility and the United Nations Convention on the Rights of Persons with Disabilities, For an Inclusive and accessible society for all*, prepared for the United Nations as background documentation for the United Nations Expert Group Meeting on Accessibility: Innovative and cost-effective approaches for inclusive and accessible development, Washington D.C., 28–30 June 2010, 7 October 2010, p. 11.

²¹ Committee on Economic, Social and Cultural Rights, General Comment No. 5, Persons with Disabilities, 1994.

²² Preamble (e) UNCRPD.

²³ Preamble (f), (g), (h), (k) and (v) UNCRPD; B. Dion and C. Waddell, *Technical Paper on Accessibility and the United Nations Convention on the Rights of Persons with Disabilities, For an Inclusive and accessible society for all*, prepared for the United Nations as background documentation for the United Nations Expert Group Meeting on Accessibility: Innovative and cost-effective approaches for inclusive and accessible development, Washington D.C., 28–30 June 2010, 7 October 2010, p. 19–20.

²⁴ Article 3 UNCRPD.

Convention, namely to ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities. It is also included within the General Obligations of the Convention.²⁵ The Convention requires, in that regard, that States Parties should provide, in accessible formats, information about 'mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities' to people with disabilities.²⁶

Fourthly and significantly, accessibility is addressed in a stand-alone article of the UNCRPD. Article 9 UNCRPD seeks to enable persons with disabilities to live independently and fully participate in all aspects of life by securing the removal of barriers to accessibility.²⁷

Fifthly, accessibility appears in several substantive rights of the Convention in the form of accessibility obligations. In particular, accessibility is mentioned in the articles on the right to freedom of expression and opinion and access to information²⁸, work and employment²⁹, participation in political and public life³⁰ and participation in cultural life, recreation, leisure and sport.³¹

Lastly, the UNCRPD states that data and statistics on the implementation of the UNCRPD, the programmes related to international cooperation³², as well as the text of the UNCRPD³³, should be easily accessible to persons with disabilities.

B. 'ACCESSIBILITY OF' AND 'ACCESS TO'

It is important to note, before moving on to the analysis of the concept of accessibility, that the concepts of 'accessibility' of a service and 'access to' a service are different and distinct concepts. It is arguable that access to a good or service is connected to accessibility of a good or service, but it is not true to say that they are the same. The right to have access to a good or a service is well-established in international human rights law. The ICCPR states that every citizen has a right to have access, on general terms of equality, to public service positions in his or her country.³⁴ Moreover, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) guarantees everyone the right of access to any place or service that is intended for use by the general public, without discrimination, on the basis of race, colour, or national

²⁵ Article 4 (1) (h) UNCRPD.

²⁶ Article 4 (1) (h) UNCRPD.

²⁷ Article 9 UNCRPD.

²⁸ Article 21 UNCRPD.

²⁹ Article 27 UNCRPD.

³⁰ Article 29 UNCRPD.

³¹ Article 30 UNCRPD.

³² Articles 31 and 32 UNCRPD.

³³ Article 49 UNCRPD.

³⁴ Article 25 (c) ICCPR.

or ethnic origin.³⁵ In other words, access to a good or service is the right of everyone to use a good or service, or in more general terms, to enjoy a good or service on equal terms with others.

Persons with disabilities face technical and environmental barriers to ‘accessibility of’ the environment, such as the absence of lifts in multi-floor buildings and a lack of information in accessible formats, as well as the attitudinal barriers and other forms of discrimination that impede their access to goods and services.³⁶ These barriers can be removed, *inter alia*, through the application of accessibility standards. Thus, accessibility of a good or service is guaranteed when these technical and environmental barriers that do not allow people with disabilities to enjoy their right of access to a good or service are removed.

In the context of the UNCRPD, the implementation of ‘accessibility of’ the environment aims to address the particular needs of people with disabilities and to guarantee that people with disabilities will enjoy accessible environments, goods and services. The Convention also refers to Universal Design. Universal Design is defined in the Convention as the ‘design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design’.³⁷ Thus, while Universal Design is a design that addresses the particular needs of all people, the implementation of accessibility standards addresses the particular needs of people with disabilities.

Access to a good or service is a right that is applicable to all, including people with disabilities. Furthermore, the right of access to a good or service is broader in scope than the accessibility of a good or service. For example, the right of everyone to have access to education, as interpreted by the Committee on Economic Social and Cultural Rights, includes³⁸:

- ‘(a) Availability – functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party (..);
- (b) Accessibility – educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party (..);
- (c) Acceptability – the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents (..); and
- (d) Adaptability – education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings’.³⁹

³⁵ Article 5 (f) ICERD.

³⁶ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, p. 2.

³⁷ Article 2 UNCRPD.

³⁸ Committee on Economic, Social and Cultural Rights General Comment No. 13, The right to education, 1999.

³⁹ Ibid.

Thus, in this instance, the CESCR's interpretation of the positive duties to provide access to education accounts for several elements, including the accessibility of education. Thus, the concept of 'accessibility of' is subsumed under the broader concept of 'access to'. The same can be said with regard to the elements of access to healthcare in the context of General Comment No. 14 on the right to the highest attainable standard of health.⁴⁰ In order to make the distinction between accessibility of a good or service and access to a good or service evident, I will provide two examples from the field of education and insurance services.

Accessibility of education requires, amongst other things, the adjustment of the education syllabus to the particular needs of people with disabilities, such as providing books in accessible formats for blind people or the provision of sign language interpreters for deaf people. Yet, if a blind person is explicitly denied access to a mainstream school, and is instead placed in a segregated-special school, this will constitute a violation of their right to access education and it will constitute a form of discrimination on the basis of disability, regardless of whether the segregated-special school provides books that are accessible to blind users.

In the field of insurance, companies do not often provide certain kinds of insurance products, like car insurance and life insurance for certain people with disabilities, or if they do then they typically charge higher premiums for those products.⁴¹ That does not exclude the possibility of the insurance company's office being fully accessible, or that they provide information in accessible formats. Thus, insurance services might be accessible, but at the same time they might discriminate against persons with disabilities by depriving them of the right to have access to such services.

The above analysis shows that when human rights treaties refer to the right to access a good or service, they do not necessarily refer to disability accessibility, as the former covers all people, while the latter targets people with disabilities. Indeed, the right of access is a broader concept and includes disability accessibility within its ambit. Nevertheless, it is important to note that the UNCRPD guarantees both the right of access and accessibility. This is evident in the number of references to these terms in the Convention with regard to the general obligations of UNCRPD and the substantive rights thereof, as I extensively explain in part IV of this chapter.

⁴⁰ Committee on Economic, Social and Cultural Rights General Comment No. 14, The right to the highest attainable standard of health, 2000.

⁴¹ J. Newfield, 'Ways Disability Insurance Companies Use to Deny Claims', *Disabled World* (2011), www.disabled-world.com/disability/insurance/claims/denying.php#sthash.3hJN2rID.dpuf-last (accessed 17 January 2018).

C. DIMENSIONS OF ACCESSIBILITY

Accessibility is not defined in either the UNCRPD or General Comment No. 2 of the Committee on the Rights of Persons with Disabilities (CRPD Committee). Even though several proposals⁴² for a definition were put forward during the drafting process of the UNCRPD, none of the proposals were ultimately adopted by the drafters of the Convention. Instead of focusing on a definition of accessibility, it might be better to use a different approach for the purposes of understanding this concept. Accessibility comprises several aspects, according to the, following the analysis of *Schulze*⁴³ in combination with General Comment No. 14 of the CESCR. In particular, accessibility has the following dimensions: attitudinal accessibility, economic accessibility or affordability, physical accessibility, information accessibility and communication accessibility.

i. Social or attitudinal accessibility

Accessibility has a social or attitudinal aspect.⁴⁴ This dimension of accessibility refers to the removal of stigma and other negative behaviour that people with disabilities, their families and their caretakers experience throughout their lives.⁴⁵ Stigma is ‘any persistent characteristic of an individual or group that evokes negative or punitive responses from others’.⁴⁶ Stigma arises most commonly as a result of the lack of awareness that non-disabled people have with regard to disability. One common way to measure the stigmatisation of people with disabilities by society is reference to ‘social distance’.⁴⁷ This approach examines how comfortable a person without disabilities feels when interacting with a disabled person.⁴⁸ Based on this indicator, the disabled people who face the highest level of stigma are persons with mental illnesses and persons with

⁴² See, Bangkok recommendations on the elaboration of a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities; T. Minkowitz, ‘Accessibility as a right of users and survivors of psychiatry with psychological disabilities’, *Submission of the World Network of Users and Survivors of Psychiatry (WNUSP) to the Committee on the Rights of Persons with Disabilities for its day of General discussion on CRPD Article 9* (2010), www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD7102010.aspx (accessed 17 January 2018).

⁴³ M. Schulze, *Handicap International* (2010), p. 46; S. Charitakis, ‘An Introduction to the Disability Strategy 2010–2020, with a focus on Accessibility’, *Ars Aequi* (2013).

⁴⁴ J.E. Lord, *Harvard School of Law and DARE Presentation for the General Day of Discussion on Accessibility* (2010), www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD7102010.aspx, p. 4–5; Committee on Economic, Social and Cultural Rights General Comment No. 14, The right to the highest attainable standard of health, 2000; M. Schulze, *Handicap International* (2010), p. 46.

⁴⁵ *Ibid.*

⁴⁶ R. Westerholm et al., ‘Stigma’, in G. Albrecht et al. (eds.), *Encyclopedia of disability* (Sage, 2006), p. 1503.

⁴⁷ L. Shur, D. Kruse and P. Blanck, *People with Disabilities: Side-lined or Mainstreamed?* (Cambridge University Press, 2013), p. 119.

⁴⁸ *Ibid.*

intellectual disabilities, while the level of stigma of people with sensory and mobility impairments is comparatively lower.⁴⁹

Thus, with a view to removing the existing accessibility barriers and preventing the emergence of new ones, it is essential to change the attitudes that some people have towards persons with disabilities and to fight against stigma and discrimination.⁵⁰ In that regard, it is essential to promote ongoing education efforts, awareness-raising, cultural campaigns and communication on the subject of disability.⁵¹

ii. Economic accessibility or affordability

Accessibility includes an affordability aspect within its scope.⁵² This dimension of accessibility expresses the idea that facilities, goods and services must be affordable to people with disabilities. Affordability can be divided into two separate, but nevertheless interrelated, aspects. The first aspect reflects the economic capacity of people with disabilities to afford the costs of using such facilities, goods and services.⁵³ It is connected to the direct prices of goods and services or facilities, related expenses and the opportunity costs related to loss of income.⁵⁴ Such costs can vary depending on the type of good, service or facility in question.⁵⁵

The second dimension of affordability refers to the capacity of people with disabilities to generate economic resources, through income, savings or loans so as to pay for goods, services and facilities. Such capacity can be restricted by issues such as social exclusion, poverty and indebtedness.⁵⁶ In that regard it is important to note that people with disabilities and their families are more likely to experience economic and social disadvantage than those without disabilities. To illustrate this, *Parckar*⁵⁷ estimates that approximately three million people with disabilities in the United Kingdom are living in poverty, and that the risk of being in that situation is twice as high for people with disabilities than for people without disabilities.

⁴⁹ Ibid; J. Kersh, 'Attitudes about people with intellectual disabilities: Current status and new directions', in R. M. Hodapp (ed.), *International Review of Research in Developmental Disabilities* (Oxford Academic Press, 2011); K. Scior, 'Public awareness, attitudes and beliefs regarding intellectual disability: A systematic review', 32 *Research in Developmental Disabilities* (2011).

⁵⁰ L. Shur, D. Kruse and P. Blanck, *People with Disabilities: Side-lined or Mainstreamed?*, p. 119.

⁵¹ Ibid.

⁵² M. Schulze, *Handicap International* (2010), p. 46; J.E. Lord, *Harvard School of Law and DARE Presentation for the General Day of Discussion on Accessibility* (2010), p. 5; Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health, 2000.

⁵³ J. Levesque, M. Harris and G. Russell, 'Patient-centred access to health care: conceptualising access at the interface of health systems and populations', 12 *International Journal for Equity in Health* (2013), p. 6.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ G. Parckar, 'Disability Poverty in the UK', *Leonard Cheshire Disability* (2008), www.lcdisability.org/?lid=6386 (accessed 17 January 2018).

Furthermore, households with a disabled person(s) have lower average incomes. A 2010 study of economic inequality experienced by people with disabilities in Spain – using data from the Survey on Disabilities, Personal Autonomy and Dependency Situations⁵⁸ – identified that such households have an average income that is 23% less than households without people with disabilities. Close to half (45.4%) of households with a disabled person(s) have a monthly income of less than € 1,000, compared with the percentage of 25.6% in the context of households without a disabled person(s).

In addition, *Sen* argues that poverty is not only associated with the level of income, but it also relates to the capacity of a person to use that money to reach full participation in society.⁵⁹ He indicates that there are two ways in which poverty ‘handicaps’ people with disabilities: the ‘earning handicap’ and the ‘conversion handicap’.⁶⁰ The first refers to the fact that people with disabilities face more challenges when searching for a job, or retaining it. The ‘earning handicap’ also pays attention to the fact that disabled individuals often receive lower salaries than non-disabled individuals.⁶¹ The second ‘handicap’ that is identified by *Sen* refers to the ability of people with disabilities to convert their income to whatever good or service they need to.⁶² A disabled person might need a larger income in order to afford the same items as individuals without disabilities.⁶³ This can be explained, by way of example, by the fact that people with disabilities may require assistance, which might take the form of using a wheelchair, hearing aids, assistance dogs, interpreters or personal support, in order for them to either move or hear.⁶⁴ Accessible goods, services or facilities may also be more expensive than standard goods, services or facilities which can be used by persons without disabilities. Thus, as *Sen* notes:

‘[W]ith the same level of income a disabled person may be able to do far fewer things, and may be seriously deprived in terms of the capabilities that he or she has reason to value. For the same reason for which disability makes it harder to earn an income, disability also makes it harder to convert income into the freedom to live well’.⁶⁵

⁵⁸ A. Jiménez and A. Huete, *Estudio sobre el agravio comparativo económico que origina la discapacidad*. (Ministry of Health and Social Policy, 2010).

⁵⁹ A. Sen, *Inequality re-examined* (Russell Sage Foundation, 1999); A. Sen, ‘Social exclusion: Concept, application and scrutiny’, *No. 1. Social Development Papers* (2000), <https://www.adb.org/sites/default/files/publication/29778/social-exclusion.pdf>; M. Nussbaum, *Frontiers of justice* (Harvard University Press, 2006); M. Jones, in M.H. Rioux, L.A. Basser and M. Jones (eds.), *Critical Perspectives on Human Rights and Disability Law*, p. 68.

⁶⁰ M. Jones, in M.H. Rioux, L.A. Basser and M. Jones (eds.), *Critical Perspectives on Human Rights and Disability Law*, p. 68.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ A. Sen, *Disability and justice, Disability and Inclusive Development*, Conference-Keynote, Washington, p. 3; M. Jones, in M.H. Rioux, L.A. Basser and M. Jones (eds.), *Critical Perspectives on Human Rights and Disability Law*, p. 69.

Affordability should not only be understood as reducing the cost of an accessible good, service or facility that is placed on the market so as to match the price of the ordinary product, which reflects the first dimension of affordability; it should also include measures to support the capacity of people with disabilities to pay for such services, especially considering that people with disabilities are twice as likely to be living in poverty and given the fact that they face both the ‘earning handicap’ and the ‘conversion handicap’.

iii. Physical accessibility

Accessibility has a physical aspect that interrelates with the physical environment.⁶⁶ This type of accessibility requires that all physical environments, including facilities, goods and services, should be adjusted so that they are accessible to persons with disabilities, with or without assistance.⁶⁷ According to the European Disability Forum’s (EDF) response to the consultation on the European Accessibility Act⁶⁸, the main barriers that persons with disabilities face in relation to the physical accessibility of services are barriers, ‘to the physical environment in which the service is provided, to adequate transport to and from the place of the service provision, to accessing information and communication (including ICT), as well as to material provided, to be allowed to be accompanied by a non-paying assistant and a guide dog’.⁶⁹ As far as the physical accessibility of goods is concerned, EDF referred, in the same document, to the main barriers that people with disabilities typically encounter. These relate to: packaging of the goods, safety when using those products, barriers to the physical environment where goods are available and the lack of availability of accessible mainstream goods.⁷⁰ As a result, physical accessibility includes several dimensions.

The first dimension is the actual availability of accessible goods, services and facilities. People with disabilities should be able to choose, in a timely manner,

⁶⁶ J.E. Lord, *Harvard School of Law and DARE Presentation for the General Day of Discussion on Accessibility* (2010), p. 4–5; M. Schulze, *Handicap International* (2010), p. 46; Committee on Economic, Social and Cultural Rights General Comment No. 14, The right to the highest attainable standard of health, 2000.

⁶⁷ EDF, ‘EDF Response to the Public Consultation with a View to a European Accessibility Act, March 2012’, *EDF* (2012), www.edf-feph.org/search/node/EDF%20Response%20to%20the%20Public%20Consultation%20with%20a%20View%20to%20a%20European%20Accessibility%20Act, p. 5 (accessed 17 January 2018).

⁶⁸ 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 the accessibility requirements for products and services, COM(2015) 0615 final; the European Accessibility Act is a proposed EU directive that aims to facilitate the implementation of Article 9 UNCRPD and to improve the functioning of the EU internal market through the harmonisation of national laws, regulations and administrative provisions of the EU Member States.

⁶⁹ *Ibid.*

⁷⁰ EDF, ‘EDF Response to the Public Consultation with a View to a European Accessibility Act, March 2012’, *EDF* (2012), p. 15.

from a catalogue of goods, services and facilities that are accessible to them. For example, in order to determine whether an accessible mobile phone is available to people with disabilities it is important to examine whether an effective distribution mechanism of, and a responsive market for, this technology actually exists.⁷¹

The second aspect of physical accessibility is the usability of goods, services and facilities.⁷² Usability is the extent to which a good, service or facility is usable by people with the widest range of disabilities. People with disabilities should be able to perceive, understand, navigate and interact with a good, service or facility in the most effective manner. In that regard, the removal of barriers to accessibility, by adjusting the built environment, is essential.⁷³ The third dimension of physical accessibility is safety: people with disabilities should be able to use goods, services and facilities without being exposed to danger, risk or injury.

The fourth aspect of physical accessibility is the user-friendliness⁷⁴ of a good, service or facility. Goods, services or facilities should be used by people with disabilities with ease and in an effective, efficient and satisfying fashion. In addition, people with disabilities should be able to easily understand the way in which goods, services or facilities are used.

iv. Information accessibility

Another dimension of accessibility is information accessibility.⁷⁵ This type of accessibility refers to the fact that people with disabilities are entitled, on an equal basis with others, to seek, receive and impart information and ideas. The human right that is most closely connected to information accessibility is the right to freedom of expression and, in particular, the right of everyone to have access to information.⁷⁶ The right of people with disabilities to have access to information plays an essential role in facilitating the enjoyment of accessible facilities, goods and services. Without access to information about the level of accessibility of a facility, people with disabilities might face accessibility barriers, even if the building meets accessibility standards.

⁷¹ J.E. Lord, *Harvard School of Law and DARE Presentation for the General Day of Discussion on Accessibility* (2010), p. 12.

⁷² J. Levesque, M. Harris and G. Russell, 12 *International Journal for Equity in Health* (2013), p. 6.

⁷³ *Ibid.*

⁷⁴ EDF, 'EDF Response to the Public Consultation with a View to a European Accessibility Act, March 2012', *EDF* (2012), p. 15.

⁷⁵ M. Schulze, *Handicap International* (2010), p. 47; J.E. Lord, *Harvard School of Law and DARE Presentation for the General Day of Discussion on Accessibility* (2010), p. 4–5; Committee on Economic, Social and Cultural Rights General Comment No. 14, The right to the highest attainable standard of health, 2000.

⁷⁶ Article 19 ICCPR.

Information accessibility includes general information about facilities, goods and services that is available to all, but also information about the accessibility of facilities, goods and services. People with disabilities are entitled to be appropriately informed so as to be empowered to identify the existence of goods, services and utilities that they need the availability thereof and the way they can obtain them. They should also be empowered to make informed choices about using them, in the same way that non-disabled people are able to. Transparency, the availability of information relating to facilities, goods and services and outreach activities can all contribute to the level of information accessibility.⁷⁷ In addition, people with disabilities are entitled to receive information on the accessibility features of goods, services and facilities so that they are able to make an informed decision. Moreover, they are entitled to be informed about whether assistance is available when services are provided and when accessing facilities. This includes information on accessible goods, facilities and services, warranty conditions and user manuals, including electronic information and communication materials.⁷⁸

Information accessibility differs from the physical aspect of accessibility because, in the case of physical accessibility, the obligation is to adjust the physical environment to accommodate people with disabilities, while in the case of information accessibility, the obligation is to make information available to people with disabilities.

v. *Communication accessibility*

The last aspect of accessibility that I will analyse is the communication aspect.⁷⁹ This type of accessibility concerns the supply of information in alternative modes and means of communication, such as Braille, big print and audio, and for all types of persons with disabilities, including providing reading formats and communicating in a way that is accessible to people with intellectual and learning impairments.^{80, 81} The difference between this type of accessibility and the information aspect of accessibility is that the former (communication accessibility) refers to the format in which the information is provided to

⁷⁷ J. Levesque, M. Harris and G. Russell, 12 *International Journal for Equity in Health* (2013), p. 5.

⁷⁸ EDF, 'EDF Response to the Public Consultation with a View to a European Accessibility Act, March 2012', *EDF* (2012), p. 15.

⁷⁹ M. Schulze, *Handicap International* (2010), p. 47; J.E. Lord, *Harvard School of Law and DARE Presentation for the General Day of Discussion on Accessibility, 7 October 2010* (2010), p. 4–5; Committee on Economic, Social and Cultural Rights General Comment No. 14, The right to the highest attainable standard of health, 2000.

⁸⁰ M. Schulze, *Handicap International* (2010), p. 47.

⁸¹ *Ibid.*; J.E. Lord, *Harvard School of Law and DARE Presentation for the General Day of Discussion on Accessibility, 7 October 2010* (2010), p. 4–5; Committee on Economic, Social and Cultural Rights General Comment No. 14, The right to the highest attainable standard of health, 2000.

disabled persons (which should be accessible) whereas the latter refers to the content of the information that a person with disabilities is entitled to receive.

D. ACCESSIBILITY AS A UNCRPD GENERAL PRINCIPLE

Accessibility is a general principle pursuant to Article 3 UNCRPD.⁸² The choice of the drafters of the UNCRPD to propose and adopt an article on general principles is a new feature in the drafting of human rights treaties.⁸³ General principles constitute the cornerstone of the UNCRPD and lay the groundwork for changes in legislation, policies and practice.⁸⁴ As a general principle that is found in Article 3 of the UNCRPD, accessibility supports the purpose of the Convention, namely to ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities.⁸⁵ There are at least two ways of comprehending and using accessibility as a general principle. Firstly, general principles should be considered as filters through which it can be examined whether existing law is in conformity with the UNCRPD.⁸⁶ This means that the accessibility principle should be used by States Parties to the UNCRPD in order to examine the conformity of national legislation with the Convention. Secondly, general principles should be considered as an interpretive tool, whose purpose is to guide the implementation of the UNCRPD, particularly in relation to its specific substantive rights.⁸⁷ The International Court of Justice stated in the *Gulf of Maine* case that a general principle should ‘serve as a rule of fundamental and general character which gives specific, particularized application’.⁸⁸ In other words, in the case of the UNCRPD, the general principle of accessibility must be taken into consideration, as a cross-cutting principle of the Convention, in the implementation of the substantive articles of the UNCRPD.⁸⁹ This function of the general principle of accessibility is essential because most of the substantive rights of the Convention do not entail obligations related to accessibility.

⁸² Article 9 UNCRPD.

⁸³ M. Schulze, *Handicap International* (2010), p. 44.

⁸⁴ *Ibid.*

⁸⁵ V. Della Finna, ‘Article 3 [General Principles]’, in V. Della Finna, R. Cera and G. Palmisano (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, p. 130.

⁸⁶ J.E. Lord, *Harvard School of Law and DARE Presentation for the General Day of Discussion on Accessibility, 7 October 2010* (2010), p. 6.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*; ICJ, *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada. v. U.S.A.), 1984 ICJ Reports, p. 165 (Oct. 12).

⁸⁹ OHCHR, ‘Written comments by the Mental Disability Advocacy Centre, submitted to the Committee on the Rights of Persons with Disabilities, on its day of General Discussion on Article 9, the right to accessibility of the Convention on the Rights of Persons with Disabilities’, *OHCHR* (2010), www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD7102010.aspx (accessed 17 January 2018).

To illustrate the application of accessibility as a principle of the UNCRPD, I will provide an example below on how accessibility – in all its dimensions – can be implemented in the context of the right to vote.⁹⁰ Article 29 (a) of the UNCRPD states as follows:

‘States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:

- a. Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, *inter alia*, by:
 - i. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;
 - ii. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;
 - iii. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice.’⁹¹

It is evident from the text of this article that accessibility is already mentioned in the context of the right to vote.⁹² The article requires that States Parties to the Convention should ensure that voting facilities, as well as voting procedures and materials, are physically accessible to people with disabilities. At the same time, it requires states to facilitate the use of assistive and new technologies⁹³ and assistance, preferably by a person the voter with disabilities trusts⁹⁴, to guarantee that voting procedures are accessible to people with disabilities.

Having reviewed the application of the principle of accessibility in the context of the right to vote, I will now analyse how each aspect of accessibility applies in the context of Article 29 UNCRPD. To begin with the attitudinal aspect of accessibility, it is important to combat the preconceptions that are related to the capacity of people with disabilities to vote, particularly those with psychosocial disabilities and with intellectual disabilities. This stigma is reflected in the legislation of many countries that ban certain people with disabilities from voting.⁹⁵ Yet, even

⁹⁰ Article 29 (a) UNCRPD.

⁹¹ Article 29 (a) UNCRPD.

⁹² Article 29 (a) (i) UNCRPD.

⁹³ Article 29 (a) (ii) UNCRPD.

⁹⁴ Article 29 (a) (iii) UNCRPD.

⁹⁵ Fundamental Rights Agency, ‘(FRA) Report, The right to political participation of persons with mental health problems and persons with intellectual disabilities’, *Fundamental Rights Agency* (2010), <http://fra.europa.eu/en/publication/2010/right-political-participation-persons-mental-health-problems-and-persons>.

where this is not the case, prejudice against people with disabilities can translate into attitudes and practices that are patronising, offensive and which violate their human dignity. In turn, this can violate their right to cast a secret ballot. This could be highly likely in the case of personal assistance that is provided to people with disabilities by the state, if the personnel are not trained in that regard.

As far as affordability is concerned, it is important that people with disabilities are not financially burdened by the assistance provided to them by the State in voting in elections. The same applies to any disability-specific measure that is adopted by the government in order to facilitate persons with disabilities in casting their vote, for instance in the context of e-voting.

With regard to physical accessibility, Article 29 UNCRPD requires that facilities and materials should be accessible to people with disabilities. In particular, it should be noted that there must be a sufficient number of voting facilities so as to allow people with disabilities to vote in a timely manner and to ensure that this does not cause them any additional pressure or frustration. In that regard, some flexibility in relation to voting facilities is necessary for people with disabilities. Moreover, it is not just the voting facilities that should be physically accessible to people with disabilities, but States Parties to the Convention should also ensure that people with disabilities are able to reach voting facilities and this means providing accessible public transport thereto. The safety of facilities and voting machines that may potentially be used should also be guaranteed by the States Parties to the Convention. Lastly, as is mentioned in Article 29 UNCRPD, the use of assistive and new technologies and personal assistance should be facilitated.

In relation to information accessibility, people with disabilities are entitled to information with regard to the voting process, and in particular, information about voting registration, where required, and information about the electoral system, including how, where and when to cast their vote.⁹⁶ This includes information about the use of voting machines and e-voting, if available, and the method used for casting votes. People with disabilities are also entitled to receive information about political parties and the candidates that are participating in elections as well as their competing ideas, policies and platforms⁹⁷, so that they are able to make an informed decision about the party and candidate to support. Lastly, people with disabilities are entitled to receive information about the level of physical accessibility of the voting process. This includes information about materials and facilities, including alternative methods of voting, such as e-voting or voting machines, and the availability of assistance or whether personal assistance is allowed in that context.

The last dimension of accessibility is communication accessibility. According to this aspect of accessibility, all the information that people with disabilities are

⁹⁶ M. Jones, in M.H. Rioux, L.A. Basser and M. Jones (eds.), *Critical Perspectives on Human Rights and Disability Law*, p. 73.

⁹⁷ Ibid.

entitled to receive in the context of the right to vote should be provided in accessible formats, such as Braille, large print and audio. The information should also be provided in forms that are intelligible to people with intellectual impairments.⁹⁸

Lastly, the compatibility of existing national legislation on the right to vote with the accessibility obligations of the UNCRPD should be examined. If national laws that create barriers to accessibility exist then it follows that they should be altered or removed, as they violate the object and purpose of the UNCRPD.

In the next part of this chapter, I will interpret Article 9 UNCRPD with a view to acquiring a better understanding of accessibility in the context of the UNCRPD. To perform this interpretive task, I will apply the interpretive rules that are contained in the VCLT.

III. THE VCLT METHODS OF INTERPRETATION

In this section of the chapter, I will present the Vienna Convention on the Law of Treaties and its various methodological tools. Those tools will be used to interpret the relevant provisions of the UNCRPD.

The VCLT's rules of interpretation are spelled out in Articles 31 and 32 VCLT. Article 31 VCLT includes the general rules of interpretation and stipulates that:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - a. Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - b. Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - a. Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - c. Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.⁹⁹

⁹⁸ M. Jones, in M.H. Rioux, L.A. Bassar and M. Jones (eds.), *Critical Perspectives on Human Rights and Disability Law*, p. 74.

⁹⁹ Article 31 VCLT.

The methods of interpretation that Article 31 VCLT provides for refer to the text, the context and the object and the purpose of the treaty at hand.

Article 32 VCLT refers to the supplementary means of interpretation and it reads as follows:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- a. Leaves the meaning ambiguous or obscure; or
- b. Leads to a result which is manifestly absurd or unreasonable.¹⁰⁰

Article 32 VCLT provides that the original intention of the drafters, as reflected in the *travaux préparatoires* of the treaty at hand, should be considered as a supplementary means of interpretation.

Most of the rules of interpretation that are found in the VCLT are considered to be part of customary international law.¹⁰¹ This is reaffirmed by the case law of the International Court of Justice, and other international courts and tribunals, such as, the World Trade Organisation (WTO) Appellate Body.¹⁰² The International Law Commission has rejected the idea that when interpreting a treaty, one must give more weight to one particular factor, such as the text, or the object and the purpose of the treaty or the intention of the parties.¹⁰³ The exclusive reliance on one of these factors is therefore unlikely to produce satisfactory results.¹⁰⁴

There has been debate about the way in which the interpretive techniques in Article 31 VCLT should be understood.¹⁰⁵ Some scholars have argued that Article 31 VCLT imposes a literal ordering, whereby the methods of interpretation included in this article should be applied in the order in which they appear,

¹⁰⁰ Article 32 VCLT.

¹⁰¹ ICJ, Case concerning the application of the Convention on the prevention and punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), 2007, ICJ Reports, p. 43, (Febr. 26), para. 160; B. Schlutter, 'Aspects of human rights interpretation by the UN treaty bodies', in H. Keller and G. Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy*, p. 262.

¹⁰² ICJ, Case concerning the Territorial Dispute (*Libya v. Chad*), 1994 ICJ Reports, p. 7 (Feb. 3), para. 21; J. Cameron and K.R. Gray, 'Principles of International Law in The WTO Dispute Settlement Body', 50 *International and Comparative Law Quarterly* (2001), p. 248.

¹⁰³ A. Aust, *Modern Treaty Law and Practice* (2nd edition, Cambridge University Press, 2007), p. 231.

¹⁰⁴ See, H. Thirlway, 'The Law and procedure of the International court of Justice 1960–1989', 80 *British Yearbook of International Law* (2009), p. 16–17, and, J. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005), p. 48–74; A. Aust, *Modern Treaty Law and Practice*, p. 231.

¹⁰⁵ See, R Gardiner, *Treaty Interpretation* (Oxford University Press, 2008); B. Cali, 'Specialised Rules of Treaty Interpretation: Human Rights', in D.B. Hollis (ed.), *Oxford Guide to Treaties* (Oxford University Press, 2012), p. 526.

starting with textual interpretation, followed by contextual interpretation and interpretation according to the object and the purpose of the treaty at hand.¹⁰⁶ According to that approach, it is only when the wording of the text is not clear should the interpretation be based on the context of the treaty at hand or the object and purpose of that treaty.¹⁰⁷ If the application of the contextual method of interpretation does not clarify the particular provision under examination, then the use of the object and the purpose of the treaty is regarded as the last resort.¹⁰⁸

Since 1969, there has been wide scholarly support for a holistic approach to the interpretation of Article 31 VCLT.¹⁰⁹ This approach prioritises the judgement of the interpreter, as far as the interactions between the interpretive methods of Article 31 VCLT are concerned.¹¹⁰ The first appearance of this understanding of Article 31 VCLT can be found in the ILC Commentaries on the draft VCLT, which describes the interpretation of treaties as a ‘single combined operation’, whereby wording, context and object and purpose are ‘thrown into a crucible’.¹¹¹ This method was later called the ‘crucible approach’.¹¹² An early subscriber to this approach was the European Court of Human Rights, as was first introduced in *Golder v. United Kingdom*.¹¹³

Despite appearing to be substantially different at first glance, these two different approaches to understanding Article 31 VCLT are not that different. The prioritisation of textual interpretation as an interpretative approach might not be fundamentally different from the ‘crucible approach’ as first seems.¹¹⁴ It is arguable that if the text of a treaty is very clear and there is agreement among scholars about its content, then it might not be necessary to take further interpretive steps by using the context and object and purpose of that treaty.¹¹⁵ The fact that the text of a treaty is clear and undisputed does not imply that the treaty at hand is not in need of interpretation or that the latter interpretive methods are not connected to textual interpretation.¹¹⁶ It actually suggests

¹⁰⁶ See, A. McNair, *The Law of the Treaties* (Clarendon Press, 1961), p. 364–383; I. Sinclair, *Vienna Convention on the Law of Treaties* (2nd edition, Manchester University Press, 1984), p. 114–119; B. Cali, in D.B. Hollis (ed.), *Oxford Guide to Treaties*, p. 526.

¹⁰⁷ B. Cali, in D.B. Hollis (ed.), *Oxford Guide to Treaties*, p. 527.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid. p. 528.

¹¹⁰ A. McNair, *The Law of the Treaties*, p. 365; B. Cali, in D. B. Hollis (ed.), *Oxford Guide to Treaties*, p. 528.

¹¹¹ ILC Study Group, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 2006, UN Doc/CAN.4L.682’, *ILC* (2006), para. 428; B. Cali, in D.B. Hollis (ed.), *Oxford Guide to Treaties*, p. 528.

¹¹² R. Gardiner, *Treaty Interpretation*, p. 9–10; B. Cali, in D.B. Hollis (ed.), *Oxford Guide to Treaties*, p. 528.

¹¹³ ECtHR, *Golder v. United Kingdom*, Application No. 4451/70, Judgment of 21 February 1975, para. 30.

¹¹⁴ B. Cali, in D.B. Hollis (ed.), *Oxford Guide to Treaties*, p. 528.

¹¹⁵ Ibid.

¹¹⁶ Ibid.; see on this point and the distinction between neutral and semantic concepts, R. Dworkin, *Justice in Robes* (Harvard University Press, 2006).

that the meaning of the text of the treaty under examination is in line with the context and the object and purpose of the treaty.¹¹⁷

In the context of human rights treaties, the necessity of the ‘crucible approach’ becomes more apparent. Such treaties usually lack precision as they apply to a much broader variety of situations than most other international treaties.¹¹⁸ Thus, human rights treaty provisions need to be interpreted in view of the changing political, social and economic justifications of State policies.¹¹⁹ Thus, situations where the wording of the treaty, even when they are accompanied with a more contextual approach, can effectively explain the meaning of the text of the treaty are very limited.¹²⁰ This conclusion shows that human rights treaties require an onerous interpretive framework in order to be effectively implemented.¹²¹ In that regard, some scholars have supported the idea of the *lex specialis* nature of human rights interpretation.¹²² While others, such as *Christoffersen*, have argued that special approaches to human rights interpretations, like effectiveness and dynamic treaty interpretation – which will be analysed below – are included in the context of the VCLT. Thus, there is no need for an approach that is based on *lex specialis* in the context of interpreting human rights interpretation.¹²³

In my analysis of Article 31 and 32 VCLT, and in my interpretation of Article 9 UNCRRPD, I will rely on the ‘crucible approach’ in light of *Christoffersen*’s view of the inclusion of effectiveness and dynamic interpretation within the context of the VCLT.

A. ARTICLE 31 PARAGRAPH 1 VCLT

This article contains the ‘general rule of interpretation’ of treaties. The three main elements of this rule relate to the text, the context and the object and the purpose of the treaty. Although at first glance, paragraphs 1, 2 and 3 might imply a hierarchy between the different methods of interpretation, this is not the case¹²⁴ In reality, the three paragraphs represent a logical progression.¹²⁵

¹¹⁷ B. Cali, in D.B. Hollis (ed.), *Oxford Guide to Treaties*, p. 529.

¹¹⁸ *Ibid.*, p. 531.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*, p. 529.

¹²¹ *Ibid.*

¹²² For example, see, C. Trindade, ‘La Interpretation de Tratados en El Derecho Internacional y La Especificidad de los Tratados de Derechos Humanos’, in Z.D. de Clement (ed.), *Estudios de Derecho Internacional en Homenaje al Profesor Ernesto J. Rey Caro* (Drnas, Lerner, 2004), p. 753; W. Kalin and J. Kunzli, *The law of International Human Rights Protection* (Oxford University Press, 2009), p. 38.

¹²³ J. Christoffersen, ‘Impact on General Principles of Treaty Interpretation’, in M. Kamminga and M. Scheinin (eds.), *The Impact of General human Rights Law on General International Law* (Oxford University Press, 2009), p. 43, 50.

¹²⁴ A. Aust, *Modern Treaty Law and Practice*, p. 234.

¹²⁵ *Ibid.*

As I have analysed above, for the most part, particularly in the case of human rights treaties, a combination of several methods of interpretation is necessary in order for the researcher to determine the meaning of the text of a treaty.¹²⁶

The text of a treaty should be interpreted in good faith. This principle governs ‘the creation and performance of legal obligations’¹²⁷, and it influences all aspects of treaty law.¹²⁸ It emanates from the principle of *pacta sunt servanda* that is contained in Article 26 VCLT.¹²⁹

The interpretation of the text of a treaty is an essential element of the performance of that treaty.¹³⁰ Thus, the analysis of the relevant materials and their final assessment should be done in good faith.¹³¹ This rule forbids any interpretation that would be manifestly absurd or unreasonable.¹³²

The principle of good faith requires the interpreter to translate the provisions of treaties in an ‘effective, real, and practical’ manner for individuals, as rights-holders, under international law.¹³³ This principle is called the principle of effectiveness.¹³⁴ *Gardiner* argues that the principle of effectiveness has two aspects.¹³⁵ The first aspect obliges the interpreter to interpret the text of the treaty in such a manner that guarantees that each term has effect rather than no effect.¹³⁶ This aspect is derived from the principle of good faith that is found in Article 31 VCLT, as I have explained above.¹³⁷ The second aspect entails the adoption of a teleological approach to the interpretation of a treaty¹³⁸ and is connected with interpretation in line with the object and purpose of a treaty.¹³⁹

Moving to textual interpretation, Article 31 (1) VCLT states that a treaty should be interpreted in accordance with the ordinary meaning of the text. It

¹²⁶ B. Schlutter, in H. Keller and G. Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy*, p. 274.

¹²⁷ CJ, Case concerning Nuclear Tests (New Zealand v. France), 1973 ICJ Reports, p. 457 (Dec. 20), para. 46.

¹²⁸ B. Schlutter, in H. Keller and G. Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy*, p. 274.

¹²⁹ A. Aust, *Modern Treaty Law and Practice*, p. 234.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, p. 2.

¹³² See, ECtHR, *Louizidou v. Turkey* (Preliminary Objections), (1995) 20 EHRR 99, para. 102; B. Cali, in D.B. Hollis (ed.), *Oxford Guide to Treaties*, p. 538.

¹³³ D. Rausching, *The Vienna Convention on the Law of the Treaties, Travaux Préparatoires* (Metzner, 1978), p. 251; B. Cali, in D.B. Hollis (ed.), *Oxford Guide to Treaties*, p. 538.

¹³⁴ *Ibid.*, p. 538; ECtHR, *Tyler v. the United Kingdom*, Application No. 5856/72, Judgment of 25 April 1978, para. 15–16.

¹³⁵ ICJ, Case concerning the Corfu Channel (the United Kingdom v. Albania), 1949, ICJ Reports, p. 4 (Apr. 9), para. 29; B. Cali, in D.B. Hollis (ed.), *Oxford Guide to Treaties*, p. 538.

¹³⁶ B. Cali, in D.B. Hollis (ed.), *Oxford Guide to Treaties*, p. 538.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

is reasonable to contend that the ordinary meaning of the text is most likely to represent the intentions of the parties that have drafted the treaty in question; at least pending the establishment of the contrary.¹⁴⁰ Nevertheless, the determination of the ordinary meaning of the text of a treaty cannot be done in a vacuum, but it should take into consideration the context of that treaty, as well as its object and purpose.¹⁴¹ The context of a treaty includes materials related to the conclusion of the treaty, while the object and purpose of the treaty is usually used to confirm a certain interpretation.¹⁴² An interpretation is not correct if it does not comply with the object and purpose of the treaty in question.¹⁴³ The object and purpose of a treaty can be explicitly stated in the text of a treaty, as in the case of the UNCRPD¹⁴⁴, or it can be derived from the reading of a treaty as a whole in the form of the treaty's essential goal or spirit.

B. ARTICLE 31 PARAGRAPH 2 VCLT

This paragraph explains what must be taken into account when interpreting the context of the treaty. It states that the context of a treaty includes the text of that treaty, its preamble and its annexes.¹⁴⁵ It also includes 'any agreement relating to that treaty which was made between all the parties in connection with the conclusion of that treaty and any instrument which was made by one or more parties in connection with the conclusion of that treaty and accepted by the other parties as an instrument related to the treaty'.¹⁴⁶ Such agreements and instruments do not have to be part of that treaty or constitute a treaty themselves.¹⁴⁷ They must, however, be considered as a clear expression of the intention of the parties.¹⁴⁸ These instruments should not be seen as mere aids to interpretation.¹⁴⁹ They should be viewed as important tools of the treaty-drafter as well.¹⁵⁰ The explanatory reports that are approved by government experts involved in drafting conventions of the Council of Europe (adopted and published at the same time as the conventions themselves)¹⁵¹, provide an example of such an instrument.

¹⁴⁰ A. Aust, *Modern Treaty Law and Practice*, p. 235.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.*, p. 235.

¹⁴⁴ Article 1 UNCRPD.

¹⁴⁵ Article 31 (2) VCLT.

¹⁴⁶ Article 31 (2) VCLT.

¹⁴⁷ A. Aust, *Modern Treaty Law and Practice*, p. 236.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*, p. 237.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

C. ARTICLE 31 PARAGRAPH 3 VCLT

Sub-paragraph (a) states that, together with the context, the person interpreting a treaty should take into consideration any 'subsequent agreement' between the parties in relation to the interpretation of the treaty at hand or the application of its provisions.¹⁵² An example of a 'subsequent agreement' was the decision of the heads of the Member States of the EU to change the name of the EU currency from the ECU to the Euro, which was done through the 'Conclusions' of their meeting in Spain.¹⁵³

Sub-paragraph (b) provides that, together with the context, subsequent practice in the application of the treaty, which establishes the agreement of the parties with regard to its interpretation, should be considered in the interpretation as well.¹⁵⁴ This provision has been part of the jurisprudence of international tribunals and it is an essential element of the interpretation of any treaty.¹⁵⁵ Such a practice should be consistent and common to or accepted, expressly or tacitly, by all parties.¹⁵⁶ General Comments and UN treaty bodies' jurisprudence are prime examples of international practice that flow from the conclusion of a human rights treaty.¹⁵⁷ Both types of practice seem to be consistent with Article 31 (3) (b) VCLT, even though it might be argued that they do not sometimes establish an agreement of the States Parties in relation to that interpretation, because they have not always become part of the national legislation in the form of hard law.¹⁵⁸

Identifying the intentions of the parties when interpreting an international treaty sometimes requires consideration of not only the international law that existed at the time of the treaty's conclusion, but it also requires the consideration of contemporary international law.¹⁵⁹ This approach allows changing circumstances and social realities to be taken into account in the context of treaty interpretation.¹⁶⁰

In the context human rights law, this approach is manifested in the dynamic or evolutive form of treaty interpretation.¹⁶¹ This method examines whether

¹⁵² Article 31 (3) (a) VCLT.

¹⁵³ Conclusions of the Madrid European Council 1995 (Bulletin of the EU, 12-1995), p. 10.

¹⁵⁴ Article 31 (3) (b) VCLT.

¹⁵⁵ A. Aust, *Modern Treaty Law and Practice*, p. 231.

¹⁵⁶ *Ibid.*; see the US v. France Air Services Arbitration 1963 (54 ILR 303).

¹⁵⁷ B. Schlutter, in H. Keller and G. Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy*, p. 289.

¹⁵⁸ *Ibid.*; K. Mechlem, 'Treaty Bodies and the Interpretation of Human Rights', 42 *Vanderbilt Journal of Transnational Law* (2009), p. 920.

¹⁵⁹ I. Sinclair, *Vienna Convention on the Law of Treaties*, p. 138-140; A. Aust, *Modern Treaty Law and Practice*, p. 234.

¹⁶⁰ B. Schlutter, in H. Keller and G. Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy*, p. 293.

Ibid., p. 295.

¹⁶¹ *Ibid.*, p. 296.

certain changing factual circumstances could affect the application of certain treaty rules.¹⁶² It is also arguable that this method of interpretation could also be based on Article 31 (3) (b) as a change in subsequent practice.¹⁶³ An example of the application of this method was found in the judgment of *Tyler v. the United Kingdom*, whereby the ECtHR found that the Convention is a living instrument which should be interpreted according to the present-day conditions.¹⁶⁴ Article 31 VCLT also refers to the systemic method of interpretation.¹⁶⁵ It prescribes the interpretation of a treaty term in view of international rules which have the same content.¹⁶⁶

D. ARTICLE 31 (4) VCLT

This paragraph states that in the event that the parties of a treaty intended to give a special meaning to a term, then that term must be interpreted according to that special meaning.¹⁶⁷ The party that invokes any special meaning has the burden of proving that such a meaning was, indeed, agreed upon by all parties.¹⁶⁸

E. ARTICLE 32 VCLT

This article provides that, with a view to confirm the meaning of a provision of a treaty that has been interpreted according to Article 31 VCLT, in certain circumstances, the use of supplementary elements, such as the *travaux préparatoires* is both possible and allowed by the Vienna Convention.¹⁶⁹ The same supplementary means of interpretation can be used also in cases where the primary means of interpretation produce an interpretation which either leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.¹⁷⁰ The *travaux préparatoires* might include, amongst other things, written material, like successive drafts of the treaty, conference records, explanatory statements by an expert consultant at a coordination

¹⁶² Ibid., p. 296; F. Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties, Part I', XXI *Hague Yearbook of International Law* (2008), p. 102–113.

¹⁶³ Ibid., p. 297.

¹⁶⁴ B. Schlutter, in H. Keller and G. Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy*, p. 296; F. Fitzmaurice, XXI *Hague Yearbook of International Law* (2008), p. 297; ECtHR, *Tyler v. The United Kingdom*, para. 31.

¹⁶⁵ B. Schlutter, in H. Keller and G. Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy*, p. 298.

¹⁶⁶ Ibid.

¹⁶⁷ Article 31 (4) VCLT.

¹⁶⁸ I. Sinclair, *Vienna Convention on the Law of Treaties*, p. 126–127; A. Aust, *Modern Treaty Law and Practice*, p. 234.

¹⁶⁹ Article 32 VCLT.

¹⁷⁰ Ibid.

conference, the interpretive statements of the chairman of a drafting committee that were not contested or ILC Commentaries.¹⁷¹ The value and importance of such materials will depend on several factors including *inter alia*, their authenticity, completeness and availability.¹⁷²

IV. INTERPRETATION OF ARTICLE 9 UNCRPD

In this section of the chapter, I use the VCLT methods of interpretation to interpret Article 9 UNCRPD. Article 9 (1) UNCRPD states as follows:

To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities 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, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, *inter alia*:

- a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;
- b) Information, communications and other services, including electronic services and emergency services;

A. THE PURPOSE OF ARTICLE 9 UNCRPD

To enable persons with disabilities to live independently and participate fully in all aspects of life (...)

From the first sentence of Article 9 UNCRPD, it can be concluded that the aim of this article is to give persons with disabilities the means¹⁷³ to live independently and participate fully in in all aspects of life. Thus, the Convention considers accessibility as a means of empowering people with disabilities.

To live independently means that people with disabilities should be able to live their life free from outside control and not be subjected to someone else's authority.¹⁷⁴ Thus, people with disabilities are entitled to make their own choices with regard to the way in which they live their lives. The UNCRPD considers the

¹⁷¹ A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, p. 238.

¹⁷² Ibid.

¹⁷³ Oxford dictionary online on the interpretation of 'enable', www.oxforddictionaries.com/definition/english/enable?q=enable (accessed 17 January 2018).

¹⁷⁴ Oxford dictionary online on the interpretation of 'independent', www.oxforddictionaries.com/definition/english/independent?q=independent (accessed 17 January 2018).

right to live independently as a principle of the Convention¹⁷⁵ and a substantive right of the Convention.¹⁷⁶ The Preamble of the Convention recognises the importance of living independently, which includes the concepts of individual autonomy, independence and the freedom of people with disabilities to make their own choices.¹⁷⁷ Within the elements of the right to live independently, the Convention includes the right of people with disabilities to choose their place of residence in Article 19 thereof; the right not to be obliged to live in a particular living arrangement; the right to have access to in-home residential and community support services, including personal assistance and the right to use community services and facilities that are open to all of the population on an equal basis with others.¹⁷⁸

As *Quinn* and *Doyle* argue, living independently gives people with disabilities a ‘voice’ and it forces others to respect their will and preferences.¹⁷⁹ It also gives them ‘choice’, especially with regard to the way in which they live their own lives and particularly their personal living arrangements, and it creates life ‘chances’ by eliminating barriers to inclusion which can be tangible as well as intangible.¹⁸⁰ Lastly, the authors indicate that living independently reconstructs the welfare model so as to ensure that inclusion and community engagement is guaranteed.¹⁸¹

Apart from Article 19 UNCRPD, the Convention includes a number of other provisions designed to guarantee that people with disabilities are able to live independently, especially Article 12 UNCRPD, which obliges the States Parties to ensure that the necessary supports are put in place to guarantee that individuals can exercise their inherent legal capacity and make their own decisions, *inter alia* decisions related to their residence. In the same vein, Article 9 UNCRPD requires that all aspects of life are open and accessible to people with disabilities.¹⁸²

Accessibility does not only aim to guarantee that people with disabilities live independently, but it also ensures that they are able to fully participate in all aspects of life. Participation means the action of taking part in something.¹⁸³ The Convention does not provide any definition of participation, as is the case with the right to live independently. The full and effective participation

¹⁷⁵ Article 3 (a) UNCRPD.

¹⁷⁶ Article 19 UNCRPD.

¹⁷⁷ Preamble (n) UNCRPD.

¹⁷⁸ Article 19 (a), (b) and (c) UNCRPD.

¹⁷⁹ G. Quinn and S. Doyle, ‘Taking the UN Convention on the Rights of Persons with Disabilities Seriously: The Past and Future of the EU Structural Funds as a Tool to Achieve Community Living’, 9 *The Equal Rights Review* (2012), p. 72.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*, p. 73.

¹⁸³ Oxford dictionary online on the interpretation of ‘enable’, www.oxforddictionaries.com/definition/english/participation?q=participation.

of people with disabilities in all aspects of life is one of the principles of the Convention.¹⁸⁴ In the Preamble of the Convention, it is recognised that people with disabilities face attitudinal and environmental barriers that hinder their ability to fully participate in all aspects of life as equal members of society.¹⁸⁵ It is also stated in the Preamble that the full participation of people with disabilities in the society will result in their increased sense of belonging and it will mark the development of significant advances in the human, social and economic development of society and the gradual elimination of poverty.¹⁸⁶ Participation also appears in the substantive rights part of the Convention, in the context of the right to live independently¹⁸⁷; the right to education¹⁸⁸; the rights to political and public life¹⁸⁹ and cultural life, sports and leisure.¹⁹⁰ Furthermore, as a principle of the UNCRPD, it applies to all substantive rights of the Convention.

*Jones*¹⁹¹ argues that participation is interconnected with the concept of inclusion. This is also evident in the Convention as the term ‘full and effective participation and inclusion in society’ is one of its principles.¹⁹² She indicates that the principle of inclusion means that everyone has the right to fully participate in all aspects of life, that everyone has the same rights and responsibilities and that we all have something to offer in society.¹⁹³ This principle aims to guarantee that every person is entitled to meaningful interaction, involvement and engagement in each and every part of society. *Jones* divides inclusion into three parts: ‘the non-discriminatory attitude towards people with disabilities, the guarantee of access to participation in every area of life, and the facilitation of people with disabilities to limit the impact of disability’.¹⁹⁴ It is evident from this division that accessibility is essential to the principle of inclusion, or in other words, to the ability of people with disabilities to fully and effectively participate in society. For example, without accessible public or private transportation, the mobility of people with disabilities is significantly reduced and thus, they might not be able to commute to work or go to school. Therefore, their participation in all aspects of life is impaired by several barriers.

¹⁸⁴ Article 3 (c) UNCRPD.

¹⁸⁵ Preamble (e) and (k) UNCRPD.

¹⁸⁶ Preamble (m) UNCRPD.

¹⁸⁷ Article 19 UNCRPD.

¹⁸⁸ Article 24 UNCRPD.

¹⁸⁹ Article 26 UNCRPD.

¹⁹⁰ Article 29 UNCRPD.

¹⁹¹ M. Jones, in M.H. Rioux, L.A. Basser and M. Jones (eds.), *Critical Perspectives on Human Rights and Disability Law*.

¹⁹² Article 3 (c) UNCRPD.

¹⁹³ M. Jones, in M.H. Rioux, L.A. Basser and M. Jones (eds.), *Critical Perspectives on Human Rights and Disability Law*, p. 57.

¹⁹⁴ *Ibid.*, p. 58.

The CRPD Committee stated that accessibility is one of the key issues that it discussed with States Parties during the consideration of their initial reports.¹⁹⁵ The CRPD Committee regards accessibility as a vital precondition for people with disabilities to live independently and participate fully and equally in society¹⁹⁶, and to effectively and equally enjoy their civil, political, economic, social and cultural rights.¹⁹⁷ Without accessible environments, transportation, information and communication and services, persons with disabilities will not be able to integrate into their respective local communities, and to lead an independent life.¹⁹⁸

The drafters of the Convention made the same connection by recognising that accessibility is essential to the full and effective participation of people with disabilities in all aspects of life. Thus, accessibility contributes significantly to the removal of barriers that people with disabilities face, namely choosing the way they want to live their lives and enjoying meaningful interaction, involvement and engagement in their everyday life.

B. THE PROGRESSIVE REALISATION OF ARTICLE 9 UNCRPD

(...) States Parties shall take appropriate measures (...)

The obligation of States Parties to the Convention to take ‘appropriate measures’ implies that this obligation is, in general, progressively realised. This is because the implementation of this obligation is formulated in such a way that requires States Parties to the Convention to take positive measures by using their available resources with a view to achieving systemic change. The obligation to take appropriate measures to achieve accessibility will certainly require the investment of a large amount of resources and an overall change in States’ policies. Thus, States Parties to the UNCRPD are required to take measures to progressively achieve accessibility. On the contrary, if accessibility were an immediately realisable obligation on par with civil and political rights, the obligation of Article 9 (1) UNCRPD would have required the States Parties to the Convention to refrain from taking actions that would interfere with accessibility, such as is the case with the freedom of expression. The CRPD Committee repeatedly stated in General Comment No. 2 on accessibility that States Parties should guarantee that accessibility is achieved through gradual implementation.¹⁹⁹ The drafting history of the Convention also reaffirms that the

¹⁹⁵ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 10.

¹⁹⁶ Ibid., para. 1.

¹⁹⁷ Ibid., para. 4.

¹⁹⁸ Ibid., para. 37.

¹⁹⁹ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 11, 14, 24 and 27.

obligations with regard to accessibility are to be realised progressively in general. During the discussions of the working group, the Chair noted that: 'Accessibility is an economic, social, and cultural right, and so progressive realization would be appropriate; however, there are also elements of a civil and political right, freedom of expression; therefore Article 19 is something of a hybrid'.²⁰⁰ In the end, it was recognised that there was a clear agreement among the delegations that this article is subject to progressive realisation.²⁰¹

In that regard Article 4(2) UNCRPD reads:

'With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law'.²⁰²

The CRPD Committee has provided some indication, through its General Comment No. 2 on Article 9 UNCRPD and various decisions of the Committee, of what 'progressive realisation' means in the context of accessibility. While the Committee's work provides a good starting point, a comprehensive analysis of the set of obligations that stem from the progressive nature of Article 9 obligations still remains to be conducted. In that regard, it is useful to examine how the CESCR has interpreted the concept of progressive realisation, as part of the contextual interpretation of Article 9 UNCRPD that I will carry out. The observations of the CESCR will be permeated by the relevant position of the CRPD Committee on the issues under analysis. This methodological choice with regard to the interpretation of the term 'progressive realisation' seems fitting for two reasons. Firstly, the UNCRPD does not create new or exclusive rights for people with disabilities.²⁰³ As Donnelly states:

'Human rights are, literally, the rights that one has simply because one is a human being. (...) Human rights are equal rights: one either is or is not a human being, and therefore has the same human rights as everyone else'.²⁰⁴

²⁰⁰ Ad Hoc Committee on the Disability Convention, Daily Summaries, Sixth Session, Morning Session, 5 August 2005; Article 19 is the older draft version of Article 9 UNCRPD.

²⁰¹ Ad Hoc Committee on the Disability Convention, Daily Summaries, Seventh Session, Morning Session, 17 January 2006.

²⁰² Article 4(2) UNCRPD.

²⁰³ C. Harnacke and S. Graumann, 'Core principles of the UN convention on the rights of persons with disabilities: an overview', in J. Anderson and J. Philips (eds.), *Disability and Universal Human Rights Legal, Ethical, and Conceptual Implications of the Convention on the Rights of Persons with Disabilities* (SIM Special: Netherlands Institute for Human Rights, 2012), p. 35.

²⁰⁴ J. Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 2003), p. 10.

Thus, the UNCRPD is not deemed to create new rights, but rather it tailors the existing international human rights framework to the specific needs of people with disabilities.²⁰⁵ This is relevant to accessibility as well. As the General Comment No. 2 of the CRPD Committee on Article 9 UNCRPD has stated, accessibility should be considered as part of the pre-existing right to access²⁰⁶ from the specific perspective of disability.²⁰⁷ Thus, the work of the CESCR on the interpretation of the meaning of progressive realisation is significant for the interpretation of progressive realisation within the context of the UNCRPD.

Secondly, the wording of Article 4(2) UNCRPD is very similar to, and uses the same concepts as, Article 2(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR). This Article reads:

‘Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’.²⁰⁸

From the above, it is clear that Article 4(2) UNCRPD and Article 2(1) ICESCR use the same terminology to describe the implementation of economic social and cultural rights.²⁰⁹ Thus, it is useful to examine the interpretation that the CESCR has provided of ‘progressive realisation’ in the context of economic, social and cultural rights.²¹⁰

i. Obligation to take ‘deliberate, concrete and targeted’ steps under the ICESCR and relevance for the UNCRPD

‘Progressive realisation’ constitutes a recognition of the fact that economic social and cultural rights cannot be achieved in a short period of time.²¹¹ Nevertheless, States Parties are obliged to immediately take initial steps in order to progressively realise the rights that are included in the ICESCR.²¹² States,

²⁰⁵ F. Megret, ‘The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?’, 30 *Human Rights Quarterly* (2008), p. 515.

²⁰⁶ Article 25 (c) ICCPR.

²⁰⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 14.

²⁰⁸ Article 2(1) ICESCR.

²⁰⁹ See, also, F. Seatzu, in V. Della Finna, R. Cera and G. Palmisano (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, p. 232.

²¹⁰ For a similar analysis see, S. Charitakis, ‘Austerity Measures in Greece and the Rights of Persons with Disabilities’, 2 *Cyprus Human Rights Law Review* (2013).

²¹¹ Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of States Parties’ Obligations, 1990, para. 9.

²¹² M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, 2003), p. 313; for more information on ‘progressive

regardless of their level of development, are obliged to take ‘deliberate, concrete and targeted’ steps with a view to fully realising the rights of the Covenant.²¹³ States Parties are given a large amount of flexibility with regard to the types of measures that can be taken. The only limitation to States Parties’ action is that it must be consistent with the nature of the rights so that the states’ action can fulfil the obligations under the Covenant.²¹⁴ Such measures may be legislative, judicial, administrative, financial, educational or social.²¹⁵

Despite allowing for certain discretion to States Parties on the type of measures that they can adopt to implement the requirements of the Covenant, the Committee requires that those measures to be reasonable and effective so that their outcome is consistent with the obligations of the Covenant.²¹⁶ To determine whether a measure is reasonable, the Committee takes into consideration the level of development of the State under examination.²¹⁷ The more developed a State is, the higher the expectations of the Committee are with regard to the level of protection of a right achieved by the measures that the State has adopted.²¹⁸ The Committee has not developed a test to measure the effectiveness of actions that a State has taken, but it can be inferred from the Committee’s concluding observation on the Russian Federation that State action is not effective when the state has not invested an appropriate amount of financial resources for the purposes of its implementation.²¹⁹ The outcome of State action is also a criterion for determining whether the measure was appropriate or effective for implementing the requirements of the Covenant.²²⁰

States can also not wait indefinitely to take measures.²²¹ They are required ‘to move as expeditiously and effectively as possible’ to initiate measures.²²² Even in cases where there is a severe lack of resources, due to several factors such as

realisation’ in the context of Economic, Social and Cultural Rights see, M. Senyonjo, ‘Reflections on the state obligations with respect to economic, social and cultural rights in international human rights law’, 16 *The International Journal of Human Rights* (2011), p. 976–982; A. Miller, ‘Limitations to and Derogations from Economic Social, and Cultural Rights’, 9 *Human Rights Law Review* (2009), p. 584–591.

²¹³ Ibid.

²¹⁴ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1986, No. 17; M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 336.

²¹⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of States Parties’ Obligations, 1990, para. 7.

²¹⁶ M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 337.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Committee on Economic, Social and Cultural Rights, Concluding observations Russia E/1998/22, para. 104.

²²⁰ M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 338.

²²¹ Ibid, p. 314.

²²² Ibid; Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1986, No. 21.

economic recession, the vulnerable members of society should be protected by the adoption of low-cost targeted programmes.²²³ An example of a severe lack of resources might be the case of Iraq, where despite a trade embargo, which has created difficult conditions with respect to the availability of food, medicines and medical articles, the Committee recommended that the Iraqi government should invest all available resources to address the needs of the population, particularly the most vulnerable groups.²²⁴

Applying these rules in the context of the implementation of accessibility means that the States Parties to the UNCRPD, when implementing Article 9 UNCRPD, should take 'deliberate, concrete and targeted' steps to fulfil the obligations that this article entails. They should also move as expeditiously and effectively as possible to implement those measures. Even in times of economic crisis, States Parties to the UNCRPD should be aware of the need to use the maximum of their available resources to implement Article 9 UNCRPD. The States Parties to the Convention have a certain discretion with regard to the type of measures they can adopt to implement Article 9 UNCRPD, yet those measures should be effective and reasonable with a view to producing results that are compatible with the requirements of the Convention.

The CRPD Committee indicated in General Comment No. 2 on Article 9 UNCRPD that, to fulfil the obligation to take 'deliberate, concrete and targeted' steps to implement accessibility, States Parties should establish definite time frames and allocate adequate resources for the elimination of existing barriers.²²⁵ The CRPD Committee also provided a roadmap for the gradual implementation of accessibility standards. The Committee suggested that in the instance that States Parties do not have relevant legislation in place, they should firstly adopt a suitable legal framework.²²⁶ The Committee recommended that the States Parties conduct an analysis to identify the obstacles and barriers that need to be eliminated in an efficient manner and within a short to mid-term framework.²²⁷ The removal of accessibility barriers should be carried out in a continuous and systematic, gradual but steady manner. The Committee also proposed that the States Parties undertake a comprehensive review of their laws on accessibility in order to identify, monitor and address gaps in legislation and implementation of accessibility standards.²²⁸ The Committee welcomed the adoption by States Parties of legislative measures that mainstream accessibility standards in laws

²²³ Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of States Parties' Obligations, 1990, para. 9.

²²⁴ Committee on Economic, Social and Cultural Rights, Concluding observations Iraq E/1998/22, para. 281.

²²⁵ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 27.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 28.

on construction and planning, public aerial, railway, road and water transport, information and communication and services open to the public, amongst others.²²⁹ Nevertheless, the Committee indicated that accessibility should be an integral part of general and specific laws on equal opportunities, equality and participation with regard to combating disability-based discrimination.²³⁰ Lastly, the Committee emphasised the importance of the modification or abolition of existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.²³¹

Some of these requirements are evidenced by the decision of the CRPD Committee in the case of *Szilvia Nyusti and Péter Takács v. Hungary*.²³² This case related to the ‘failure by the State party’s authorities to eliminate discrimination on the ground of disability by a private credit institution and to ensure that persons with visual impairments have an unimpeded access to the services provided by ATMs on an equal basis with other clients’.²³³ The applicants were persons with visual impairment that claimed that the entire network of ATMs operated by OTP Bank Zrt. credit institution (OTP) were inaccessible to people with visual impairments.²³⁴

The Committee observed that none of the measures that were taken by the Hungarian government ensured the accessibility to the banking card services that were offered by the ATMs (operated by OTP) for the applicant or other persons in a similar situation.²³⁵ This could be considered, among others, as a comment on the ineffectiveness of the measures that were adopted by the government of Hungary to produce outcomes consistent with the requirements of the Convention.

The Committee addressed the obligation to take ‘deliberate, concrete and targeted’ steps with regard to the implementation of Article 9 UNCRPD in *F. v. Austria*.²³⁶ The applicant, a blind individual living in the city of Linz, complained that Austria failed to guarantee that the information regarding the transportation services provided to people without disabilities was also provided, on an equal basis, to persons with visual impairments.²³⁷ In particular the applicant stated that the failure to install an audio system on tram line 3 made the tram inaccessible.²³⁸ The Committee found that Austria failed to effectively

²²⁹ Ibid., para. 29.

²³⁰ Ibid.

²³¹ Ibid., para. 23; Article 4 (1) (b) UNCRPD.

²³² Committee on the Rights of Persons with Disabilities Decision, *Szilvia Nyusti and Péter Takács v. Hungary* (Communication No. 1/2010, CRPD/C/9/D/1/2010), 21 June 2013.

²³³ Ibid, p. 1.

²³⁴ Committee on the Rights of Persons with Disabilities Decision, *Szilvia Nyusti and Péter Takács v. Hungary* (Communication No. 1/2010, CRPD/C/9/D/1/2010), 21 June 2013, para. 9.2.

²³⁵ Ibid., para. 9.6.

²³⁶ Committee on the Rights of Persons with Disabilities Decision, *F. v. Austria* (Communication No. 21/2014, CRPD/ C/14/D/21/2014), 21 September 2015.

²³⁷ Ibid., para. 8.6.

²³⁸ Ibid, para. 3.1.

implement Article 9 in the field of transport.²³⁹ It also advised Austria to ‘create a legislative framework with concrete, enforceable and time-bound benchmarks for monitoring and assessing the gradual modification and adjustment necessary to enable the access by persons with visual impairment to the information that is visually available.’²⁴⁰ This legislative framework should include sanctions for those who fail to implement the accessibility standards.²⁴¹

Consequently, it can be inferred that the CRPD Committee is following a similar interpretive approach as that of the CESCR in interpreting the obligation to progressively realise certain duties under the UNCRPD.

ii. Obligation to use the maximum of the available resources

As I have mentioned in the previous section, States Parties to the Convention should use the maximum of their available resources to implement Article 9 UNCRPD. This does not mean that States Parties to the Convention should use all their resources, or that they should use resources that they do not have with a view to implementing Article 9 UNCRPD.²⁴² Nevertheless, the CESCR has imposed limitations on the discretion of states to allocate their resources.²⁴³ Examples of such limitations are cases where the State has not spent funds that are allocated for the implementation of the obligations of the Covenant because of inefficient administration or corruption.²⁴⁴ This applied in the case of Colombia. When examining the progress achieved by Colombia in the implementation of the Covenant, the Committee found that the practice of the ‘non-utilisation’ of the budget items of the Colombian Government in the field of social expenditure violated the obligation to allocate the maximum of the available resources to realise the requirements and obligations of the Covenant.²⁴⁵

Another indicator that is considered by the Committee when examining the States Parties’ use of the resources to the maximum extent is the comparative analysis of financial resources that are spent by a state in matters that are related to the Covenant and those which are spent on unrelated matters.²⁴⁶ In the case where there is a significant difference between the spending on matters that are

²³⁹ Ibid., para. 8.7.

²⁴⁰ Ibid., para. 9.b.i.

²⁴¹ Ibid., para. 9.b.iii.

²⁴² M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 315.

²⁴³ Committee on Economic, Social and Cultural Rights, Concluding observations Nigeria E/1999/22, para. 97 and 119.

²⁴⁴ M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 317.

²⁴⁵ Committee on Economic, Social and Cultural Rights, Concluding observations Colombia E/1996/22, para. 200.

²⁴⁶ M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 316.

not-related to the Covenant (military spending)²⁴⁷ and Covenant-related matters (education, healthcare and employment), the Committee considers this to be an indicator of failure of the state to comply with the requirement to use all available resources.²⁴⁸

Moreover, the Committee compares the spending on a particular right of the Covenant between states with the same level of development.²⁴⁹ If the allocation of funding is significantly smaller in one State, the Committee considers such action as not fulfilling the obligation to use the maximum of their available resources.²⁵⁰

In the context of this obligation, States Parties to the Covenant are required to accord a degree of priority to human rights considerations in the allocation of their resources.²⁵¹ In that regard The Limburg Principles state:

‘In the use of the available resources due priority shall be given to the realization of rights recognized in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services’.²⁵²

This principle maintains that, in the event that a state does not grant some degree of priority to the implementation of the Covenant, it will not be compliant with the duty to achieve the progressive realisation of the Covenant. As a result of this, it will be very difficult to justify its non-compliance with the requirement to accord a degree of priority to human rights in the allocation of resources.²⁵³ Therefore, implementation of the Covenant implies some limitation on the sovereign discretion of States Parties to the Covenant, insofar as it related to the allocation of resources.²⁵⁴

This interpretation of the duty to progressively realise a right can be applied to the implementation of accessibility within the ambit of the UNCRPD. Inefficient or corrupt spending, spending that focuses unevenly on matters not related to accessibility, lower spending of States compared to others at the same level of development in the area of accessibility and the non-prioritisation (to

²⁴⁷ Committee on Economic, Social and Cultural Rights, Concluding observations Korea E/C.12/1/Add.59.

²⁴⁸ M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 317.

Ibid., p. 317.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*; Committee on Economic, Social and Cultural Rights, Concluding observations Dominican Republic E/1997/22, para. 228.

²⁵¹ M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 332.

²⁵² Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1986, No. 28.

²⁵³ M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 333.

²⁵⁴ *Ibid.*

some degree) of accessibility in the allocation of resources might be regarded as a violation of the obligation to allocate the ‘maximum of their available resources’ to implement Article 9 UNCRPD.

iii. Obligation to continuously improve conditions

Sepulveda argues that the ordinary meaning of the term ‘progressive’ leads to two main obligations for the States Parties to the ICESCR, and in our case to Article 9 UNCRPD.²⁵⁵ These obligations are: the obligation to continuously improve conditions and the obligation to abstain from deliberately taking retrogressive measures except under specific circumstances. In this part of the chapter, I will analyse the former aspect and in the next part of the chapter I will address the latter aspect.

The CESCR has stated that the progressive realisation of a right means that the States Parties to the Covenant should ‘move as expeditiously and effectively as possible’ with a view to fully implementing this right.²⁵⁶ The obligation to continuously improve conditions, as *Sepulveda* argues, is without doubt applicable to all Covenant rights and, thus, it can be applied in the context of the UNCRPD and in particular to the concept of accessibility as well.²⁵⁷ For example, the CESCR indicated in the General Comment on the highest attainable standard of health that

‘States Parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realisation of Article 12 of the Covenant’.²⁵⁸

The fact that States Parties have to continuously improve the level of protection they provide for each right in the Covenant implies that any decline in or lowering of the standards of protection of a right as a result of external circumstances, that is not addressed by the State at hand, is in violation of the Covenant, according to the CESCR.²⁵⁹ In other words, if a State Party to the ICESCR neglects to take action to address a decline in, or lowering of the standards of, the protection of a right that is contained in the Covenant, and where this is due to external circumstances, it correspondingly constitutes a violation of the obligation to continuously improve conditions. On the other hand, if a State Party adopts a measure that lowers the standards of protection

²⁵⁵ *Ibid.*, p. 320.

²⁵⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of States Parties’ Obligations, 1990, para. 9.

²⁵⁷ M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 320.

²⁵⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health, 2000, para. 31.

²⁵⁹ Committee on Economic, Social and Cultural Rights, Concluding observations Sri Lanka E/1999/22, para. 76 and 90.

of a right contained in the Covenant, this would be in violation of the obligation to abstain from deliberately taking retrogressive measures. Examples of extremal circumstances that could cause a decline in or lowering of the standards of protection of the Covenant rights could be an increase in the HIV infection rate, a sudden deterioration of the environment due to exhaustion of natural resources or an increase in sexual tourism.²⁶⁰

In the context of the UNCRPD, and particularly in relation to accessibility, this obligation means that failure by a State Party of the Convention to effectively address any decline with regard to the level of accessibility that is provided by the State Party in question as a result of external circumstances, is in violation of the UNCRPD. In that regard, States Parties to the UNCRPD must continuously improve the level of accessibility. In that regard, the CRPD Committee stated in General Comment No. 2 on Article 9 UNCRPD that States Parties should continue to provide sufficient funds to remove barriers to accessibility and train monitoring staff after the adoption of their strategies to implement Article 9 UNCRPD.²⁶¹ Nevertheless, there might be instances, such as natural disasters and wars that could force the governments to take measures that will impede the progressive realisation of Article 9 UNCRPD. Such measures might be justifiable in certain circumstances as I describe in the following section of this chapter.

iv. Obligation to abstain from taking deliberately retrogressive measures
except under specific circumstances

In relation to the prohibition of the adoption of deliberately retrogressive measures by the States Parties to the Covenant, the CESCR has noted that ‘any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources’.²⁶²

Sepulveda indicates that a ‘retrogressive measure’ in the context of the ICESCR is any measure or action that implies a lowering of the level of protection accorded to the rights of the Covenant caused by an intentional state decision.²⁶³ Examples of such practice could be a legislative measure or policy that has a direct or collateral negative effect on the enjoyment of the rights by individuals²⁶⁴

²⁶⁰ M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 320.

²⁶¹ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 33.

²⁶² Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of States Parties’ Obligations, 1990, para. 9.

²⁶³ M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 324–325.

²⁶⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 13, The right to education, 1999, para. 9.

or an unjustified reduction in the public expenditure that is normally allocated to implement economic social and cultural rights without the state taking any other measures to protect the injured individuals.²⁶⁵ Furthermore the CESCR has indicated that

‘[A]s with all other rights in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party’s maximum available resources.’²⁶⁶

From the above, *Sepulveda* concludes that retrogressive measures are, prima facie, in violation of the Covenant and that states have the burden of proof with regard to persuading the CESCR that the measures at hand were justified and compatible with the Covenant.²⁶⁷ The CESCR has been more lenient towards the States Parties to the Covenant in cases where there has been an economic crisis or natural disaster, whereby the adoption of retrogressive measures or the lack of constant improvement of the levels of protection of the rights of the Covenant cannot be avoided.²⁶⁸ Nevertheless, this discretion is not unlimited. For instance, in the case of Colombia the Committee indicated that economic recession, combined with the certain aspects of the structural adjustment programmes and the economic liberalisation policies that were implemented by the government, had aggravated the negative effects on the enjoyment of the rights of the Covenant by the population, particularly by the more disadvantaged groups in the healthcare sector.²⁶⁹ In order to address these measures, the Committee proposed the allocation of a higher percentage of the GDP to the health sector and the promotion of measures to ensure that the most disadvantaged groups are not discriminated against.²⁷⁰

This obligation with regard to the progressive realisation of accessibility means that the States Parties to the Convention are prohibited from adopting retrogressive measures. In cases where States Parties decide to implement such measures, they are obliged to prove to the CRPD Committee that these measures

²⁶⁵ Committee on Economic, Social and Cultural Rights, Concluding observations Zimbabwe E/1998/22, para. 77; See on the same subject, in the context of the Right to social security, Committee on Economic, Social and Cultural Rights, General Comment No. 19, The right to social security, 2007, para. 42.

²⁶⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health, para. 32.

²⁶⁷ M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 328.

²⁶⁸ *Ibid.*

²⁶⁹ Committee on Economic, Social and Cultural Rights, Concluding observations Colombia E/C.12/1/Add.74.

²⁷⁰ *Ibid.*, para. 31.

were justified. However, the CRPD Committee indicated in General Comment No. 2 on accessibility that States Parties are not allowed to use austerity measures as a justification to avoid guaranteeing the progressive implementation of accessibility for persons with disabilities.²⁷¹

v. Obligation to monitor the realisation of the rights

With a view to examining and estimating the nature and the scope of the problems within a state, the CESCR has stated that the States Parties to the Covenant, regardless of their level of development, must establish a monitoring mechanism that is to be established immediately.^{272, 273} Apart from examining the deficiencies and main challenges with regard to the implementation of the Covenant, analysing the progress achieved and advising on new priorities and strategies, the monitoring mechanism should also be there to collect data.²⁷⁴ This data-collection should be based on indicators that are designed on the criteria used by the UN specialised agencies.²⁷⁵ Lastly, the CESCR has recommended that States Parties to the Covenant establish national benchmarks and collate detailed disaggregated data.²⁷⁶

This obligation means, in the context of the progressive realisation of accessibility, that the States Parties to the UNCRPD should immediately establish a monitoring mechanism that will collect data, establish benchmarks and design indicators to measure the progress of the implementation of the Convention, and Article 9 UNCRPD in particular. Indeed, such an obligation can be inferred from the wording of Article 9 UNCRPD. In paragraph one thereof, it is stated that the States Parties to the Convention should identify barriers to accessibility.²⁷⁷ Moreover, in the second paragraph thereof, the States Parties are required to 'monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public'.²⁷⁸ Lastly, Articles 33 and 31 UNCRPD require the States Parties to the Convention to develop a monitoring mechanism and to collect data on the implementation of the Convention.

In that regard, the CRPD Committee stated in General Comment No. 2 on Article 9 UNCRPD that States Parties should establish an effective monitoring

²⁷¹ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 25.

²⁷² Committee on Economic, Social and Cultural Rights, General Comment No. 5, Persons with disabilities, 1994, para. 13.

²⁷³ See for example, Committee on Economic, Social and Cultural Rights, General Comment No. 4, The right to adequate housing, 1991, para. 13.

²⁷⁴ M. Sepúlveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 362.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ Article 9 (1) UNCRPD.

²⁷⁸ Article 9 (2) (a) UNCRPD.

framework and set up efficient monitoring bodies with adequate capacity and appropriate mandates to ensure that plans, strategies and standardisation are implemented and enforced.²⁷⁹ States Parties should also adopt a legislative framework with specific, enforceable and time-bound benchmarks for the purposes of monitoring and assessing the progressive implementation of Article 9 UNCRPD by public and private entities.²⁸⁰ In the instance of an entity's failure to comply with the accessibility standards adopted by States Parties, the monitoring mechanism should have the power to apply sanctions, including fines.²⁸¹ The States Parties' monitoring mechanisms should also provide effective legal remedies at the disposal of people with disabilities who have been denied accessibility.²⁸² States Parties should precisely stipulate the duties of the different authorities and entities that should be involved in order to guarantee accessibility.²⁸³ The CRPD Committee considers that local authorities play an important role in the implementation of accessibility standards. Therefore, States Parties should support them through continuous capacity-building, the provision of adequate resources and the training of monitoring staff.²⁸⁴

vi. Obligation to devise strategies and programmes for the implementation of rights

Despite the fact that this obligation only applies in the case of compulsory education, the CESCR has clarified that the progressive realisation of the rights of the Covenant require the immediate adoption of a detailed plan of action for implementing each of its respective rights.²⁸⁵ The designing, implementation and evaluation of the national implementation plans should also include input from civil society.²⁸⁶ The planning can either take the form of an action plan with regard to each right of the Covenant²⁸⁷ or the form of a comprehensive national plan that applies to the Covenant as a whole.²⁸⁸

²⁷⁹ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 30.

²⁸⁰ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 30.

²⁸¹ *Ibid.*, para. 29.

²⁸² *Ibid.*

²⁸³ *Ibid.*, para. 24.

²⁸⁴ *Ibid.*, para. 33.

²⁸⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 1, Reporting by States parties, 1981, para. 4.

²⁸⁶ Committee on Economic, Social and Cultural Rights, Concluding observations, Mexico E/2000/22, para. 393.

²⁸⁷ See, Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health, 2000, para. 43.

²⁸⁸ See, Committee on Economic, Social and Cultural Rights, General Comment No. 1, Reporting by States parties, 1981, para. 4.

In the context of the UNCRPD, this obligation requires the States Parties to the Convention to develop a plan or strategy for the implementation of Article 9 UNCRPD immediately after the ratification of the Convention. Indeed, the CRPD Committee in General Comment No. 2 on accessibility specified that States Parties should adopt strategies and action plans to locate existing barriers to accessibility, set time frames with specific deadlines and provide adequate human and material resources to eliminate those barriers.²⁸⁹ An example of such a strategy is the European Disability Strategy 2010–2020²⁹⁰, which is a comprehensive plan to implement the requirements of the Convention, including accessibility, at the EU level.

vii. Obligation to ensure the minimum core level for each right

The minimum core level of a right is often defined as the nature or the essence of the right.²⁹¹ As *Coomans* argues, the core of a right embodies the intrinsic value of that right, the essential elements without which a right loses its value as a human right.²⁹² The elements of a right that are outside of the core of that right should be considered as a by-product or a consequence of the core elements of that right.²⁹³ The core of rights should be considered as universal, which implies that the core of each right is the same worldwide.²⁹⁴

The CESCR made a reference to the core of the rights in General Comment No. 3 on the nature of States Parties' obligations. It stated that:

'On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States Parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of

²⁸⁹ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 33.

²⁹⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe, COM(2010) 636 final.

²⁹¹ S. Russell, 'Minimum state obligations: International dimensions', in D. Brand and S. Russell (eds.), *Exploring the core content of socio-economic rights: South Africa and international perspectives* (Intersentia, 2001), p. 15.

²⁹² F. Coomans, 'In search of the core content of the right to education', in D. Brand and S. Russell (eds.), *Exploring the core content of socio-economic rights: South Africa and international perspectives*, p. 166–167.

²⁹³ *Ibid*; see also, F. Coomans, *The international protection of the right to education* (PhD thesis, Maastricht University, 1992), p. 38–39; Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1986, No. 56.

²⁹⁴ F. Coomans, in D. Brand and S. Russell (eds.), *Exploring the core content of socio-economic rights: South Africa and international perspectives*, p. 167.

essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps “to the maximum of its available resources”. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.²⁹⁵

The core obligations of rights should be implemented irrespective of the availability of resources of states or any other factors or difficulties, according to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.²⁹⁶ The CESCR has stated that in the case of a failure of a state to comply with the minimum core of a right due to the lack of availability of resources, that state should demonstrate that it made every effort possible to use all the resources at its disposal with a view to meeting the minimum core requirements as a matter of priority.²⁹⁷ The privatisation of services does not discharge the state from its duty to ensure the implementation of the minimum core obligations of the Covenant, particularly for the most vulnerable and disadvantaged groups of its population.²⁹⁸

This obligation in the context of Article 9 UNCRPD requires the States Parties to the Convention to guarantee the implementation of a minimum core of accessibility. In the following paragraphs I will enumerate upon the obligations that should be addressed with a view to ensure the minimum core of accessibility.²⁹⁹

The first element of the minimum core of the obligation of states to ensure accessibility is that public transportation in cities (vehicles and services) should be accessible to people with disabilities. As the CESCR has stated:

‘(...) the failure of Governments to ensure that modes of transportation are accessible to persons with disabilities greatly reduces the chances of such persons finding suitable, integrated jobs, taking advantage of educational and vocational training, or

²⁹⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of States Parties' Obligations, 1990, para. 10.

²⁹⁶ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997, No. 9.

²⁹⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of States Parties' Obligations, 1990, para. 10.

²⁹⁸ See, Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health, 2000, para. 35.

²⁹⁹ For further analysis of the minimum core of human rights in the context of the UNCRPD, see, Committee on the Rights of Persons with Disabilities, General Comment No. 4, The right to inclusive education, 2016, para. 41.

commuting to facilities of all types. Indeed, the provision of access to appropriate and, where necessary, specially tailored forms of transportation are crucial to the realization by persons with disabilities of virtually all the rights recognized in the Covenant'.³⁰⁰

Accessible urban transport will guarantee a minimum level of mobility to people with disabilities. This should apply to both new³⁰¹ and old vehicles. Solutions such as tailored forms of transportation, that could guarantee the accessibility of urban transport, will also be welcomed on the condition that efforts will be made by the States Parties, as soon as possible, to replace their inaccessible urban transport vehicles with new accessible vehicles so that the segregation that are caused by tailored forms of transportation cause will no longer continue.

The second element of the minimum core of the obligation of states to ensure accessibility is the accessibility of both public and private web-sites, including the content that they offer (for example streaming motion pictures). Considering that the retrofitting of the barrier-filled built environment is very challenging, both from a financial and temporal perspective, the accessibility of the web could guarantee a minimum level of participation and independence to people with disabilities. For example, the web can be used as a means of socialising, shopping, voting, working and constitute a source of entertainment. In that regard, the CRPD Committee reiterated that information and communication technologies, like the internet, have the ability 'to open up a wide range of services, transform existing services and create greater demand for access to information and knowledge'.³⁰² However, they can be used to promote the full and equal participation of persons with disabilities in society in so far as they are designed and produced in a way that ensures disability accessibility.³⁰³

Certainly, there might be some concerns that mere emphasis on the internet might have an exclusionary effect, but considering the number of barriers that the built environment entails and the challenges of retrofitting that environment, the availability of accessible internet ensures a minimum core of inclusion of people with disabilities in everyday life. For this to happen, though, the availability of accessible hardware and software that could be used to connect to the internet should be guaranteed at an affordable price, at least similar to that which is available to non-disabled people.

The third element of the minimum core of Article 9 UNCRPD is the obligation to provide training for stakeholders on accessibility issues that disabled

³⁰⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 5, Persons with disabilities, 1994, para. 23.

³⁰¹ See, Committee on the Rights of Persons with Disabilities Decision, F. v. Austria (Communication No. 21/2014, CRPD/ C/14/D/21/2014), 21 September 2015.

³⁰² *Ibid.*, para. 8.5.

³⁰³ Committee on the Rights of Persons with Disabilities Decision, F. v. Austria (Communication No. 21/2014, CRPD/ C/14/D/21/2014), 21 September 2015, para. 8.5.

persons face so as to better provide the assistance and services to people with disabilities.³⁰⁴ Accessibility stakeholders can be considered to be all people, groups or organisations or legal entities that have an interest in accessibility. This could include developers of accessible goods and services, accessibility assessors, public bodies and the government, services providers and people with disabilities and their representative organisations. This is essential for the improvement of the accessibility of goods and services and for the improvement of accessibility policies.

The fourth element of the minimum core of the obligation of States Parties to ensure accessibility is the obligation to include accessibility and the human rights-approach within the curriculum of higher education in areas that could be relevant to accessibility, such as engineering, architecture and web-design. This obligation is essential insofar as it guarantees that stakeholders on accessibility will be familiar with this subject, it will spark more interest in accessibility that could lead to further research on this subject and it will improve the levels of accessibility in all aspects of life in the long run, as a result of the advances in technologies and the changes in attitudes towards disability.

The fifth aspect of the minimum core of Article 9 UNCRPD is the obligation to guarantee that effective means of redress or remedies are available to any person who has been treated in violation of this article of the Convention, and effective means of ensuring the accountability of the government in case of such violations.³⁰⁵ This is an essential obligation in terms of giving effect to the requirements of the Convention.

The sixth and last element of the minimum core of the obligation of states to ensure accessibility is that any unjustifiable emergence of new barriers to accessibility is regarded as being in violation of Article 9 UNCRPD. Such actions are contrary the core idea that lies behind accessibility, which is to allow people with disabilities to live independently and participate fully in all aspects of life by eliminating accessibility barriers. States are responsible for guaranteeing that the creation of new barriers will be avoided in both the public and private sphere. This means that accessibility will be considered at an early stage in the development of public policies, purchases, and services and it will also be given consideration in the context of the private sphere too.³⁰⁶ For example,

³⁰⁴ See, Committee on the Rights of Persons with Disabilities Decision, Szilvia Nyusti and Péter Takács v. Hungary (Communication No. 1/2010, CRPD/C/9/D/1/2010), 21 June 2013, para. 10.2 (b); Committee on the Rights of Persons with Disabilities Decision, F. v. Austria (Communication No. 21/2014, CRPD/ C/14/D/21/2014), 21 September 2015, para. 9 (b) (ii).

³⁰⁵ See, Committee on the Rights of Persons with Disabilities Decision, F. v. Austria (Communication No. 21/2014, CRPD/ C/14/D/21/2014), 21 September 2015, para. 9 (a); Committee on the Rights of Persons with Disabilities Decision, Mr. X. v. Argentina (Communication No. 8/2012, CRPD/C/11/D/8/2012), 18 June 2014, para. 9 (a); Committee on the Rights of Persons with Disabilities Decision, Szilvia Nyusti and Péter Takács v. Hungary (Communication No. 1/2010, CRPD/C/9/D/1/2010), 21 June 2013, para. 10.1.

³⁰⁶ Committee on the Rights of Persons with Disabilities Decision, F. v. Austria (Communication No. 21/2014, CRPD/ C/14/D/21/2014), 21 September 2015, para. 8.5 and 8.7.

new public buildings that are open or provided to the public should be made accessible to people with disabilities. In that regard, the CRPD Committee in General Comment No. 2 on accessibility indicated that ‘it is unacceptable to use public funds to create or perpetuate the inequality that inevitably results from inaccessible services and facilities’.³⁰⁷ In addition, the Committee in the *F. v. Austria* case indicated that new investments, research and production should contribute to the elimination of inequality and not to the creation of new accessibility barriers.³⁰⁸ The same applies to a new web-site, phone, car or ATM machine.³⁰⁹ Nevertheless, this does not imply that all new products in the market should be accessible, but, for every new product that is available on the market, there must also be an available accessible version that is available at no extra cost.

To conclude, the progressively realisable nature of Article 9 UNCRPD implies that the States Parties to the Convention have to address several immediate obligations. These obligations include, the obligation to take ‘deliberate, concrete and targeted’ steps to implement Article 9 UNCRPD, the obligation to use the maximum of the available resources for its implementation, the obligation to improve conditions in relation to accessibility, the obligation to abstain from adopting deliberately retrogressive measures with regard to the level of accessibility, the obligation to monitor the implementation of Article 9 UNCRPD, the obligation to devise strategies and programmes for its implementation and the obligation to comply with and respect the minimum core level of Article 9 UNCRPD.

C. THE OBLIGATIONS OF ARTICLE 9 UNCRPD

(...) to ensure (...)

According to Article 9 (1) UNCRPD, States Parties shall take appropriate measures to ensure accessibility. The obligation to ‘ensure’ is part of the general obligations of the Convention stated in Article 4 UNCRPD. In the context of international human rights law, the obligation to ‘ensure’ is explicitly formulated in Article 2 ICCPR. According to *Manfred Nowak*, the obligation to ‘ensure’ is a positive obligation, which combines the obligation to ‘protect’ and to ‘fulfil’. This conclusion can also be derived from the work of the Human Rights Committee

³⁰⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 32.

³⁰⁸ Committee on the Rights of Persons with Disabilities Decision, *F. v. Austria* (Communication No. 21/2014, CRPD/ C/14/D/21/2014), 21 September 2015, para. 8.5.

³⁰⁹ See, Committee on the Rights of Persons with Disabilities Decision, *Szilvia Nyusti and Péter Takács v. Hungary* (Communication No. 1/2010, CRPD/C/9/D/1/2010), 21 June 2013, para. 10.2 (a).

and the CESCR.³¹⁰ I refer to the work of the CESCR to interpret this obligation because, as I have explained above³¹¹, Article 9 UNCRPD is to be progressively realised and it resembles economic, social and cultural rights in that regard. I also provide the relevant position of the CRPD Committee on the issues under analysis.³¹²

i. The obligation to protect

The obligation to ‘protect’ requires the States Parties to take measures to prevent any impediment or interference to accessibility that is created by private entities. Therefore, the States Parties to the Convention, within their jurisdiction, are obliged to regulate the performance of individuals, individual groups and private entities in order to prevent conduct that may create barriers to accessibility, and to guarantee and maintain accessibility on an equal basis with others. In that regard it is important to note that in the case of privatisation of the provision of public goods, the States Parties to the Convention remain responsible for regulating the activities of private entities so as to ensure that Article 9 UNCRPD is not violated.³¹³

Particularly, States Parties are obliged to adopt legislation that guarantees accessibility and to annul any legislation that creates barriers to accessibility.³¹⁴ Such legislation may not be sufficient on its own to guarantee accessibility, but it can certainly contribute towards changing perceptions within society about people with disabilities and their right to live independently and to participate in aspects of life which, in the long term, can accelerate the implementation of Article 9 UNCRPD.³¹⁵ An example of such legislation at the EU level is the Audio-visual Services Directive which requires the Member States to encourage media service providers to gradually make their services accessible for people with a visual or hearing disability.³¹⁶

³¹⁰ M. Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary* (2nd edition, N.P. Engel, 2005), p. 39.

³¹¹ See, Chapter I, The progressive realisation of Article 9 UNCRPD.

³¹² I believe that the CRPD Committee’s work does not provide a comprehensive analysis of this subject. Therefore, I chose to use the work of the CESCR Committee to interpret the obligations found in Article 9 UNCRPD.

³¹³ M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 238.

³¹⁴ See, Committee on Economic, Social and Cultural Rights, Concluding observations Morocco E/2001/22, para. 520; Committee on Economic, Social and Cultural Rights, Concluding observations Zimbabwe E/1998/22, para. 73; M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 226.

³¹⁵ *Ibid.*

³¹⁶ Article 7 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), [2010] OJ L 95/1.

States Parties should also invest in the development of minimum standards and guidelines that will pave the way towards the implementation of accessibility. Standards are essential for the implementation of accessibility because they give guidance on how to design accessible goods and facilities. Without standardisation the implementation of accessibility will be impossible. The adoption of legislation and the design of standards, on their own, are not enough to guarantee the removal of barriers of accessibility. The States Parties to the Convention need to take measures to enforce those laws and standards. Thus, if a state adopts a law requiring the retrofitting of football stadiums so that they become accessible to people with disabilities and a standard that explains how to design such stadiums, but it does not actually allocate enough resources to create inspection bodies to examine the implementation of that law and standard, the implementation of that law will be challenging. As the CRPD Committee noted in General Comment No. 2 on accessibility, a common challenge to the implementation of accessibility standards and laws has been the lack of an adequate monitoring mechanism to ensure the practical implementation of these standards and relevant legislation.³¹⁷

Therefore, the States Parties are obliged to adopt legislation to establish effective monitoring mechanisms in the field of accessibility. The monitoring mechanisms should also involve inspection mechanisms in order to ensure that there is no impunity for any violation of the obligations.³¹⁸ In that regard, the States Parties to the Convention should make sure that effective means of redress or remedies are available to persons who have experienced violations of Article 9 UNCRPD and to ensure that effective means of guaranteeing the accountability of the government in the case of such violations are in place.³¹⁹

Article 9, paragraph 2 (a) UNCRPD provides a similar obligation to the one analysed in the previous paragraph with regard to monitoring, with a particular emphasis on standardisation. Article 9 2 (a) reads: 'States Parties shall also take appropriate measures to develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public'.³²⁰ Civil society, in particular persons with disabilities and their representative organisations, should be involved in and participate fully in these monitoring mechanisms.³²¹ An example of the development of standards at the EU level is the standardisation mandate of the

³¹⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 10.

³¹⁸ See, Committee on Economic, Social and Cultural Rights, Concluding observations El Salvador E/1997/22, para. 162 and 165; Committee on Economic, Social and Cultural Rights, Concluding observations Guatemala E/1997/22, para. 131; M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 233.

³¹⁹ See, Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 24 and 29.

³²⁰ Article 9 (2) (a) UNCRPD.

³²¹ Article 33 (3) UNCRPD. See, also, See, Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 25, 28 and 30.

Commission that calls for the development of standards on accessibility for the built environment in the context of public procurement.³²²

The States Parties also have the obligation to remove all barriers and traditional practices that obstruct accessibility.³²³ Examples of such traditional practices may be the use of steps to enter a building or, in a broader context, the overreliance of the disability policy of a state on assistive technologies with regard to accessibility. This is a type of policy that is closely related to the medical model of disability. This example might be closer to discrimination than inaccessibility, but it is indicative of the need to change practices that hinder the full and effective participation of people with disabilities in all aspects of life.

In addition, the States Parties to the Convention are required to take measures to protect people with disabilities from abusive behaviour carried out by the private business sector, including national and transnational corporations.³²⁴ For example, the states should protect people with disabilities from the harm from accessible products of low quality that might not be safe for them to use. The EU has proposed a new measure on product safety that requires the Member States to consider vulnerable groups, including people with disabilities, when they assess the safety of a product.³²⁵

Furthermore, when negotiating financial support from international institutions such as the International Monetary Fund and the World Bank, and international organisations such as the World Trade Organisation, States Parties should take into account Article 9 UNCRPD and act as the protectors of accessibility with a particular focus on the most vulnerable members of society.³²⁶ For example, when Greece was negotiating financial support from the EU and the IMF, it should have considered all the obligations of the UNCRPD with regard to accessibility. The same applies to the participation of States Parties in international organisations.³²⁷ They are required to take into account Article 9 UNCRPD when they are adopting policies through these organisations.³²⁸

³²² Standardisation Mandate M/420 to CEN CENELEC and ETSI in support of European accessibility requirements for public procurement in the built environment, 21 December 2007.

³²³ Article 4 (1) (b) UNCRPD; Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 23; see, Human Rights Committee, Concluding comments Sudan CCPR/79/Add. 85, para. 11; I. Boerefijn, *The Reporting procedure under the Covenant on Civil and Political Rights: practice and procedure of the Human Rights Committee* (Intersentia, 1999), p. 319; M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 226.

³²⁴ M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 229.

³²⁵ Article 6 of Proposal for a Regulation of the European Parliament and the Council on consumer product safety and repealing Council Directive 87/357/EEC and Directive 2001/95/EC, COM(2013) 078 final.

³²⁶ M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 234.

³²⁷ *Ibid.*, p. 237.

³²⁸ *Ibid.*

Lastly, Article 9 (2) (b) UNCRPD reads: ‘States Parties shall also take appropriate measures to ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities’.³²⁹ The term ‘take into account’ might imply a weaker obligation than the obligation ‘to ensure access’ that is contained in the first paragraph of the same article, because the former requires private entities to consider accessibility or to think carefully about accessibility while the latter requires States Parties to ‘ensure access’.³³⁰ Nevertheless, the CRPD Committee pointed out in General Comment No. 2 on Article 9 UNCRPD that, as long as goods, products and services are open or provided to the public, they should be accessible to all, regardless of the legal personality and the public or private nature of who owns them or provides them to the public.³³¹ In other words, it does not matter who owns the facility or service but rather all that matters is who uses it. Therefore, the obligation to ‘ensure access’ in Article 9 (1) UNCRPD addresses both the public and the private sector which means that Article 9 (2) (b) UNCRPD overlaps with the obligation of Article 9 (1) UNCRPD. As a result, Article 9 (2) (b) UNCRPD can only be seen as a reminder that the scope of Article 9 UNCRPD includes private entities as well, but this is not an argument against the inclusion of the private sphere in the scope of Article 9 UNCRPD, or for a weaker obligation with regard to the responsibility of private entities to provide accessible goods, services and facilities to the public.

ii. The obligation to fulfil

According to the CESCR, the obligation to ‘fulfil’ includes the obligation to ‘facilitate’, the obligation to ‘provide’ and the obligation to ‘promote’.³³² The obligation to facilitate obliges the States Parties to the UNCRPD to take measures to enable and assist people with disabilities to enjoy accessibility on an equal basis with others.³³³ In that regard, the States Parties to the Convention are required to identify and remove the barriers to the enjoyment of accessibility by people with disabilities. Consequently, States Parties are obliged to adopt national policies to realise accessibility, preferably through legislation, and to take measures to ensure that such legislation is enforced in practice. In that regard, States Parties should closely consult with and actively involve persons with disabilities when

³²⁹ Article 9 (2) (b) UNCRPD.

³³⁰ Oxford dictionary online on the interpretation of ‘consider’, www.oxforddictionaries.com/definition/english/consider (accessed 17 January 2018); see, also, F. Seatzu, in, V. Della Finna, R. Cera, G. Palmisano (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, p. 229.

³³¹ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 13.

³³² M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 239.

³³³ *Ibid.*

they are developing and implementing legislation and policies or making any decision that are relevant to persons with disabilities.³³⁴ For example, the EU has adopted legislation on copyright law with a view to removing barriers to accessibility and enabling people with disabilities to have access, on an equal basis with others, to works in accessible formats. The relevant directive allows Member States to pass exemptions on copyright for the benefit of people with disabilities and, thus, facilitate their access to works in accessible formats.³³⁵

In addition, the duty of the States Parties to facilitate includes a requirement on public authorities to consider their obligation to ensure accessibility at the earliest possible stage when they are formulating national policies and actions.³³⁶ In that regard, the CRPD Committee in General Comment No. 2 on accessibility pointed out that a clear distinction should be made between the obligation to ensure access to all newly designed, built or produced objects, infrastructure, goods, and services and the obligation to ensure access to the existing infrastructure, goods and services open or provided to the public.³³⁷ The cost of subsequent adjustments with a view to making existing infrastructure, goods and services accessible may be considerable, especially in the case of certain historical buildings, while the initial implementation of accessibility standards is more economical³³⁸ However, the CRPD Committee has highlighted that the potential costs of the subsequent elimination of barriers may not be used as a justification for evading the requirement to progressively remove barriers to accessibility.³³⁹ After all, it is arguable that the cost of accessibility adaptations could, for instance, be offset by the benefits of increased participation of people with disabilities in the workforce or other areas of life.³⁴⁰ For that reason, the Committee stated that all new objects, infrastructure, facilities, goods, products and services must be designed based on accessibility standards, whereas, the application of accessibility standards to existing infrastructure, facilities, goods, products and services should be gradual in nature.³⁴¹ Lastly, the Committee

³³⁴ Article 4 (3) UNCRPD.

³³⁵ Article 3 (b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] OJ L 167/10.

³³⁶ See, Committee on Economic, Social and Cultural Rights, Concluding observations Argentina E/2000/22, para. 275; Committee on Economic, Social and Cultural Rights, Concluding observations Iceland E/2000/22, para. 85; M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 241.

³³⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 24.

³³⁸ *Ibid.*, para. 15; Committee on the Rights of Persons with Disabilities Decision, F. v. Austria (Communication No. 21/2014, CRPD/ C/14/D/21/2014), 21 September 2015, para. 8.7.

³³⁹ *Ibid.*

³⁴⁰ F. Seatzu, in, V. Della Finna, R. Cera and G. Palmisano (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, p. 237.

³⁴¹ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 24.

reiterated that strengthening the direct involvement of disabled persons in the development of national policies and actions and the designing of products and infrastructure would improve the understanding of the particular needs of persons with disabilities and the overall effectiveness of accessibility standards.³⁴²

A good example of the obligation on national authorities to ensure accessibility at an early stage of the formulation of national policies and actions at the EU level, is public procurement legislation that obliges the Member States to take into account accessibility within the context of the technical specification of public contracts and, thus, to take such considerations into account from an early stage in the formulation of state action.³⁴³

Furthermore, the States Parties to the Convention are obliged to facilitate accessibility by taking measures to combat poverty with regard to disabled people or to achieve a better distribution of wealth so as to enable people with disabilities to enjoy accessibility on an equal basis with others.³⁴⁴ Such measures address the affordability aspect of accessibility.

The obligation to ‘provide’ requires States Parties to take positive measures to enable and assist³⁴⁵ persons with disabilities, so that they can enjoy accessible transport, goods and services and ICTs, among others, in cases where these individuals are not able, due to their impairment, to enjoy accessibility without some form of assistance. This general obligation is translated into several requirements for the States Parties to the Convention to take action to provide assistance and enable persons with disabilities to enjoy accessibility in subparagraphs (c), (d) and (e) of Article 9 (2) UNCRPD. It is important to note, in that regard, that the CRPD Committee considers banning assistance dogs from entering a particular building or open space as a prohibited act of disability-based discrimination.³⁴⁶ An example of measures addressing the obligation to ‘provide’ in the context of EU legislation is the fact that people with disabilities, when travelling by train, have a right to receive assistance free of charge, both at the railway stations and when they are on board the trains.³⁴⁷

In addition, according to paragraph (c), States Parties are required ‘to provide training for stakeholders on accessibility issues facing persons with

³⁴² Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 19.

³⁴³ Article 42 (1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L 94/65.

³⁴⁴ M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 239.

³⁴⁵ See, Committee on Economic, Social and Cultural Rights, Concluding observations Germany E/1999/22, para. 344; M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 243.

³⁴⁶ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 29.

³⁴⁷ Article 22 (1) and 23 of Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers’ rights and obligations, [2007] OJ L 315/14.

disabilities'.³⁴⁸ An example of this obligation in the context of the CRPD Committee's case law is the case of *Mr. X v. Argentina*.³⁴⁹ This case dealt with, amongst other things, the failure by Argentina to ensure accessibility and effective accommodation for a prisoner who used a wheelchair and who had a serious medical condition.³⁵⁰ The Committee concluded in this case that Argentina should provide sufficient and regular training on the application of the Convention and its Optional Protocol to prison officials, particularly health-care personnel, judges and other judicial officers.³⁵¹

A stakeholder is someone with an interest or concern in something.³⁵² In the context of Article 9 UNCRPD, a stakeholder is a person, group or organisation or legal entity that has an interest in accessibility. Such stakeholders could be members of the central and local government that have an interest in accessibility, public bodies, Disabled Peoples Organisations and any representative organisations of people with disabilities, people with disabilities and disabled rights activists, disability service providers, international organisations such as the WHO and the EU, developers of accessible goods and services and accessibility assessors. The CRPD Committee stated, in that regard, in General Comment No. 2 on accessibility that, while the UNCRPD does not define who a stakeholder can be, 'any exhaustive list should include the authorities that issue building permits, broadcasting boards and ICT licences, engineers, designers, architects, urban planners, transport authorities, service providers, members of the academic community and persons with disabilities and their organizations'.³⁵³ The Committee also specified that training should be provided not only to those designing goods, services and products, but also to those who actually produce them.³⁵⁴

Furthermore, Article 9 (2) UNCRPD requires the States Parties 'to provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms' (subparagraph (d))³⁵⁵ and 'to provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public' (subparagraph (e)).³⁵⁶ Without signage, accessible information and communication and support services, orientation and movement in and through buildings could become impossible for many disabled people,

³⁴⁸ Article 9 (2) (c) UNCRPD.

³⁴⁹ Committee on the Rights of Persons with Disabilities Decision, *Mr. X. v. Argentina* (Communication No. 8/2012, CRPD/C/11/D/8/2012), 18 June 2014.

³⁵⁰ *Ibid.*, para. 2–3.

³⁵¹ *Ibid.*, para. 9.b.v.

³⁵² Oxford dictionary online on the interpretation of 'stakeholder', www.oxforddictionaries.com/definition/english/stakeholder (accessed 17 January 2018).

³⁵³ See, Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 19.

³⁵⁴ *Ibid.*

³⁵⁵ Article 9 (2) (d) UNCRPD.

³⁵⁶ Article 9 (2) (e) UNCRPD.

particularly those who experience cognitive fatigue.³⁵⁷ In addition, Article 4 (1) (h) UNCRPD requires the States Parties 'to provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities'.³⁵⁸ It is important to note, in that regard, that the implementation of accessibility standards does not automatically eliminate the need for technical aids.³⁵⁹ There are several examples of such obligations at the EU level. As far as Article 9(2) (d) UNCRPD is concerned, EU law requires the Member States to guarantee that the name of the medical product on the packaging is in Braille format.³⁶⁰ With regard to Article 9(2) (e) UNCRPD, the relevant EU law in the field of road travel requires the Member States to ensure that assistance will be provided to people with disabilities, free of charge, at bus and coach terminals and on buses and coaches.³⁶¹ As far as Article 4 (1) (h) UNCRPD is concerned, EU law requires the Member States to guarantee that information on quality standards of assistance is available to people with disabilities when they are travelling by sea.³⁶²

The obligation to promote accessibility requires the States Parties to raise awareness among authorities and individuals about accessibility in the context of the UNCRPD.³⁶³ A good example of an action addressing the promotion of accessibility is the translation of texts on human rights norms and instruments on accessibility by the States Parties to the Convention into their official language including, among others, the Convention, general comments and concluding observations by the CRPD Committee and providing them in accessible formats.³⁶⁴ An example of an awareness-raising event on accessibility at the EU was the organisation of the third European Parliament of Persons with Disabilities, which took place one day after the International Day of People with Disabilities on the 4th of December 2012. The two previous meetings were held in 1993 and 2003. The event involved 450 delegates from organisations representing persons with disabilities from all over Europe as well as EU representatives. The

³⁵⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 20.

³⁵⁸ Article 4 (1) (h) UNCRPD.

³⁵⁹ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 15.

³⁶⁰ Article 56 (a) of Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, [2004] OJ L 136/34.

³⁶¹ Article 13 (1) of Council Directive 2009/47/EC of 5 May 2009, amending Directive 2006/112/EC as regards reduced rates of value added tax, [2009] OJ L 116/18.

³⁶² Article 13 (3) of Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2011] OJ L 334/1.

³⁶³ See, M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 244.

³⁶⁴ M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 244.

purpose of this event was to discuss and raise awareness of the challenges that people with disabilities face in the climate of the current crisis and the way in which the EU could contribute to increasing their participation in society and contribute to independent living.

In the context of the obligation to promote, the states are obliged to undertake training programmes to increase awareness of accessibility.³⁶⁵ The training programmes should target primarily all groups that, as part of their profession or job, might interact with people with disabilities. These groups include among others, employers, retailers, product designers, public servants, judges, headmasters, teachers, police officers, doctors, nurses, bankers, receptionists, booking agents and taxi drivers. This obligation is similar to the obligation of Article 4 (1) (i) UNCRPD which requires States Parties 'to promote the training of professionals and staff working with persons with disabilities in the rights recognized in this Convention so as to better provide the assistance and services guaranteed by those rights'.³⁶⁶ In that regard, the term 'working' does not mean being in the same workplace with people with disabilities, because there is no connection between people being co-workers with people with disabilities and people providing assistance and services to people with disabilities. Furthermore, such an interpretation would limit the benefits of the training only to people who work with people with disabilities, which is very peculiar considering the fact that many people who provide services or products to people with disabilities would benefit from such training. Thus, it is my view that 'working', in the context of this obligation, means interacting or associating in some way with people with disabilities through the work or service that a worker provides to the public as a whole. An example of training of personnel at the EU level is the obligation on the Member States to guarantee that people who directly provide assistance to people with disabilities and people and who provide services to the public in the context of road travel receive disability-training. The former should receive both training on how to treat to people with disabilities and how to provide assistance to people with disabilities and the latter are only required to receive training on how to treat people with disabilities.³⁶⁷ Lastly, the media should not only ensure the accessibility of their own programmes and services for persons with disabilities, but they should also assume an active role in promoting accessibility and contributing to awareness-raising.³⁶⁸

Furthermore, States Parties have a duty to 'promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to

³⁶⁵ Ibid.

³⁶⁶ Article 4 (1) (i) UNCRPD.

³⁶⁷ Article 16 of Council Directive 2009/47/EC of 5 May 2009, amending Directive 2006/112/EC as regards reduced rates of value added tax, [2009] OJ L 116/18.

³⁶⁸ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 35.

information'.³⁶⁹ This can be achieved, for example, through state investment in research on that subject. With regard to research, States Parties are specifically obliged 'to undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost'³⁷⁰ and to 'promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost'.³⁷¹ The CRPD Committee emphasised, in that regard, in General Comment No. 2 on accessibility that 'new investments, research and production should contribute to eliminating inequality, not creating new barriers'.³⁷²

In addition, Article 9 (2) (g) UNCRPD obliges states to 'promote access for persons with disabilities to new information and communications technologies and systems, including the Internet'.³⁷³ Public campaigning might be a good policy in order to fulfil this obligation.

Lastly, the States Parties to the Convention are obliged to guarantee that the human rights approach to disability and accessibility are part of the curriculum of both formal and non-formal education and particularly in the area of higher education.³⁷⁴

D. 'ACCESSIBILITY OF' AND 'ACCESS TO'

(...) *access to* (...)

According to Article 9 UNCRPD, States Parties to the Convention are required to take appropriate measures to ensure that persons with disabilities have access 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.

³⁶⁹ Article 9 (2) (f) UNCRPD.

³⁷⁰ Article 4 (1) (g) UNCRPD.

³⁷¹ Article 9 (2) (h) UNCRPD.

³⁷² Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 22.

³⁷³ Article 9 (2) (g) UNCRPD; Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 39.

³⁷⁴ M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 246; See, Committee on Economic, Social and Cultural Rights, Concluding observations Australia E/2001/22, para. 400.

As I have analysed above, the term ‘access to’ has a different meaning to ‘accessibility of’.³⁷⁵ The term ‘access to’ refers to access for all people, and it covers a broader array of issues, while ‘accessibility of’ is a term specifically used with regard to people with disabilities. Accessibility is focused on the removal of barriers, physical or attitudinal, that hinder people with disabilities from living independently and participating fully in all aspects of life. Thus, it is submitted that the decision of the drafters of the UNCRPD to refer to ‘access to’, in an article that addresses ‘accessibility of’, is confusing. In that regard, I argue in this section of the chapter that the intention of the drafters of the Convention with regard to Article 9 UNCRPD was to lay down the obligations with regard to ‘accessibility of’ and not the obligations in relation to ‘access to’, notwithstanding the wording which was used.

The first indication of this intention can be inferred from the title of the article. The article is entitled ‘accessibility’, which means that the purpose of this article is to guarantee that people with disabilities do not face accessibility barriers.

In the second sentence of Article 9 (1) UNCRPD, the article emphasises the fact that the appropriate measures to enable people with disabilities to live independently and participate fully in all aspects of life ‘shall include the identification and elimination of obstacles and barriers to accessibility’.³⁷⁶ This reference to accessibility is another indicator that Article 9 UNCRPD addresses the issue of inaccessibility, which excludes people with disabilities from participating in society and does not enable them to live independently, because the article recognises that, to achieve its purpose, it is essential to identify and remove barriers to accessibility.

In addition, the second paragraph of Article 9 overwhelmingly refers to accessibility issues. Incidentally, there are only two references to the term ‘access to’ in Article 9(2) UNCRPD. For example, paragraph (2) (a) addresses the issue of accessibility standards. The most important reference to accessibility is contained in paragraph (2) (b), which addresses the obligation of States Parties to ensure that the private sector takes into account disability accessible facilities and services. The term that the drafters of the Convention used was ‘accessibility’ and not ‘access to’, which is indicative of the fact that Article 9 UNCRPD addresses obligations with regard to ‘accessibility of’ and not broader ‘access’ obligations.

The examination of the Convention as a whole shows that the concept of ‘access to’ is referred to in many articles, including in Article 5 UNCRPD on equality and non-discrimination, and other substantive articles, such as Article 13 UNCRPD on access to justice and Article 30 UNCRPD. The latter article requires States Parties to ensure that people with disabilities ‘enjoy access to cultural materials in accessible formats’.³⁷⁷ In none of these articles should the term ‘access to’ be confused with the term ‘accessibility of’.

³⁷⁵ See Chapter I, Accessibility of and Access to.

³⁷⁶ Article 9 (1) UNCRPD.

³⁷⁷ Article 13 and 30 (1) (a) UNCRPD.

The foregoing interpretation is confirmed by the drafting history of the Convention itself. Throughout the *travaux préparatoires*, the terms ‘access to’ and ‘accessibility of’ were used interchangeably to address accessibility, sometimes even in the same sentence. For example, the National Human Rights Institutions proposed that a ‘definition of access or accessibility needs to be added’, which has been transformed into to what is now Article 9 UNCRPD.³⁷⁸ The Australian delegation stated that ‘Australia’s interpretation of access to the open environment is that the facilities that enable people to enjoy spectacular views or visit historic sites, for example, should be equally accessible to PWD’.³⁷⁹ It is evident from these two references that the terms ‘access to’ and ‘accessibility of’ mean the same thing in the context of Article 9 UNCRPD. Moreover, during the drafting of the Convention there was no reference to the different meanings of these terms and given that there was no reference to what is included in the broader concept of ‘access to’, it is evident that the drafters intended to lay down the obligations with regard to ‘accessibility of’ and not the obligations in relation to ‘access to’ in Article 9 UNCRPD.

The CRPD Committee’s General Comment No. 2 on accessibility does not provide any clarity with regard to this issue. In that General Comment, the Committee recognised that accessibility should be considered as part of the broader right of access in the context of disability.³⁸⁰ The Committee also asserts that this right is ensured through the implementation of accessibility standards, without making a reference to other elements of the right of access, as I have analysed above³⁸¹, such as the principle of non-discrimination.³⁸² Thus, the Committee seems to imply that ‘accessibility of’ and the ‘right of access’ have the same meaning. While this understanding removes the confusion resulting from references to both ‘access to’ and ‘accessibility of’ in the same article, it is contrary to the analysis of ‘access to’ that is outlined above. It is also contrary to the way in which ‘access to’ has been interpreted in other human rights instruments, and contrary to the way in which it is understood in other UNCRPD articles.³⁸³ The CRPD Committee also stated that the removal of barriers to access to all areas of life is a gradual process that should be systematically performed and continuously monitored.³⁸⁴ This implies that the right of access is to be progressively realised. This is consistent with the view put forward by the Committee, namely that

³⁷⁸ Ad Hoc Committee on the Disability Convention, Daily Summaries, Sixth Session, Evening Session, 5 August 2005.

³⁷⁹ Ad Hoc Committee on the Disability Convention, Daily Summaries, Seventh Session, Morning Session, 17 January 2006.

³⁸⁰ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 5.

³⁸¹ See Chapter I, Accessibility of and Access to.

³⁸² Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 14.

³⁸³ See Chapter I, Accessibility of and Access to.

³⁸⁴ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 23 and 27.

the right of access of people with disabilities is ensured through the removal of barriers to accessibility because, as was stated above, accessibility is to be progressively realised. However, the Committee, in the same General Comment, indicates that the denial of access should be considered as a prohibited act of discrimination, which implies that the prohibition of discrimination is part of the right of access as well. This statement of the Committee seems to be contrary to the statements of the Committee that the right of access is to be progressively realised. Even if these statements were to be read as complementing each other so as to explain the meaning of the right of access, the way in which the Committee uses the terms ‘access to’ and ‘accessibility of’ is rather confusing.

In my view, the intention of the drafters of the Convention with regard to Article 9 was to lay down the obligations of States Parties with regard to accessibility. This is evident from the reference in Article 9 (1) UNCRPD to the removal of accessibility barriers and from the fact that the obligations of paragraph (2) of the same article predominantly refer to accessibility. The reference to ‘access’ in the first paragraph of Article 9 UNCRPD signifies a broader goal of the Convention, which is to guarantee that people with disabilities have equal access in all areas of life. The implementation of accessibility standards and the removal of barriers to accessibility are two of the measures that contribute to the fulfilment of these obligations. As I have mentioned in this section of the chapter, the Convention entails several obligations that could contribute to ensuring that people with disabilities have equal access to all areas of life in accordance with Article 9 (1) UNCRPD, including the prohibition of discrimination and the right of people with disabilities to be reasonably accommodated.

The reference in Article 9 UNCRPD to the term ‘access to’, in addition to accessibility, is therefore confusing. It would have been more appropriate to place such a broad obligation in Article 4 UNCRPD as part of the general obligations of the Convention. By so doing, this would have avoided the confusion between the terms ‘access to’ and ‘accessibility of’ and it would have given the drafters the opportunity to explain more clearly what is included in the term ‘access to’.

E. ACCESSIBILITY AND EQUALITY

(...) on an equal basis with others (...)

To begin with the ordinary meaning of the phrase, the term ‘equal’ means having the same status, rights or opportunities.³⁸⁵ The meaning of the term ‘basis’ is the foundation for an idea, argument or processor.³⁸⁶ In the context of the

³⁸⁵ Oxford dictionary online on the interpretation of ‘equal’, www.oxforddictionaries.com/definition/english/equal (accessed 17 January 2018).

³⁸⁶ Oxford dictionary online on the interpretation of ‘basis’, www.oxforddictionaries.com/definition/english/basis (accessed 17 January 2018).

Convention, ‘others’ are people who are not considered to be disabled according to the Convention.³⁸⁷ Therefore, when the text of the Convention mentions that ‘States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others’, it means that the States Parties should take effective measures to ensure that people with disabilities have the same opportunities as non-disabled people with regard to the enjoyment of accessibility in all aspects of life.

The notion of equality which prescribes that people should have the same opportunities to enjoy their human rights is closely related to the idea of equality of opportunity. Equality of opportunity is part of a broader concept of equality that is named ‘substantive or *de facto* equality’. The purpose of substantive equality is to compensate for the social inequalities and disadvantages that certain groups have been subjected to and experienced.³⁸⁸ It recognises that achieving equality for members of disadvantaged groups is challenging, because it involves the elimination of extra burdens and barriers.³⁸⁹ Substantive equality focuses on the material reality of peoples’ lives.³⁹⁰ Formal equality, on the other hand, maintains that people in the same situations should be treated in the same manner; substantive equality might therefore require people being treated differently in order to ensure equality.

General Comment No. 2 of the CRPD Committee on accessibility considers accessibility as a result of the shift from formal to substantive equality.³⁹¹ It recognises that accessibility is an essential part of the new duty to respect, protect and fulfil equality rights.³⁹² Accessibility is not just a tool that contributes to the elimination of barriers that hinder the equal enjoyment of the human rights and fundamental freedoms of people with disabilities, but it is a vital precondition for the enjoyment of such rights and freedoms as well.³⁹³ The obligations of Article 9 UNCRPD signify that for the States Parties to the Convention to guarantee the equal rights of people with disabilities, it is not sufficient that people with

³⁸⁷ It is important to note that the term ‘others’ may also include other people with disabilities. This would cover situations where a group of people with a certain type of disability receives preferential treatment in comparison with other individuals with disabilities. However, in the context of Article 9 UNCRPD, such instances are very rare. For instances of preferential treatment of veterans, see, Committee on the Rights of Persons with Disabilities, Concluding observations Bosnia and Herzegovina CRPD/C/BIH/CO/1/2017, para. 10 (b). On the interpretation of the phrase ‘on an equal basis with others’, see, A. Broderick, *The long and winding road to equality and inclusion for persons with disabilities: the United Nations convention on the rights of persons with disabilities*, p. 92–95.

³⁸⁸ E. Howard, *The EU race directive: developing the protection against racial discrimination within the EU* (Routledge, 2009), p. 115.

³⁸⁹ Ibid.

³⁹⁰ Ibid.

³⁹¹ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 14.

³⁹² Ibid.

³⁹³ Ibid., para. 1 and 4.

disabilities are treated in the same way as non-disabled people, but rather it entails that all the barriers that hinder the enjoyment of their fundamental rights and freedoms should be removed.

As part of the concept of ‘substantive equality’, the equality of opportunity recognises the systematic discrimination that certain groups, such as people with disabilities, have experienced in the past and which they continue to experience. This poses a challenge for members of those group from reaching the status of ‘being alike’.³⁹⁴ It recognises that the equal treatment of people based on merit cannot be achieved if people have not been able to or had the opportunity to obtain this based on merit.³⁹⁵ As *Fredman* stated:

‘Inequality of opportunity is particularly likely to result where one group suffers from the effects of a history of systematic discrimination which has limited the educational and economic opportunities open to them’.³⁹⁶

People with disabilities have been systematically treated unequally with regard to their ability to enjoy accessibility due to the numerous barriers to accessibility that they have faced in all aspects of their lives. Thus, measures to identify and eliminate those barriers should be adopted by the States Parties to the Convention with a view to correcting those injustices and disadvantages, and with a view to achieving equal opportunities for people with disabilities with regard to their enjoyment of accessibility in all aspects of their lives.

In the context of the Convention, equality of opportunity is one of the principles of the UNCPRD. This means that it applies to all of the Convention’s obligations. In that regard, it applies in the context of accessibility too. This fact reaffirms the interpretation that equality of opportunity, as a part of the general concept of ‘substantive equality’, is included within the phrase: ‘on an equal basis with others’.

Nevertheless, the measures adopted with a view to implementing equality of opportunity might not be sufficient to guarantee full equality. Once individuals, in our case people with disabilities, enjoy equality of opportunity, it is assumed that the barriers and disadvantages associated with institutional discrimination have been eliminated.³⁹⁷ In reality, the removal of those barriers does not necessarily lead to greater fairness in the end.³⁹⁸ This is due to the fact that equality of opportunity, as I have explained above, is not concerned with the end

³⁹⁴ E. Howard, *The EU race directive: developing the protection against racial discrimination within the EU*, p. 117.

³⁹⁵ *Ibid.*, p. 118.

³⁹⁶ *Idem*; D. Fredman, *Civil Liberties and Human Rights in England and Wales* (2nd edition, Oxford University Press, 2002), p. 152.

³⁹⁷ S. Fredman, ‘Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights’, in I. Boerefijn et al. (eds.), *Temporary Special Measures: Accelerating de facto Equality of Women under Article 4 (1) UN Convention on the Elimination of All Forms of Discrimination against Women* (Intersentia, 2003), p. 114.

³⁹⁸ *Ibid.*

result.³⁹⁹ The opportunities created by the measures adopted on the basis of this concept of equality do not guarantee that systematically disadvantaged groups, like people with disabilities, will necessarily take them.⁴⁰⁰ In the context of accessibility, the removal of all barriers that do not allow people with disabilities to enjoy their human rights and fundamental freedoms on an equal basis with others will not instantly guarantee their equality, full inclusion and participation in society. Just because a good or service is made accessible to people with disabilities does not necessarily mean that it will be purchased or used by them.

Therefore, measures should be taken by States to achieve parity of people with disabilities with non-disabled people so as to fully realise equality.⁴⁰¹ Such measures should accelerate the fulfilment of equality⁴⁰² and they should be based on the concept of the 'equality of results'. This aspect of substantive equality is focused on correcting the effects of past or present discrimination that certain people, like people with disabilities, have experienced and achieving a more representative participation of all groups of people in all aspects of life.⁴⁰³ It aims to establish a fairer distribution of goods and resources in society by treating disadvantaged groups of people more favourably.⁴⁰⁴

Several terms have been used to refer to measures based on the concept of equality of results, due to the varied practices found in different national contexts. Examples of such terms are, 'affirmative action', 'positive action', 'positive measures', 'reverse discrimination' and 'positive discrimination'. For the purposes of this section, I will use the term 'specific measures'. In order to address the challenges that people with disabilities face, because of past and present discrimination, specific measures might be necessary. Nevertheless, the implementation of these measures should be done without violating the fundamental rights and freedoms of non-disabled people.⁴⁰⁵ This implies that specific measures should focus on addressing the particular needs of people with disabilities by giving them an advantage rather than significantly restricting the rights of others on the basis of disability.⁴⁰⁶

A measure that could be considered as implementing equality of results in the context of Article 9 UNCRPD might be the offering of discounts to people

³⁹⁹ Ibid.

⁴⁰⁰ S. Fredman, in I. Boerefijn et al. (eds.), *Temporary Special Measures: Accelerating de facto Equality of Women under Article 4 (1) UN Convention on the Elimination of All Forms of Discrimination against Women*, p. 114.

⁴⁰¹ Ibid.

⁴⁰² Ibid., p. 97.

⁴⁰³ E. Howard, *The EU race directive: developing the protection against racial discrimination within the EU*, p. 120.

⁴⁰⁴ Ibid.

⁴⁰⁵ M. Bossuyt, 'The Concept and Practice of Affirmative Action', in I. Boerefijn et al. (eds.), *Temporary Special Measures: Accelerating de facto Equality of Women under Article 4 (1) UN Convention on the Elimination of All Forms of Discrimination against Women*, p. 72.

⁴⁰⁶ Ibid.

with disabilities when they exercise their right to participate in cultural life, recreation, leisure and sport. Such discounts might apply to theatre tickets, football tickets or museum tickets. This example addresses the affordability aspect of accessibility.

Article 9 UNCRPD does not provide any guidance on whether such measures are permitted by the Convention. In that regard, it is important to examine the Convention as a whole to identify if such actions are indeed allowed. Article 5 UNCRPD on equality could clarify this issue. Paragraph (4) of this article states that ‘specific measures which are necessary to accelerate or achieve *de facto* equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention’.⁴⁰⁷ Thus, measures that can accelerate or achieve *de facto* or substantive equality, such as the specific measures I referred to above, are permitted by the Convention.

After establishing that specific measures are allowed under the UNCRPD, it is important to examine whether the term ‘on equal basis with others’ entails the adoption of such measures as well. The context of the Convention is not helpful in that regard. Nevertheless, it should be noted that, because such measures accelerate the achievement of equality and because the object and purpose of Article 9 UNCRPD is to enable people with disabilities to live independently and participate fully in all aspects of life, measures that can speed up the process of inclusion and independent living as a result of the achievement of equal enjoyment of accessibility should be allowed.

This outcome is confirmed by analysing the broader context of human rights treaties. The UN Human Rights Committee in its General Comment on the Equality of Rights between Men and Women in the context of the right to participate in the conduct of public affairs has stated that:

‘The right to participate in the conduct of public affairs is not fully implemented everywhere on an equal basis. States Parties must ensure that the law guarantees to women the rights contained in article 25 ICCPR on equal terms with men and take effective and positive measures to promote and ensure women’s participation in the conduct of public affairs and in public office, including appropriate affirmative action’.⁴⁰⁸

The Committee has used the term ‘on equal terms’ to describe a relationship of equality between men and women. The ordinary meaning of the phrase ‘on – term’ means in a specified relation or footing.⁴⁰⁹ Thus, the ordinary meaning of the phrase ‘on equal terms’ is: on equal footing. The meaning of the term

⁴⁰⁷ Article 5 (4) UNCRPD.

⁴⁰⁸ Committee on Civil and Political Rights, General Comment No. 28, The Equality of Rights between Men and Women, 2000, para. 29.

⁴⁰⁹ Oxford dictionary online on the interpretation of ‘on term’, www.oxforddictionaries.com/definition/english/on-term (accessed 17 January 2018).

‘footing’ is the basis on which something is established or operates.⁴¹⁰ Therefore, the term ‘on equal terms’ means ‘on an equal basis’, which is the same term that is used in Article 9 UNCRPD.

In the context of participation in public affairs, the Committee has indicated that in order to achieve women’s participation, states should adopt positive measures, including affirmative action, which is a term used to describe measures that are based on the concept of equality of results. Consequently, the interpretation of the term ‘on equal basis’ in the context of human rights law, confirms that this term includes the possibility of the adoption of special measures in the context of Article 9 UNCRPD and that this term addresses both the concepts of equality of opportunity and equality of results.

However, the fact that specific measures play an important role in ensuring that people with disabilities enjoy their human rights and fundamental freedoms on an equal basis with others does not mean that the adoption of specific measures is always mandatory for the States Parties to the UNCRPD. Article 5 (4) UNCRPD refers to specific measures ‘which are necessary to accelerate or achieve *de facto* equality of persons with disabilities’.⁴¹¹ The ordinary meaning of the word necessary means ‘essential, needed to be done, achieved or present’.⁴¹² In the context of Article 5 (4) UNCRPD, ‘necessary’ implies that States Parties should not take actions that exceed what is imperative to ensure *de facto* equality. In that regard, not all specific measures can be seen as essential to guaranteeing *de facto* equality. Therefore, it is arguable that specific measures are obligatory in the context of the UNCRPD only insofar as they address inequalities that are structural and deep rooted in society.

In the context of Article 9 UNCRPD, this finding means that the States Parties are obliged to adopt specific measures in relation to accessibility, insofar as these measures address barriers to accessibility that are structural and deep rooted in society. For example, the existing built environment has been historically designed without taking into account the particular needs of persons with disabilities. Article 9 UNCRPD requires States Parties to take action to gradually adapt their built environment with a view to eliminating accessibility barriers. However, in the meantime, people with disabilities face a plethora of barriers to their movement around these built environments. In order to address these barriers to accessibility, it is arguable that States Parties should adopt specific measures to this effect. An example of such a specific measure might be the creation of an accessible website so as to help people with disabilities to submit applications to the government, which otherwise have to be submitted in person at the offices of the relevant government agencies.

⁴¹⁰ Oxford dictionary online on the interpretation of ‘footing’,
www.oxforddictionaries.com/definition/english/footing (accessed 17 January 2018).

⁴¹¹ Article 5 (4) UNCRPD.

⁴¹² Oxford dictionary online on the interpretation of ‘necessary’,
www.oxforddictionaries.com/definition/english/necessary (accessed 17 January 2018).

F. THE MATERIAL SCOPE OF ARTICLE 9 UNCRPD

(...) the physical environment, to transportation (...)

The term ‘physical’ means something relating to things that are perceived through the senses as opposed to the mind.⁴¹³ It is something tangible or concrete.⁴¹⁴ The term ‘environment’ pertains to the surroundings or conditions in which a person, animal or plant lives or operates.⁴¹⁵ Thus, the physical environment is the surroundings or conditions that can be perceived through the senses in which a person, in our case people with disabilities, live or operate. Therefore, the physical environment includes both the natural environment and the built environment. According to Article 9 (1) (a) UNCRPD, it includes buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces.

Other examples of the physical environment might be squares, vehicles (transport), parking spaces, streets, children’s play areas, monuments, water/gas installations, natural parks, beaches and other outdoor environments. The obligation to ensure the accessibility of the physical environment is not limited to Article 9 UNCRPD, but rather it is found in several articles of the Convention: Article 13 (access to justice), Article 24 (education), Article 25 (health), Article 27 (employment), Article 29 (participation in political life) and Article 30 (participation in cultural life, recreation, leisure and sport).

During the drafting of this provision, there were some objections with regard to scope of the physical environment. Austria, on behalf of the EU, argued that: ‘The text should be carefully constructed to ensure that accessibility requirements do not apply to all public environments, because many of these are natural environments that could not practically be made accessible.’⁴¹⁶ Costa Rica urged caution with respect to the renovation of historical sites for the purpose of accessibility.⁴¹⁷ Nevertheless, in both cases their objections were deflected by the majority of the states. The Chair of the same session recognised that ‘there was consensus that PWD⁴¹⁸ should have access to the “open environment” within the practical limitations of nature.’⁴¹⁹

⁴¹³ Oxford dictionary online on the interpretation of ‘physical’, www.oxforddictionaries.com/definition/english/physical (accessed 17 January 2018).

⁴¹⁴ Ibid.

⁴¹⁵ Oxford dictionary online on the interpretation of ‘environment’, www.oxforddictionaries.com/definition/english/environment (accessed 17 January 2018).

⁴¹⁶ Ad Hoc Committee on the Disability Convention, Daily Summaries, Seventh Session, Morning Session, 17 January 2006.

⁴¹⁷ Ibid.

⁴¹⁸ PWD means Persons with Disabilities.

⁴¹⁹ Ad Hoc Committee on the Disability Convention, Daily Summaries, Seventh Session, Morning Session, 17 January 2006.

On the subject of the retrofitting of historical buildings, all of the countries that addressed this issue in the drafting process, such as Chile, Australia, Brazil, Yemen and several organisations such as the European Disability Forum and the World Union for Progressive Judaism, supported the inclusion of historical and heritage sites within the scope of Article 9 UNCRPD.⁴²⁰ The inclusion of such sites is reflected in the wording of Article 9 UNCRPD, which does not include any exceptions to the scope of the article with regard to the physical environment. Moreover, the purpose of this article is to eliminate barriers and to achieve inclusion and the participation of persons with disabilities. Therefore, any action or omission that creates or maintains any kind of accessibility barrier should not be allowed. Certainly though, respect should be given to the historical and cultural value of sites and any retrofitting that is attempted with a view to making these sites accessible to people with disabilities should take into account their historical or cultural significance. Reading this provision in a broader context, Article 30 (1) (c) UNCRPD obliges the States Parties to ensure that people with disabilities, ‘as far as possible, enjoy, access to monuments and sites of national cultural importance’.⁴²¹ This implies that there will be instances whereby such monuments and sites cannot become accessible to those with disabilities. Thus, a balance should be achieved between, on the one hand, the dangers that retrofitting those sites poses to their cultural and historical identity and uniqueness and the need to guarantee the right of people with disabilities to participate in cultural life, recreation, leisure and sport on the other. Bearing in mind, though, that the purpose of the Convention is to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity’⁴²², the emphasis should be placed on the most effective way to make those sites accessible to people with disabilities at the minimum cost for their historical and cultural value. The CRPD Committee in General Comment No. 2 on accessibility, recognised the challenges of adapting historical monuments to make them accessible to disabled people, but it pointed out that many monuments and sites of national cultural importance have been made accessible in a manner that respects their cultural and historical value.⁴²³

The obligation to ensure the accessibility of the ‘physical environment’ is related to the concept of ‘physical accessibility’ that was analysed above.⁴²⁴ This type of accessibility means that the physical environment, including facilities,

⁴²⁰ Ad Hoc Committee on the Disability Convention, Daily Summaries, Sixth and Seventh Session, 5 August 2005 and 17 January 2006.

⁴²¹ Article 30 (1) (c) UNCRPD.

⁴²² Article 1 UNCRPD.

⁴²³ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 44.

⁴²⁴ See Chapter I, Dimensions of Accessibility.

goods and services, should be adjusted with a view to becoming accessible to persons with disabilities. The difference between the obligation to ensure the accessibility of the physical environment and physical accessibility is that the former refers to the removal of barriers related to all aspects of accessibility – including physical accessibility – that exist in the physical environment. On the other hand, the latter refers to the removal of the barriers that pertain to physical accessibility that occur in the physical environment, transportation, information and communications, including information and communications technologies and systems, and other facilities and services that are open or provided to the public.

(...) to information and communications, including information and communications technologies and systems (...)

The term ‘information’ means facts provided or learned about something or someone.⁴²⁵ The obligation to ensure the accessibility of information is connected to the concept of ‘information accessibility’ that was examined above.⁴²⁶ This type of accessibility refers to the idea that people with disabilities are entitled, on an equal basis with others, to seek, receive and impart information and ideas. The ‘information’ that falls within the scope of Article 9 includes, amongst other things, information about ‘mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities’.⁴²⁷

‘Communication’ means the imparting or exchanging of information by speaking, writing or through some other medium.⁴²⁸ According to Article 2 UNCRPD, communication ‘includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology’.⁴²⁹

Information and communication technologies can be broadly defined as technologies that are used to convey, manipulate and store data by electronic means.⁴³⁰ Such technologies include, amongst other things, broadcast media, computerised information and services software applications and operating systems,

⁴²⁵ Oxford dictionary online on the interpretation of ‘information’, www.oxforddictionaries.com/definition/english/information (accessed 17 January 2018).

⁴²⁶ See Chapter I, Dimensions of Accessibility.

⁴²⁷ Article 4 (h) UNCRPD.

⁴²⁸ Oxford dictionary online on the interpretation of ‘communication’, www.oxforddictionaries.com/definition/english/communication (accessed 17 January 2018).

⁴²⁹ Article 2 UNCRPD.

⁴³⁰ B.E. Perron et al., ‘Information and communication technologies in social work’, 11 *Advances in Social Work* (2010), p. 67.

web-based internet and internet information and applications, telecommunication products, video multimedia products, self-contained closed products, intelligent building management systems and desktop and portable computers.⁴³¹

(...) and to other facilities and services open or provided to the public (...)

This phrase is the result of the debate during the drafting of Article 9 UNCRPD which centred on the subject of the public and the private sphere. The question was whether accessibility requirements should be limited to the public sector or whether States Parties should guarantee accessibility within the private sector as well. Some delegations argued that services and facilities that are open or provided to the public – irrespective of whether they are publicly or privately owned – should be covered by this article.⁴³² Other delegations, such as Japan, opposed this view by arguing that ‘states could not force all private entities to adhere to’ this obligation and ‘suggested changing the word “ensure” to “encourage”’.⁴³³ Ultimately, the Chair of the working group concluded that ‘the issue of publicly owned versus privately owned buildings was discussed at length’, and that ‘there was support for the concept that the focus should not be on who owns the buildings, but on who uses them’.⁴³⁴

This approach was reaffirmed by General Comment No. 2 on accessibility of the CRPD Committee, as was explained above.⁴³⁵ The Committee clarified that the element that determines whether Article 9 UNCRPD is applicable is whether services and facilities are open or provided to the public.⁴³⁶ This approach is also supported by the guidelines that were issued by the United Nations Secretary General on the reporting document to be submitted by States Parties under Article 35 (1) UNCRPD. It specifies, in particular, regarding Article 9 UNCRPD that ‘States Parties should report on the identification and elimination of obstacles and barriers to accessibility including from both within the public and the private sector, and national accessibility plans established with clear targets and deadlines’.⁴³⁷ This interpretation is reaffirmed by the wording of the text of the

⁴³¹ See, Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 5.

⁴³² Ad Hoc Committee on the Disability Convention, Daily Summaries, Third Session, Afternoon Session, 1 June 2004.; Ad Hoc Committee on the Disability Convention, Daily Summaries, Sixth Session, Morning Session, 5 August 2005.

⁴³³ Ad Hoc Committee on the Disability Convention, Daily Summaries, Seventh Session, Afternoon Session, 17 January 2006.

⁴³⁴ Ibid.

⁴³⁵ See, Chapter I, The obligation to protect.

⁴³⁶ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 13; See, also, F. Seatzu, in, V. Della Finna, R. Cera and G. Palmisano (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, p. 234.

⁴³⁷ Committee on the Rights of Persons with Disabilities, ‘Guidelines on treaty-specific document to be submitted by states parties under article 35, paragraph 1, of the Convention

Convention. The ordinary meaning of the term ‘open’ is allowing access, passage, or a view through an empty space.⁴³⁸ The ordinary meaning of the term ‘provided’ is to make something available for use.⁴³⁹ Thus, the scope of Article 9 (1) UNCRPD covers facilities and services that are either available for use or that allow access to the public, regardless of whether they are publicly or privately owned.⁴⁴⁰

Goods and products in the scope of application of Article 9 UNCRPD

The scope of application of Article 9 UNCRPD, as I have analysed above⁴⁴¹, covers the physical environment, transportation, information and communications, including information and communications technologies and systems and other facilities and services that are either open or provided to the public. However, it is not clear whether the scope of application of Article 9 UNCRPD includes goods or products. A product is an article or substance that is manufactured or refined for sale.⁴⁴² A good is an article of trade or a possession.⁴⁴³ In other words, goods can also be items that were not designed for sale, while products are always manufactured or refined for sale.

The wording of Article 9 UNCRPD does not include any reference to goods or products, except for the specific reference to ICTs. This might imply that Article 9 UNCRPD does not require States Parties to ensure that goods or products are accessible. The scope of application of Article 9 UNCRPD covers services that are provided to the public. The provision of services is often closely connected to goods or products. For example, the provision of accommodation services by a hotel could include rooms with beds, air-conditioning, television, internet connection and domestic appliances, amongst other things. It is my view that the implementation of Article 9 UNCRPD, insofar as it relates to accommodation services, requires the adaptation of the service and the goods or products that are attached to the service. Otherwise, the provision of services will not be fully accessible to people with disabilities. Therefore, the wording of Article 9 UNCRPD means that the scope of application of this article includes goods or products that are linked to services that are provided to the public.

on the Rights of Persons with Disabilities, CRPD/C/2/3’, *CRPD* (2009), www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD7102010.aspx (accessed 17 January 2018).

⁴³⁸ Oxford dictionary online on the interpretation of ‘open’, www.oxforddictionaries.com/definition/english/open (accessed 17 January 2018).

⁴³⁹ Oxford dictionary online on the interpretation of ‘provide’, www.oxforddictionaries.com/definition/english/provide (accessed 17 January 2018).

⁴⁴⁰ See, also, Committee on the Rights of Persons with Disabilities Decision, Szilvia Nyusti and Péter Takács v. Hungary (Communication No. 1/2010, CRPD/C/9/D/1/2010), 21 June 2013, para. 9.4.

⁴⁴¹ See, Chapter I, The material scope of Article 9 UNCRPD.

⁴⁴² Oxford dictionary online on the interpretation of ‘product’, www.oxforddictionaries.com/definition/english/product (accessed 17 January 2018).

⁴⁴³ Oxford dictionary online on the interpretation of ‘good’, www.oxforddictionaries.com/definition/english/good (accessed 17 January 2018).

Outside of Article 9 UNCRPD, there is only one reference to products which is found in the definition of Universal Design.⁴⁴⁴ This reference is not sufficient to support the inclusion of goods or products within scope of application of Article 9 UNCRPD. However, the CRPD Committee has shed some light on this issue. In General Comment No. 2 on accessibility, the Committee repeatedly indicated that goods and products fall within the scope of application of Article 9 UNCRPD.⁴⁴⁵ The Committee stated unequivocally that ‘as long as goods, products and services are open or provided to the public they must be accessible to all’.⁴⁴⁶

Furthermore, the inclusion of goods and products in the scope of application of Article 9 UNCRPD is compatible with the object and purpose of the Convention. The ‘full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities’⁴⁴⁷ will not be possible if goods and products provided to the public are not accessible to people with disabilities. For example, the enjoyment of the right to education on an equal basis with others would be inconceivable without the provisions of accessible environments, and modes and means of teaching. In conclusion, the contextual and teleological interpretation of the treaty supports the inclusion of goods and products within the scope of application of Article 9 UNCRPD.

(...) both in urban and in rural areas (...)

Article 9 states that accessibility is to be achieved in both urban and rural areas. The reason behind this choice is that very little has been done by states in developing policies and strategies to enable the enjoyment of the rights of persons with disabilities in rural areas. At global level, the majority of disabled persons live in rural areas, but only 2% receive some support, either financial or other, such as social and care services, from the state and 96% do not possess a formal education.⁴⁴⁸ Furthermore, persons in rural areas are usually poorer and they possess limited resources.⁴⁴⁹ Therefore, unless they have

⁴⁴⁴ Article 2 UNCRPD.

⁴⁴⁵ See, Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 13, 14, 15, 19, 24, 28, 30, 34, 47.

⁴⁴⁶ *Ibid.*, para. 13.

⁴⁴⁷ Article 1 UNCRPD.

⁴⁴⁸ The community-based Rehabilitation (CBR) & UN Convention on Rights of Persons with Disabilities (CRPD), International Workshop on *Community-based Rehabilitation (CBR) and U.N. Convention on Rights of Persons with Disabilities (CRPD)* was jointly organised by the Disability & Rehabilitation team of World Health Organisation (WHO/DAR) and Italian Association Amici di Raoul Follereau (AIFO/Italy), with support from Disabled Peoples’ International (DPI), Norwegian Association of Disabled (NAD) and International Disability & Development Consortium (IDDC) on the occasion of First Asia Pacific CBR Congress. www.aifo.it/english/resources/online/books/cbr/cbr_workshops_0209/CRPD/ CBR%26CRPD_workshop_report_final.doc accessed 17 January 2018.

⁴⁴⁹ *Ibid.*; see, Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 16.

resources they will not be able to participate in everyday life.⁴⁵⁰ Moreover, since representative organisations of people with disabilities work in or close to their own geographical bases, their focus is towards the cities and urban areas and not on rural or tribal areas.⁴⁵¹ The UNCRPD attempts to address this issue by indicating the equal importance of accessibility in both the urban and rural areas.

In the next two parts of this chapter, the concepts of reasonable accommodation and Universal Design are analysed and compared with accessibility with a view to better understanding and defining accessibility.

V. REASONABLE ACCOMMODATION

A. THE EVOLUTION OF REASONABLE ACCOMMODATION

The obligation to provide reasonable accommodation, as *Waddington* has stated, ‘emanates from the realisation that the interaction between the social environment and an individual’s inherent characteristics, such as impairment, can result in the inability to perform a particular task or function in the conventional manner’.⁴⁵² This shows the connection between this concept and the notion of the social model of disability. The concept of ‘reasonable accommodation’ was introduced in the US following the adoption of the Equal Employment Opportunity Act of 1972, which amended the Civil Rights Act of 1964.⁴⁵³ It required that employers should reasonably accommodate the religious practices of their employees, unless they could rely on the undue hardship defence.⁴⁵⁴ Thus, this obligation was introduced with a view to protecting employees against discrimination on the ground of their religious beliefs in the field of employment.⁴⁵⁵ Since then, reasonable accommodation and undue hardship have held had a prominent place in US legislation.⁴⁵⁶ But it was not until the adoption of the Rehabilitation Act of 1973 and the subsequent adoption of the Americans with Disabilities Act of

⁴⁵⁰ Ibid.

⁴⁵¹ UNCRPD, ‘Vision to Action’, *UNCRPD* (2018), www.cbrnetworksouthasia.org.in/uncrpd.php (accessed 17 January 2018).

⁴⁵² L. Waddington, ‘Reasonable Accommodation’, in D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Ius Commune Casebooks for the Common Law of Europe, Hart Publishing, 2007), p. 677–678. This was done with the collaboration of T. Choudhury, O. De Schutter, J. Gerards, A. McColgan and G. Moon.

⁴⁵³ L. de Campos Velho Martel, ‘Reasonable accommodation: The New Concept from an Inclusive Constitutional Perspective’, 8 *International Journal on Human Rights* (2011), p. 88.

⁴⁵⁴ Ibid.

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid.

1990 that these concepts became the subject of increasingly intense debate and discussion, both among scholars and in the national case law.⁴⁵⁷

Over the past decade, many European countries have incorporated reasonable accommodation duties in their national legislation. The EU has also incorporated the concept of reasonable accommodation. The Council Directive establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive) requires the Member States of the EU to adopt legal obligations in relation to reasonable accommodation.⁴⁵⁸ In particular, Article 5 of this directive states: 'In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers should take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned'.⁴⁵⁹

Despite the fact that all EU Member States now possess a legislative duty to make reasonable accommodation, *Waddington* has argued that EU Member States have not adopted legislation on reasonable accommodation in a consistent manner.⁴⁶⁰ As a result, there is no common understanding of the meaning of 'reasonable accommodation' among the EU Member States.⁴⁶¹ In addition, reasonable accommodation appeared in the international scene for the first time in the General Comment No. 5 of the CESCR.⁴⁶²

B. REASONABLE ACCOMMODATION AND THE UNCRPD

It was with the adoption of the UNCRPD that reasonable accommodation was addressed for the first time in the context of an international treaty. Drawing on the language of the CESCR⁴⁶³, the UNCRPD defined reasonable accommodation as:

⁴⁵⁷ Ibid.

⁴⁵⁸ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

⁴⁵⁹ Article 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

⁴⁶⁰ Article 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

⁴⁶¹ L. de Campos Velho Martel, 8 *International Journal on Human Rights* (2011), p. 88; L. Waddington, 'When it is reasonable for Europeans to be confused: understanding when disability accommodation is "reasonable" from a comparative perspective', 29 *Comparative Labour Law and Policy Journal* (2008), p. 318–319.

⁴⁶² J.E. Lord and R. Brown, 'The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities', in M.H. Rioux, L.A. Basser and M. Jones (eds.), *Critical Perspectives on Human Rights and Disability Law*, p. 278; Committee on Economic, Social and Cultural Rights General Comment No. 4, The right to adequate housing, 1991.

⁴⁶³ Ibid.

‘[N]ecessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’.⁴⁶⁴

It is also fundamental to note that Article 2 UNCRPD defines a denial of the provision of reasonable accommodation as a form of discrimination, except when the denial of the provision of reasonable accommodation constitutes an undue burden on the duty-bearer. Thus, the denial of the provision of reasonable accommodation should be considered as a separate and distinct ground to found a claim for discrimination on the ground of disability under the UNCRPD.⁴⁶⁵

The classification of a denial of reasonable accommodation as a form of discrimination in the UNCRPD is also reflected in Article 5 of the Convention. This article requires the States Parties to the Convention to ‘take all appropriate steps to ensure reasonable accommodation is provided’, and when they are adopting measures they are required ‘to promote equality and eliminate discrimination’.⁴⁶⁶ In other words, the Convention obliges States Parties to take legislative and non-legislative action to guarantee that reasonable accommodations are provided to people with disabilities with the view to ensuring that people with disabilities are able to enjoy their human rights and fundamental freedoms on an equal basis with others and without discrimination. Among the positive measures that are required by Article 5 (3) UNCRPD, as *Lawson* has argued, is awareness-raising in relation to the duty to accommodate and the establishment of compliance mechanisms for the implementation of the duty of reasonable accommodation.⁴⁶⁷ This interpretation of the obligation in Article 5 (3) UNCRPD is based on the contextual interpretation of this article in combination with Article 8 UNCRPD which requires the States Parties to the Convention to adopt immediate, effective and appropriate measures to raise awareness of the rights of people with disabilities.⁴⁶⁸

Furthermore, the fact that the denial of reasonable accommodation is considered as a form of discrimination means that the duty to make a reasonable accommodation is part of the UNCRPD general principle of non-discrimination. Like accessibility, this implies that reasonable accommodation should be implemented within the context of all the substantive rights of the Convention; any laws that are not consistent with this obligation should be considered as

⁴⁶⁴ Article 2 UNCRPD.

⁴⁶⁵ J.E. Lord and R. Brown, in M.H. Rioux, L.A. Basser and M. Jones (eds.), *Critical Perspectives on Human Rights and Disability Law*, p. 278.

⁴⁶⁶ *Ibid*; Article 5 (3) UNCRPD.

⁴⁶⁷ A. Lawson, *Disability and equality law in Britain: The role of reasonable adjustment* (Hart Publishing, 2008), p. 32; J.E. Lord and R. Brown, in M.H. Rioux, L.A. Basser and M. Jones (eds.), *Critical Perspectives on Human Rights and Disability Law*, p. 279.

⁴⁶⁸ *Ibid*; Article 8 UNCRPD.

violating the object and the purpose of the UNCRPD. Thus, it is acknowledged that the obligation on States Parties to provide a duty to make a reasonable accommodation is an essential element in the effort to guarantee the enjoyment of human rights by people with disabilities 'on an equal basis with others'.⁴⁶⁹

The purpose of reasonable accommodation is therefore to remove the specific barrier or disadvantage to which a disabled individual would otherwise be exposed, with a view to ensuring equality.⁴⁷⁰ This approach implies that the reasonable accommodation duty is confined to situations where meaningful comparisons can be made with the position of non-disabled people or people with other types of impairment.⁴⁷¹ Thus, the reasonable accommodation duty cannot be used as an argument to support special treatment or extra services or benefits for persons with disabilities, such as waiving health care charges for disabled patients.⁴⁷² Such arguments, as *Lawson* has pointed out, can be made for each of the substantive articles of the Convention.⁴⁷³

The States Parties to the UNCRPD bear the responsibility for providing for a duty to make reasonable accommodations. Nevertheless, this does not mean that reasonable accommodations will only be provided within the public sphere. As the definition of reasonable accommodation in Article 2 UNCRPD implies, the Convention requires States Parties to ensure that reasonable accommodation is provided by a broad array of social actors, among others, the States Parties, employers, education providers, health care providers and providers of goods and services, regardless of whether they belong to the public or the private sphere.⁴⁷⁴ This view is supported by the fact that the reasonable accommodation duty, as part of the principle of non-discrimination, should be implemented within the context of each substantive article of the Convention. In that regard, reasonable accommodation is mentioned in some of the substantive articles of the Convention, including the articles on liberty and security of the person, education, work and employment and access to justice.⁴⁷⁵

The reference to a 'particular case' in the definition of reasonable accommodation in Article 2 UNCRPD indicates that the reasonable accommodation duty is an individualised duty. It requires that due consideration should be given to identifying the appropriate means of eliminating the barriers that a particular disabled person is facing in a given circumstance.⁴⁷⁶ The identification of these means will

⁴⁶⁹ A. Lawson, 'Disability, equality, reasonable accommodation and the avoidance of ill-treatment in places of detention: the role of supranational monitoring and inspection bodies', 16 *The International Journal of Human Rights* (2012), p. 847.

⁴⁷⁰ *Ibid.*, p. 848.

⁴⁷¹ *Ibid.*

⁴⁷² *Ibid.*

⁴⁷³ *Ibid.*

⁴⁷⁴ J.E. Lord and R. Brown, in M.H. Rioux, L.A. Basser and M. Jones (eds), *Critical Perspectives on Human Rights and Disability Law*, p. 279.

⁴⁷⁵ Articles 14 (2), 24, 27 and 12 UNCRPD.

⁴⁷⁶ A. Lawson, 16 *The International Journal of Human Rights* (2012), p. 848.

naturally require consultation between the disabled person and the duty-bearer.⁴⁷⁷ Considering that the impairments, characters, experiences and preferences of people with disabilities vary enormously in both nature and severity, it would be unwise for duty-bearers to make assumptions as to what might be the most appropriate approach to remove the aforementioned barriers that a person with disabilities is facing in a particular circumstance.⁴⁷⁸ Thus, the dialogue between the duty-bearer and the right holder is essential.⁴⁷⁹

The accommodations can take several forms, such as adjusting the premises, allocating some of the disabled person's duties to someone else, acquiring or modifying equipment, modifying procedures for testing or assessment, providing a reader or interpreter, providing means of avoiding a feature, providing a reasonable alternative method for making a service available to disabled people or facilitating the use of a service.⁴⁸⁰ The text of the Convention and its drafting history do not provide any guidance in this regard.

The accommodation should also be 'reasonable'. This term has created great confusion as it has been interpreted in Europe and in other parts of the world in different ways. *Waddington* has identified three main approaches with regard to the interpretation of 'reasonable' in the European context.⁴⁸¹ An accommodation is 'reasonable', according to the first interpretive approach, if it does not impose excessive difficulties or costs on the duty-bearer.⁴⁸² In this case, the reasonableness requirement exists alongside a separate and stricter defence, namely that the provision of reasonable accommodation should not constitute a disproportionate burden for the duty-bearer.⁴⁸³ The second approach to the interpretation of the term 'reasonable' considers this term as meaning effective.⁴⁸⁴ This indicates that a reasonable accommodation is one that allows the right-holder to perform his activities that gave rise to the request for such an accommodation in the first place.⁴⁸⁵ Lastly, 'reasonable' has been interpreted as meaning both effective adjustment or modification and not imposing excessive inconveniences or costs on the duty-bearer.⁴⁸⁶

In the text of the Convention, the drafters used two words to describe what is 'reasonable'. Article 2 of the Convention states that reasonable is what

⁴⁷⁷ Ibid.

⁴⁷⁸ Ibid.

⁴⁷⁹ This is considered to be the 'procedural' element of reasonable accommodation duties. See, S.J. Schwab and S.L. Willborn, 'Reasonable Accommodation of Workplace disabilities', 44 *William and Mary Law Review* (2003), p. 1197.

⁴⁸⁰ L. Waddington, in D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, p. 677–678; Articles 18B (2) and 21 (2) of the UK Disability Discrimination Act 1995.

⁴⁸¹ L. Waddington, 29 *Comparative Labour Law and Policy Journal* (2007), p. 339–340.

⁴⁸² Ibid.

⁴⁸³ Ibid.

⁴⁸⁴ Ibid.

⁴⁸⁵ Ibid.

⁴⁸⁶ Ibid.

is 'necessary' and 'appropriate'. 'Appropriate' means suitable or proper in the circumstances, while necessary means 'essential, needed to be done, achieved or present'.⁴⁸⁷ This means that the duty-bearer must do what is proper in the circumstances so as to accommodate a disabled person in order to enable that person to carry out the activities that gave rise to the claim for reasonable accommodation in the first place. The term 'appropriate' has been used by the Irish Employment Equality Act 1998–2004 as well as the French Labour Code⁴⁸⁸, and it implies that the accommodation should be effective. The term 'necessary' implies that the duty-bearer is only required to do what is essential to eliminate the barriers facing a disabled individual in a particular situation. This indicates that the duty-bearer is not obliged to take actions that exceed what is necessary to remove the barriers faced by a person with disabilities in a particular instance.

Thus, it seems that the wording of Article 2 with regard to the definition of reasonable accommodation is closer to the third interpretive approach that *Waddington* refers to. Nevertheless, it is important to note that the duty-bearer is required to take the appropriate and necessary steps to accommodate a disabled individual in a given situation with a view to enabling that person to enjoy or exercise 'on an equal basis with others' 'all human rights and fundamental freedoms'.⁴⁸⁹ This second phrase functions as an explanation to what is 'necessary and appropriate'. The steps that the duty-bearer must take should guarantee the enjoyment of all human rights and fundamental freedoms by the disabled person at hand. Thus, the duty-bearer must do what is essential, but effective, to guarantee that the disabled person at hand is able to enjoy or exercise their rights on an equal basis with others. Reasonable accommodation does not require special rights, but it aims to ensure the enjoyment of all human rights by persons with disabilities in individual cases and on an equal basis with others.

Lastly, the accommodation should not cause the duty-bearer an 'undue or disproportionate burden'. This burden is not confined to financial cost and it might include other elements such as disruption to the working arrangements or reduction of the quality levels or nature of core services.⁴⁹⁰ However, there are many types of accommodation that do not carry a financial cost or obvious burden, such as allowing a customer with a hearing impairment to write down a request, or guaranteeing that a prisoner with an autistic spectrum disorder is able to sit in the same place for meals.⁴⁹¹ Lastly, it is important to note that the assessment of whether an accommodation causes undue or disproportionate burden to the duty-bearer should be sensitive to the circumstances of the duty-bearer.⁴⁹²

⁴⁸⁷ Oxford dictionary online on the interpretation of 'reasonable', www.oxforddictionaries.com/definition/english/reasonable (accessed 17 January 2018).

⁴⁸⁸ L. Waddington, in D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, p. 669.

⁴⁸⁹ Article 2 UNCRPD.

⁴⁹⁰ A. Lawson, 16 *The International Journal of Human Rights* (2012), p. 848.

⁴⁹¹ *Ibid.*

⁴⁹² *Ibid.*

C. THE DIFFERENCES BETWEEN ACCESSIBILITY AND REASONABLE ACCOMMODATION

Accessibility and reasonable accommodation are concepts that interrelate to each other. They both aim to ensure that people with disabilities enjoy all their human rights and fundamental freedoms on an equal basis with others. They perform that task by eliminating the barriers that people with disabilities face as a result of the disabling society. Thus, they are both deeply connected to the idea of the social model of disability. Yet they have several fundamental differences.

First, accessibility is a proactive duty. It aims at the identification and elimination of barriers to accessibility that prohibit people with disabilities from living independently and participate fully in all aspects of life, even in the instance where a complaint has not been made.⁴⁹³ Proactive measures are also preventative.⁴⁹⁴ The States Parties to the Convention, when implementing the accessibility requirements, should consider the impact any new or established policies and legislation may have on accessibility in practice, and they must take appropriate action to prevent the emergence of accessibility barriers by an act or omission.⁴⁹⁵ On the other hand, reasonable accommodation is a reactive duty. It is activated when there is a barrier or disadvantage to a disabled individual that impedes his/her ability to perform a task.

Second, accessibility is not a duty that is owed to a particular individual to make the appropriate adjustments to remove a particular barrier or disadvantage.⁴⁹⁶ It is a duty of States Parties to the Convention to take steps to eliminate the accessibility barriers that people with disabilities as a group face.⁴⁹⁷ On the other hand, reasonable accommodation is an individualised duty. The duty-bearer has to take measures to reasonably accommodate the disabled individual, except if this will cause the duty-bearer an undue or disproportionate burden. The more accessible an environment is to people with disabilities, the less likely it is for a disabled individual to face a disadvantage and to require an accommodation.⁴⁹⁸

Third, the content of the possible accommodations in the case of reasonable accommodation is much broader than potential adjustments in the case of accessibility. Accessibility focuses on removing barriers with regard to attitudes, the physical environment, affordability, information accessibility and alternative forms of communication. The concept of 'reasonable

⁴⁹³ S. Fredman, 'Breaking the Mold: Equality as a Proactive Duty', 60 *The American Journal of Comparative Law* (2012), p. 271; Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 25.

⁴⁹⁴ Ibid.

⁴⁹⁵ S. Fredman, 60 *The American Journal of Comparative Law* (2012), p. 271.

⁴⁹⁶ A. Lawson, 16 *The International Journal of Human Rights* (2012), p. 850; Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 25.

⁴⁹⁷ Ibid.

⁴⁹⁸ A. Lawson, 16 *The International Journal of Human Rights* (2012), p. 848.

accommodation' can include measures in those fields, but it can also cover other forms of accommodation such as flexible working or school schedules, additional supervision in school and allocating some of the disabled person's duties to someone else. This is a result of the individualised nature of reasonable accommodation which aims to address the specific needs of a disabled person.

Fourth, Article 9 (1) UNCRPD requires States Parties to the Convention to take measures to eliminate the accessibility barriers that people with disabilities face.⁴⁹⁹ This obligation is similar in structure to the state obligations in the context of economic, social and cultural rights.⁵⁰⁰ This view is supported by the drafting history of the Convention, where most of the States Parties considered accessibility to be similar to those rights.⁵⁰¹ Like economic, social and cultural rights, accessibility is a progressively realisable obligation⁵⁰², and the States Parties to the Convention are required to use the maximum of their available resources to implement it.⁵⁰³ This is reaffirmed by the CRPD Committee's General Comment No. 2 on accessibility, as I have analysed above.⁵⁰⁴

On the other hand, reasonable accommodation is connected to the principle of non-discrimination and, as a result, it creates an obligation of immediate effect.⁵⁰⁵ States Parties to the Convention are required to sanction the failure to provide reasonable accommodation and to do so immediately, as the right to not be discriminated against is a negative right and as such, is not subject to progressive realisation.⁵⁰⁶ However, it is possible that a request of a disabled person to receive reasonable accommodation will be denied due to the fact that it constitutes an undue burden for the duty-bearer, whereas the implementation of the obligations of States Parties to the UNCRPD with regard to accessibility can be delayed due to limited resources, but they cannot be disregarded by the States Parties entirely. In that regard, the CRPD Committee stated in General Comment No. 2 on accessibility that the obligation to implement accessibility is unconditional in nature.⁵⁰⁷ The Committee explained that the entity that is responsible for providing accessibility may not use the excuse that it would be burdensome to implement accessibility requirements.⁵⁰⁸

⁴⁹⁹ Article 9 (1) UNCRPD.

⁵⁰⁰ See, also, F. Seatzu, in V. Della Finna, R. Cera and G. Palmisano (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, p. 232.

⁵⁰¹ M. Schulze, *Handicap International* (2010), p. 77.

⁵⁰² Article 4 (2) UNCRPD.

⁵⁰³ Article 4 (2) UNCRPD.

⁵⁰⁴ See, Chapter I, The progressive realisation of Article 9 UNCRPD; Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 19.

⁵⁰⁵ J.E. Lord and R. Brown, in M.H. Rioux, L.A. Basser and M. Jones (eds.), *Critical Perspectives on Human Rights and Disability Law*, p. 280; Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 19.

⁵⁰⁶ *Ibid.*; A. Lawson, in O. Arnardottir and G. Quinn (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, p. 103.

⁵⁰⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 25.

⁵⁰⁸ *Ibid.*

VI. UNIVERSAL DESIGN

A. THE EVOLUTION OF UNIVERSAL DESIGN

The concept of Universal Design is one that has evolved significantly since introduction in the mid-1970s. It has transformed from a ‘narrow code of compliance to meet the specialised needs of a few’ to ‘a more inclusive design process for everybody’.⁵⁰⁹ There are two other terms which are used in this context and which have the same meaning as Universal Design: the term ‘design for all’, which is used in continental Europe and the term ‘inclusive design’ which is used in the UK.⁵¹⁰ These terms reflect, to a certain extent, the socially dominant models of disability or the different perspectives and approaches to disability studies.⁵¹¹

The European Institute for Design and Disability (EIDD) was originally established in 1993 to study and promote Universal Design principles.⁵¹² This institute, which is now called EIDD-Design for All Europe, has active membership from 22 European countries.⁵¹³ Universal Design principles have been articulated in the national legislation of most European countries, such as Ireland (Disability Act, 2005), Italy (Law 1 March 2006, n. 67), France (Loi n° 2005–102) and most recently Norway (Anti-Discrimination and Accessibility Act 2008). Lastly, the Council of Europe Disability Strategy 2017–2023 includes Universal Design as a principle that is vital to the implementation of this plan.⁵¹⁴

At the European Union level, early references to Universal Design can be found in the Commission’s e-Europe 2002 Action Plan.⁵¹⁵ The Plan included separate actions on WAI guidelines⁵¹⁶, national centres of excellence and curricula for designers and Design for All standards. The concept also appeared

⁵⁰⁹ H. Dong, ‘Global Perspectives and Reflections’, in the Delta Centre (ed.), *Trends in Universal Design: An anthology with global perspectives, theoretical aspects and real world examples* (Norwegian Directorate for Children Youth and Family affairs, 2013), p. 39, https://www.bufdir.no/Global/nbbf/universell_utforming/Trends_in_Universal_Design.PDF.

⁵¹⁰ Ibid.

⁵¹¹ Ibid.

⁵¹² J.E. Bickenbach and A. Cieza, ‘The Prospects for Universal Disability Law and Social Policy’, 1 *Journal of Accessibility and Design for All* (2014), p. 27.

⁵¹³ Ibid.

⁵¹⁴ Recommendation of the Committee of Ministers, REC (2015)2, Human rights: a reality for all – Council of Europe Disability Strategy 2017–2023, 25 June 2015; Recommendation of the Committee of Ministers, REC (2006)5, The Council of Europe Action Plan to Promote the Rights and full Participation of People with Disabilities in Society: Improving the Quality of Life of People with Disabilities in Europe 2006–2015, 5 April 2006.

⁵¹⁵ Communication on a Commission initiative for the special European Council of Lisbon, 23 and 24 March 2000 – eEurope – An information society for all, COM(1999) 687 final.

⁵¹⁶ WAI guidelines are guidelines that aim to improve the accessibility of the web for people with disabilities. They are produced by the World Wide Web Consortium, an international standards organisation for the web, as part of their Web Accessibility Initiative (WAI).

in the European Disability Strategy 2010–2020.⁵¹⁷ The Strategy aims, amongst other things, to encourage the incorporation of accessibility and ‘design for all’ in educational curricula and training for relevant professions. The EU has also issued Mandate M/473⁵¹⁸ to the European Standardisation Bodies to include ‘Design for All’ within the relevant standardisation initiatives. Lastly, ‘design for all’ can be part of the technical specifications under the EU Public Procurement Directives.⁵¹⁹

B. DEFINING UNIVERSAL DESIGN

The growing need for an inclusive approach when it comes to the design of the physical and cultural environment has resulted in heated debates amongst various stakeholders about the importance of Accessible Design and Universal Design.⁵²⁰ Accessible Design is the design of products and environments which can be independently used by people with a variety of disabilities. The purpose of Accessible Design is to increase the level of participation of people with disabilities in all areas of life, such as education, employment and community activities.⁵²¹ However, the designing of products and environments for specific populations entails the danger of thinking in terms of separate and special solutions.⁵²² These solutions can lead to the design and production of goods that are frequently more expensive, harder to find, unreliable and difficult to repair.⁵²³ This could isolate people with disabilities from society, despite the fact that their particular needs have been addressed through Accessible Design. This is what *Welsh* has referred to as the ‘potent symbols of separateness’ that stigmatise particular sections of the community.⁵²⁴

⁵¹⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe, COM(2010) 636 final.

⁵¹⁸ Standardisation Mandate M/473 to CEN, CENELEC and ETSI to include ‘Design for All’ in relevant standardization initiatives, 1 September 2010.

⁵¹⁹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L 94/65; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, [2014] OJ L 94/243.

⁵²⁰ C. Barnes, ‘Understanding Disability and the importance of Design for All’, 1 *Journal of Accessibility and Design for All* (2011), p. 68; R. Imrie, ‘Ableist Geographies, Disablist Spaces, Towards a Reconstruction of Golledge’s “Geographies of the Disabled”’, 21 *Transactions of the Institute of British Geographers* (1996).

⁵²¹ J.E. Bickenbach and A. Cieza, 1 *Journal of Accessibility and Design for All* (2013), p. 27.

⁵²² *Ibid.*

⁵²³ *Ibid.*, p. 26.

⁵²⁴ C. Barnes, 1 *Journal of Accessibility and Design for All* (2011), p. 68; P. Welsh, *Strategies for Teaching Universal design* (Adaptive Environments, 1995).

In response to this potential drawback, many advocates of Accessible Design and architectural accessibility have realised the power of the idea of addressing the common needs of all people, including people with disabilities.⁵²⁵ Supporting this idea was the fact that many of the environmental changes needed to accommodate people with disabilities could benefit everyone.⁵²⁶ This idea, in turn, informed the creation of Universal Design which, contrary to Accessible Design, requires designers to provide one solution that can accommodate people with disabilities as well as the rest of the population.⁵²⁷

At its best, Universal Design is an integrated conceptual approach to design that aims to consider the particular needs and preferences of as many people as possible.⁵²⁸ The challenge is to plan and develop mainstream solutions with inherent adaptability and compatibility that is capable of accommodating many people as possible.⁵²⁹ It is important to note in that regard, that Universal Design does not make assistive technologies and other specialised devices obsolete.⁵³⁰ Universal Design solutions must be able to interact and adapt to the specifications of assistive technologies.⁵³¹

The term ‘Universal Design’, according to Mace⁵³², refers to ‘the design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation, specialist design.’⁵³³ Universal Design can also be defined as a movement that approaches the design of the environment, products and communications, which takes the widest range of users into consideration.⁵³⁴ The main purpose of Universal Design is to improve the physical and social environment and therefore to reduce the need for ‘special’ provisions and ‘assistive technologies.’⁵³⁵ Thus, the rationale behind Universal

⁵²⁵ J.E. Bickenbach and A. Cieza, *1 Journal of Accessibility and Design for All* (2013), p. 27.

⁵²⁶ Ibid.

⁵²⁷ Ibid., p. 26.

⁵²⁸ S. Ruptash, ‘How to promote Universal Design through Passion, Knowledge and Regulations’, in The Delta Centre (ed.) *Trends in Universal Design: An anthology with global perspectives, theoretical aspects and real world examples*, p. 25.

⁵²⁹ S. Ginnerup, ‘Achieving full participation through Universal Design’, *Council of Europe* (2009), <https://book.coe.int/eur/en/integration-of-people-with-disabilities/4143-achieving-full-participation-through-universal-design.html>, p. 8.

⁵³⁰ Ibid., p. 10.

⁵³¹ Ibid.

⁵³² C. Barnes, *1 Journal of Accessibility and Design for All* (2013), p. 68; R. Mace, ‘Universal Design in Housing’, *10 Assistive Technology* (1998).

⁵³³ Ibid; Centre for Universal Design: *The New Principles of Universal Design*. Centre for Universal Design, College of Design, North Carolina State University, 2011.

⁵³⁴ C. Barnes, *1 Journal of Accessibility and Design for All* (2013), p. 68; A. Gossett et al., ‘Beyond Access: A case study on the intersection between, accessibility, sustainability and universal design’, *4 Assistive Technology* (2009).

⁵³⁵ C. Barnes, *1 Journal of Accessibility and Design for All* (2013), p. 68; E. Steinfield, Position paper, *The future of Universal Design*, IDEA Centre, University of Buffalo, 2006.

Design is to diminish the need for segregated solutions and special services and to promote a mainstream solution for each and every person.⁵³⁶

Universal Design provides us with a philosophy that is conducive to full citizenship, independent living and integration.⁵³⁷ Universal Design contributes to the prevention and elimination of barriers to integration.⁵³⁸ These barriers may be psychological, educational, family-related, cultural, social, professional, urban or architectural.⁵³⁹ Therefore Universally Designed solutions aim to develop products, communication systems, buildings, public utilities, amenities and spaces that can be used by the greatest number of people and, at the same time, are aesthetically acceptable.⁵⁴⁰

Universally designed products and environments are based on seven principles, which have been set out by *Tory, Mueller and Mace*⁵⁴¹, along with guidelines for each principle.⁵⁴² The principles and their guidelines constitute the first level of operationalisation of the concept of Universal Design.⁵⁴³ These principles are⁵⁴⁴:

- Equitable use: the design must be useful and marketable to people with diverse abilities.
- Flexible in use: the design must accommodate a wide range of individual preferences and abilities.
- Simple and Intuitive: the use of the design must be easy to understand, regardless of the user's experience, knowledge, language skills, or current concentration level.
- Perceptible Information: the design must be able to effectively communicate the necessary information to the user, regardless of their sensory abilities.
- Tolerance for Error: the design must reduce hazards and the adverse consequences of accidents.
- Low Physical Effort: the design must allow efficient usage with minimum effort.
- Size and Space for Approach and Use: an appropriate space must be provided so as to enable comfortable and effective use by anyone, regardless of physical and sensory ability.

⁵³⁶ Ibid.

⁵³⁷ S. Ginnerup, 'Achieving full participation through Universal Design', *Council of Europe* (2009), p. 9.

⁵³⁸ Ibid.

⁵³⁹ Ibid.

⁵⁴⁰ C. Barnes, 1 *Journal of Accessibility and Design for All* (2013), p. 68; P. Welsh, *Strategies for Teaching Universal design*.

⁵⁴¹ S. Story, J.L. Mueller and R.L. Mace, *The Universal design file: Designing for People of all ages and abilities*, (The Centre for Universal Design, 1998).

⁵⁴² J.E. Bickenbach and A. Cieza, 1 *Journal of Accessibility and Design for All* (2013), p. 28; F.S. Story, J.L. Mueller and R.L. Mace, *The Universal design file: Designing for People of all ages and abilities*.

⁵⁴³ J.E. Bickenbach and A. Cieza, 1 *Journal of Accessibility and Design for All* (2013), p. 28.

⁵⁴⁴ Idem; F.S. Story, J.L. Mueller and R.L. Mace, *The Universal design file: Designing for People of all ages and abilities*, *Raleigh*.

Thus, Universally Designed artefacts, products and infrastructures should be barrier-free and accessible to all regardless of age, impairment, gender, ethnicity and sexuality.⁵⁴⁵

Critics of the Universal Design approach argue that the definition and principles of Universal Design are too general and lack clarity.⁵⁴⁶ Other concerns pertain to the lack of benchmarking, measurement and examples of best practice against which Universally Designed goods and outcomes might be judged.⁵⁴⁷ Moreover, *Steinfeld* has argued that the notion of Universal Design suggests that there is a single universally acceptable solution to all design problems.⁵⁴⁸ He argued that this assertion is both ‘utopian and simplistic’ and unachievable because of the ethnic and cultural divisions within and across nation states as well as the diverse needs of different impairment groups.⁵⁴⁹ Furthermore, alterations to the mainstream environment that address the accessibility needs of a portion of the disabled population may pose problems for other groups of disabled persons.⁵⁵⁰ In that regard, it is also important to note that ‘different people with the same impairment may require different accommodations because everyone experiences their own impairment differently’.⁵⁵¹ Lastly, concerns, linked to the failure to embrace a more ‘authoritative definition of disablement’, have also been raised about issues such as cost, participation outcomes and social change.⁵⁵²

C. UNIVERSAL DESIGN AND THE UNCRPD

Universal Design is referred to twice in the text of the UNCRPD. The Convention defines Universal Design as ‘the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. “Universal Design” shall not exclude assistive devices for particular groups of persons with disabilities where this is needed’.⁵⁵³

⁵⁴⁵ J.E. Bickenbach and A. Cieza, 1 *Journal of Accessibility and Design for All* (2013), p. 29.

⁵⁴⁶ C. Barnes, 1 *Journal of Accessibility and Design for All* (2013), p. 72.

⁵⁴⁷ Ibid; E. Steinfield, Position paper, *The future of Universal Design*, IDEA Centre, University of Buffalo, 2006, p. 3.

⁵⁴⁸ Ibid.

⁵⁴⁹ C. Barnes, 1 *Journal of Accessibility and Design for All* (2013), p. 72; E. Steinfield, Position paper, *The future of Universal Design*, IDEA Centre, University of Buffalo, 2006; A. Gossett et al., 4 *Assistive Technology* (2009); T.W. Shakespeare, *Disability Rights and Wrongs* (Routledge, 2006).

⁵⁵⁰ C. Barnes, 1 *Journal of Accessibility and Design for All* (2013), p. 72.

⁵⁵¹ T.W. Shakespeare, *Disability Rights and Wrongs*, p. 46.

⁵⁵² C. Barnes, 1 *Journal of Accessibility and Design for All* (2013), p. 72; E. Steinfield, Position paper, *The future of Universal Design*, IDEA Centre, University of Buffalo, 2006, p. 8.

⁵⁵³ Article 2 UNCRPD.

This definition is commensurate with the way in which the concept of Universal Design has developed over the years. It is also important to note that despite aiming at reducing the need for ‘special’ provisions and ‘assistive technologies’, Universal Design does not exclude the use of assistive technologies in cases where this is needed by a particular group of disabled persons.

The second reference to Universal Design in the UNCRPD is found among the general obligations of the Convention. Article 4 (1) (f) states that States Parties should take action ‘to undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in Article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote Universal Design in the development of standards and guidelines’.⁵⁵⁴

The fact that Universal Design is mentioned only in the context of research and development shows that the Convention drafters did not, at that time, consider this type of design as a potential option for guaranteeing accessibility. This is also evident from the wording of Article 9 UNCRPD. This article obliges the States Parties to design the physical environment with a view to guaranteeing that it will be accessible to people with disabilities through Accessible Design.⁵⁵⁵

Nevertheless, this does not exclude the possibility that States Parties may choose to adopt a Universal Design approach over the Accessible Design approach, as long as the former can guarantee the same level of accessibility as the Accessible Design in that given area. If not, Accessible Design should take priority, as the UNCRPD is a disability-specific Convention which is designed ‘to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity’⁵⁵⁶ and which does not aim to accommodate every person or minority group. *Lord* has argued in that regard, that Universal Design is clearly a component of the accessibility obligations due to its appearance in Article 4 UNCRPD, which sets forth general and cross-cutting obligations. Nevertheless, the reference to Universal Design in Article 4 UNCRPD, as an obligation to research and develop Universally Designed goods, services and facilities, shows that the drafters of the Convention seem to recognise that Universal Design could, in the near future, become the most appropriate method for dismantling the accessibility barriers that people with disabilities currently face, without the stigmatisation that Accessible Design might cause.

⁵⁵⁴ Article 4 (1) (f) UNCRPD.

⁵⁵⁵ Article 9 (1) UNCRPD.

⁵⁵⁶ Article 1 UNCRPD.

VII. CONCLUSION

Accessibility is a very complicated concept and it is very difficult to provide an exact definition thereof. This might be the reason why the drafters of the UNCRPD decided not to incorporate such a definition in the Convention. In an attempt to identify the content of accessibility, I enumerated and analysed its individual aspects. I conceptualise accessibility as the sum of its parts. Accessibility includes the following dimensions: attitudinal, physical, information, communication and affordability. It is also important to clarify that 'accessibility of' is a different concept than that of 'access to'. The latter is broader and it includes the former within its scope. Nevertheless, both concepts are addressed in the context of the UNCRPD.

Moving to the content of Article 9 UNCRPD, accessibility is connected with the principles of living independently and the full participation of people with disabilities in all aspects of life. Without accessibility it is not possible for people with disabilities to enjoy full participation in all aspects of life and to live independently. Thus, the purpose of accessibility is to enable people with disabilities to live independently and to participate fully and effectively in society.

Moreover, accessibility is a progressively realisable obligation. Nevertheless, this fact does not exclude the possibility that it produces several immediate obligations that are essential for the effective implementation of Article 9 UNCRPD and to guarantee that a certain level of protection will be provided to people with disabilities, such as the obligation to devise strategies and programmes with regard to accessibility and the obligation to monitor the implementation of Article 9 UNCRPD. In addition, the fact that Article 9 UNCRPD is to be progressively realised should not be used by States Parties to the Convention as a justification on their part not to take action to implement its requirements or to justify inaction due to a shortage of financial resources.

Furthermore, the obligation to ensure accessibility requires States Parties to take an array of different measures to implement accessibility. This ranges from guaranteeing that the private sector, both at the domestic and international level, will not create barriers to accessibility, to actions that promote the research and development of assistive technologies, to actions that increase awareness-raising of accessibility through education.

Following my analysis in the first part of the chapter about the difference between the terms 'accessibility of' and 'access to', the second part of the chapter sought to identify the true intention of the drafters of the Convention when they adopted the obligations that are currently found in Article 9 UNCRPD. I argue that, because the title and the context of the article was focused on accessibility and because the drafting history of Article 9 UNCRPD did not include any discussion on the broader term 'access to', the true intention

of the drafters of this article was to lay down the obligations with regard to accessibility. The drafters of the Convention referred to the right of access as a broader goal of the Convention, which the implementation of accessibility could contribute to.

In addition, I analysed the connection between accessibility obligations and equality. I explained that for the States Parties to the Convention to ensure accessibility on an equal basis with others, they are allowed to take measures that guarantee both equality of opportunity and equality of result.

Lastly, as far as the scope of application of Article 9 UNCRPD is concerned, I identified that the ownership of a facility, good or service, does not play a role in determining the scope of the article. The element that is essential to the scope of application of this article is who uses a service or facility. In addition, I pointed out that goods and products fall within the scope of application of Article 9 UNCRPD, despite the lack of references to goods or products in the Convention in general and Article 9 UNCRPD in particular.

Moving to reasonable accommodation, the analysis of this concept showed that the diverse implementation of this concept throughout the world and the lack of clear guidance by the UNCRPD with regard to various issues, such as the meaning of the terms ‘reasonable’ or ‘undue or disproportionate burden’, can create challenges to the implementation of the Convention. Furthermore, the examination of this concept indicated that, while it shares a common goal with accessibility – namely the elimination of barriers experienced by people with disabilities – it has some fundamental differences with the latter. In particular, achieving accessibility is a proactive duty, while the duty to make a reasonable accommodation is reactive. The personal scope of accessibility covers people with disabilities as a group whereas reasonable accommodation focuses on a particular individual. The scope of the barriers that reasonable accommodations can eliminate is broader than the scope of the barriers that accessibility measures can remove. Lastly, accessibility is to be progressively realised while the duty to provide a reasonable accommodation, subject to the disproportionate burden defence, should be immediately realised.

Moving to Universal design, this concept does not look at disability specifically. It aims to create a physical environment that is accessible to all. It also avoids the sometimes segregating effect that Accessible Design causes by creating disability-specific goods and services, because Universal Design should aim to create goods and services that can be used by everyone. That is the big difference between the two forms of design. Universal Design is fully inclusive while Accessible Design prioritises and primarily addresses the particular needs of people with disabilities. This is evident in Article 9 UNCRPD where the focus of the article is on the removal of barriers to disability accessibility and where there is no reference to Universal Design.

PART II

**HOW AND TO WHAT EXTENT
IS THE EU COMPETENT
TO IMPLEMENT THE OBLIGATIONS
OF ARTICLE 9 UNCRRPD WITH
REGARD TO ACCESSIBILITY
THROUGH LEGISLATIVE
OR OTHER POLICIES?**

CHAPTER II

THE UNCRPD AS A MIXED AGREEMENT UNDER EU LAW

I. INTRODUCTION

The European Union is a contracting party to a number of bilateral and multilateral treaties. It has actively engaged with a large number of international organisations and institutions with different legal characters. Thus, the EU has gradually become an important actor on the international stage. The European Union concluded the UNCRPD in December 2010. The Convention came into force for the EU in January 2011. The UNCRPD constitutes the first human rights treaty to which the EU has become a party and the Convention is the first human rights treaty that can be acceded to by 'regional integration organisations', like the EU, and not just the states themselves.¹

Moreover, the Convention constitutes a mixed agreement of the EU. The term 'mixity' can be defined, according to *Koutrakos*, 'as the legal formula enabling the Community (now Union) and the Member States to negotiate, conclude and implement an international agreement whose subject-matter falls within the competence of both'.² The Convention is a mixed agreement because it covers fields that fall within the exclusive competence of the EU, but it also covers fields that fall within the exclusive competence of the Member States, and it also falls within the field of competences that are shared between the EU and its Member States. This was reaffirmed in the Council Decision on the conclusion of the UNCRPD by the EU (Council Decision) which stated that 'both the Community and its Member States have competence in the fields covered by the UN Convention'.³ As the Council Decision states, the 'Community and the Member States should become Contracting Parties to it, so that together they can fulfil the obligations laid down by the UN Convention and exercise the rights invested in them, in situations of mixed competence in a coherent manner'.⁴

¹ Article 44 UNCRPD.

² P. Koutrakos, *EU international relations law* (Hart Publishing, 2006), p. 150.

³ Council Decision 2010/48/EC of 24 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35, para 7.

⁴ *Ibid.*

The accession of the EU to the UNCRPD attracted much attention from scholars.⁵ The implications of the implementation of such a broad Convention by both the European Union and the Member States poses interesting questions, especially with regard to the division of competences between the EU and its Member States in relation to issues that are regulated by the UNCRPD, and on the procedural implications with regard to the implementation of the Convention, due to its status as a mixed agreement.

This chapter examines the role of the EU in the negotiation of the UNCRPD and the process of the conclusion of the Convention by the EU [Section II]. In addition, this chapter discusses the implications for the EU and the Member States of the fact that the UNCRPD is an international mixed agreement that has been concluded by the EU [Section III]. Moreover, this chapter discusses the competences of the EU with regard to matters governed by the UNCRPD [Section IV]. This chapter also analyses the challenges of the implementation of the UNCRPD by the EU and its Member States [Section V]. Lastly, this chapter examines the duty of close cooperation and how it can affect the implementation of the UNCRPD by the EU and its Member States vis-à-vis accessibility [Section VI].

II. THE NEGOTIATION AND CONCLUSION OF THE UNCRPD BY THE EU

The launch of the drafting process of what would eventually become the UNCRPD was made by the UN General Assembly in December 2001. Mexico advocated strongly for such an initiative with the support of interested groups and actors.⁶ The European Community participated in the drafting process of the Convention and was represented by the Commission. Initially, the European Community (EC) was not in favour of a legally binding instrument on the protection of the rights of persons with disabilities.⁷ It indicated that the Ad Hoc Committee that was coordinating the drafting process of the UNCRPD should not exclude the possibility of options other than a legally binding instrument, such as an instrument ‘containing general principles, mainly including equality and non-

⁵ L. Waddington, ‘The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences’, 18 *Maastricht Journal of European and Comparative Law* (2011); D. Ferri, ‘The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EU/EC: A Constitutional Perspective’, in L. Waddington and G. Quinn (eds.), *European Yearbook of Disability Law* (Volume II, Intersentia, 2010).

⁶ T. Melish, ‘The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify’, 14 *Human Rights Brief* (2007).

⁷ G. De Burca, ‘The EU in the Negotiations of the UN Disability Convention’, 35 *European Law Review* (2010), p. 179.

discrimination⁸ with respect to human rights in the context of disability'.⁹ Thus, at that time the EC advocated for strengthening, supporting and interpreting the two main UN Covenants (ICCPR and ICESCR) so as to guarantee that they would apply to all, including persons with disabilities, instead of the creation of a separate human rights Convention for people with disabilities.¹⁰ Nevertheless, the moment it became clear that a consensus between the states participating in the drafting process of the UNCRPD was in favour of a binding international treaty, the EC altered its position and advocated an anti-discrimination instrument.¹¹ The development of a legal instrument, based on the principles of equality and non-discrimination, could have served as an international extension of the EC's own internal model into the UN context.¹² Furthermore, by advocating for an anti-discrimination instrument the EC would have limited the need for the subsequent internal adaptation of its disability policies.¹³

To sum up, the EC entered into the negotiations at the UN level with a view to promoting a non-binding instrument that would state the principles that should be used to interpret the two main Covenants, so as to guarantee that they would be applied to people with disabilities. However, when it realised that this option did not have enough support, the EC shifted its focus to advance the adoption of an anti-discrimination instrument. The EC also put much effort into guaranteeing that it could become a party, for the first time and as a recognised international organisation, to an international human rights treaty. This was done by advocating for the inclusion of 'regional integration organisations' in Article 44 UNCRPD and ensuring that they would have the capacity to accede the Convention.¹⁴ Thus, the primary goals of the EC during the drafting process of the Convention were the extension to the international level of its internal anti-discrimination model of disability policy and the promotion of its own identity and role as an actor at the international level.¹⁵

The EC signed the Convention on the 20th of March 2007. The signing of the Convention by the EC was based on Article 13 EC (now Article 19 TFEU), Article 95 EC (now Article 114 TFEU) and Article 300 (2) and (3) EC (now Articles 216 (2) and (3) TFEU).¹⁶ Article 13 EC enabled the EC to take measures

⁸ Communication from the Commission to the Council and the European Parliament, Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities, COM(2003) 16 final, p. 3.

⁹ G. De Burca, 35 *European Law Review* (2010), p. 179.

¹⁰ *Ibid.*, p. 179.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*, p. 180, 196.

¹⁵ *Ibid.*

¹⁶ Council Decision No. 7407/07/EC of 20 March 2007 on the signing, on behalf of the European Community, of the United Nations' Convention on the Rights of Persons with Disabilities, [2007].

to combat discrimination on the grounds of *inter alia* disability, whilst Article 95 EC empowered the EC to take measures with regard to the establishment and the functioning of the internal market. Article 300 EC (now Article 218 TFEU) referred to the procedure for the conclusion of international agreements by the Community. The reference to the internal market as one of the legal basis of the accession of the EC to the Convention is surprising because both the Commission Communication 'Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities'¹⁷ and the Opinion of the Economic and Social Committee on the Communication¹⁸ did not make any reference to this legal basis.¹⁹ At the same time, Article 13 EC was mentioned in both documents.²⁰ This fact suggests that the notion of the EU being involved in implementing the Convention beyond the area of non-discrimination was recognised only at a relatively late stage in the process.²¹

On the 26th of November 2009, the Council adopted a Decision concerning the conclusion, by the European Community, of the UNCRPD.²² The Council Decision was based on Article 13 EC, Article 95 EC and Article 300 (2) and (3) EC, despite the Commission's proposal that contained a larger number of legal bases (including: Articles 13, 26, 47(2), 55, 71(1), 80(2), 89, 93, 95 and 285 EC (now Articles 19, 31, 53, 62, 91(1), 100(2), 109, 113, 114 and 338 TFEU)).²³

The choice of two substantive legal bases might give the impression that the EU was limited to implementing the Convention by only using these legal bases, as these two legal bases have been chosen as the most appropriate legal grounds for the implementation of the Convention at the EU level. This is, however, not the case. The European Court of Justice (henceforth Court of Justice of the European Union or CJEU) indicated, in a case concerning the implementation of the Rotterdam Convention on International trade in hazardous chemicals, that 'the fact that one or more provisions of the treaty have been chosen as legal bases for the approval of an international agreement is not sufficient to show that those same provisions must also be used as legal bases for the adoption of measures intended

¹⁷ Communication from the Commission to the Council and the European Parliament, Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities, COM(2003) 16 final.

¹⁸ Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the Council and the European Parliament – Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities' (COM(2003) 16), [2003] OJ C 133/50.

¹⁹ L. Waddington, 18 *Maastricht Journal of European and Comparative Law* (2011), p. 439.

²⁰ Ibid.

²¹ Ibid.

²² Council Decision No. 7407/07/EC of 20 March 2007 on the signing, on behalf of the European Community, of the United Nations' Convention on the Rights of Persons with Disabilities, [2007].

²³ Proposal for a Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, COM (2008) 530/2 final.

to implement that agreement at Community level.²⁴ Thus, it is not mandatory for the EU to use the legal bases that have been chosen as the grounds for the EU to conclude the UNCRPD, as the legal bases to implement the UNCRPD.

This idea is also supported by the Declaration of Competence that is attached to the Council Decision. This declaration is required by Article 44 UNCRPD which refers to the accession of regional integration organisations²⁵ to the Convention. This article states that regional integration organisations should declare, in their instruments of formal confirmation of their accession to the Convention, the extent of their competence vis-à-vis the issues governed by the UNCRPD.²⁶ They should also announce any substantial modification to these competences to the depositary. This Declaration concerning the competence of the European Community with regard to matters governed by the UNCRPD (henceforth Declaration of Competence) makes reference to several other areas where the EU has the competence to take actions to implement the Convention, and it does not suggest that the EU should only use Articles 13 EC and 95 EC.²⁷ It is important to note in this regard that the EU updated the Declaration of Competence²⁸, after a recommendation from the CRPD Committee.²⁹ These updates are discussed below.³⁰

Apart from the Declaration of Competence, before the deposition of the instruments of formal confirmation of the Convention with the Secretary General of the United Nations by the President of the Council, the Council, the Commission and the Member States agreed on a Code of Conduct (henceforth Code of Conduct).³¹ While the Declaration of Competence is directed towards the other States Parties of the UNCRPD, the Code of Conduct is directed towards the EU institutions and its Member States, and it is therefore of no concern to the States Parties of the UNCRPD. This Code was adopted on

²⁴ Case C-178/03 *Commission of the European Communities v. European Parliament and Council of the European Union*, EU:C:2006:4, para. 40–46.

²⁵ Regional integration organisation shall mean an organisation constituted by sovereign states of a given region, to which its Member States have transferred competence in respect of matters governed by the present Convention.

²⁶ Article 44 UNCRPD.

²⁷ Council Decision 2010/48/EC of 24 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35, Annex II.

²⁸ Commission Staff Working Document Progress Report on the implementation of the European Disability Strategy (2010 – 2020), SWD(2017) 29 final, p. 158–199; see, also, Report on the concluding observations of the UN Committee on the Rights of Persons with Disabilities on the initial report of the European Union (CRPD/C/EU/CO/1/Add.1) (2017), p.1.

²⁹ Committee on the Rights of Persons with Disabilities, Concluding observations EU CRPD/C/EU/CO/1/2015, para. 16.

³⁰ Chapter II, Complementary competencies.

³¹ Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ C340/11.

the 24th of November 2010. The aim of the Code of Conduct is to set out the arrangements between the Commission, the Council and the Member States on cooperation, primarily with regard to the representation of the EU at the UN level.³² The Code addresses several issues, amongst others, the division of tasks based on competence, the establishing of positions, speaking in cases of agreed coordinated, Union or common positions, speaking and voting in cases of no coordinated, Union or common positions, nominations, the focal point (as required by Article 33(1) UNCRPD), monitoring and reporting and the review of arrangements.³³

A part of the Code is devoted to the division of duties on the basis of competence. It refers to matters falling within the competence of the Member States, matters falling within the exclusive competence of the Union, matters falling within shared competence and matters where the Union coordinates, supports and/or supplements the actions of the Member States.³⁴ These issues are addressed in more detail below.

III. THE UNCRPD AS AN INTERNATIONAL AGREEMENT UNDER EU LAW

The UNCRPD was concluded under the EC treaty regime that was applicable before the Lisbon Treaty came into force. This regime, and particularly the relationship between international agreements to which the EC is a contracting party and Community law, was governed by Article 281 EC (now Article 47 TEU) and Article 300 (7) EC (now Article 216 TFEU). Article 281 EC stated that the EC had international legal personality, and as a result it possessed the ability to become a party to international agreements that were governed by international law.³⁵ Article 300 (7) EC stated that agreements concluded by the Community are binding upon the institutions of the Community and on its Member States.³⁶

³² Article 1 of Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C 340/11.

³³ Article 1 of Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C 340/11.

³⁴ Article 1 of Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C 340/11.

³⁵ Article 281 TEC.

³⁶ Article 300 (7) TEC.

The current regime has its own chapter in the Treaty on the Functioning of the European Union and is regulated by Articles 216 to 219 TFEU.

Typically, international law does not decide on the legal status of an international agreement within the internal legal order of a contracting party.³⁷ This task is assigned to the contracting parties. At the EU level, the CJEU decided on this question in the *Haegeman* judgment.³⁸ The Court held that from the entry into force of the treaty under consideration, its provisions form an integral part of Community law.³⁹ If one reads this case together with the principle of supremacy of EC law that was laid down in *Costa v. ENEL*⁴⁰, it can be concluded that the provisions of an international agreement, which has been concluded by the EU, have supremacy over the internal law of the Member States.⁴¹ Furthermore, the Court has stated that international agreements concluded by the Union have primacy over secondary Union legislation.⁴² However, it does not have primacy over EU primary law.⁴³

According to this analysis, the UNCRRPD – as an international agreement that the EU has concluded – should be placed, in the following hierarchical terms: below the Treaties and above secondary law. From this hierarchy it can be concluded that the existing secondary legislation of the EU should be reviewed to establish whether it violates the Convention and any future legislative measures of the EU should always be compatible with the UNCRRPD. The primacy of the UNCRRPD over secondary EU law was also acknowledged by the CJEU in the case of *Ring and Skouboe Werge*.⁴⁴ It is also important to note that because the EU is an autonomous legal order, the CJEU has stated that the international agreements that the EU concludes cannot influence the allocation of powers that are established by the EU Treaties.⁴⁵ As such, the conclusion of the UNCRRPD by the EU cannot lead to the expansion of EU competences in the field of disability.

³⁷ G. Dahm, J. Debruck and R. Wolfrum, *Volkerrecht* (Berlin Walter de Gruyter, 1989), p. 106.

³⁸ Case 181/73 *Haegeman v. Belgium*, EU:C:1974:41.

³⁹ *Ibid.*, para. 5.

⁴⁰ Case 6/64 *Flaminio Costa v. ENEL*, EU:C:1964:66.

⁴¹ C. Tietje, 'The status of international law in the European legal order: The case of International Treaties and non-binding international instruments', in J. Wooters, A. Nollkaemper and E. de Wet (eds.), *The Europeanization of International Law: The Status of International Law in the EU and its Member States* (T.M.C Asser Press, 2008), p. 57.

⁴² Case C-61/94 *Commission v. Germany*, EU:C:1996:313, para. 52; Case C- 344/04 *IATA v. Department for Transport*, EU:C:2006:10, para. 35.

⁴³ M. Cremona, 'External relations and External Competence of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law', *EUI Working Papers Law No. 2006/22* (2006), <http://cadmus.eui.eu/handle/1814/6249>; C. Tietje, in J. Wooters, A. Nollkaemper and E. de Wet (eds.), *The Europeanization of International Law: The Status of International Law in the EU and its Member States*, p. 58.

⁴⁴ Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, EU:C:2013:222, para. 28.

⁴⁵ Joined cases C-402/05 and C-415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, EU:C:2008:461.

In addition, the CJEU has developed a body of well-established case law with regard to the competence of individuals to invoke directly provisions of an international agreement to which the EU is a contracting party. The Court applies a twofold test in that regard. First the Court examines whether, in principle, the international agreement under consideration is of such a nature that it might create directly effective rights and obligations for individuals. If the Court gives an affirmative answer to the first question, it then examines whether the provision in question is 'legally perfect' so as to directly create rights for individuals.⁴⁶

In this respect, Article 216 TFEU and the *Haegeman*⁴⁷ doctrine are a bit deceptive. They give the impression that the EU legal order is categorically open towards international law, but in practice that is not the case.⁴⁸ *Mendez* has argued that in many instances challenges to EU measures were unsuccessful, solely on the basis of international treaties to which the EU has become a party.⁴⁹ In addition, even in the instances where the EU courts have expressed powers of legislative review, they are reluctant to apply these powers.⁵⁰ It is also quite rare for EU legislative acts to be struck down.⁵¹ This hesitation is more evident where international treaties to which the EU has become a party are the basis for the assessment of EU actions.⁵² This is surprising when one considers both the number of international treaties that the EU has become party to and the amount of legislative and administrative law-making that has taken place in the years that have passed since the establishment of the *Haegeman* doctrine.⁵³

The UNCRPD, from an initial reading, does not seem to have direct effect, as all the provisions of the Convention are directed to the States Parties and none of them seem to be clear and unconditional enough to be considered as 'legally perfect'.⁵⁴ The CJEU supported this view in *Z. v. A Government Department and the Board of Management of a Community School*.⁵⁵ The Court stated that the provisions of the UNCRPD are not, as regards their content, unconditional

⁴⁶ Case 12/86 *Demirel v. Stadt Schwabisch Gmund*, EU:C:1987:400, para. 19; Case C-162/96 *Racke v. Hauptzollamt Mainz*, EU:C:1998:400, para. 31; Joined Cases C-300/98 and C-392/98 *Christian Dior and Assco Geruste*, EU:C:2000:688, para. 42.

⁴⁷ Case 181/73 *Haegeman v. Belgium*.

⁴⁸ See, M. Mendez, *The Legal Effects of EU Agreements* (Oxford University Press, 2013).

⁴⁹ *Ibid.*, p. 302.

⁵⁰ *Ibid.*, p. 303.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*, p. 302.

⁵⁴ European Foundation Centre Report, 'Study on the challenges and good practices in the implementation of the UN Convention on the Rights of Persons with Disabilities', *EFCD* (2010), www.efc.be/publication/study-on-challenges-and-good-practices-in-the-implementation-of-the-un-convention-on-the-rights-of-persons-with-disabilities-executive-summary/, p. 31.

⁵⁵ Case C-363/12 *Z. v. A Government department, The Board of management of a community school*, EU:C:2014:159, para. 87–90.

and sufficiently precise within the meaning of its prior case law, because the implementation of the Convention relies on the adoption of subsequent measures by the contracting parties.⁵⁶ Therefore, due to the ‘programmatically’ nature of the UNCPRD, its provisions do not have direct effect according to EU law.⁵⁷

Lastly, the CJEU explicitly held that ‘the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as possible, be interpreted in a manner that is consistent with those agreements’.⁵⁸ In that regard, the CJEU in the *Ring and Skouboe Werge* case⁵⁹, and in subsequent cases⁶⁰ in which the CJEU has referred to the UNCPRD, has repeated this statement. This statement is of great importance with regard to the implementation of the UNCPRD, because it can be used to guarantee a consistent interpretation of EU secondary legislation with the Convention. For example, in the field of EU consumer law the Union has adopted the Consumer Rights Directive.⁶¹ Article 5 of this Directive requires the trader to provide the consumer with information in a clear and comprehensible manner.⁶² This provision regulates the format that the information provided to consumers should take. Nevertheless, despite the legislator’s emphasis on the need for this information to be as clear and as comprehensive as possible so as not to mislead the consumer, the provision does not make a reference to the particular needs of certain people with disabilities who might not be able to understand the information provided by the trader because of the inaccessibility of the format the information is provided in. By adopting this legislation, the EU has reinforced existing barriers or created new barriers to the accessibility of the information that people with disabilities are entitled to receive. However, in light

⁵⁶ Ibid., para. 87–88.

⁵⁷ Ibid., para. 89.

⁵⁸ Case C-61/94 *Commission v. Germany*, para. 52; M. Mendez, *The Legal Effects of EU Agreements*, p. 27.

⁵⁹ Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, para. 28.

⁶⁰ C-312/11 *Commission v. Italy*, EU:C:2013:446, para. 56–58; Case C-363/12 *Z. v. A Government department, The Board of management of a community school*, para. 75; Case C-354/13 *FOA v. Kommunernes Landsforening (KL) (Kaltoft)*, EU:C:2014:2463, para. 53; Case C-198/15 *Invamed Group Ltd, Invacare UK Ltd, Days Healthcare Ltd, Electric Mobility Euro Ltd, Medicare Technology Ltd, Sunrise Medical Ltd, Invacare International SARL v. Commissioners for Her Majesty’s Revenue & Customs*, EU:C:2016:362, para. 31; Case C-395/15 *Mohamed Daouidi v. Bootes Plus SL and Others*, EU:C:2016:917, para. 40–41; Case C-406/15 *Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control*, EU:C:2017:198, para. 31, 48 and 64.

⁶¹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, [2011] OJ L 304/64.

⁶² Article 5 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, [2011] OJ L 304/64.

of the UNCRPD and particularly Article 9 UNCRPD, which aims at removing the barriers to accessibility of people with disabilities and which requires that the information provided to people with disabilities is offered in accessible formats, it is arguable that this provision of the Consumer Rights Directive should be interpreted so as to require that traders will provide the information mentioned in Article 5 of the directive in accessible formats, as and when this is required.

Nevertheless, the CJEU recognised in the *Glatzel* case⁶³ that in certain instances it is not possible to give a provision of secondary law an interpretation that is consistent with the UNCRPD.⁶⁴ The applicant in this case was denied a renewal of his driving licence for C1 and C1E (heavy goods vehicles) categories, because an ophthalmological examination revealed that he suffered from a substantial functional loss of vision in one eye (unilateral amblyopia). The CJEU was asked to determine whether the refusal to issue a new licence constituted discrimination within the meaning of Article 2 UNCRPD. The Court reaffirmed, initially, in its judgment that provisions of secondary law must, insofar as is possible, be interpreted in a manner that is consistent with international agreements that the EU has concluded, such as the UNCRPD.⁶⁵ However, the Court stated that when an EU law provision unequivocally lays down a minimum rule, it is impossible to give that provision an interpretation which would enable it to circumvent the clear rule.⁶⁶ It also indicated that in this case the EU legislator 'has weighed the requirements of road safety and the right of persons affected by a visual disability to non-discrimination in a manner which cannot be regarded as disproportionate in relation to the objectives pursued'.

In addition, it is important to note that, although the Court has established in its case law that EU secondary laws should be interpreted in a manner that is consistent with the UNCRPD, the Court has not been successful in providing a consistent interpretation with the Convention in practice.⁶⁷ *Waddington* has recognised in that regard that the CJEU has quite radically amended the definition of disability that is developed in its previous case law for the purposes of the Employment Equality Directive⁶⁸ in order to bring it into line with the Convention. It has done this, according to *Waddington*, by shifting away from the medical model of disability⁶⁹, to seemingly embracing the social-contextual

⁶³ C-356/12 *Wolfgang Glatzel v. Freistaat Bayern*, EU:C:2014:350.

⁶⁴ *Ibid.*, para. 71–72.

⁶⁵ *Ibid.*, para. 70.

⁶⁶ *Ibidem*, par 71.

⁶⁷ L. Waddington, 'Saying all the right things and still getting it wrong: The Court of Justice's definition of disability and non-discrimination law', 22 *Maastricht Journal of European and Comparative Law* (2015).

⁶⁸ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

⁶⁹ Case C-13/05 *Chacón Navas v. Eures Colectividades SA*, EU:C:2006:456.

model of disability.⁷⁰ However, she has argued that the Court ‘failed to follow through on the implications of its own definition, and failed to apply it correctly’ in subsequent cases.⁷¹

IV. THE COMPETENCES OF THE EU WITH REGARD TO MATTERS GOVERNED BY THE UNCRPD

To understand the EU competences in relation to the matters that are governed by the UNCRPD and the challenges to the cooperation of the EU and its Member States with regard to the implementation of the Convention, it is important to examine, foremostly, the Council Decision, the Declaration of Competence that is attached to this Decision and the Code of Conduct, which amongst other things, sets out the division of tasks based on competences between the EU and the Member States.

As I have mentioned above, Article 44 UNCRPD required the EU to deposit a declaration of competences along with the instruments of approval. This is not the first time the EU was required to produce such a document. This practice has been gradually developed due to the conclusion of many mixed agreements by the EU.⁷² This declaration constitutes a guide for the other parties to the agreement and also for the Member States⁷³, and it details the distribution of power and responsibilities between the Union and the Member States concerning the mixed agreement in question.⁷⁴ Nevertheless, the distribution of power that is stated in the decision providing for the conclusion of an international agreement is not definite. Due to the fact that the Union’s competences develop over time, the declarations should be updated whenever the division of powers between the Union and the Member States changes in any way.⁷⁵ The same applies to the Declaration of Competence with regard to the UNCRPD. The Declaration of Competence states the areas of Community competence with regard to the Convention. It also makes reference to the fact that the competences of the Community are ‘subject to continuous development’ and that the Community will ‘complete or amend the declaration’ in the case of any substantial modification to these competences, as I have mentioned above.⁷⁶

⁷⁰ L. Waddington, 22 *Maastricht Journal of European and Comparative Law* (2015), p. 590; Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, para. 28.

⁷¹ L. Waddington, 22 *Maastricht Journal of European and Comparative Law* (2015), p. 585.

⁷² C. Hillion and P. Koutrakos, *Mixed Agreements Revisited* (Hart Publishing, 2010), p. 316.

⁷³ See Case C-459/03 *Commission v. Ireland*, EU:C:2006:345.

⁷⁴ C. Hillion and P. Koutrakos, *Mixed Agreements Revisited*, p. 317.

⁷⁵ *Ibid.*, p. 318.

⁷⁶ Council Decision 2010/48/EC of 24 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35, Annex II.

These declarations typically have a common structure, which the Declaration of Competence with regard to the UNCRRPD shares. The beginning of the declaration entails general descriptive statements about broad competences in relation to the agreement under examination.⁷⁷ These statements are followed by a warning that the division of competences is subject to change.⁷⁸ The final common element is a list of specific EU instruments and conventions that are related to the subject matter of the treaty at hand.⁷⁹ The instruments mentioned in the Declaration of Competence are illustrative of the EU's competence with regard to the implementation of the UNCRRPD.

Before moving on to look at the division of EU competences with regard to matters that are governed by the UNCRRPD, it is important to understand the nature of these EU competences. The EU Treaties set out certain objectives that must be attained in order for the EU to fulfil its purpose.⁸⁰ These objectives are presented in Article 3 TEU and they include, *inter alia*, the promotion of peace and the well-being of its people⁸¹, the establishment of an area of freedom, security and justice⁸², the establishment of internal market⁸³ and combating social exclusion and discrimination.⁸⁴ These objectives are to be carried out following a set of legal rules. These rules constitute the legal basis for EU actions or, phrased differently, the EU competences. The limits of these competences are governed by the principle of conferral which means that EU actions should be limited to the framework of competences that have been conferred upon the EU by the Member States in the Treaties. Thus, competences that have not been conferred by the Member States upon the EU in the Treaties should be considered as competences of the Member States of the EU.⁸⁵

Furthermore, the exercise of EU competence is subject to compliance with the principles of subsidiarity and proportionality. Firstly, following Article 5 (3) TEU 'under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'.⁸⁶ Secondly, according to the principle of proportionality, 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'.⁸⁷

⁷⁷ C. Hillion and P. Koutrakos, *Mixed Agreements Revisited*, p. 326.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ K. Lenaerts and P. Van Nuffel, *Constitutional law of the European Union* (Thomson: Sweet and Maxwell, 2004), p. 80.

⁸¹ Article 3 (1) TEU.

⁸² Article 3 (2) TEU.

⁸³ Article 3 (3) TEU.

⁸⁴ Article 3 (3) TEU.

⁸⁵ Articles 5 (1) and (2) TEU.

⁸⁶ Article 5 (3) TEU.

⁸⁷ Article 5 (4) TEU.

The TFEU states the categories of competences which have already been recognised by the CJEU and laid down by the Treaties. There are three categories of EU competences: exclusive, shared and supporting.⁸⁸ When the Treaties confer upon the EU exclusive competence in a specific area, it means that only the Union may legislate and adopt legally binding acts in that field, while the Member States are only allowed to legislate in that specific field if they have received prior authorisation from the Union⁸⁹ or in case they implement EU legal acts.⁹⁰ In the cases where both the EU and the Member States are allowed to legislate in a specific area, the competences in this field are called shared competences.⁹¹ In fields of shared competence, the Member States are allowed to adopt legally binding measures only to the extent that the EU has not exercised its competence in this field or where the EU has ceased to exercise its competence.⁹² Finally, the Union has supporting competences in a particular field when it is allowed to carry out actions to support, coordinate or supplement the actions of the Member States⁹³, without being allowed to adopt legislative harmonisation rules.⁹⁴

While the wording of the Treaties shows that the areas of exclusive and supporting competences are exhaustive⁹⁵, in the area of shared competences this is not the case.⁹⁶ This is evident from Article 4 (1) TFEU which states that the EU should share competence with the Member States where the Treaties have attributed to the EU powers that do not fall within the scope of Articles 3 and 6 that refer respectively to exclusive and to supplementary competences.⁹⁷ This is also implied in the second paragraph of Article 4 TFEU which enumerates the principle areas of shared competence, and, thus, paragraph two suggests that this list is not exhaustive.⁹⁸ The text of the TFEU states that ‘the Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6’.⁹⁹ This provision reveals the residual nature of the shared competences and it implies that in cases where a new legal basis is introduced after a Treaty revision, which does not fall under the scope of either the areas of exclusive or complementary competence, it should be considered as a shared competence. In

⁸⁸ Articles 3, 4 and 6 TFEU.

⁸⁹ See, Case 41/76 *Donckerwolcke*, EU:C:1976:182, para. 32.

⁹⁰ Article 2 TFEU.

⁹¹ Article 2 (2) TFEU.

⁹² Article 2 (2) TFEU.

⁹³ Article 2 (2) TFEU.

⁹⁴ J. Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press, 2010), p. 75.

⁹⁵ Articles 3 and 6 TFEU.

⁹⁶ J. Piris, *The Lisbon Treaty: A Legal and Political Analysis*, p. 77.

⁹⁷ Article 4 (1) TFEU.

⁹⁸ P. Craig and G. De Burca, *EU Law, Texts, Cases and Materials* (5th Edition, Oxford University Press, 2011), p. 83.

⁹⁹ Article 4 TFEU.

the instance of a new legal basis that would allow the EU to adopt legislation on issues governed by the UNCRPD, for example, this competence would fall under the shared competence ambit, so long as it does not relate to the areas referred to in Articles 3 and 6 TFEU.

Returning to the analysis of the Declaration of Competence, this document states that the EU has exclusive and shared competences with regard to matters that are governed by the UNCRPD.¹⁰⁰ It also suggests that there are other EU policy areas that could be of some relevance for the implementation of the Convention by the Union. These areas pertain to the field of complementary competences.

A. EXCLUSIVE COMPETENCES

As I have mentioned above, the Union enjoys exclusive competence in a number of areas. In its case law, the CJEU has ruled that the Union has *a priori* exclusive competences in the following fields: the common commercial policy, protection of maritime resources and the conservation of marine biological resources in relation to the common fisheries policy.¹⁰¹ In a more concrete fashion, the TFEU states in Article 3 thereof that the Union has exclusive competence in the areas of the EU customs union, the establishment of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, the conservation of marine biological resources under the common fisheries policy and the common commercial policy.¹⁰²

In these areas of exclusive Union competence, the Member States are prohibited from enacting legislation. The competence to legislate in these fields does not exist with the Member States, because such competence has been transferred to the EU.¹⁰³ It is, therefore, the Union that is able to decide whether to return to the Member States parts of the exclusive competences that have been conferred upon the Union. Otherwise, the Member States' power is limited to implementing EU legislation in these fields.¹⁰⁴ Thus, it is up to the Union's institutions to decide whether to allow the Member States to exercise those competences on behalf of the EU.¹⁰⁵

¹⁰⁰ Council Decision 2010/48/EC of 24 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35.

¹⁰¹ Opinion 1/75 of the Court of 11 November 1975 1/75, EU:C:1975:145; Case 41/76 *Donckerwolcke* (for Common Commercial Policy); Case 804/79 *Commission v. UK*, EU:C:1981:93 (for maritime resources).

¹⁰² Article 3 (1) TFEU.

¹⁰³ D. Obradovic and N. Lavranos, *Interference between EU Law and National Law* (Europa Law Publishing, 2007), p. 17.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*, p. 18.

Furthermore, the exclusivity of the Union's powers means that the principle of subsidiarity is not applicable in these instances, because the Member States are prohibited from taking any actions.¹⁰⁶ This is supported by the text of the TEU in Article 5 (3) thereof where it is stated that 'in areas which do not fall within its exclusive competences' the principle of subsidiarity is applicable.¹⁰⁷ Therefore, this principle can only be applied to the other two categories of competence.¹⁰⁸ Thus, the measures that the EU takes to implement the UNCRPD in the areas of shared competence should take into consideration the principle of subsidiarity.

The Declaration of Competence identifies three areas of exclusive competence of the EC with regard to matters governed by the UNCRPD: the compatibility of State aid with the common market, the Common Custom Tariff and requirements in relation to the EC's own public administration, in particular, regulating the recruitment, conditions of service, remuneration, training etc. of non-elected officials under the Staff regulations and the implementing rules to those regulations.¹⁰⁹ The EU has adopted a number of legal instruments that address matters which are related to the situation of people with disabilities in these fields of exclusive competence. For example, regarding the Common Custom Tariff¹¹⁰, the EU has adopted a regulation setting up a Community system of reliefs from customs duty, which, amongst other things, relieves certain products from customs duty, especially those which are designed to meet the particular needs of persons with disabilities. Another example, this time from the field of State aid, is the Regulation declaring certain categories of aid compatible with the common market¹¹¹, which, *inter alia*, states that certain aid that is designed to benefit disabled and disadvantaged workers is compatible with common market rules. Nevertheless, it is clear from the Declaration of Competence that the areas of EU exclusive competence with regard to the matters governed by the UNCRPD are quite limited, especially when compared to shared competences.

The Code of Conduct suggests that in matters falling within the exclusive competence of the EU, the Union will aim to elaborate coordinated positions in the context of the representation of the Union at the UN level whenever this is considered appropriate.¹¹² The Commission's and the Member States'

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Council Decision 2010/48/EC of 24 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010], OJ L 23/35.

¹¹⁰ Council Regulation No. 1186/2009/EC of 16 November 2009 setting up a Community system of reliefs from customs duty, [2009] OJ L 324/23.

¹¹¹ Commission Regulation No. 800/2008/EC of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), [2008] OJ L 214/3.

¹¹² Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the

coordination meetings within the competent Council Working Group will be held following an initiative by the President of the Council or upon the request of the Commission or a Member State.¹¹³ Electronic consultation is allowed during these coordination meetings, when they are so required due to urgent circumstances.¹¹⁴ The Commission is responsible for expressing the Unions' position on behalf of those EU Member States which have ratified the UNCRPD.¹¹⁵

B. SHARED COMPETENCES

In the areas falling under shared competences, both the EU and the Member States are competent to adopt legislative measures. The Union action in this category of competence is subject to the principles of subsidiarity and proportionality.¹¹⁶ In general, the EU possesses shared competences in the following areas: internal market, social policy, economic, social and territorial cohesion, agriculture and fisheries, excluding the conservation of marine biological resources, environment, consumer protection, transport, trans-European networks, energy, freedom, security and justice and common safety concerns in public health matters.¹¹⁷

The Declaration of Competence states that the Community shares competence with Member States in the areas of anti-discrimination policy on the ground of disability, free movement of goods, services, persons and capital agriculture, transport, taxation, internal market, equal pay for men and women, trans-European network policy and statistics.¹¹⁸ The EU has adopted most of its disability-related legislation based on the competences that it shares with the Member States. For example, in the area of transport the EU has adopted a comprehensive framework of legislation on passengers' rights when travelling by

European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C 340/11, para. 4.

¹¹³ Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C 340/11, para. 6(b).

¹¹⁴ Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C 340/11, para. 6(b).

¹¹⁵ Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C 340/11, para. 6(b).

¹¹⁶ T. Konstandinides, *Division of Powers in the European Union: The Delimitation of the Internal Competence between the EU and the Member States* (Kluwer Law International, 2009), p.168.

¹¹⁷ Article 4 (2) TFEU.

¹¹⁸ Council Decision 2010/48/EC of 24 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35, Annex II.

air, water, road and rail. Three of these regulations¹¹⁹ mainstreamed disability considerations and one of those regulations¹²⁰ is disability specific. In the area of taxation, the EU has adopted a Directive on the common system of value added tax (henceforth VAT Directive)¹²¹, which, amongst other things, allows for exceptions to the usual VAT rate in the case of disability-related medical aids and appliances. In the field of anti-discrimination policy, the EU has adopted the Employment Equality Directive¹²² that protects people with disabilities from discrimination in the field of employment and occupation and provides them with the right to reasonable accommodation.¹²³ Lastly, in the area of the internal market, the EU has adopted a regulation concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor¹²⁴, which stipulates, amongst other things, that certain types of vehicles should be accessible to persons with reduced mobility.

In addition, it is important to examine the effects on the competence of the Member States when there is no EU law, the adoption of EU law and the decision of the EU not to legislate in a particular field. Firstly, when the EU is 'silent' it means that it has not yet exercised its harmonising powers, thus, the Member States are free to legislate.¹²⁵ However, they must respect their obligations under the EU Treaties.¹²⁶ These obligations are unconditional and their attainment by the Member States requires the uniform application of EU law.¹²⁷

¹¹⁹ Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L55/1; Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L 315/14; Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L 334/1.

¹²⁰ Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L 204/1.

¹²¹ Directive 2006/112/EC of the European Parliament and of the Council of 28 November 2006, on the common system of value added tax, [2006] OJ L 347/1.

¹²² Directive 2000/78/EC of the European Parliament and of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

¹²³ Directive 2000/78/EC of the European Parliament and of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

¹²⁴ Regulation No. 661/2009 of the European Parliament and of the Council of 13 July 2009 concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor, [2009] OJ L 200/1.

¹²⁵ T. Konstandinides, *Division of Powers in the European Union: The Delimitation of the Internal Competence between the EU and the Member States*, p.170; D. Obradovic and N. Lavranos, *Interference between EU Law and National Law*, p. 21.

¹²⁶ T. Konstandinides, *Division of Powers in the European Union: The Delimitation of the Internal Competence between the EU and the Member States*, p.170.

¹²⁷ Ibid.

Secondly, once the EU has exercised its powers through the adoption of legislation in the field of shared competence, the Member States' freedom to legislate is not only restricted by their Treaty obligations, but also by the Union's secondary law. Article 2(2) TFEU states that 'when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area'.¹²⁸ The Member States should exercise their competence to the extent that the Union has not exercised its competence.¹²⁹ This provision refers to the principle of pre-emption, which states that national competence ceases when the EU exercises its powers in a field of shared competence. The extent of the barring of national competence depends on the scope of EU powers in each field where it shares competence with the Member States, and the extent to which the EU has exercised those powers in each field of shared competence. The scope of the EU to take measures in the field of shared competences depends on the powers that each legal basis confers on the EU. Thus, the limits of EU competence can be found in the detailed provisions of the TFEU that state what the EU is competent to do in each field of shared competence. The extent that the EU exercises its competence in a field where it shares competence with the Member States depends on the legislative instrument and the level of harmonisation that the EU utilises any measure. There are many different ways that the EU can intervene in a particular area, such as through the adoption of uniform regulations, the harmonisation of national laws or the adoption of minimum harmonisation. When the EU adopts a measure that introduces uniform rules into a policy field, Member States cannot deviate from those rules as these rules constitute the governing norm for this particular field. In such cases, the EU action pre-empts the Member States from taking action in this field. By way of contrast, when the EU takes action in a field of shared competence by introducing minimum standards, Member States are allowed to take some further action in that area. This is because minimum standards are rules that provide a 'floor of rights' without preventing the Member States from adopting stricter rules.¹³⁰

The Member States, in an effort to address their concerns with regard to the possible pre-emptive impact of Article 2(2) TFEU, adopted the Protocol on the exercise of shared competence.¹³¹ The Protocol states that where the EU has taken an action in the field of shared competence 'the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area'.¹³² Thus, Member States can still take actions in the particular field in areas that are not covered by the EU action.

¹²⁸ Article 2 (2) TFEU.

¹²⁹ Ibid.

¹³⁰ T. Konstandinides, *Division of Powers in the European Union: The Delimitation of the Internal Competence between the EU and the Member States*, p.177.

¹³¹ Protocol (No. 25) on the exercise of shared competence, [2008] OJ C115/307.

¹³² Protocol (No. 25) on the exercise of shared competence, [2008] OJ C115/307.

Thirdly, in the instances where the EU has decided to no longer exercise its powers in a field of shared competence, by either repealing existing secondary legislation or by not exercising a competence because the CJEU has annulled a legal act, the Member States are once again capable of exercising their competences in these fields by reactivating their competences.¹³³

Moving back to the distinction between uniform rules and minimum standards, it is important to note that this distinction is of great importance for the implementation of the UNCPRD. This is because it can provide a better understanding of the extent of EU obligations in relation to the implementation of the UNCPRD. This is reaffirmed by the Declaration of Competence which states that the EC is solely responsible for implementing the UNCPRD both in the areas where it has exclusive competence and in areas where the provisions of the Convention or legal instruments adopted in implementation thereof affect uniform rules that were previously established by the EC.¹³⁴ In the cases where the Union has established minimum standards in an area of shared competence, Member States can exercise their competence, without prejudice to the EU's competence. Thus, the EU is required to implement the UNCPRD obligations not only in the areas where it has exclusive competence, according to the TFEU, but also in the areas where Member State action has been pre-empted due to the adoption of EU secondary legislation. Nonetheless, even in the instances where EU has established minimum standards that implement or that will implement the Convention, the EU still has the competence to adopt further measures in these fields by either adopting more minimum standards or uniform rules.

With a view to providing a better illustration of the difference between uniform rules and minimum standards and the way that this distinction affects the implementation of the UNCPRD by both the EU and the Member States, I will provide two examples.

The first example is in the field of transport. The EU has adopted several passengers' rights regulations that address the needs of people with disabilities. The regulation concerning the rights of passengers in bus and coach transport¹³⁵, among others, provides that carriers and terminal managing bodies should, within their respective areas of competence, provide assistance to disabled persons and persons with reduced mobility, at least to the extent that is specified in part (a) of Annex I. This includes, *inter alia*, assistance in communicating to the terminal managing bodies the arrival of disabled

¹³³ D. Obradovic and N.Lavranos, *Interference between EU Law and National Law*, p.21; Article 2 (2) TFEU.

¹³⁴ Council Decision 2010/48/EC of 24 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35, Annex II.

¹³⁵ Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L 55/1.

persons and persons with reduced mobility at the terminal and their request for assistance at designated points.¹³⁶ It is clear from the wording of the provision that it establishes a minimum content of assistance to disabled people or people with reduced mobility. Thus, in this case, Member States are not excluded from taking measures to oblige carriers and terminal managing bodies to provide assistance in other cases than the ones that are mentioned in Annex I of this Regulation with a view to implementing the UNCRPD and to improve assistance to disabled persons and persons with reduced mobility. The EU is, also, not excluded from taking measures to further implement the Convention in this field by revising this regulation. For example, the Convention requires the States Parties take measures to provide signage in Braille and in easy to read and understandable forms in buildings and other facilities such as the bus and coach terminals¹³⁷, and to develop, promulgate and monitor the implementation of minimum standards with regard to the accessibility of such terminals. These are requirements that have not been fully addressed by the regulation concerning the rights of passengers in bus and coach transport.

The same does not apply to the next example, which concerns EU legislation in the field of taxation. As per the VAT Directive¹³⁸, Member States may apply either one or two reduced VAT rates to goods and services, including medical equipment, aids and other appliances intended for use by people with disabilities and domestic care services, such as home help and care for the disabled.¹³⁹ The reduced rates should not amount, as a percentage of the taxable sum, to less than 5%.¹⁴⁰ This measure should be considered as a uniform rule, as the Member States are not allowed to deviate therefrom, because the list of goods and services that could possibly receive a reduced VAT rate is exhaustive. Thus, if a Member State decided to enact legislation with a view to adding other goods and services for the exclusive use by people with disabilities to the existing options of the directive, it would be in violation of the Treaty, because of the pre-emptive effect of EU legislation in the field of taxation.

The Declaration of Competence also states that in the case where the EU has not exercised its competence in a field where it shares competence with the Member States, the competence to act rests with the Member States.¹⁴¹ This statement might

¹³⁶ Article 13 (1) of Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L 55/1.

¹³⁷ Article 9 (2) UNCRPD.

¹³⁸ Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2006] OJ L 347/1.

¹³⁹ Council Directive 2009/47/EC of 5 May 2009 amending Directive 2006/112/EC as regards reduced rates of value added tax, [2009] OJ L 116/18, Annex.

¹⁴⁰ Article 99 of Directive 2006/112/EC, of 28 November 2006 on the common system of value added tax, [2006] OJ L 347/1.

¹⁴¹ Council Decision 2010/48/EC of 24 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35, Annex II.

suggest, as *Waddington* has argued¹⁴², that in all areas where the EU does not have exclusive competence or has not set uniform rules, the responsibility to implement the UNCRPD lies with the Member States, and the EU, when adopting minimum standards or taking other action outside from the policy areas where it has exclusive competence, need pay little attention, if any, to the UNCRPD.¹⁴³ Despite the fact, as *Waddington* has explained, that this might be a correct interpretation of the Declaration of Competence, in practice it is unlikely that this approach will be adopted by the EU institutions.¹⁴⁴ On the contrary it seems that the EU, when it adopts policy documents¹⁴⁵ or legislation that sets minimum standards¹⁴⁶ has, quite often, taken into consideration the needs of persons with disabilities.

Lastly, pursuant to the Code of Conduct, the Union and the Member States will elaborate common positions.¹⁴⁷ The common positions will be discussed at the coordination meetings within the competent Council Working Group between the Commission and the Member States in the context of the representation of the EU at the CRPD bodies, following the same process as the meetings in the cases of exclusive competences of the EU. In the instance of exclusive competence, the Commission and the Member States will decide who will deliver any statement to be made on behalf of the Union and its Member States where the respective competences are inextricably linked. As far as common positions are concerned, on matters lying within the competence of the Union, the Commission will present them, while in the case where the issue at hand is situated predominantly in the area of the Member States' competence, the Presidency or a Member State will present the common position.¹⁴⁸

C. COMPLEMENTARY COMPETENCES

In the policy areas where the Union has complementary competences, the Union is allowed to supplement, support and coordinate the actions taken by

¹⁴² L. Waddington. 18 *Maastricht Journal of European and Comparative Law* (2011).

¹⁴³ *Ibid.*, p. 446.

¹⁴⁴ *Ibid.*

¹⁴⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe, COM(2010) 636 final.

¹⁴⁶ For example, Council Directive 2009/47/EC of 5 May 2009 amending Directive 2006/112/EC as regards reduced rates of value added tax, [2009] OJ L 116/18.

¹⁴⁷ Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C 340/11, para. 5.

¹⁴⁸ Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C 340/11, para. 6 (c).

the Member States.¹⁴⁹ The areas of complementary competences according to Article 6 TFEU are as follows: the protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection and administrative cooperation.¹⁵⁰

The exercise of a complementary competence by the EU does not block regulatory action by the Member States in the same field.¹⁵¹ The Union actions do not entail the harmonisation of Member States' laws.¹⁵² However, the Union is not barred from adopting legally binding legislation.¹⁵³ Supporting competences empower the Union to take action to assist Member States' actions in these fields. For example, in the field of employment policy the EU can take initiatives with a view to developing exchanges of information and best practices, providing comparative analysis and advice as well as promoting innovative approaches and evaluating experiences.¹⁵⁴ Such an initiative is also an example of EU legislative action that does not have a harmonising effect.¹⁵⁵ Supplementing competences give the EU the power to adopt measures that complement the existing framework in a policy area that has been developed by the Member States. For example, the Union can take measures to supplement Member States' action which aims at the development of quality education, while fully respecting the responsibility of the Member States with regard to the content of teaching and the organisation of education systems and their cultural and linguistic diversity.¹⁵⁶ Coordinating competences empower the EU to take measures to encourage the cooperation between the Member States and the Commission in the field of complementary competence. An example of such a power in the field of public health is the competence of the Commission to encourage the coordination of the Member States among themselves and their coordination with the Commission on their policies and programmes that aim, amongst other things, at improving public health, preventing physical and mental illness and diseases and obviating sources that are dangerous to physical and mental health.¹⁵⁷

The Declaration of Competence states that there are several EU policy areas that might be of relevance to the UNCRPD. In these areas, the EU can take actions to support, supplement and coordinate the actions of the Member States. These areas are as follows: the development of a coordinated strategy for employment, of quality education, of a vocational training policy and the development of actions to strengthen economic and social cohesion and cooperation with third

¹⁴⁹ D. Obradovic and N. Lavranos, *Interference between EU Law and National Law*, p. 22–23.

¹⁵⁰ Article 6 TFEU.

¹⁵¹ D. Obradovic and N. Lavranos, *Interference between EU Law and National Law*, p. 22–23.

¹⁵² Article 2 (5) TFEU.

¹⁵³ D. Obradovic, and N. Lavranos, *Interference between EU Law and National Law*, p. 22–23.

¹⁵⁴ Article 149 TFEU.

¹⁵⁵ See, for example, Council Decision 2010/707/EU of 21 October 2010 on guidelines for the employment policies of the Member States, [2010] OJ L 308/46.

¹⁵⁶ Article 165 (1) TFEU.

¹⁵⁷ Article 168 TFEU.

countries.¹⁵⁸ Common positions with regard to the representation of the Union at the CRPD bodies in this area of competences are reached in the same way as for issues that fall under the scope of shared competences.¹⁵⁹

Before moving to the next part of this chapter, it is important to note that the Declaration of Competence includes an appendix listing legislative ‘Community Acts which refer to matters governed by the Convention’. These acts illustrate the scope of the area of competence of the Community.¹⁶⁰ The appendix further states that ‘the extent of the European Community’s competence ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establish uniform rules’.¹⁶¹ Nevertheless, there is neither a specific analysis on the exact competences of the Union that these legislative instruments reveal nor an identification of the uniform rules that the EU has established through the adoption of the instruments enumerated in this list.¹⁶² It is also important to note that this list includes instruments that make specific reference to disability, but it does not include instruments that, despite not mentioning disability, illustrate that the EU has competence to act in an area of competence.¹⁶³ Such an area is the EU consumer policy. In this area, references to disability are quite limited despite the fact that, as *Waddington* has argued, the TFEU allows for addressing the needs of persons with disabilities in this area and considering the great scope for mainstreaming disability within EU legislation.¹⁶⁴ The omission of these instruments from the appendix attached to the Declaration of Competence, in addition to the failure of the EU legislator to include disability considerations in certain areas of EU competence despite being able to do so, might possibly create the misconception of the EU legislator, as *Waddington* has argued, that the EU does not have a competence to address disability considerations in these fields, and, thus, it has no competence to implement the UNCRPD obligations.¹⁶⁵

¹⁵⁸ Council Decision 2010/48/EC concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, 24 November 2009, [2010] OJ L 23/35, Annex II.

¹⁵⁹ Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C 340/11, para. 6 (c).

¹⁶⁰ Council Decision 2010/48/EC of 24 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35, Appendix.

¹⁶¹ Council Decision 2010/48/EC of 24 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35, Appendix.

¹⁶² L. Waddington, 18 *Maastricht Journal of European and Comparative Law* (2011), p. 433.

¹⁶³ *Ibid.*, p. 444.

¹⁶⁴ *Ibid.*, p. 434.

¹⁶⁵ *Ibid.*, p. 445.

In that regard, the initial report of the EU with regard to the implementation of the UNCRPD¹⁶⁶ mentioned the area of consumer protection as a relevant area of EU policy with regard to the implementation of the UNCRPD, in passing, without providing any examples.¹⁶⁷ The only examples of consumer related legislation that were mentioned in this report were instruments that are outside of the scope of the area of EU consumer policy.¹⁶⁸ The CRPD Committee in the concluding observations on the initial report by the EU stated that the Declaration of Competence had not been updated and did not thoroughly specify the legislation applicable to or affecting people with disabilities.¹⁶⁹ For that reason, the Committee recommended that the EU regularly update the Declaration of Competence and its list of instruments to entail recently adopted instruments and instruments that may not explicitly refer to people with disabilities, but that are nevertheless relevant to disabled people.¹⁷⁰ The Committee also referred, to the area of consumer protection when recommending, in the context of legal capacity, that the EU take appropriate measures to ensure that persons with disabilities can exercise all the rights enshrined in EU treaties and legislation, such as access to justice, goods and services, including banking, employment and health care, as well as voting and consumer rights, in a manner that is commensurate with the Convention.¹⁷¹

In response to the recommendations of the CRPD Committee, the EU has updated the Declaration of Competence. The EU provided a comprehensive and up-to-date overview of the EU legislative acts referring to matters relevant to the implementation of the UNCRPD. The new version of the appendix listing 'Legislative acts which refer to matters governed by the UN Convention' is attached to the Progress Report on the implementation of the European Disability Strategy (2010 – 2020).¹⁷² The new appendix addresses the concerns of the CRPD Committee. It provides an extensive list of EU legislation that is applicable to or which affects people with disabilities. It includes legislation that not only refers to people with disabilities, but also to legislation that is related to persons with disabilities. In particular, and with regard to the latter, the updated appendix includes several legal instruments, old and recent, that are connected to the EU's consumer protection policy.¹⁷³ This update is certainly making a step in the right direction. By mentioning instruments that do not refer specifically to people with disabilities in this appendix, the EU has clarified that the UNCRPD

¹⁶⁶ Committee on the Rights of Persons with Disabilities, Initial Report, EU CRPD/C/EU/1/2014.

¹⁶⁷ *Ibid.*, para. 48.

¹⁶⁸ *Ibid.*, para. 61.

¹⁶⁹ Committee on the Rights of Persons with Disabilities, Concluding observations, EU CRPD/C/EU/CO/1/2015, para. 16.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*, para. 37.

¹⁷² Commission Staff Working Document, Progress Report on the implementation of the European Disability Strategy (2010 – 2020), SWD(2017) 29 final, p. 158–199.

¹⁷³ *Ibid.*

could be applicable in areas where there is currently no EU legislation which refers to disability. It also means that EU legislation in areas in where legislation does not refer to people with disabilities, such as consumer protection, should be updated so as to implement UNCRPD.¹⁷⁴

V. THE CHALLENGES OF THE IMPLEMENTATION OF THE UNCRPD BY THE EU

International treaties, once they are concluded by the EU, are binding on the European institutions and the Member States according to Article 216 (2) TFEU.¹⁷⁵ In the particular instance of mixed agreements, like the UNCRPD, to which both the EU and Member States are parties, conclusion by the EU means, on the one hand, that all of the provisions of the agreement falling within EU competences are binding on the European institutions. On the other hand, Member States have an EU law obligation to implement a mixed agreement insofar as its provisions are ‘within the scope of Community competence’.¹⁷⁶

The UNCRPD, as I have mentioned above¹⁷⁷, in Article 44(1) UNCRPD thereof requires that regional integration organisations acceding to the Convention should declare, in their instruments of formal confirmation or accession, the extent of their competence.¹⁷⁸ This Declaration of Competence indicates the areas of EU competence that are related to the UNCRPD. As I have stated above¹⁷⁹, the EU has exclusive competence to implement the Convention in the areas of the compatibility of State aid with the common market, the Common Custom Tariff and requirements in relation to the EU’s own public administration. However, the EU is also bound by the UNCRPD in the areas where it has established uniform rules. Nevertheless, the Declaration of Competence has not indicated the areas in which the EU has adopted uniform rules and, thus, has exclusive competence to implement the Convention.

The majority of fields, however, that relate to matters that are governed by the Convention are fields where the EU and the Member States share the competence to act. The Declaration of Competence, as I have analysed above, indicates that

¹⁷⁴ L. Waddington, 18 *Maastricht Journal of European and Comparative Law* (2011), p. 433.

¹⁷⁵ Article 216 (2) TFEU.

¹⁷⁶ Case C-239/03 *Commission of the European Communities v. French Republic*, EU:C:2004:598. In this case, the ECJ held that a Member State could be in breach of its Community law obligations by failing to implement a mixed agreement, even though the alleged breach concerned an aspect of the agreement which was not covered by Community legislation; it was enough that the field in general was ‘covered in large measure’ by Community legislation and in such cases ‘there is a Community interest in compliance by both the Community and its Member States with commitments entered into’.

¹⁷⁷ See, Chapter II, The UNCRPD as an international agreement under EU law.

¹⁷⁸ Article 44 (1) UNCRPD.

¹⁷⁹ See Chapter II, Exclusive competences.

outside the scope of the EU's exclusive competences, the power to act and, thus, the requirement to implement the UNCRPD, rests with the Member States.¹⁸⁰ This statement might not exclude the EU from adopting measure in this field, but it suggests that the EU is not required to act, as the Member States are required to do so. Nevertheless, the EU is certainly required not to take measures that will violate the object and the purpose of the Convention and its provisions. Thus, the EU is liable for any actions which violate the UNCRPD. The EU is not liable, though, in the instances whereby the EU does not fully implement the Convention, for example where EU measures establish minimum standards. In these instances, the Member States have the power to further regulate the field that the EU has regulated through minimum standards and, thus, Member States are required to take actions to fully meet the Convention's obligations. However, if the EU adopts uniform rules in a particular field of policy where it shares competence with the Member States and it fails to fully implement the Convention, the EU is in violation of the Convention.

The notion that the EU is not required to implement international agreements in the field of shared competences has been supported by *Heliskoski*.¹⁸¹ He states that 'the justification for the participation of the Member States is to be found precisely in the circumstance that the Community has not decided – and upon the conclusion of a given agreement does not decide – actually to exercise its non-exclusive competence, which makes it possible for the Member States to act under their own powers. But this must however mean that the Community's participation is legally only relevant insofar as the Community's exclusive competence is concerned; the rest of the commitments are assumed by the Member States in their individual capacity'.¹⁸²

The CJEU has taken a more nuanced approach on this issue by introducing the concept of the Union's interest in the performance of a mixed agreement. Following that concept, EU Member States' can be in breach of EU law obligations in the cases where they fail to implement a mixed agreement in an area that is not covered by EU legislation.¹⁸³ This was decided in the *Etang de Berre* case. In 1983, the EC and its Member States ratified the Barcelona

¹⁸⁰ Council Decision 2010/48/EC of 24 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35.

¹⁸¹ J. Heliskoski, *Mixed Agreements As a Technique for Organizing the International Relations of the European Community and Its Member States* (Martinus Nijhoff Publishers, 2001), p. 46–47; M. Cremona, 'External relations and External Competence of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law', *EUI Working Papers Law No. 2006/22* (2006), p. 17.

¹⁸² *Ibid.*

¹⁸³ M. Cremona, 'External relations and External Competence of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law', *EUI Working Papers Law No. 2006/22* (2006), p. 17; Case C-13/00 *Commission v. Ireland* (*Berne Convention*), EU:C:2002:184, para. 16 and 19.

Convention on the protection of the Mediterranean Sea against pollution. The ‘Etang de Berre’ is a saltwater marsh that is situated in the south of France and is connected with the Mediterranean Sea. The Electricité de France Company, which had a hydro-electric power station in that area, was sued on the basis that discharges of polluted water from the power station flowed into the Etang de Berre were in violation of the Barcelona Convention. The European Court of Justice (now CJEU) held that a Member State could be in violation of EC law requirements by failing to implement international agreements, even if the alleged violation related to an area of the agreement that was not covered by EC legislation.¹⁸⁴ It was sufficient for the Court that the field of competence in general was ‘covered in large measure’ by EC legislation.

Thus, the reasoning of the Court was based on the Union’s interest and the scope of Union law, rather than on the issue of competence. This is of great importance because the limits of Union competence are not the same as the limits of the scope of application of the TFEU. This is because the objectives of the TFEU are attained not only through EU action but through the action of the Member States as well.¹⁸⁵ Thus, Member States do not only have an international obligation to implement international agreements, such as the UNCRRPD, but they also have an EU obligation to implement international agreements in specific areas, where the EU has not legislated, but which are nevertheless within the scope of EU law. Thus, the moment that the UNCRRPD was concluded by the EU, it became part of EU law and the EU interest is relevant to its enforcement and interpretation by the Member States.¹⁸⁶

VI. THE DUTY OF CLOSE COOPERATION

In Opinion 1/94, the Court of Justice of the European Union stated that ‘where it is apparent that the subject matter of an agreement or convention falls in part within the competence of the Community and in part within that of the Member States, it is essential to ensure close cooperation between the Member States and the community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in international representation

¹⁸⁴ Case C-239/03 *Commission v. France (Étang de Berre)*, para. 29 and 30.

¹⁸⁵ A. Dashwood, ‘The Limits of European Community Powers’, 21 *European Law Review* (1996), p. 113.

¹⁸⁶ On the interpretation of mixed agreements see: Case C-53/96 *Hermes International v. FHT Marketing*, EU:C:1998:292; Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior SA v. Tuk Consultancy*; Case C-89/99 *Schieving-Nijstad v. Groeneveld*, EU:C:2001:438; M. Cremona, ‘External relations and External Competence of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law’, *EU Working Papers Law No. 2006/22* (2006), p. 18.

of the community'.¹⁸⁷ Therefore, the respective institutions of the EU and the Member States are obliged to cooperate closely in the negotiation, conclusion and implementation of international agreements where the competence to take actions in the field of application of the agreement is shared by both the Union and the Member States.¹⁸⁸ This duty reflects a fundamental principle and is a result of the general principle of loyal cooperation.¹⁸⁹ The CJEU has articulated and developed a specific duty of close cooperation so as to harmonise the actions of the EU and the Member States when they act on the international level.¹⁹⁰ As a result, the duty of close cooperation aims to enhance the coherence and consistency of the EU's external action.¹⁹¹

The case law of the CJEU shows that two general issues have informed the development of the duty of close cooperation.¹⁹² The Court introduced the duty in order to ensure complete and successful implementation of mixed agreements, so as to render the Union capable of fully complying with the international obligations generated by the agreements and to ensure and secure the appropriate functioning of the agreement in general.¹⁹³ Moreover, the duty of close co-operation is generated by an unwritten but fundamental requirement of unity in the international representation of the Union. The purpose of this principle is to ensure that the EU will be capable of effectively protecting its rights and interests in international relations.¹⁹⁴ Instead of a treaty-based legal justification, it was these two considerations that originally contributed to the introduction of the duty of close co-operation.¹⁹⁵

In the *PFOS* case¹⁹⁶ the Court seems to have clarified, as *Cremona* has argued, that the duty of close cooperation in the context of mixed agreements is an example of, and is derived from, the principle of sincere cooperation that is contained in Article 4 (3) TEU.¹⁹⁷ This article states that 'pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'. Moreover, 'The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the

¹⁸⁷ Opinion 1/94 of the Court of 15 November 1994, EU:C:1994:384, para. 190.

¹⁸⁸ D. Verwey, *The European Community, the European Union and the International Law of Treaties* (T.M.C. Asser Press, 2004), p. 158.

¹⁸⁹ H. Bull, 'Mixity Seen from the Outside of the EU but inside the Internal Market', in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited*, p. 327.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² R. Holdgaard, *External relations Law of the European Community* (Kluwer Law International, 2008), p. 158.

¹⁹³ *Ibid.*, p. 159.

¹⁹⁴ *Ibid.*

¹⁹⁵ R. Frid, *The relations Between the EC and International Organizations: Legal theory and Practice* (Kluwer Law International, 1995), p. 149.

¹⁹⁶ Case C-246/07 *Commission v. Sweden (PFOS)*, EU:C:2010:203.

¹⁹⁷ M. Cremona, 'C-246/07 Case Law', 48 *Common Market Review* (2011), p. 1652.

Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.¹⁹⁸ In addition, in the *PFOS* case the Court reaffirmed that the purpose of the duty of close cooperation is not only to ensure coherence in the actions taken for the attainment of the Union's objectives, but also to guarantee unity in the international representation of the Union.¹⁹⁹ Therefore, in order to understand the scope of application of the duty of close cooperation, the identification of the Union's objectives is a crucial step in this process.²⁰⁰

In international relations, the duty of close cooperation is recognised as an overarching principle with which it is possible to solve practical problems and determine, more precisely, the obligations that are respectively imposed on the Union and the Member States when they initiate actions jointly.²⁰¹ The duty of close cooperation is a significant external relations obligation that is constructed particularly to deal with situations where treaty making competence is shared between the Union and the Member States.²⁰²

The first case to clarify that the duty of close cooperation imposes legal and enforceable obligations was the *FAO* (Food and Agriculture Organisation)²⁰³ judgment. To summarise the facts, an Arrangement was agreed between the Commission and the Council on which party should vote at the FAO meetings: the Commission or the Member States. The Commission challenged the Council's decision to grant voting rights to Member States in relation to the FAO Agreement (that promotes compliance with international conservation and management measures by fishing vessels on the high seas).²⁰⁴ The Court declared that the duty of close cooperation entailed legal requirements that were based on the inter-institutional agreement. It further held that while the Arrangement was agreed by the Commission and the Council, Member States were also bound by its provisions on the basis that the Arrangement entailed clear obligations towards them.²⁰⁵ This judgment could have certain implications with regard to the representation of the EU at the CRPD bodies. Considering that the EU has adopted a Code of Conduct, which is similar in content to the Arrangement in the *FAO* case, it could be argued that a violation of the Code of Conduct by the EU institutions or the Member States with regard to the representation of

¹⁹⁸ Article 4 (3) TEU.

¹⁹⁹ M. Cremona, 48 *Common Market Review* (2011), p. 1652; Case C-246/07 *Commission v. Sweden (PFOS)*.

²⁰⁰ *Ibid.*

²⁰¹ R. Holdgaard, *External relations Law of the European Community*, p. 159.

²⁰² *Ibid.*

²⁰³ Case C-25/94 *Commission v. Council*, EU:C:1996:114.

²⁰⁴ C. Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the "Duty of Cooperation"', in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited*, p. 93.

²⁰⁵ *Ibid.*; P. Eeckhout, *External relations of the European Union-Legal and constitutional foundations* (Oxford University Press, 2004), p. 214.

the EU at the UN level has legal consequences. This is due to the duty of close cooperation, and a violation thereof could possibly lead to the initiation of infringement procedures against either the EU institutions or the Member States.

The Court's emphasis on the importance of the duty of close cooperation in policy fields where the EU shares competence with the Member States has led to the development of two opposing views with regard to the application of this duty.²⁰⁶ The first view suggests that the duty of close cooperation is an obligation of result, which means that Member States and the EU institutions must always act jointly, on the basis of coordinated positions, with regard to the representation of the Union in the context of a mixed agreement.²⁰⁷ The failure of these parties to reach a common position will therefore lead to inaction.²⁰⁸ This interpretation of the duty of close cooperation is directly connected to the requirement of unity in international representation.²⁰⁹ The second view perceives the duty of close cooperation as an obligation of conduct.²¹⁰ This implies that the Member States are only bound to use their best endeavours to reach a common position with the Union.²¹¹ If a common position is not reached, it is for each Member State to defend its own interests as and when they deem fit.²¹²

The wording of the Code of Conduct implies that the EU favoured the first view. The Code of Conduct states that in cases where no position can be reached 'including for reasons relating to disagreement on the repartition of competences between the Union and its Member States, the matter will be referred without undue delay to the competent Council Working Group and/or, when applicable, other Council bodies'.²¹³ Further to this, 'If no agreement can be reached in these bodies, the matter will be referred to the Permanent Representatives Committee (Coreper)'. In cases where the meetings of the competent working group or the

²⁰⁶ C. Hillion, in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited*, p. 103; Joined Cases C-300/98 and C-392/98 *Christian Dior and Assco Geruste*; see, Case C-459/03 *Commission v. Ireland*.

²⁰⁷ C. Hillion, in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited*, p. 104; on this view, see, C.W.A. Timmermans, 'Organising joint participation of EC and Member States', in A. Dashwood and C. Hillion (eds.), *The General Law of EC External Relations* (Sweet & Maxwell, 2000), p. 241–243.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ On this view, see, I. McLeod, I.D. Henry and S. Hyett, *The external relations of the European Communities* (Oxford University Press, 1996), p. 149 and I. Smyth, 'A view from Foreign and Commonwealth Office', in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited*; C. Hillion, in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited*, p. 104.

²¹¹ I. McLeod, I.D. Henry and S. Hyett, *The external relations of the European Communities*, p. 149.

²¹² C. Hillion, in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited*, p. 104.

²¹³ Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C 340/11, para. 6 (ii).

other Council bodies cannot be convened due to time constraints, the matter is referred directly to the COREPER, which will then decide on the common position on the basis of the voting rules laid down in the relevant to the subject matter EU Treaty provision.²¹⁴ Thus, it seems that the EU considers unity in its international representation to be of critical importance for the implementation of the UNCRPD and for enhancing the EU's image in the wider international sphere.

VII. CONCLUSION

The purpose of this chapter was to discuss the consequences of the fact that the UNCRPD is a mixed agreement that has been concluded by the EU. Based on the foregoing analysis, it is evident that the implementation of the UNCRPD by the EU and the Member States is a very challenging process. It is noticeable that the process of the implementation of the Convention by the EU is filled with uncertainty and vagueness. The Council Decision and the other relevant documents have clarified the areas under the Convention where the EU has exclusive competence and the areas where it shares competence with the Member States. Nevertheless, there are many issues that require further explanation. For example, it has not yet been discussed whether the EU or the Member States should act with the view to implementing the Convention in the fields of shared competence.²¹⁵ Lastly, the case law of the CJEU with regard to the duty of close cooperation, despite the fact that the precise legal foundation of this duty was recently clarified, has not provided a comprehensive examination of its scope of application and the nature of the obligation it imposes.

²¹⁴ Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C 340/11, para. 6 (ii).

²¹⁵ See, Chapter III, Between the EU and the Member States: Factors that decide who is responsible for implementing the UNCRPD in a field of shared competence.

CHAPTER III

THE ALLOCATION OF SHARED COMPETENCES BETWEEN THE EU AND THE MEMBER STATES WHEN IMPLEMENTING ARTICLE 9 UNCRPD

I. INTRODUCTION

In the previous chapter, I revealed that the implementation of the UNCRPD by the EU and the Member States is very challenging. There is a lack of clarity with regard to the division of competences between the EU and the Member States vis-à-vis the implementation of the Convention. The Council Decision to conclude the Convention¹, as well as the other relevant documents, such as the report on the implementation of the UNCRPD by the EU² and the Council's Code of Conduct setting out the arrangements for the implementation by, and the representation of, the EU relating to the UNCRPD³, have not been particularly helpful in this regard. It is clear, based on the initial perusal of these instruments and documents, that the EU is solely responsible for the implementation of the Convention in the areas where it has exclusive competence. In the fields where the EU has a complementary competence, the Member States bear the responsibility for implementing the Convention, while the role of the EU is restricted to supporting, supplementing and coordinating the actions of the Member States.⁴ Nevertheless, it is not clear whether the EU or the Member States should act with the view to implementing the Convention in the fields of shared competence.

¹ Council Decision 2010/48/EC of 24 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35.

² Commission Staff Working Document, Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union, SWD(2014) 182 final.

³ Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C 340/11.

⁴ Council Decision 2010/48/EC of 24 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35.

This chapter attempts to provide some clarifications with regard to this last issue. In this chapter, I examine the particular factors that should be considered in deciding whether the EU or the Member States should take action to implement Article 9 UNCRPD in the fields where they share the power to take legislative action. According to the Declaration concerning the competence of the European Community (now: European Union) with regard to the matters governed by the UNCRPD, these fields are as follows: anti-discrimination policy on the basis of disability, the free movement of goods, services, persons and capital, agriculture, transport, taxation, the internal market, equal pay for men and women, trans-European network policy and statistics.⁵

This chapter is divided into two parts. In the first part, I make a distinction between accessibility mainstreaming and disability-specific instruments. This distinction is essential for the purposes of understanding of the policy options that the EU has when implementing the UNCRPD [Section II]. In the second part, I explore the factors that should be taken into account in deciding whether the EU or the Member States should take action to implement Article 9 UNCRPD in the fields where they share competence, and I reach some conclusions in this regard [Section III]. I also examine the factors that can determine the most effective legislative form of any EU action to implement Article 9 UNCRPD. In that regard, I examine whether the EU's action to implement the UNCRPD should take the form of directives or regulations and whether this action should impose uniform rules or minimum standards [Sections IV]. Lastly, I examine the effect of the principle of proportionality on the implementation of disability accessibility by the EU; whether the EU's action to implement the UNCRPD should take a holistic approach and whether the EU should provide a regulatory space to the Member States with regard to the implementation of disability accessibility [Section V].

II. ALTERNATIVE WAYS THE EU CAN ADDRESS DISABILITY ISSUES

Before moving on to the analysis of the factors that should be taken into account in deciding whether the EU or the Member States are responsible for implementing Article 9 UNCRPD in the fields where they share the competence to take action, it is important to make a distinction between disability-specific legal instruments and disability mainstreaming legal instruments. This distinction is important because it sheds light on the legislative options that the EU has in respect of implementing the UNCRPD. This distinction also clarifies the critical elements that are conducive to the development of disability policy.

⁵ Council Decision 2010/48/EC of 24 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35, Annex II.

These elements are crucial for the evaluation of EU policies that relate to the UNCRPD, and the determination of the most effective legislative form for EU action to implement the UNCRPD.

Disability-specific legislation is a measure that specifically regulates the situation of persons with disabilities with a view to increasing their empowerment and participation in society. Hitherto, the EU has adopted very few disability-specific legislative instruments. An example of an EU disability-specific legislative instrument is the regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air.⁶ By way of contrast, the EU has adopted numerous disability mainstreaming legal instruments in different fields.

Mainstreaming legislation in the field of disability and disability accessibility in particular can be defined as the systematic incorporation of disability accessibility considerations into all legislative acts that are relevant to accessibility.⁷ The incorporation of such considerations should be present at all stages of the policy-making process, including the design, implementation, monitoring and evaluation of such policies.⁸ The purpose of accessibility mainstreaming is to increase the levels of accessibility and, thus, increase levels of empowerment and participation of people with disabilities in society. Examples of this type of policy-making can be found in the field of transport where the EU has adopted mainstreaming legislation regulating the rights of disabled passengers when travelling by water, road and rail.⁹ Moreover, in the internal market field the EU has adopted several disability mainstreaming legal instruments regulating, for example, postal services¹⁰, telecommunication services¹¹ and audio-visual services.¹²

⁶ Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L 204/1.

⁷ For a definition of non-discrimination mainstreaming see, Centre for Strategy & Evaluation Services, 'Report, Non-discrimination mainstreaming – instruments, case studies and way forwards', *Centre for Strategy & Evaluation Services* (2007), http://edz.bib.uni-mannheim.de/daten/edz-ath/gdem/07/mainstr07_en.pdf, p. 1.

⁸ Ibid.

⁹ Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L 55/1; Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L 315/14; Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L 334/1.

¹⁰ Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, [2008] OJ L52/3.

¹¹ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, as amended by the Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

¹² Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in

Given that disability accessibility mainstreaming has been a significant tool for protecting the rights of persons with disabilities at EU level, it is important to examine how this policy method has been implemented by the EU and what the EU can do to improve such measures.

During the mid-1990s, EU disability policy adopted mainstreaming as a means to achieve equal opportunities for people with disabilities.¹³ This is evident from the inclusion of disability mainstreaming as a policy option in the 'New European Community Disability Strategy', which was published in 1996.¹⁴ Since then, the EU has adopted several legal instruments that have included accessibility considerations, despite the fact that disability accessibility was never mentioned in the EU Treaties.¹⁵ The Lisbon Treaty introduced Article 10 TFEU, which states that the EU should aim to combat discrimination on several grounds, including disability, when it is formulating and implementing its policies.¹⁶ This provision affirms the practice of EU policy-makers of enacting mainstreaming disability considerations into EU legislation, and it crystallised the importance of disability mainstreaming in the EU legal order as a whole.

The areas of transport and the internal market have consistently, and to the greatest extent, embraced the policy approach of mainstreaming accessibility considerations. Sometimes this method has been successful, but there are instances where the approach failed to achieve the desired goals. The measures adopted in the area of transport have been the most successful in guaranteeing the rights of people with disabilities.¹⁷ Conversely, in the areas of telecommunication¹⁸ and public procurement¹⁹ mainstreaming has not been an effective means of protecting the rights of people with disabilities.

Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), [2010] OJ L 95/1.

¹³ Communication of the Commission on equality of opportunity for people with disabilities, A New European Community Strategy, COM(1996) 406 final.

¹⁴ Ibid.

¹⁵ Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L 55/1; Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L 315/14; Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L 334/1.

¹⁶ Article 10 TFEU.

¹⁷ Report from the Commission to the European Parliament and the Council on the functioning and effects of Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, COM(2011) 166 final.

¹⁸ Technosite et al., 'Study on assessing and promoting e-accessibility', *European Commission* (2013), <https://ec.europa.eu/digital-single-market/en/news/study-assessing-and-promoting-e-accessibility>.

¹⁹ T. Bianchini and V. Guidi, 'The Comparative Survey on the National Public Procurement Systems Across the PPN', *PPN* (2010), www.forum-vergabe.de/fileadmin/user_upload/

The reasons behind this failure emanate from the way in which the EU legislator has formulated mainstreaming provisions in these fields. For example, in the field of public procurement, the old Utilities Directive²⁰ states that ‘whenever possible (...) technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users’.²¹ In the field of telecommunications, the Universal Service Directive²² states that ‘Member States shall ensure that national regulatory authorities may impose obligations on undertakings in order to ensure that public pay telephones or other public voice telephony access points are provided to meet the reasonable needs of end-users in terms of the geographical coverage, the number of telephones or other access points, accessibility to disabled end-users and the quality of services’.²³ It is evident in both instruments that the wording of these provisions cannot effectively guarantee accessibility. In the first example, the Member States are only obliged to take into account accessibility whenever it is possible to do so. The wording of this provision leaves the inclusion of accessibility considerations, in the technical specifications of public utilities contracts, to the discretion of the Member States. In the second example, the Member States are obliged to ensure that national regulatory authorities have the power to impose obligations on undertakings so as to guarantee the accessibility of public voice telephone access points and public pay phones for persons with disabilities. Thus, it is at the discretion of the regulatory authorities as to whether they will oblige undertakings to guarantee the accessibility of public voice telephone access points and public pay phones. The formulation of these mainstreaming provisions cannot, in any way, guarantee the rights of persons with disabilities, because these provisions are optional in nature. Therefore, it is essential that accessibility mainstreaming entails clear-cut obligations for the Member States to take action to guarantee the rights of people with disabilities.

Another important factor that explains the ineffectiveness of the above-mentioned measures to guarantee accessibility is the lack of monitoring. This

Weiterf%C3%BChrende_Informationen/Comparative_survey_on_PP_systems_across_PPN.pdf.

²⁰ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, [2004] OJ L 134/1.

²¹ Article 34(1) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, [2004] OJ L 134/1.

²² Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services, as amended by the Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

²³ Article 6 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services, as amended by the Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

becomes evident when one reads the reports²⁴ on the transposition of both directives, which do not make reference to the level of implementation of the accessibility mainstreaming provisions. This could have provided useful insights into the effectiveness of these measures and a better understanding of the way in which the implementation of these measures could have been improved. As *Waddington* and *Bell* have argued²⁵, ‘the focus on predicting and monitoring the effects of law and policy creates a need for enhanced data collection mechanisms’.²⁶ Without the collection of data, it is impossible to monitor the implementation and effectiveness of a law. Data collection is even more important in the case of mainstreaming because of the nature of this policy method. A legal instrument that mainstreams disability accessibility may contain only a few or perhaps only one provision that actually addresses accessibility, while at the same time the instrument will deal with broader issues, such as trade or free movement of goods. This fact makes the monitoring process, from a disability perspective, more challenging. Furthermore, it highlights the need for data collection, and the close scrutiny of the implementation of the accessibility provisions becomes more fundamental as a result. Indeed, one of the main criticisms of mainstreaming as a policy-making tool is based on the inconsistencies in implementation.²⁷

The Centre for Strategy & Evaluation Services enumerated, in a report on non-discrimination mainstreaming, several factors that contribute to the successful implementation and effectiveness of mainstreaming measures.²⁸ It is arguable that such factors apply to accessibility mainstreaming as well. The report suggests that it is imperative for the success of such measures that the principle of non-discrimination (or, in our case, accessibility) is applied at all stages of the policy or the legislative process, it should be considered at an early stage of this process and that the participation of representatives of people with disabilities is essential.²⁹ The report also maintains that human and financial resources are required in order for such measures to be effective.³⁰ Providing the policy-makers and all the people that are involved in the implementation of such measures with disability accessibility training are equally essential for the

²⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Progress report on the single European electronic communications market 2009, COM(2010) 253 final; Commission Staff Working Document, Annual Public Procurement Implementation Review, SWD(2012) 21 final.

²⁵ L. Waddington and M. Bell, ‘Exploring the boundaries of positive action under EU law: A search for conceptual clarity’, 48 *Common Market Review* (2011).

²⁶ *Ibid.*, p. 1520.

²⁷ *Ibid.*

²⁸ Centre for Strategy & Evaluation Services, ‘Non-discrimination mainstreaming- instruments case studies and way forwards’, *Centre for Strategy & Evaluation Services* (2007), http://edz.bib.uni-mannheim.de/daten/edz-ath/gdem/07/mainstr07_en.pdf, p. 3.

²⁹ *Ibid.*, p. 4.

³⁰ *Ibid.*

implementation of mainstreaming legislation and policies.³¹ Lastly, as I have mentioned above, regular monitoring and data collection is important for the successful implementation of such measures.³²

Consequently, EU mainstreaming measures to implement the UNCRPD obligations, and in particular the accessibility obligations, should take into consideration the factors that were identified in the previous paragraph. Being mindful of the fact that mainstreaming has been the main policy approach pursued by the EU to achieve disability accessibility, it is imperative that mainstreaming measures are drafted, adopted and implemented with due diligence.

Lastly, as was discussed in the first chapter of this thesis³³, Article 9 UNCRPD imposes an immediate obligation on the States Parties to the Convention to address accessibility considerations from the initial stages of policy formulation.³⁴ The implementation of this obligation is an important tool for preventing the emergence of new barriers to accessibility. As I argued in Chapter I³⁵, this obligation is part of the minimum core of Article 9 UNCRPD.³⁶ The EU, by concluding the UNCRPD, is bound by its obligations. As a result, the EU is required to mainstream disability accessibility considerations in all their policies in the instances where the lack of accessibility mainstreaming could cause accessibility barriers to emerge.

III. BETWEEN THE EU AND THE MEMBER STATES: FACTORS THAT DECIDE WHO IS RESPONSIBLE FOR IMPLEMENTING THE UNCRPD IN A FIELD OF SHARED COMPETENCE

In the previous section of this chapter, I provided an overview of the legislative tools that the EU has hitherto relied upon to address disability accessibility. Due to the conclusion of the UNCRPD by the EU, the EU is required to take action to implement the Convention. While it is clear from my analysis in Chapter II³⁷ that the EU is responsible for the implementation of Article 9 UNCRPD in the areas where it has exclusive competence, and that the Member

³¹ Ibid.

³² Centre for Strategy & Evaluation Services, 'Non-discrimination mainstreaming- instruments case studies and way forwards', *Centre for Strategy & Evaluation Services* (2007), p. 4.

³³ See Chapter I, The obligations of Article 9 UNCRPD.

³⁴ See, Committee on Economic, Social and Cultural Rights, Concluding observations Argentina E/2000/22, para. 275; Committee on Economic, Social and Cultural Rights, Concluding observations Iceland E/2000/22, para. 85; M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, 2003), p. 241.

³⁵ See Chapter I, Obligation to ensure the minimum core level for each right.

³⁶ Ibid.

³⁷ See, Chapter II, The competences of the EU with regard to matters governed by the UNCRPD.

States are responsible for implementing the Convention in the areas where the EU has complementary competence, it is not clear which of the two bears the responsibility for implementing the Convention in the areas where the EU and the Member States share the competence to take action.

In the next four sections of this chapter, I examine four factors that should be taken into account when deciding whether the EU or the Member States should take action to implement Article 9 UNCRPD in the areas where they share the competence to act. This involves a mix of legal factors that limit the exercise of EU competence, as well as political factors. These four factors are as follows: the principle of subsidiarity; the functioning of the EU internal market; the elimination of discrimination in the EU territory and the path-dependency in EU disability policy.³⁸

A. THE PRINCIPLE OF SUBSIDIARITY

In this section of Chapter III, I examine the principle of subsidiarity as a factor that should be considered in deciding whether the EU or the Member States should take action to implement Article 9 UNCRPD in the areas where they share the competence to act.

In the areas falling under EU shared competence, both the EU and the Member States are allowed to adopt legislative measures. The Union action in this category of competence is subject, however, to the principles of subsidiarity and proportionality.³⁹ Although the Member States are able to take actions in the areas where they share competence with the EU, the regulatory actions taken by the Union in this area take precedence over the adoption of national legislation.⁴⁰

According to Article 5(3) TEU, under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.⁴¹

The principle of subsidiarity involves the application of two tests. On the one hand, the EU can only act where the objectives of the proposed action cannot be

³⁸ It is important to note that the internal market and the elimination of discrimination are not examined in the context of their functioning as EU competences, but as overall EU objectives and 'drivers' of EU law and policy actions.

³⁹ T. Konstandinides, *Division of Powers in the European Union: The Delimitation of the Internal Competence between the EU and the Member States* (Kluwer Law International, 2009), p.168.

⁴⁰ D. Obradovic and N. Lavranos, *Interference between EU Law and National Law* (Europa Law Publishing, 2007), p. 20–21.

⁴¹ Article 5 (3) TEU.

achieved in a sufficient manner by the Member States.⁴² This is referred to as the national insufficiency test.⁴³ On the other hand, the EU should not act unless it could better reach the objectives of the proposed action.⁴⁴ This test is referred to as the comparative efficiency test.⁴⁵ This test has so far favoured the Union taking action.⁴⁶

Pursuant to Article 5(3) TEU, and with particular emphasis on the phrase ‘if and in so far’, subsidiarity can be divided into two categories. The *stricto sensu* version of subsidiarity focuses on the ‘if’ question.⁴⁷ This means that the EU should examine whether it should act.⁴⁸ The second category is based on the question of ‘in so far’, which means that the second element of subsidiarity focuses on the form that the Union action should take.⁴⁹

The principle of subsidiarity could be seen as constituting a condition for the legitimacy of the Union’s action.⁵⁰ Therefore, it operates as a constitutional safeguard for national sovereignty against disproportionate EU centralisation.⁵¹

The basic principle of subsidiarity was laid down in Article 5 (3) EC (now Article 5 (3) TEU) and was further developed in Protocol No. 30 on the application of the principles of subsidiarity and proportionality of the Treaty of Amsterdam.⁵² This Protocol was amended and the new version is currently attached to the Lisbon Treaty.⁵³ The Protocol mandates that for every draft legislative act, an explanatory statement – which details the reasons why EU action satisfies the subsidiarity and proportionality criteria – should be produced.⁵⁴ For the purposes of this Protocol, ‘draft legislative acts’ should be considered ‘the proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from

⁴² R. Schutze, *From Dual to Cooperative Federalism: The changing Structure of European Law* (Oxford University Press, 2009), p. 250.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*; L. Mackenzie-Stuart, ‘Subsidiarity: A Busted Flush’, in D. Curtin and D. O’Keefe (eds.), *Constitutional adjudication in European community and national law* (Butterworth, 1992), p. 22; R. Dehousse, ‘The legacy of Maastricht: Emerging Institutional Issues’, in M. Cremona, B. de Witte and, F. Francioni (eds.), *Collected Courses of the Academy of European Law* (Nijhoff, 1992).

⁴⁶ T. Konstandinides, *Division of Powers in the European Union: The Delimitation of the Internal Competence between the EU and the Member States*, p.121.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, p.120.

⁵¹ *Ibid.*

⁵² Protocol (No. 30) on the application of the principles of subsidiarity and proportionality, [1997] OJ C321/308.

⁵³ Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, [2008] OJ C115/206.

⁵⁴ Article 5 of Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, [2008] OJ C115/206.

the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank, for the adoption of a legislative act'.⁵⁵ The explanatory statement should contain some assessment of the financial impact of the draft legislative act and, particularly in the instance of a directive, of its implications for the rules to be put in place by Member States, taking into account regional legislation as and where necessary.⁵⁶ In addition, the justification for concluding that a Union objective could be better achieved at Union level should be supported by qualitative and, wherever possible, quantitative indicators.⁵⁷ Draft legislative acts should take account of the need to minimise any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, and it should be the case that any burden is commensurate with the objective to be achieved.⁵⁸

The older version of this Protocol, which was attached to the Treaty of Amsterdam, included certain guidelines that should be considered when determining the twofold subsidiarity test that I have analysed above. The guidelines stated that if, 'the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States, actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests, or action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States', the EU action under consideration will pass the subsidiarity test.⁵⁹ The current version of this Protocol, however, does not include these guidelines. This implies that these guidelines might not have been very helpful for the purposes of determining the compatibility of an EU action with the subsidiarity test. Nevertheless, they reveal a factor that can influence the decision of whether the EU should take action to implement Article 9 UNCRPD or whether the implementation of this article is a matter that should be regulated by the Member States.

As I have described above, in order for the EU to take an action in a field of shared competence, this action must pass the subsidiarity test. In the case of the implementation of Article 9 UNCRPD by the EU, the subsidiarity test means

⁵⁵ Article 3 of Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, [2008] OJ C115/206.

⁵⁶ Article 5 of Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, [2008] OJ C115/206.

⁵⁷ Article 5 of Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, [2008] OJ C115/206.

⁵⁸ Article 5 of Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, [2008] OJ C115/206.

⁵⁹ Protocol (No. 30) on the application of the principles of subsidiarity and proportionality, [1997] OJ C321/308, para 5.

that the issue the EU wants to address should not be sufficiently regulated by the Member States and that the EU should be regarded as the actor that could achieve the objectives of the proposed action in a better manner. In that regard, it has been proven that it is very difficult for the Commission to provide meaningful quantitative indicators that suggest that Union action is better than national action to regulate a given issue.⁶⁰ As a result, ‘softer’ qualitative indicators are often used to justify EU action.⁶¹ This fact makes it easier to argue that EU action should be taken with regard to the implementation of Article 9 UNCRPD, since there is a high level of difficulty in conducting research and identifying indicators when measuring the existing and possible future impact existing or future laws that regulate, for example, the accessibility of goods and services.

Furthermore, as I mentioned above, in the EU context the principle of subsidiarity is viewed as a means to ensuring that decisions are taken as closely as possible to the citizens. This implies that, in principle, the EU Treaties consider it to be most appropriate and effective if the decision-making process is close to the citizens of the EU. Thus, as a general rule, priority should be attributed to the Member States and if possible to local governments in the decision-making process, especially in areas where both the Member States and the EU have competence to act. The EU should adopt new legislation only if that legislation has passed the subsidiarity test.

Moreover, according to the revised Protocol on the application of the principles of subsidiarity and proportionality, the Commission should take into account the regional and local dimension of the intended action when proposing legislation.⁶² In that regard, as I have analysed above, any proposed legislative act should be accompanied by a statement on any burden (financial or other) that this legislation might place on national governments as well as regional and local authorities, economic operators and citizens.⁶³ Furthermore, this Protocol has upgraded the role of the national parliaments, including regional parliaments with legislative powers, to review EU legislative proposals with regard to their compatibility with the subsidiarity test.⁶⁴

These elements of the Protocol show the importance that the EU Treaties give to the participation of national and local governments in the EU legislative process, so as to bring the decision-making process closer to the citizens. They also demonstrate the significance of national, regional and local traditions, practices

⁶⁰ Protocol (No. 30) on the application of the principles of subsidiarity and proportionality, [1997] OJ C321/308, para 5; A. Estella, *The Principle of Subsidiarity and its Critique* (Oxford University Press, 2002), p. 121–131.

⁶¹ P. Craig, *EU Administrative Law* (Oxford University Press, 2006), p. 423.

⁶² Article 3 of Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, [2008] OJ C115/206.

⁶³ Article 5 of Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, [2008] OJ C115/206.

⁶⁴ Article 4, 6 and 7 of Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, [2008] OJ C115/206.

and legislation in the assessment of whether any proposed EU legislation passes the subsidiarity test, as well as the emphasis that the EU legislator should place on the impact that such legislation might have at either national, regional and local level.

The analysis in the previous paragraph is relevant to the analysis in this chapter on whether the EU or the Member States should take action to implement Article 9 UNCRPD, because it reveals that there are instances where EU legislative proposals might not pass the subsidiarity test, due to these concerns. Linguistic, cultural, historical and institutional, political and economic organisation considerations among the Member States should be taken into account by the EU legislator in determining whether a proposed measure passes the subsidiarity test. In that regard, it is important to note that the effective implementation of human rights obligations in any society requires that the norms be accepted and internalised by the local societies.⁶⁵ The acceptance and internalisation of human rights obligations depends very much on the local knowledge not only of law, but also of norms and their background justifications.⁶⁶

Especially in terms of the implementation of human rights by the EU, like the case of the UNCRPD, the principle of subsidiarity can play an important role in ensuring that national, regional and local concerns are taken into consideration in the EU's decision to legislate or in the development of such legislation. The implementation of human rights requirements, like the ones in the UNCRPD, is not a process of deduction, because these obligations can be given effect in various ways.⁶⁷ As long as the implementation of human rights requirements is consistent with the basic requirements of the common good they try to protect, strict uniformity in the implementation of human rights obligations is not mandatory.⁶⁸ Therefore, in at least some cases, local bodies would be better suited to implementing human rights obligations.⁶⁹ In the case of the EU, national, regional or local policy-makers may sometimes have a better understanding than more distant authorities of the constitutional traditions of their nation and the particularities of human rights discourse in their social and political context.⁷⁰ They may frequently have access to better or more complete information when making their decisions, they may be more sensitive to the popular legitimacy of certain human rights topics and they may enjoy more institutional legitimacy among the people affected by the implementation of human rights, than supranational bodies like the EU.⁷¹

Therefore, it is possible that national traditions, practices and laws will be significantly affected by proposed EU legislation on accessibility, to the extent

⁶⁵ P.G. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', 97 *American Journal of International Law* (2003), p. 75.

⁶⁶ *Ibid.*, p. 72.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, p. 73.

⁷¹ P.G. Carozza, 97 *American Journal of International Law* (2003), p. 73.

that it might be preferable if the EU did not intervene in this field. For example, there might be a number of Member States that have developed specially tailored forms of transportation in regional and local areas to successfully address the needs of people with disabilities in a cost-effective manner. These tailored forms of transportation might have to be eliminated when implementing EU legislation, because EU law might require the removal of tailored forms of transportation due to their segregationist nature and the establishment of a fully accessible transportation network instead. Such a development might be too excessive an intervention in the Member States' legislative order, especially if, for instance, the national, regional and local governments cannot financially sustain the requirements of the proposed EU legislation. Therefore, it is essential that the EU takes careful consideration of the impact that any legislative proposal will have on national, regional and local traditions, laws and practices.

B. THE FUNCTIONING OF THE EU INTERNAL MARKET

In this section of Chapter III, I examine the functioning of the EU's internal market as a factor that should be taken into account in deciding whether the EU or the Member States should take action to implement Article 9 UNCRPD in the areas where they share the competence to act. In that regard, I also analyse the impact that subsidiarity has on the implementation of actions that ensure the smooth functioning of the internal market.

One of the fundamental purposes of the EU is to establish an internal market that will achieve the sustainable development of Europe.⁷² The EU internal market should also, among others, promote scientific and technological advances, combat social exclusion and discrimination, and promote social justice and protection, economic, social and territorial cohesion, and solidarity among Member States.⁷³ The internal market is an area without internal frontiers that ensures the free movement of goods, persons, services and capital.⁷⁴

To secure the functioning of the internal market and the free movements of goods, persons, services and capital, the EU is allowed to take measures based on Article 114 TFEU. The measures that the EU adopts to secure the functioning of the internal market are usually of a transnational nature. Transnational measures, according to the guidelines of Protocol No. 30 on the application of the principles of subsidiarity and proportionality of the Amsterdam Treaty that I have analysed above, pass the subsidiarity test.⁷⁵ Therefore, the transnational nature of the issue under consideration is important for the decision of whether

⁷² Article 3 (3) TEU.

⁷³ Article 3 (3) TEU.

⁷⁴ Article 26 TFEU.

⁷⁵ See, Chapter III, The principle of subsidiarity; Protocol (No. 30) on the application of the principles of subsidiarity and proportionality, [1997] OJ C321/308, para. 5.

the EU or the Member States should take action to implement Article 9 UNCRPD. The accessibility of goods and services in the internal market of the EU is a transnational issue. It can be argued, in that regard, that despite the capacity of Member States to individually regulate the accessibility of goods and services, there is a clear danger that the development of different accessibility requirements applicable to a good or service at the national level will affect transnational trade, the movement of this good or service in the internal market, and possibly cause distortions of competition with regard to this good or service. The same reasoning can be applied in the case of failure by the EU to take measures to prevent malfunctions in the internal market that diverse national legislation on the accessibility of a good or service might cause. Therefore, an EU legislative measure that regulates the accessibility of a good or service within the internal market might be a more appropriate instrument than a series of national laws, to address the transnational aspects of this issue.

In that regard, it is important to note that all the EU Member States, except Ireland, have ratified the UNCRPD and thus are bound by its obligations. This means that it is likely that all these Member States will at some point adopt legislation to regulate, for example, the accessibility of goods and services with a view to complying with the UNCRPD. This will create the danger identified above: the Member States will eventually adopt differing national legislation that, while meeting the requirements of the UNCRPD, will create a mixed set of standards and level of protection within the EU.⁷⁶ This could create barriers to the free movement of goods and services because a number of manufacturers, producers and service providers will either have to adjust their goods and services to every different accessibility requirement or not put them into circulation in all the Member States. Thus, the lack of an EU coordinating action to guarantee a minimum level of accessibility throughout the EU could lead to malfunctions in the internal market and, as a result, conflicts with the Treaty requirements on the free movement of goods and services. In that regard, the Committee on the Rights of Persons with Disabilities (CRPD Committee) has stated in General Comment No. 2 on accessibility that the accessibility standards of the States Parties to the Convention should be developed in accordance with the standards of other States Parties with the view to ensuring interoperability with regard to the free movement of persons with disabilities according to Article 18 UNCRPD.⁷⁷ Therefore, the CRPD Committee has recognised the importance of uniform standards in the implementation of Article 9 UNCRPD.

In addition, even though subsidiarity might be the principle which mandates that matters should be dealt with at the level closest to those affected, it follows

⁷⁶ L. Waddington, 'Future Prospects for EU Equality Law: Lessons to be Learnt from the Proposed Equal Treatment Directive', 36 *European Law Review* (2011), p. 183.

⁷⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 18.

that the very reason for the EU's existence will often require that EU action should be taken. This is necessary to ensure the uniformity of a general approach which is in turn fundamental for the realisation of the internal market.⁷⁸ In the case of an instrument regulating disability accessibility, a certain level of uniformity will naturally be beneficial for the achievement of the internal market. Thus, in such instances it seems that the independent national actions may be disfavoured. However, it is important to note in that regard that the EU alone cannot adopt all the possible measures for to the smooth functioning of the internal market. The EU legislator has a political choice to make with regard to regulating a certain matter or not. In terms of the implementation of Article 9 UNCRPD by the EU, the fact that the EU legislator can decide whether or not to take action to implement the UNCRPD, shows that, in spite of uniformity in the implementation of accessibility standards being beneficial to the functioning of the internal market, that is not in itself a decisive reason to justify EU action.

Furthermore, business interests will often support the adoption of one regulatory approach rather than several national measures regulating the same matter, as this approach will reduce their transaction costs.⁷⁹ In that regard, it is possible that businesses will put pressure on the EU to adopt a measure in a particular area.⁸⁰ Thus, it is arguable that because business interests often support the adoption of a common European regulatory approach on certain issues, instead of several national measures, this might be decisive for adopting EU action in the field of disability accessibility. By establishing one set of accessibility requirements, business transaction costs will be reduced and businesses will not have to adjust their goods or services to the accessibility requirements of each EU Member State. This view is shared by a large majority of Europeans according to Eurobarometer data. In 2012, a Eurobarometer survey on accessibility found that 78% of Europeans think that the adoption of uniform rules on accessibility in the EU will facilitate the operation of companies in another EU country.⁸¹

Another factor that should be considered in deciding whether the EU or the Member States should take action to implement Article 9 UNCRPD – and, in fact, a reason supporting that such action should be taken by the EU instead of the Member States – is the technical complexity of accessibility. This factor also relates to the functioning of the EU internal market. The design and manufacture of goods and services which are accessible to people with disabilities is a very complex and technical subject area. The need for standardisation is therefore indispensable in order to implement the accessibility obligations that are generated by the UNCRPD. This is evident in Article 9 (2) a UNCRPD which reads:

⁷⁸ P. Craig, *EU Administrative Law*, p. 423; Communication Commission Report to the European Council, Better Law-making, COM(1999) 562 final, p. 2.

⁷⁹ P. Craig, *EU Administrative Law*, p. 423.

⁸⁰ *Ibid.*

⁸¹ Flash Eurobarometer 345, Accessibility, December 2012, p. 12.

‘States Parties shall also take appropriate measures: a) to develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public.’⁸²

European standards on the accessibility of goods and services will naturally be beneficial for the implementation of accessibility provisions throughout the Union, because they will remove the additional financial burden on manufacturers and providers that comes with adjusting goods and services to the technical requirements that each Member State imposes or will impose in subsequent years.

In that respect, the harmonisation of national laws on the accessibility of goods and services by the EU is essential for both disabled people, because they will be able to enjoy the same standards in all the EU Member States, and for the internal market, because harmonisation is conducive to the free movement of goods and services in the EU. Moreover, the CJEU has identified the necessity of harmonising technically complex issues in the electronic communications sector.⁸³ In the *ENISA* case, the Court examined whether Regulation (EC) No 460/2004 establishing the European Network and Information Security Agency⁸⁴, which was adopted on the internal market legal basis, fell within the EU’s competence. This regulation established the European Network and Information Security Agency, which aims to assist the Commission and the Member States in fulfilling their network and information security obligations, including those set out in present and future EU legislation, such as in the Directive on a common regulatory framework for electronic communications networks and services (Framework Directive).⁸⁵ Consequently, the Agency is to assist in ensuring the smooth functioning of the internal market.⁸⁶

The Court indicated that ‘[a]s a result of the technical complexity of networks and information systems, the variety of products and services that are interconnected, and ‘the huge number of private and public actors that bear their own responsibility’, the smooth functioning of the internal market risks being undermined by a heterogeneous application of the technical requirements laid down in the Framework Directive and the specific directives’.⁸⁷

⁸² Article 9 (2) (a) UNCRPD.

⁸³ Case C-217/04 *UK v. European Parliament and Council*, EU:C:2006:279.

⁸⁴ Regulation No. 460/2004/EC of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency, [2004] OJ L 77/1.

⁸⁵ Article 1(2) of Regulation No. 460/2004/EC of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency, [2004] OJ L 77/1.

⁸⁶ Article 1(2) of Regulation No. 460/2004/EC of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency, [2004] OJ L 77/1.

⁸⁷ See, for example, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), [2002] OJ L108/33; Directive 2002/19/EC of the

In this paragraph of the judgment, it seems that the Court suggested that because the field of communications is very 'technically complex and developing rapidly'⁸⁸, it was predictable that the transposition and application of the Framework Directive and other specific directives would create obstacles to the functioning of the internal market.⁸⁹ Therefore, the establishment of the European Network and Information Security Agency would assist the Member States in the implementation of the electronic communications legal framework and, as a result, avoid the emergence of barriers to the functioning of the internal market.

Consequently, it can be inferred from this judgment that the more technical a matter is, the more need there is for precise and detailed EU action to harmonise national standards.⁹⁰ In the particular case that was analysed in the Court's judgment, the EU chose to remove the potential barriers to the functioning of the internal market by establishing an EU agency. However, the EU could have also taken regulatory measures to improve the existing legislation, instead of establishing an agency to provide assistance to the Member States with regard to the implementation of existing EU law in the telecommunications field. It is also important to note that the Court's conclusion, namely that EU action to establish an EU agency was justified because of the technical complexity of the issue at hand, could also apply as a justification for EU action in a field that the EU has not yet regulated. This is supported by the fact that the Court recognised that, due to the nature of the telecommunication sector as being technically complex, the heterogeneous implementation of EU legislation could jeopardise the smooth functioning of the internal market. Thus, it is my view that divergent legislation at the national level is likely to create barriers to the smooth functioning of the internal market. This is especially the case in areas that fulfil the criteria laid down by the Court. In such a case, the EU should take action to protect the functioning of the internal market.

Turning to disability accessibility, it should be noted that this fits the CJEU's definition of a 'technically complex issue'. Accessibility requires standardisation for its implementation, it concerns a variety of goods and services that are

European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), [2002] OJ L 108/33; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), [2002] OJ L 108/21; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), [2002] OJ L 108/51.

⁸⁸ Case C-217/04 *UK v. European Parliament and Council*, para. 61.

⁸⁹ J.P. Sluijs, 'Network neutrality and the internal market fragmentation', 49 *Common Market Law Review* (2012), p. 1667.

⁹⁰ *Ibid.*

interconnected⁹¹, it involves a large number of public and private actors that bear their own responsibility and it must address the (sometimes) conflicting needs of disabled persons.⁹² Moreover, most of EU Member States have ratified the UNCRPD⁹³ and thus they are bound by the Convention's obligations. As a result, EU Member States are obliged to implement the obligation to ensure accessibility.⁹⁴

According to the CJEU's reasoning, it is arguable that it is likely that the smooth functioning of the internal market, and in particular the free movement of goods and services, will be jeopardised by the heterogeneous application of the accessibility requirements that will emerge in each Member State due to the implementation of the UNCRPD. Therefore, it can be argued that the EU is both competent and required to take measures in order to prevent these barriers to the free movement of goods and services from emerging and to adopt EU disability-specific measures. This argument was adopted by the Commission in their proposal for a European Accessibility Act (henceforth EAA).⁹⁵ The Commission argued that the market for certain accessible goods and services is fragmented and that the market fragmentation of those goods and services will continue to increase as more Member States adopt legislation to implement Article 9 UNCRPD.⁹⁶ Therefore, EU action was necessary to remove the existing barriers, to prevent the emergence of future market barriers and to ensure the free movement of accessible goods and services.

However, the smooth functioning of the internal market can also be used as a basis for arguments against EU action to implement Article 9 UNCRPD. A reason that could discourage EU action in the field of accessibility is the financial impact of such action. There might only be an insignificant problem in the functioning of the internal market vis-à-vis an accessible good or service, and this might not justify action on the EU's part. An example of an insignificant malfunction might be that the costs of the adjustment of a good – in order to make it compatible with the different national standards on accessibility – might

⁹¹ For example, for someone to provide accessible retail services, there must be an accessible building in which the services are offered, and there must be accessible transportation and accessible pavements, so that the person with disabilities is able to move from his house to the retail shop.

⁹² A ramp installed to permit access to a building for a person who uses a wheelchair may impede access for someone who has a limited ability to walk on sloped surfaces.

⁹³ For more information on the ratifications of the UNCRPD, www.un.org/disabilities/countries.asp?navid=12&pid=166 (accessed 17 January 2018).

⁹⁴ Article 9 UNCRPD.

⁹⁵ 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 the accessibility requirements for products and services, COM(2015) 615.

⁹⁶ Commission Staff Working Document, 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, SWD(2015) 264.

be so low that it does not merit the EU's intervention. Furthermore, there might be instances where the costs of applying the accessibility standards that are entailed in a proposed EU measure to a good or service will be too much of a burden for the national, regional and local governments, the manufacturers and service providers. In that case, it would be better if such a measure was adopted at the Member State level and at a point in time when each Member State believes it could sustain the financial impact of such a measure.

This last point is of critical importance. In these times in particular, because of the financial crisis that is still affecting the EU and which is especially affecting the southern European States, it would be more prudent to avoid EU action. Lastly, there might be instances where the costs of implementing accessibility standards for a good or service imposed by an EU measure are significant, and at the same time the benefits that the manufacturers or service providers would enjoy from implementing those standards might be insignificant, because the market revenue for this good or service might have reached its peak. In such cases, the debate and the legislative intervention might be better conducted at the national level, where all the interests will be heard in a more direct and immediate fashion. In conclusion, it is essential for the EU to take into consideration the financial impact on the Member States that EU action on disability accessibility might entail before proceeding to adopt and implement said EU action.

C. THE ELIMINATION OF DISCRIMINATION IN THE EU TERRITORY

Outside of the functioning of the internal market, there are other factors that should be considered in deciding whether the EU or the Member States should take action to implement Article 9 UNCRPD. In this part of Chapter III, I examine the EU law principle of non-discrimination as a factor that could justify EU action to implement Article 9 UNCRPD. In that regard, I also analyse the impact that the principle of subsidiarity has on the fulfilment of this EU principle. Within the concept of non-discrimination, I include disability accessibility, in the sense that the removal of existing and future barriers to accessibility contributes to the elimination of discrimination.⁹⁷

Equality and the fight against discrimination of any kind are part of the European Union's foundations. This is evident from the EU Treaties. Article 2 TEU states the EU's founding principles include respect for human dignity, equality, respect for human rights, including the rights of people belonging to minorities.⁹⁸ It also states that non-discrimination, tolerance and pluralism are

⁹⁷ L. Waddington, 36 *European Law Review* (2011), p. 177.

⁹⁸ Article 2 TEU.

values that are common to the EU Member States.⁹⁹ This article demonstrates the importance that the values of equality and non-discrimination have for the EU.

In addition, Article 3 (3) TEU, while describing the elements of the EU internal market, states that the EU internal market aims to combat social exclusion and discrimination and to promote social justice and protection.¹⁰⁰ The inclusion of these values within the concept of the internal market displays the EU's commitment to guaranteeing equality and combating discrimination through the process of economic integration, and the establishment and the functioning of the internal market. Article 3(3) TEU does not have direct effect¹⁰¹, but it can be used in the interpretation of the EU competences.¹⁰² In other words, the principle of non-discrimination could have an impact on the formulation of the policies that are related to the establishment and the functioning of the EU internal market. This function of the principle of non-discrimination becomes clearer in Article 10 TFEU, which states that the fight against discrimination, including disability discrimination, should be considered in the formulation and implementation of EU policies.¹⁰³ This extends the impact of the principle of non-discrimination to all EU policies.

Furthermore, the Charter of Fundamental Rights of the EU (CFREU), in Article 21 thereof, prohibits discrimination on several grounds including disability.¹⁰⁴ All EU actions must be compatible with the Charter. The same applies to the actions of the Member States, only when they are implementing EU law.¹⁰⁵

Lastly, but most importantly, since the adoption of the Treaty of Amsterdam, the EU has the power to take action to combat discrimination on several grounds, including disability discrimination.¹⁰⁶ Article 19 TFEU empowers the Council, after a unanimous decision and after obtaining the consent of the European Parliament, to adopt measures to combat discrimination that falls within the scope of EU competence.¹⁰⁷ This article has been used as the legal basis of the Employment Equality Directive.¹⁰⁸ This directive prohibits disability discrimination, among other grounds of discrimination, in the employment and occupation fields.¹⁰⁹

⁹⁹ Article 2 TEU.

¹⁰⁰ Article 3 (3) TEU.

¹⁰¹ K. Lasok and T. Millet, *Judicial Control in the EU* (Richmond Law and Tax Ltd., 2004), p. 386; Case 215/88 *Casa Fleischhandel v. Balm*, EU:C:1989:331, para. 31; T. Ahmed, *The impact of EU law on Minority Rights* (Hart Publishing, 2011), p. 57.

¹⁰² A. Bredimas, *Methods of Interpretation and Community Law* (North Holland, 1978), p. 71; T. Ahmed, *The impact of EU law on Minority Rights*, p. 57.

¹⁰³ Article 10 TFEU.

¹⁰⁴ Article 21 CFREU.

¹⁰⁵ Article 51 CFREU.

¹⁰⁶ Article 13 TEC (now Article 19 TFEU).

¹⁰⁷ Article 19 TFEU.

¹⁰⁸ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

¹⁰⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

It is evident from the analysis of this part of the chapter that the principle of non-discrimination plays an important role in EU law and policies. Non-discrimination is also a value that it is shared among the Member States. Most importantly, though, the principle of non-discrimination is an important part of the EU's very existence. This is supported by the fact that the Member States conferred on the EU the power to combat discrimination in all areas of its competence, with a view to eliminating discrimination throughout the Union. Through the conferral of this power on the EU, the Member States recognised that they should come together to combat discrimination through EU actions.

An example of a unified action of the Member States against discrimination expressed by EU legislation occurred after the Jörg Haider's Freedom Party, a right-wing party, became part of the government coalition in Austria. *Bell* has explained that the Member States protested against the participation of such a party in a Member State's government and, as a result, the Portuguese Presidency decided to push forward the adoption of the EU Racial Equality Directive¹¹⁰, partly as a response to Austrian situation.¹¹¹ The result was that that directive was adopted in a very short period.¹¹² This EU action showed that, following the intrusion of a discriminatory ideology in the EU territory, the Member States recognised the need for a unified and immediate action to combat discrimination, and that EU action was the most appropriate way to achieve this goal. However, the Member States do not always agree on the adoption of EU action to combat discrimination. In 2008 the Commission adopted a proposal for an Equal Treatment Directive.¹¹³ The purpose of this proposal was to implement the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation outside the labour market.¹¹⁴ The Member States' reactions to the directive varied, due to their views on the grounds of discrimination and the scope of application.¹¹⁵ Overall, the reactions of the Member States showed that there was not enough support for the adoption of the directive in the Council. As a result, the EU failed to adopt this measure. The proposal has not yet been withdrawn by the Commission and it still is on the Council's agenda, but it seems unlikely that it will ever be adopted.

The story of the proposal for the Equal Treatment Directive has a silver lining with regard to disability policy. As *Waddington* has noted, the ground

¹¹⁰ 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 L 180/22.

¹¹¹ M. Bell, *Anti-discrimination law and the European Union* (Oxford University Press, 2002), p. 74.

¹¹² *Ibid.*

¹¹³ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 0426 final.

¹¹⁴ *Ibid.*

¹¹⁵ L. Waddington, 36 *European Law Review* (2011), p.170.

of disability seems to have had the most support among the Member States.¹¹⁶ This was probably reflective of the fact that the Member States wanted to implement the UNCRPD.¹¹⁷ Therefore, despite the failure to adopt the Equal Treatment Directive, the Member States nevertheless seem to be supportive of actions to ensure equality for people with disabilities at EU level. In that regard, the conclusion of the UNCRPD by the EU and the Member States, with the exception of Ireland¹¹⁸, and the Commission's proposal for the EAA are further evidence of the fact that the EU has an important role to play in the fight against discrimination – so long as its competence allows it to do so –, thereby displaying the will of the Member States to eliminate discrimination in a comprehensive manner, at least insofar as disability is concerned.

Therefore, EU action to implement Article 9 UNCRPD might be a more suitable option than individual action by the Member States. This is due to the fact that the EU Member States, despite the failure to adopt the Equal Treatment Directive, seem to be supportive of unified action to combat discrimination on the ground of disability. Furthermore, because the EU has the capacity to take action to combat discrimination that will apply to all the Member States it is able to express the Member States' common desire to eliminate discrimination.

Such EU action cannot be of unlimited scope however. Firstly, the scope of EU action to eliminate discrimination must be 'within the limits of the powers conferred by them [the Treaties] upon the Union'.¹¹⁹ It should be noted that the word 'powers' has been interpreted by scholars in different ways.¹²⁰ Some scholars are of the opinion that Article 19 TFEU provides powers to the EU legislator, even in the instances where these powers are not found elsewhere in the Treaties, to take action to combat discrimination.¹²¹ *Allen* argues that this issue is a matter of political choice.¹²² To be more specific, *Allen* argues that since Article 19 TFEU requires unanimity in Council, it is most likely that any resulting legislation would not be challenged on the grounds that it went beyond the limits of the powers conferred by the EU Treaties.¹²³ However, most scholars

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ For more information on the ratifications of the UNCRPD, www.un.org/disabilities/countries.asp?navid=12&pid=166 (accessed 17 January 2018).

¹¹⁹ Article 19 (1) TFEU.

¹²⁰ *R. Allen*, 'Article 13 – EC, evolution and current contexts', in H. Meenan (ed.), *Equality law in an enlarged European Union: understanding the Article 13 Directives* (Cambridge University Press, 2007), p. 249; E. Howard, *The EU race directive: developing the protection against racial discrimination within the EU* (Routledge, 2009), p. 115.

¹²¹ I. Chopin and J. Niessen, *Proposals for Legislative Measures to Combat Racism and to Promote Equal Rights in the European Union* (Commission for Racial Equality, 1998), p. 21–22.

¹²² *R. Allen*, in H. Meenan (ed.), *Equality law in an enlarged European Union: understanding the Article 13 Directives*, p.249.

¹²³ Ibid.

support the view that the scope of application of Article 19 TFEU is limited to those areas where the Union already has competence to act.¹²⁴

Second, like every aspect of EU shared competence, EU action in the field of non-discrimination is limited by the principle of subsidiarity. The subsidiarity limitations in this field might not relate to cross-border effects, but, as I have analysed in this chapter¹²⁵, they might relate to the particular economic, social and cultural situation of the Member States which may be significantly affected by actions in this field. The implementation of human rights can be done in various ways on the condition that the implementation is compatible with the basic requirements of the common good that human rights intend to guarantee. Thus, national, regional or local authorities will sometimes be better suited to implement the principle of non-discrimination than EU action, as they have a better grasp of national constitutional practices, and of the debates surrounding equality in their social and political environment.

Lastly, Article 19 TFEU – which empowers the EU to take action to combat discrimination – requires unanimity in the Council for the adoption of such action. This provision implies that the adoption of a measure to combat discrimination at EU level will require recognition by all the Member States that such action should be taken by the EU. Thus, if the proposed action in this field is deemed excessive by some Member States, these Member States have the capacity to prevent the adoption of this measure, or limit such action as the price for granting their approval. Nevertheless, the unanimity requirement contained in Article 19 TFEU, which could be used as a limit to excessive EU action, could also create obstacles to the adoption of legislative instruments to combat discrimination, as finding agreement amongst the 28 Member States can be difficult to achieve in practice. Lastly, it can also affect the effectiveness of the EU instrument that intends to combat discrimination, because such an instrument will be the product of extensive compromises that might not have a beneficial effect on the adopted legislative instrument.

D. PATH DEPENDENCY AND EU DISABILITY POLICY

Another factor that should be taken into account in deciding whether the EU or the Member States should take action to implement Article 9 UNCRPD is that of path-dependency. In general terms, path-dependency means that current and future states, actions or decisions are dependent on the path of previous states,

¹²⁴ See, L. Waddington, 'Testing the limits of the EC treaty article on non-discrimination', 28 *Industrial Law Journal* (1999), p. 137; M. Bell, 'The new article 13 EC Treaty: A sound basis for European anti-discrimination law?', 6 *Maastricht Journal of European and Comparative Law* (1999), p. 8–9; I. Bryan, 'Equality and Freedom from Discrimination: Article 13 EU Treaty', 24 *Journal of Social Welfare and Family Law* (2002), p. 227.

¹²⁵ See, Chapter III, The principle of subsidiarity.

actions or decisions.¹²⁶ Within path-dependent processes, the choices made during critical junctures are reinforced.¹²⁷ Critical junctures are short breaks during which influential actors face an unusually broad variety of options.¹²⁸ The outcomes of this positive feedback loop have momentous consequences much later in time.¹²⁹ The existence of path-dependency in the context of EU disability law could be considered as a strong indicator that the EU should take action to implement the UNCRPD. Thus, the inclusion of this issue in the discussion of this chapter is essential.

In the context of EU disability law and policy, path-dependency means that decisions, laws and general actions that have been taken to guarantee the rights of people with disabilities at EU level might have been affected by previous decisions laws and, in general, actions that were historically taken at that level. This process has been used extensively at the EU level so as to guarantee the rights of people with disabilities. A number of examples illustrate the role of this process.

To begin with the area of Services of General Economic Interest, the EU has mainstreamed disability considerations in the telecommunications field. The original Universal Service Directive¹³⁰ did not include many provisions on the rights of people with disabilities. In 2009, however, the Universal Service Directive was amended by Directive 2009/136¹³¹, which added several disability considerations into the Universal Service Directive, such as equivalent access and the choice of telecommunications services¹³² for people with disabilities.¹³³

¹²⁶ S.E. Page, 'Path Dependence', 1 *Quarterly Journal of Political Science* (2006), p. 88.

¹²⁷ K. Linos, 'Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union', 35 *Yale Journal of International Law* (2010), p. 117.

¹²⁸ *Ibid.*; see G. Capoccia and R.D. Kelemen, 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism', 59 *World Political Science Review* (2007), p. 341.

¹²⁹ G. Capoccia and R.D. Kelemen, 59 *World Political Science Review* (2007), p. 341; K. Linos, 35 *Yale Journal of International Law* (2010), p. 117.

¹³⁰ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), [2002] OJ L 108/51.

¹³¹ Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC of 12 July 2002, concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No. 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, [2002] OJ L 108/51.

¹³² Article 23(a) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, as amended by the Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

¹³³ Article 6 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, as amended by the Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

Lastly, if the EAA is ever adopted, the area of telecommunications will be further regulated with a view to ensuring accessibility for people with disabilities.¹³⁴

In the field of transport, the EU initially regulated the rights of passengers when travelling by air by adopting a regulation¹³⁵, without making any significant reference to the particular needs of people with disabilities.¹³⁶ Two years after the adoption of this regulation, the EU adopted a disability-specific instrument so as to address the rights of disabled persons and persons with reduced mobility when travelling by air.¹³⁷ The regulation guaranteed the rights of disabled persons and persons with reduced mobility, amongst other things, to receive information about their travel, to be assisted and not to be denied boarding on the plane.¹³⁸ After the adoption of this instrument, the EU proceeded to adopt and implement passenger rights regulations in the fields of rail, sea and inland waterway and bus and coach travel.¹³⁹ All these regulations included mainstreaming provisions which guaranteed the rights of disabled persons and persons with reduced mobility in a similar manner as the regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air.

Lastly, in the field of public procurement, the Public Sector Directive did not include any disability considerations.¹⁴⁰ The revised version of this directive in 2004 included some references to people with disabilities and accessibility in particular. Amongst others, it gave the option to the Member States to include

¹³⁴ 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 the accessibility requirements for products and services, COM(2015) 0615 final.

¹³⁵ Regulation No. 261/2004/EC of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, [2004] OJ L 46/1.

¹³⁶ Articles 9 and 11 of Regulation No. 261/2004/EC of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, [2004] OJ L 46/1.

¹³⁷ Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L 204/1.

¹³⁸ Articles 3, 4 and 7 of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L 204/1.

¹³⁹ Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L 55/1; Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L 315/14; Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L 334/1.

¹⁴⁰ Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, [1993] OJ L199/51.

disability accessibility requirements in the technical specifications of the public work contracts.¹⁴¹ The latest revision (2014) of this directive further improved the protection of people with disabilities in the field of public procurement, as it now mandates that the Member States must take into account accessibility requirements within the context of the technical specifications of public work contracts.¹⁴²

It is evident from these examples, that the EU initially regulated the policy areas of transport, telecommunication and public procurement without any concern for the particular needs of people with disabilities. At some point in time, however, and because the EU developed a pre-existing legal framework in these fields, it took action to mainstream disability considerations in these fields. If we consider that the Member States will rarely take initiatives to mainstream disability considerations in a field where the EU has already regulated, as I will analyse in the last part of this chapter¹⁴³, it seems logical that reforms introducing the disability dimension in that field and implementing Article 9 UNCRPD will also be adopted by the EU rather than by the Member States. In that regard, the EU should take actions to implement the Convention in areas where the EU has established a legal framework that is relevant to the implementation of the UNCRPD, such as in the area of consumer protection.

Furthermore, the example I provided with regard to public procurement shows another aspect of path dependency in the context of EU disability law. The EU legislators in the ambit of public procurement legislation have improved the existing disability mainstreaming provisions in the new versions of the applicable directives by requiring the Member States to always take into account disability accessibility considerations in the determination of the technical specifications of public work contracts. By improving these provisions, the EU legislator took steps to implement the UNCRPD more effectively. Thus, in the instances where the existing EU disability legislation does not effectively implement the UNCRPD, the EU should take action to guarantee that this legislation *does* effectively implement the UNCRPD.

I will now sum up the discussion on the factors that should be considered in deciding whether the EU or the Member States should take action to implement Article 9 UNCRPD. In that regard, I analysed four major factors: subsidiarity, the functioning of the internal market, the fight against discrimination and path-dependency at EU level.

¹⁴¹ Article 23 (1) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004] OJ L 134/11.

¹⁴² Article 41 (1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L 94/65.

¹⁴³ See, Chapter III, The effective implementation of the requirements of the UNCRPD by the EU.

To begin with subsidiarity, the EU's legislative actions cannot be excessive. They are limited by the principle of subsidiarity. In that regard, I argued that if the EU decides to take action to implement the UNCRPD, it should take into account the national, regional and local traditions, practices and legislation of the Member States. With regard to the second factor, the functioning of the internal market, I argued that the existing or future legislation of the Member States on accessibility could create barriers to the smooth functioning of the internal market. Thus, to protect the functioning of the internal market, the EU should take actions to implement Article 9 UNCRPD. This argument is supported by the fact that, because accessibility is a technically complex issue that includes a variety of goods and services that are interconnected, it involves a large number of public and private actors and it has to address the sometimes conflicting needs of disabled persons, it is very likely that differing legislation could endanger the functioning of the internal market. However, the EU legislator should also consider the financial impact that an EU measure might have on the Member States before proposing and adopting such measures. The third factor in my analysis is the fight against discrimination. As I demonstrated above¹⁴⁴, the Member States have recognised in the EU Treaties, and have shown through their actions – with the notable exception of the failure to adopt the Equal Treatment Directive – that they consider the EU as an important actor in the fight against discrimination. Therefore, because the EU Member States seem to support legislative measures to combat discrimination on the ground of disability, and because the EU has the capacity express the common will of the Member States to combat discrimination by implementing Article 9 UNCRPD, EU action to implement these obligations might be a more suitable option than individual action by the Member States. Nevertheless, the fact that Article 19 TFEU (which empowers the EU to take action to combat discrimination) requires unanimity in the Council for the adoption of legislation could create challenges to the adoption of EU legislation to combat discrimination on the ground of disability. The fourth factor is path-dependency at the EU level. In that regard, I argued that path-dependency is a strong indicator of the fact that the EU should take action to implement Article 9 UNCRPD in two ways. First, when the EU has developed a legislative framework in a particular field that did not take into account disability accessibility, it is logical that reforms to such legislation should address the requirements of Article 9 UNCRPD. Second, in the instances where EU legislation regarding accessibility in a certain field does not effectively implement Article 9 UNCRPD, it should be the EU and not the Member States that takes action to improve these measures so that they will then effectively implement Article 9 UNCRPD.

¹⁴⁴ See, Chapter III, The elimination of discrimination in the EU territory.

IV. STATE AUTONOMY AND THE FORM OF EU ACTION IMPLEMENTING THE UNCRPD

In the previous part of this chapter, I analysed several factors that should be considered in deciding whether the EU or the Member States should take action to implement Article 9 UNCRPD. In this part of Chapter III, I examine the factors that should be taken into account in determining the most appropriate form that EU action implementing Article 9 UNCRPD should take. In that regard, I discuss the kinds of EU legislative instruments that could be used to implement Article 9 UNCRPD and the level of harmonisation that this action could impose.

To begin with the choice of legal instrument, my analysis focuses on directives and regulations as the most appropriate means to implement Article 9 UNCRPD. This is because these are the instruments that could address Article 9 UNCRPD in the most comprehensive manner at EU level. Directives are not directly applicable, but rather they need to be transposed into domestic legislation and the Member States are given a certain amount of time to implement them. In that regard, the Member States' autonomy is better respected and the Member States are granted a period to adjust their national rules to the new EU rules. In addition, due to their very nature, directives allow the Member States a certain degree of discretion on the approach that they will employ in order to transpose them into their national legislation.

By way of contrast, regulations are binding in their entirety, in principle at least. This means that the Member States do not have any possibility to adjust their content. Nevertheless, there are instances where regulations require implementing measures to fulfil their purpose and instances whereby the Member States are given some discretion with regard to the implementation of regulations.¹⁴⁵ Thus, while there is a notion that directives and regulations are very different types of legal instruments, in legal terms, their differences are not so significant. Nevertheless, directives might be more welcomed by the Member States from a political perspective, as they are perceived as 'weaker' interventions in the autonomy of the Member States than regulations, and thus they can minimise the political objections of the Member States to EU action that has an impact on their national order.

The next issue I will examine in this part of this chapter is the level of harmonisation that an EU legislative measure implementing Article 9 UNCRPD could impose on the Member States. The EU can either take a full harmonisation or a minimum harmonisation approach in implementing Article 9 UNCRPD.

¹⁴⁵ T. Lock, *The European Court of Justice and International Courts* (Oxford University Press, 2015), p. 202; Council Regulation No. 343/2003/EC of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L50/1.

To begin with full harmonisation, this form of harmonisation would provide for the unification of national legislation and markets in the field of accessibility, and thus, it would combat against the existing and future distortions of competition and eliminate existing or emerging barriers to the free movement of accessible goods and services. It could also possibly eliminate the extra costs of transnational trade because of the different accessibility requirements that exist or could otherwise emerge in the EU Member States. Lastly, full harmonisation might also increase the cross-border trade that might have otherwise been costlier due to the diverse national legislation in this field.¹⁴⁶

The elimination of the extra costs of transnational trade, though, could also arise as a result of minimum harmonisation as well. This is because one form of minimum harmonisation allows Member States to introduce stricter obligations than the ones stated in the minimum harmonisation directive – however, only for their own national goods and services – while at the same time the goods and services from the other Member States that are compatible with the minimum standards of the directive must be admitted throughout the EU market. For example, Article 4 (1) of the Audio-visual Media Services Directive states that Member States are permitted to require media service providers under their jurisdiction to comply with more detailed or stricter rules, so long as they fall within the scope of application of the directive.¹⁴⁷ By way of contrast, the form of minimum harmonisation that allows the Member States of the EU to impose stricter rules than the ones that are stated in the minimum harmonisation directives does not eliminate the extra costs of transnational trade.

On the one hand, the use of full harmonisation can possibly reduce fragmentation in the regulatory framework on accessibility, considerably increase legal certainty for both consumers and businesses and thus increase the market revenue.¹⁴⁸ At the same time, the practice of minimum harmonisation can possibly lead to an increase in the fragmentation of the regulatory framework regarding accessibility.¹⁴⁹ Lastly, full harmonisation can guarantee a significant level of accessibility for people with disabilities.

On the other hand, the process of full harmonisation is very slow.¹⁵⁰ Furthermore, the choice of the level of protection under an EU measure must

¹⁴⁶ J. Smits, 'Full Harmonisation of Consumer Law? A Critique of the Draft Directive on Consumer rights', 18 *European Review of Private Law* (2009), p. 7.

¹⁴⁷ Article 4 (1) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services (Audio-visual Media Services Directive), [2010] OJ L 95/1.

¹⁴⁸ J. Smits, 18 *European Review of Private Law* (2009), p. 7.

¹⁴⁹ *Ibid.*

¹⁵⁰ W. Devroe, 'Limits of differentiation in European Economic Law: Ne bis in idem and minimum versus maximum harmonisation', 16 *Maastricht Journal of European and Comparative Law* (2009), p. 146.

be very carefully negotiated, well understood and successfully applied.¹⁵¹ Thus, the choice to adopt a full harmonisation measure instead of one that prescribes minimum harmonisation implies that the national law that falls within the material scope of the EU measure that guarantees accessibility, and provides for higher standards of accessibility, will have to be eliminated.¹⁵² Such a national measure would still have been in force if the harmonisation was limited to the minimum level and the laws of the Member States would have been respected.

Moreover, even if full harmonisation can lead to an increase of cross border transactions, it can be costly as well.¹⁵³ For example, it might be difficult to come to a uniform interpretation of the concept of accessibility of people with disabilities without resorting to the European Courts.¹⁵⁴ This might be caused by linguistic variation, legal and cultural differences and political compromises that are part of the legislative transposition process, and which might lead to nebulous legislation vis-à-vis its precise intent.¹⁵⁵ On the same point, existing differences between the hypothetical EU measure on disability accessibility and national measures on the same subject might lead to the need for legal adjustments, but also to institutions and services that will certainly be costly. It is also important to note that differences in national legislation might reflect a difference in national preferences that democratically elected governments have legitimately chosen to adopt.¹⁵⁶ These preferences might be set aside if full harmonisation is chosen.¹⁵⁷ In that regard, if the Commission decides to propose legislation involving full harmonisation in the field of accessibility, it is important to consider whether differences in the current level of accessibility between Member States are a result of particular preferences, before then determining the level of accessibility that these legislative acts will establish.¹⁵⁸

Lastly, it is important to mention that, as *Boeger* has argued¹⁵⁹, minimum harmonisation should be considered as a pragmatic response to the EU's growing substantive and geographical reach.¹⁶⁰ This approach to harmonisation has been used to keep the expansion of EU competences at a sustainable and politically

¹⁵¹ S. Weatherill, 'Maximum versus Minimum Harmonisation: Choosing Between: Unity and Diversity in the Search for the Soul of the Internal Market', in N.N. Shuibhne and L.W. Gormley (eds.), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford University Press, 2012), p. 187.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ J. Smits, 18 *European Review of Private Law* (2009), p. 11.

¹⁵⁹ N. Boeger, 'Minimum harmonisation, free movement and proportionality', in P. Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press, 2012), p. 66.

¹⁶⁰ *Ibid.*

‘palatable’ level for the Member States, while at the same time promoting integration in a politically feasible manner.¹⁶¹ Minimum harmonisation therefore follows the idea of political compromise.¹⁶²

From the above, it seems that for all the benefits of full harmonisation, there are several drawbacks. On the other hand, despite the fact that minimum harmonisation does not appear to promote a high level of integration it nevertheless seems to allow more flexibility. It allows flexibility to the EU as it will not have to decide on one high standard that the Member States will then have to comply with. And it provides flexibility to the Member States, as they will be able to maintain their higher levels of protection on accessibility and will certainly feel that the EU has respected their individual preferences in that field. For example, *Torres Perez*¹⁶³ has argued, in relation to the interpretation of fundamental rights that the values reflected in the concept of state autonomy demand that a certain level of diversity should be granted to the Member States.¹⁶⁴ Moreover, the implementation of the UNCRPD is a human rights matter and as such, it is a very sensitive subject for the Member States. The EU should therefore be respectful of their autonomy and their preferences.

Considering that minimum harmonisation is an outcome of political pragmatism and that reaching consensus between large numbers of Member States on human rights issues will be a great challenge, the option of minimum harmonisation as a tool to implement Article 9 UNCRPD appears to be more respectful of the Member States’ autonomy and, thus, more commensurate with the subsidiarity principle than full harmonisations is. Moreover, a minimum harmonisation directive might receive more political support from the Member States, and thus, it might be adopted more easily than a full harmonisation directive. This is supported by the fact that most, if not all, the measures that the EU has adopted on disability accessibility have imposed minimum requirements instead of uniform rules and they have, at least in the field of transport, been rather successful.¹⁶⁵ Nevertheless, the option of full harmonisation cannot be excluded, especially if the EU wishes to increase uniformity and in the instances where the political climate supports this. For example, in the field of consumer protection there has been a shift from minimum to full harmonisation directives under the banner of decreasing fragmentation of the consumer law legislative framework.

¹⁶¹ Ibid., p. 67.

¹⁶² Ibid.

¹⁶³ A. Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press, 2009), p. 92.

¹⁶⁴ Ibid.

¹⁶⁵ Report from the Commission to the European Parliament and the Council on the functioning and effects of Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, COM(2011) 166 final.

These new full harmonisation directives have included references to disability or the term ‘vulnerable groups’ that naturally entails people with disabilities.¹⁶⁶

On the 2nd of December 2015, the Commission published a proposal for a Directive on the approximation of the laws, regulations and administrative provisions of the Member States as regards accessibility requirements for products and services (the so-called European Accessibility Act or EAA).¹⁶⁷ It is my view that the decision to use a directive as the legal instrument to implement Article 9 UNCRPD is both appropriate and effective. In principle, a directive respects the Member States’ autonomy and it grants the Member States a period to adjust their national rules to the incoming EU rules. Directives also give the Member States certain discretion as to the approach that they may employ with a view to transposing the directive into their national legislation. As a result, directives are able to gather more political support as they are more respectful of the Member States’ particularities. In that regard, the choice of a directive as the legal form for the proposed EAA is a politically expedient move by the Commission that can increase the chances of the adoption of this instrument.

In addition, the proposal takes the form of a directive which sets minimum standards.¹⁶⁸ As I argued above¹⁶⁹, the decision to use a minimum harmonisation directive seems to be effective from a political point of view. Minimum harmonisation – in spite of the fact that it does not promote a high level of integration – provides more flexibility to the EU and the Member States respectively. The EU will not have to determine which high standard that the Member States will have to comply with, and at the same time, the Member States will be able to maintain their higher levels of protection on accessibility and they are more likely to be appreciative of the fact that the EU has respected their domestic preferences.

Lastly, among the purposes of the proposed EAA, is the implementation of Article 9 UNCRPD. The policy area of human rights is a very sensitive area for

¹⁶⁶ See, Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’), [2005] OJ L149/22; Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, [2011] OJ L304/64.

¹⁶⁷ 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 the accessibility requirements for products and services, COM(2015) 0615 final.

¹⁶⁸ Commission Staff Working Document, 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, SWD(2015) 264 final, p. 47.

¹⁶⁹ See, Chapter III, State autonomy and the form of EU action implementing the UNCRPD.

the Member States. Therefore, the EU should be respectful of the Member States' autonomy and their preferences with regard to human rights. The decision to propose a minimum harmonisation directive for the EAA is a policy option that can provide for a good level of accessibility, while simultaneously respecting the particularities of the Member States.

V. THE EFFECTIVE IMPLEMENTATION OF THE UNCRPD BY THE EU

In this part of Chapter III, I examine three issues that the EU should take into account when taking action to implement Article 9 UNCRPD. These are as follows: the principle of proportionality, the holistic approach with regard to the regulation of accessibility and the provision by the EU of regulatory space to the Member States with regard to the implementation of disability accessibility.

Apart from the principle of subsidiarity, the second principle that limits EU action is the proportionality principle. Article 5(4) TEU reads:

'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'.¹⁷⁰

The CJEU has repeatedly indicated that for a provision of EU law to be compatible with the principle of proportionality, it is necessary to establish whether the means it uses with a view to reaching its goal corresponds to the importance of the aim and whether the means are necessary for its achievement.¹⁷¹ This statement involves the application of two tests. The first test is the suitability test. It refers to the relationship between the means and the end. The means used by the measure must be suitable, that is reasonably likely to reach its objectives.¹⁷² The second test is whether the measure is necessary to reach its objectives. The Court determines the necessity of the measure by assessing the consequences that the measure has on the existing competing interests and decides whether those consequences are justified in view of the importance of the objective pursued.¹⁷³ In that regard, the Court has determined that it will not strike down an EU measure unless it considers it is manifestly inappropriate to achieve those objectives.¹⁷⁴

¹⁷⁰ Article 5 (4) TEU.

¹⁷¹ Case 66/82 *Fromançais v. Forma*, EU:C:1983:42, para. 8; Case 47/86 *Roquette Freres v. ONIC*, EU:C:1987:316, para. 19; Case C-358/88 *Oberhausener Kraftfutterwerk Wilhelm Hopenmann GmbH v. Bundesanstalt für landwirtschaftliche Marktordnung*, EU:C:1990:173, para. 13.

¹⁷² T. Tridimas, 'The Rule of Reason and its Relation to Proportionality and Subsidiarity', in A. Schrauwen (ed.), *Rule of Reason: Rethinking another Classic of European legal Doctrine* (Europa Law Publishing, 2005), p. 112.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

There are two differences between proportionality and subsidiarity. The first difference is that the principle of *stricto sensu* subsidiarity comes to play at an early stage in the decision-making process, because it defines whether or not action must be taken at the EU level. By way of contrast, proportionality emerges once it is decided that the EU should take action in order to define the scope of this action.¹⁷⁵ However, it is important to note that, as I have analysed above¹⁷⁶, subsidiarity can overlap with proportionality, particularly in terms of the second proportionality test, that is, whether an EU measure is necessary to reach its objectives. The second difference is that the subsidiarity test is applied only in cases where the EU competence is shared, while proportionality is used in instances whereby the EU competence is both exclusive and shared.¹⁷⁷

The application of these principles is not only *a posteriori*. It also happens *a priori*. This means that the Commission is obliged to provide a detailed statement when it proposes a legislative instrument so that the compliance with the principles of subsidiarity and proportionality can be examined. This statement should include an assessment of the financial impact of the proposals, and also qualitative and (and when possible) quantitative indicators to prove that the objective can be better fulfilled at the Union level.¹⁷⁸

In the case of implementing Article 9 UNCRPD, the EU must respect the principle of proportionality. This means that every EU measure on disability accessibility should use suitable means to reach its objectives and that any negative consequences that the measure will have on various different interests are justified because of the importance of the aim pursued. Nevertheless, it seems that the proportionality principle has sometimes been used incorrectly by the Commission to limit the material scope of EU measures. The most recent example in the field of accessibility was the proposal for a Directive on the accessibility of public sector bodies' websites. It is important to note that this proposal has since been adopted by the EU and is now part of EU law.¹⁷⁹ The proposal aimed at approximating the laws, regulations, and administrative provisions of the Member States on disability accessibility of public sector bodies' websites by establishing harmonising requirements.¹⁸⁰ The Commission stated in the impact assessment report that 'proportionality is observed by limiting the

¹⁷⁵ Ibid., p. 115.

¹⁷⁶ See, Chapter III, The principle of subsidiarity.

¹⁷⁷ T. Tridimas, in A. Schrauwen (ed.), *Rule of Reason: Rethinking another Classic of European legal Doctrine*, p. 115.

¹⁷⁸ Article 5 of Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, [2008] OJ C115/206.

¹⁷⁹ Directive 2016/2102/EU of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies, [2016] OJ L 327/1.

¹⁸⁰ Proposal for a Directive of the European Parliament and of the Council on the accessibility of public sector bodies' websites, COM(2012) 721 final, p. 6.

proposal to a minimum list (of types of) public sector websites concerned, giving the Member States the option to extend this list as they wish'.¹⁸¹

This choice seems to be highly questionable. It is difficult to argue that the harmonisation of accessibility requirements on public websites, that will guarantee that people with disabilities have access to accessible web-sites, will be achieved by limiting the directive's material scope to certain websites. It seems that this measure does less than what is necessary to achieve the objectives it pursues. Furthermore, the Commission did not provide any arguments on why this was a proportionate measure and the reasons for limiting the material scope of the proposed directive to certain websites. The argument that I will make in the following paragraphs is that if an EU legislative measure on a given issue is not constructed with a view to reaching the objectives that it pursues, then it is probably better that this issue is left for the Member States to address.

In the light of the last point, it is important to note that the effective regulation of issues with regard to accessibility requires a holistic approach. In that regard, the CRPD Committee recognised, in General Comment No. 2 on accessibility, that the interoperability of goods and services is an important aspect of the implementation of Article 9 UNCRPD.¹⁸² Accessibility works as a chain that requires the proper functioning of each of the links, as well as all the links together, in order for it to become effective.¹⁸³ For example, if a person with disabilities is to enjoy telecommunication services on an equal basis with others, that person must hold an accessible device (landline, mobile or smart phone), have available accessibility services, such as text and video relay services to write or sign when calling someone, and there must be a possibility for the IT network to transmit these services.¹⁸⁴ Otherwise the chain is broken and despite the fact that the EU has hypothetically regulated, for example, the availability of accessible services, people with disabilities might not be able to use them because their devices might not be accessible.

EU measures that have used the holistic approach to address accessibility issues have been very successful in achieving their goals. In the field of transport, the EU has taken a holistic approach by adopting the Regulation concerning the rights of passengers in bus and coach transport, the Regulation concerning the rights of passengers when travelling by sea and inland waterway, the Regulation concerning the rights of disabled persons and persons with

¹⁸¹ Commission Staff Working Document, Impact assessment accompanying the document, Proposal for a Directive of the European Parliament and of the Council on the accessibility of public sector bodies' websites, SWD(2012) 401 final, p. 28.

¹⁸² Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 30.

¹⁸³ European Disability Forum, 'EDF Response to the Public Consultation with a View to a European Accessibility Act', EDF (2012), www.edf-feph.org/search/node/EDF%20Response%20to%20the%20Public%20Consultation%20with%20a%20View%20to%20a%20European%20Accessibility%20Act, p. 16 (accessed 17 January 2018).

¹⁸⁴ Ibid.

reduced mobility when travelling by air and the Regulation on rail passengers' rights and obligations.¹⁸⁵ These instruments address all the areas of travel and have been very successful in achieving their goals, but they are not without their problems.¹⁸⁶ On the other hand, the Universal Service Directive¹⁸⁷ has not been very successful in raising the level of accessibility of communication services.¹⁸⁸ Among the reasons that have played a role in this failure is the absence of the holistic approach. For example, the Universal Service Directive does not address the software or hardware of mobile phones.

Therefore, the proportionality principle should be used very carefully when it is used to justify the exclusion of parts of the chain identified through the holistic approach from a given legislative proposal, because this use of proportionality can undermine the effectiveness of the measure the EU wants to adopt. In more general terms, the review of EU legislation based on the proportionality principle should be performed very carefully and the exclusion of elements of legislation under the guise of disproportionality should be carried out in a restrictive manner, because the aim of a legislative measure is not usually addressed in the text of the measure in a comprehensive and clear manner. As a result, the review of the proportionality of a legislative measure is very difficult to perform and the exclusion of elements from such measures as disproportionate might be unjustified and it can lead, as I have analysed above, to the ineffectiveness of the legislative measure under review. Therefore, it is essential for the effectiveness of the proportionality review that the objectives that the EU legislator wants to achieve should be correctly defined within the text of such measure.

The last point that I would like to make with regard to proportionality is the fact that it seems that the Commission, with a view to respecting the national regulatory autonomy, sometimes tries to give some regulatory space to the

¹⁸⁵ Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L 315/14; Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L 55/1; Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L 334/1; Regulation No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L 204/L.

¹⁸⁶ See, with regard to air travel, Report from the Commission to the European Parliament and the Council on the functioning and effects of Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, COM(2011) 166 final.

¹⁸⁷ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, as amended by the Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L 108/51.

¹⁸⁸ Technosite et al., 'Study on assessing and promoting e-accessibility', *European Commission* (2013), <https://ec.europa.eu/digital-single-market/en/news/study-assessing-and-promoting-e-accessibility>.

Member States, hoping that they will step up and fill in the gaps that the EU has left. This is evident in the Directive on the accessibility of the websites and mobile applications of public sector bodies.¹⁸⁹ This directive includes a list of public websites that should be made accessible.¹⁹⁰ The EU legislator opted to give the Member States the option to extend this list as they wish, by leaving the accessibility of certain public body websites unregulated. This trend has not been very successful, however, as the Member States have rarely taken initiatives to fill the regulatory gaps that the EU legislator has left open. For example, the Regulation concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefore¹⁹¹ requires that certain types of vehicles (Class I M2 and M3) should be accessible to people with disabilities. Yet, as this regulation does not regulate the accessibility of vehicles other than Class I M2 and M3, the EU legislator may have hoped that the Member States would have taken measures to regulate other types of vehicles. In reality, however, very few of the Member States have taken such action.¹⁹²

In conclusion, proportionality is an important principle for the allocation of powers within the EU and it is a way to limit the EU's power to regulate. Nevertheless, when a measure is adopted at that level, the EU must do what is necessary to achieve the set goals. This means that the EU should not do more or, most importantly less, than is necessary to achieve those goals. Especially when the EU decides to adopt a measure to implement Article 9 UNCRPD, the EU should be very careful to fully and comprehensively address accessibility in a particular area by following the logic of the holistic approach. Otherwise, there is a danger that the measure will not be successful, as I have mentioned above. It is also preferable that the EU legislator does not expect the Member States' regulatory intervention to fill in the gaps in the measure it has adopted (gaps that the EU legislator left under the false pretence that in that they served to benefit the principle of proportionality). This is due to the fact that, as I explained above, there is a real danger that the gaps will remain due to the Member States' inaction. Consequently, in this instance, EU instruments will be ineffective in their attempt to guarantee disability accessibility and the Member States will have to bear the costs of an ineffective EU measure.

¹⁸⁹ Directive 2016/2102/EU of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies, [2016] OJ L 327/1.

¹⁹⁰ Article 1 of Directive 2016/2102/EU of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies, [2016] OJ L 327/1.

¹⁹¹ Regulation No. 661/2009/EC of the European Parliament and of the Council of 13 July 2009 concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor, [2009] OJ L 200/1.

¹⁹² Zero Project Report, 'International Study on the Implementation of the UN Convention on the Rights of Persons with Disabilities', *Zero Project Report* (2012), <https://zeroproject.org/wp-content/uploads/2013/12/Zero-Project-Report-2012.pdf>, p. 36 (accessed 17 January 2018).

VI. CONCLUSION

This chapter aimed at examining the allocation of shared competences between the Member States and the EU on the subject of the implementation of the UNCRPD and in particular Article 9 UNCRPD. I analysed the distinction between disability-specific legal instruments and disability mainstreaming legal instruments. I also pointed out that mainstreaming is a policy option that the EU is obliged to use in all the fields of its competence, as it constitutes a minimum core obligation of Article 9 UNCRPD, in cases where the absence of accessibility mainstreaming could lead to the emergence of accessibility barriers. Moreover, I pinpointed that the EU has not always been effective in implementing accessibility through mainstreaming. Therefore, I have suggested some criteria that the EU legislator should consider so that mainstreaming will be effective and to ensure that the requirements of the Convention will be fulfilled.

Furthermore, I have presented several arguments that should be considered in deciding whether the EU or the Member States should take action to implement Article 9 UNCRPD. These arguments relate to the functioning of the internal market, the EU's pursuit of uniformity, business interests in having one set of requirements on disability accessibility, the technical complexity of accessibility, the financial impact of the potential EU measure on the Member States and the impact of such measure on national practices, the principle of non-discrimination at the EU level and the path-dependency process.

At the same time, I examined the factors that should be considered in determining the most effective way to legislate when proposing EU legislation on accessibility. I concluded that the option of using a directive to implement Article 9 UNCRPD could gather more political support as it is more respectful of the Member States' particularities. For the same reason, the option of minimum harmonisation seems to be a more effective option from a political point of view.

Nevertheless, the options of regulation and full harmonisation cannot be excluded, as they have both been used successfully in the past to address the needs of people with disabilities. Ultimately, the choice of the form that EU action to implement Article 9 UNCRPD might take will depend on the goals that this action aims to achieve. Lastly, I have pointed out three issues that the EU should take into account when taking actions to implement Article 9 UNCRPD. These issues are as follows: the compatibility of such EU action with the principle of proportionality, the importance of adopting a holistic approach with regard to the regulation of accessibility and the provision of regulatory space to the Member States by the EU with regard to implementing disability accessibility.

CHAPTER IV

A MECHANISM FOR THE COORDINATION OF THE IMPLEMENTATION OF THE UNCRRPD WITHIN THE EU

I. INTRODUCTION

In Chapter III, I examined the factors should be considered in determining the most appropriate form that EU action should take to implement Article 9 UNCRRPD. Furthermore, I analysed several factors that should be taken into account in deciding whether the EU or the Member States should take action to implement Article 9 UNCRRPD. That analysis might provide the reader with some indication as to which party should implement Article 9 UNCRRPD. However, without a mechanism that takes into consideration the results of that analysis, it will be impossible to decide whether the EU or the Member States should take action to implement Article 9 UNCRRPD in the areas where they share the competence to act. Therefore, the development of a mechanism that will allow the EU and the Member States to cooperate and decide which of the two should implement the UNCRRPD is essential.

In that regard, in this chapter I examine three potential mechanisms that are available at the EU level that could take on the role of the coordinating mechanism for the implementation of the UNCRRPD within the EU, and help to determine whether the EU or the Member States should act with regard to the implementing the UNCRRPD in the fields where they share competence. These mechanisms are the Disability High Level Group, the Regulations on Bilateral Agreements and the Open Method of Coordination (OMC). The Disability High Level Group is a monitoring body that examines the latest policies and priorities, at the national level, concerning people with disabilities.¹ The Regulations on Bilateral Agreements are regulations that create a legal framework for coordination between the EU and third countries with regard to the implementation of Bilateral Agreements. They were adopted as a

¹ Communication of the Commission on equality of opportunity for people with disabilities, A New European Community Strategy, COM(1996) 406 final, p. 22.

response to the challenges that the EU was facing with the coordination and the allocation of shared competences in the context of the implementation of bilateral agreements.² The OMC is a decentralised framework for cooperation between the Member States, including regional and local governments, social partners and civil society, which acts in accordance with the principle of subsidiarity with a view to directing national policies towards certain common objectives.³ In this chapter, I also examine the existing EU mechanism that carries out the task of coordinating the implementation of the UNCRPD within the EU.

This chapter is divided into five parts. The first part examines the existing EU coordination mechanism for the implementation of the UNCRPD [Section I]. The next three parts are dedicated to the analysis of whether the Disability High Level Group [Section II], the OMC [Section III] or the Regulations on Bilateral Agreements [Section IV] should be used to coordinate the actions between the Member States and the EU with a view to implementing the UNCRPD and help to determine whether the EU or the Member States should take action to implement the UNCRPD in the fields where they share the competence to act. In the fifth part of this chapter, I determine which of the four mechanisms is the most appropriate for taking on the task of coordinating the actions between the Member States and the EU regarding the implementation of the UNCRPD and help to determine whether the EU or the Member States should take action to implement the UNCRPD in the fields where they share the competence to act. Finally, I analyse how these tasks would be performed, if this mechanism were to be adopted [Section V].

II. THE EU MECHANISM FOR THE COORDINATION OF THE IMPLEMENTATION OF THE UNCRPD

As a State Party to the UNCRPD, the EU is required to designate one or more focal points with regard to issues relating to the implementation of the Convention and to establish a coordination mechanism so as to facilitate cooperation across the different sectors of government with regard to the implementation of the UNCRPD.⁴ The EU should also maintain, strengthen, designate or establish a framework comprising of, amongst other things, one or more independent mechanisms, with a view to monitoring, promoting

² See, M. Cremona, 'External Relations and External Competence: The Emergence of an Integrated Policy', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press, 2011), p. 34.

³ Ibid.

⁴ Article 33 (1) UNCRPD.

and protecting the implementation of the Convention.⁵ In these monitoring arrangements, civil society and particularly people with disabilities and their representative organisations should be involved and participate fully therein.⁶

The Council Decision concerning the conclusion, by the European Community (now European Union), of the United Nations Convention on the Rights of Persons with Disabilities designated the Commission as the focal point with regard to the implementation of the Convention.⁷ The Commission's particular responsibilities, as the EU's focal point for the implementation of the UNCRPD, are stated in the Code of Conduct setting out the arrangements for the implementation by and the representation of the EU relating to the UNCRPD.⁸ Primarily, the Commission is responsible for facilitating the coordination between its departments, the EU institutions and other bodies. It is also to promote the coordination between the EU and the Member States.⁹ As far as the participation of people with disabilities and their representative organisations in the development and implementation of disability policies at the EU level are concerned, the Commission ensures that such organisations are consulted through different channels and tools, such as their participation in expert groups, communications or consultation documents.¹⁰

The mechanism to coordinate the implementation of the Convention between the EU and the Member States is the Council's Human Rights Working Group (COHOM).¹¹ This Council working group was created in 1987 with a view to guaranteeing that human rights issues were taken into consideration in the context of the European Political Cooperation framework.¹² The COHOM is responsible for the human rights dimension of the EU's external relations.¹³ The members of the COHOM are human rights experts from each Member State and the European Commission.¹⁴ COHOM addresses various aspects of the EU's human rights policy, including taking actions in international fora, promoting dialogues with

⁵ Article 33 (2) UNCRPD.

⁶ Article 33 (3) UNCRPD.

⁷ Article 3 of Council Decision 2010/48/EC concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, 24 November 2009, [2010] OJ L23/35.

⁸ Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C340/11, para. 11.

⁹ Commission Staff Working Document, Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union, SWD(2014) 182 final, para. 211.

¹⁰ *Ibid.*, para. 212.

¹¹ *Ibid.*, para. 213.

¹² See, for the mandate of the Human Rights Working Group, www.consilium.europa.eu/uedocs/cmsUpload/COHOM_mandates.pdf (accessed 17 January 2018).

¹³ *Ibid.*

¹⁴ See, for the Human Rights Working Group, http://eeas.europa.eu/human_rights/workgroup/index_en.htm (accessed 17 January 2018).

third countries and examining thematic issues and mainstreaming.¹⁵ It prioritises urgent human rights situations and it promotes the systematic mainstreaming of human rights at summits between the EU and third countries and by placing these on the agenda of expert meetings.¹⁶ In the context of the implementation of the UNCRPD by the EU and the Member States, COHOM is responsible for coordinating common positions, the speaking and voting arrangements and monitoring and reporting between the EU and the Member States.¹⁷

The EU mechanism on the implementation of the UNCRPD involves another mechanism that I examine in the next part of this chapter, namely the Disability High Level Group. This Group discusses issues relating to the implementation of the UNCRPD at the national level, such as the establishment of monitoring mechanisms and structures with regard to the UNCRPD and the implementation of national disability strategies.¹⁸ Apart from the representatives of the Member States that constitute the members of the Group, national focal points, the Commission, Civil Society Organisations and Disabled People's Organisations also participate in this Group's discussions.¹⁹ The Commission and the Disability High Level Group have published an annual joint report on the implementation of the UNCRPD every year since 2008.²⁰

Moreover, the Commission's Inter-Service Group on Disability has an important role in the EU coordination mechanism for the implementation of the UNCRPD. This Group consists of different departments within the Commission.²¹ The purpose of this Group is to ensure that the needs and rights of people with disabilities are taken into account in the formulation and implementation of the EU's legislative and policy initiatives.²²

Furthermore, the Commission – with a view to facilitating the exchange of information and mutual learning between the EU and the Member States – has hosted a Work Forum on the Implementation of the UN Convention since 2010.²³ The Work Forum brings together representatives of national monitoring mechanisms for the UNCRPD, EU institutions and the relevant international bodies and Civil Society representatives, Disabled People's

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ See, Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C340/11.

¹⁸ Commission Staff Working Document, Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union, SWD(2014) 182, para. 214.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid., para. 217.

²² Ibid., para. 215.

²³ Ibid., para. 216.

Organisations and National Human Rights Institutions.²⁴ The representatives from the Disabled People's Organisations and Civil Society play an important role in the formulation of the Work Forum's agenda.²⁵ The Work Forum agenda includes issues such as monitoring, data collection, statistics and indicators with regard to the implementation of the UNCRPD and the coordination of disability strategies and action plans which aim to implement the Convention.²⁶

Lastly, the EU framework for monitoring, promoting and protecting the implementation of the Convention, consists of the following bodies: the European Parliament (Petitions Committee), the European Ombudsman, and the EU Agency for Fundamental Rights (FRA), the European Disability Forum (EDF) and the Commission.²⁷ The Commission has been appointed to serve as the secretariat of the framework, and the European Disability Forum chairs the meetings of the framework for a two-year term.²⁸ The EU framework is tasked with the promotion, protection and monitoring of EU legislation and policy that is relevant to the UNCRPD and with the implementation of the UNCRPD by the institutions and bodies of the Union as public administrators.²⁹

It is evident from the analysis of the EU coordinating mechanism and the EU framework for promoting, protecting and monitoring implementation of the UNCRPD, that the EU has successfully engaged many EU institutions with a view to effectively implementing the UNCRPD. Nevertheless, the use of all of these institutions seems to have created increased fragmentation between the EU and the Member States with regard to the coordination of the implementation of the UNCRPD. The tasks of these institutions seem to overlap to a certain extent and the coordination between them with a view to presenting the whole picture with regard to the implementation of the UNCRPD by the EU and the Member States is very challenging. In that regard, it might have been more effective if the EU had taken a more centralised approach, for example, by establishing one mechanism with procedures that could involve other EU institutions. For example, the EU could have assigned COHOM with the task of coordinating the implementation of the Convention between the EU and the Member States and given the Disability High Level Group and the Commission's Inter-Service Group on Disability a consulting role with regard to the implementation of the Convention.

Moreover, the CRPD Committee indicated in its concluding observations on the initial report of the European Union³⁰, that the EU framework for the

²⁴ Ibid.

²⁵ Commission Staff Working Document, Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union, SWD(2014) 182 final, para. 216.

²⁶ Ibid., para. 214.

²⁷ Ibid., para. 217.

²⁸ Ibid., para. 218.

²⁹ Ibid., para. 219.

³⁰ Committee on the Rights of Persons with Disabilities, Concluding observations EU CRPD/C/EU/CO/1/2015, para. 76-77.

implementation and monitoring of the Convention was not fully independent and inadequately resourced.³¹ The CRPD Committee also pointed out the lack of a cross-cutting, overarching framework for consultation among different bodies in the EU and people with disabilities through their representative organisations.³²

The Committee made several suggestions to the EU for how to address these problems. First, it suggested the removal of the Commission from the EU framework for monitoring, promoting and protecting the implementation of the Convention.³³ The Commission would remain as the focal point for the implementation of the Convention. Second, the CRPD Committee proposed that the EU should take action to adequately resource the EU framework for monitoring, promoting and protecting the implementation of the Convention.³⁴ Third, the Committee recommended that the EU take appropriate measures to establish a structured dialogue with adequate resources for coordination between the EU institutions, agencies and bodies and for constructive consultation with and the participation of people with disabilities and their representatives.³⁵ Fourth, it recommended the setting up of an inter-institutional coordination mechanism and the selection and placement of focal points in each EU institution, agency and body with a view to facilitating the monitoring of the implementation of the Convention.³⁶

The Commission, after receiving the concluding observations, ceased its participation in the EU framework for monitoring, promoting and protecting the implementation of the Convention meetings and it announced its intention to withdraw from this framework.³⁷ The revised EU monitoring framework still has the same remaining members with the same tasks.³⁸ The members of the EU monitoring framework are the European Parliament, the European Ombudsman, FRA and EDF. The Commission continues with its task as a focal point for the EU with regard to the implementation of the UNCRPD. Lastly, it

³¹ Ibid.

³² Ibid., para. 14.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid., para. 15.

³⁶ Ibid., para. 77.

³⁷ EU Report on the concluding observations of the UN Committee on the Rights of Persons with Disabilities on the initial report of the European Union (CRPD/C/EU/CO/1/Add.1), 2017, p. 2–3; Commission Staff Working Document Progress Report on the implementation of the European Disability Strategy (2010 – 2020), SWD(2017) 29, p. 148; European Parliament, ‘Report, EU Implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD): European Implementation Assessment’, *European Parliament* (2016), www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA%282016%29536347, p. 12.

³⁸ EU Report on the concluding observations of the UN Committee on the Rights of Persons with Disabilities on the initial report of the European Union (CRPD/C/EU/CO/1/Add.1) (2017), p. 2–3 European Parliament, ‘Report, EU Implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD): European Implementation Assessment’, *European Parliament* (2016), p. 12–13.

is important to note that the EU monitoring framework for the implementation of the UNCRPD operates only in the areas of EU competence.³⁹ It functions in a complementary manner to the work of the national frameworks and independent mechanisms which are responsible for the promotion, protection and monitoring of the UNCRPD in the Member States.⁴⁰ Nevertheless, the EU has not taken any action to establish an inter-institutional coordination mechanism or designate focal points in each European Union institution, agency and body.⁴¹ In addition, the EU continues to consult with Disabled Peoples' Organisations in the context of the Social Pillar⁴², but it has not yet taken adequate measures to expand consultation with people with disabilities for all EU institutions, bodies and agencies.⁴³

Lastly, as EDF argues, COHOM is responsible for human rights in the context of the EU's external relations.⁴⁴ Thus, it might not have the capacity to take on the coordination of the implementation of the UNCRPD between the EU and the Member States, as its mandate does not address the EU's internal human rights policy. Indeed, while it is not specifically stated in the Report on the implementation of the UNCRPD by the European Union, the focus of COHOM's work seems to be towards the representation of the EU at the international level and not as much to the coordination of the implementation of the Convention between the EU and the Member States.

EDF proposed that a more appropriate Council group to take on the role of the coordination mechanism for the implementation of the UNCRPD between the EU and the Member States would be the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP).⁴⁵ FREMP examines the Commission's legislative proposals, which are sent to the Council of Ministers, from a human rights perspective.⁴⁶ It is composed of experts from each Member State and is chaired by the delegate of the country that holds

³⁹ EU Report on the concluding observations of the UN Committee on the Rights of Persons with Disabilities on the initial report of the European Union (CRPD/C/EU/CO/1/Add.1) (2017), p. 2–3.

⁴⁰ Ibid.

⁴¹ Commission Staff Working Document, Progress Report on the implementation of the European Disability Strategy (2010 – 2020), SWD(2017) 29 final, p. 148.

⁴² The Social Pillar refers to the EU policy area of Employment, Social Affairs and Inclusion. The Employment, Social Affairs and Inclusion policies aim, among others, to create more and better jobs, protect and promote the free movement of workers, enhance the coordination of social security schemes, ensure better working conditions, combat poverty and social exclusion, and protect people with disabilities.

⁴³ Commission Staff Working Document, Progress Report on the implementation of the European Disability Strategy (2010 – 2020), SWD(2017) 29 final, p. 129.

⁴⁴ EDF, 'Alternative Report to the UN Committee on the Rights of Persons with Disabilities', EDF (2015), www.edf-feph.org/newsroom/news/edf-launches-its-alternative-report-rights-persons-disabilities, p. 64 (accessed 17 January 2018).

⁴⁵ Ibid.

⁴⁶ See, Working Party on Fundamental Rights, 'Citizens' Rights and Free Movement of Persons', *European Parliament*, www.consilium.europa.eu/en/council-eu/preparatory-bodies/working-

the rotating six-month presidency of the Council.⁴⁷ FREMP forwards the legislative proposals to the Justice and Home Affairs Council after it completes its examination.⁴⁸

To sum up, the fragmentation of the EU framework for the implementation and monitoring of the Convention could create significant challenges for the monitoring process of the implementation of the UNCRPD. The CRPD Committee has expressed concerns about the effectiveness of the coordination among the EU institutions, bodies and agencies in its concluding observations on the initial report of the European Union.⁴⁹ In that regard, the Committee proposed the establishment of an inter-institutional mechanism to better coordinate the actions of EU institutions, bodies and agencies for the implementation of the UNCRPD.⁵⁰ Moreover, the replacement of COHOM with FREMP would certainly be an improvement over the current EU mechanism, as FREMP seems to be a more appropriate forum for coordinating the implementation of the UNCRPD between the EU and the Member States.

Nevertheless, one of the most challenging aspects with regard to the implementation of the UNCRPD by the EU and the Member States is the coordination of the implementation of the Convention in the areas where the EU shares the competence to act with the Member States. The existing coordination mechanism does not entail any procedure to facilitate the implementation of the Convention with regard to the areas of shared competences. This issue is also not addressed in the Report on the implementation of the UNCRPD by the European Union. Thus, simply changing the coordination mechanism will not have a facilitating effect with regard to the implementation of the Convention in those fields where the EU and the Member States both have the competence to act. Therefore, it is important for the effective implementation of the UNCRPD by the EU and the Member States that any amendments to the current EU mechanism take into account the challenges of the implementation of the Convention in those fields where the EU and the Member States share the competence to act. Lastly, it is important to note that the concerns of the CRPD Committee and disability organisations, particularly in relation to the independence of the EU framework for the implementation of the UNCRPD, are addressed, especially if the Commission is to be omitted from that framework.

party-fundamental-rights-citizens-rights-free-movement-persons/ (accessed 17 January 2018).

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Committee on the Rights of Persons with Disabilities, Concluding observations EU CRPD/C/EU/CO/1/2015, para. 14 and 76.

⁵⁰ Ibid., para. 15 and 77.

III. THE DISABILITY HIGH LEVEL GROUP

The establishment of the Disability High Level Group was proposed by the Commission in its Communication on equality of opportunity for people with disabilities⁵¹, and it was established by the Council Resolution on equality of opportunity for people with disabilities, back in 1996.⁵² It is, as I have mentioned above, a body that is responsible for monitoring the latest policies and priorities at the national level vis-à-vis people with disabilities.⁵³ It also focuses on promoting information and experience exchange between the Member States themselves and between the Member States and the Commission, and on advising the Commission on the methodology for reporting on actions taken within the EU in relation to disability.⁵⁴ The members of the Disability High Level Group are representatives from each EU Member State. Nevertheless, as I have mentioned above, national focal points, the Commission, Civil Society Organisations and Disabled People's Organisations can participate in the Group's discussions. In order to promote the exchange of information between the Commission and the Member States, the Commission and the Disability High Level Group have an annual meeting. EDF participates in this meeting as the representative of people with disabilities.⁵⁵

The Disability High Level Group, in particular, examines whether national policies 'empower people with disabilities for participation in society, including the severely disabled, while paying due attention to the needs and interests of their families and carers, mainstream the disability perspective into all relevant sectors of policy formulation and implementation, enable people with disabilities to participate fully in society by removing barriers and nurture public opinion to be receptive to the abilities of people with disabilities and towards strategies based on equal opportunities'.⁵⁶ It is also important to note in that regard that the Disability High Level Group, since the entry into force of the UNCRPD, has focused its energy on the progress that both the Member States and the EU have made in relation to the implementation of the Convention. This is evident from their annual reports.⁵⁷

⁵¹ Communication of the Commission on equality of opportunity for people with disabilities, A New European Community Strategy, COM(1996) 406 final.

⁵² Resolution of the Council and of the representatives of the governments of Member States meeting within the Council on equality of opportunity for people with disabilities, [1996] OJ C12/1.

⁵³ Communication of the Commission on equality of opportunity for people with disabilities, A New European Community Strategy, COM(1996) 406 final, p. 22.

⁵⁴ Ibid.

⁵⁵ Ibid., p. 10.

⁵⁶ Communication of the Commission on equality of opportunity for people with disabilities, A New European Community Strategy, COM(1996) 406 final, p. 21.

⁵⁷ 3rd Disability High Level Group Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities, March 2010; 4th Disability High Level Group Report on

In addition, the Disability High Level Group seeks to identify and to compare the various approaches to the practical implementation of equality of opportunity at the national level. It also studies statistics, national indicators, innovative policies and good practices with a view to encouraging discussion between the Member States and expanding their perspectives on how they can best achieve equality of opportunity for people with disabilities, and how they can also contribute towards the implementation of the UNCRPD.⁵⁸ It also aims to guarantee that the principle of equality of opportunity is upheld by EU legislation, programmes and initiatives by advising the Commission in that regard.⁵⁹

It is important, as well, to note that these actions are carried out in collaboration with non-governmental organisations and representative organisations of people with disabilities, as their participation is essential for the better understanding of their particular needs.⁶⁰

Lastly, the Disability High Level Group, together with the Commission, is required to submit periodic reports to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions, on the progress that the Member States have made with regard to ensuring equality of opportunity for people with disabilities.⁶¹ Yet, as I have mentioned above, these reports, since the entry into force of the UNCRPD, focus particularly on the progress the Member States have been making in relation to the implementation of the Convention.

This body has several elements that would make it the ideal mechanism for the coordination of the implementation of the Convention. It encourages the exchange of information between Member States, and between the Member States and the Commission on practices with regard to the implementation of the Convention. Thus, it encompasses a level of cooperation between Member States and the Commission. Nevertheless, this cooperation seems more focused on the learning process between the Member States and the Commission and less focused on developing coordinated actions. Furthermore, the role of the Commission seems to be limited and less decisive compared to what is required from a coordination mechanism for the implementation of the UNCRPD within the EU.

the Implementation of the UN Convention on the Rights of Persons with Disabilities, May 2011; 6th Disability High Level Group Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities, September 2013; 7th Disability High Level Group Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities, July 2015; 8th Disability High Level Group Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities, September 2016.

⁵⁸ Communication of the Commission on equality of opportunity for people with disabilities, A New European Community Strategy, COM(1996) 406 final, p. 22.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

Another interesting element of this body is its monitoring mandate. By developing indicators and measuring the progress of the Member States with regard to the implementation of the Resolution on equality of opportunity for people with disabilities⁶² and the Convention, the High Level Group seems to have the capacity to effectively study progress at the national level in this area and offer solutions to the problems that the Member States face. Moreover, there is the potential for naming and shaming or a peer review process that can put pressure on Member States to implement the Convention in the fields of shared competences. Nevertheless, this is currently not the case, as the Disability High Level Group does not use such processes to this effect.

Furthermore, the reporting capacity of this High Level Group could be used as a tool to provide clarity and guidance to the CRPD Committee when it studies the progress that has been made at the EU and the Member State level with regard to fields of shared competences and the agreements that have been made between the EU and the Member States in that regard.

In more general terms, the capacity that the High Level Group has with regard to disability issues is exceptional. The involvement of representative organisations of peoples with disabilities and the experiences of the group members on disability issues is an important factor that should not be underestimated.

Despite all these positive elements, the High Level Group lacks capacity in the field of policy making, in the sense that it is limited to an advisory role. Thus, it cannot take binding decisions with regard to the implementation of the Convention in the field of shared competences. It can only give advice on the matter and offer a forum for discussion.

IV. THE OPEN METHOD OF COORDINATION

As I have mentioned above, the OMC is a framework for coordination between the Member States, which aims to help the Member States reach common goals. Sometimes the OMC complements the EU's legislative actions, while other times it operates in areas where there is little scope for EU legislative solutions.⁶³ This means that the OMC can complement EU legislative action in areas where the EU has a legislative power, as well as in those areas where the EU has limited legislative competence. However, the OMC should never be considered as a

⁶² Resolution of the Council and of the representatives of the governments of Member States meeting within the Council on equality of opportunity for people with disabilities, [1996] OJ C12/1.

⁶³ Communication, European governance – A White Paper, COM(2001) 428 final, p. 1.

replacement for EU action.⁶⁴ Therefore, while the OMC is generally perceived as a framework for coordination in fields of EU complementary competence, I believe that it can also be used as a framework for coordination in the area of shared competence. Therefore, it is important to examine the OMC as a potential mechanism for the coordination of the implementation of the UNCRPD. In addition, it should be analysed in order to determine whether the EU or the Member States should take action to implement the UNCRPD in areas where they share competence.⁶⁵

To obtain a better understanding of OMC, it is important to clarify the most important characteristics thereof. According to *Sabel and Zeitlin*⁶⁶, the most essential elements of the OMC are: ‘The joint definition by the Member States of initial objectives, indicators, and in some cases guidelines, the national reports or action plans which assess performance in light of the objectives and metrics, and propose reforms accordingly, the peer review of these plans, including mutual criticism and exchange of good practices, backed up by recommendations in some case and the re-elaboration of the individual plans and, at less frequent intervals, of the broader objectives and metrics in light of the experience gained in their implementation’.⁶⁷

It is evident from the foregoing analysis of the OMC that the emphasis with regard to coordination is put on lesson learning and comparison, encouraging the Member States to achieve the goals in place, and benchmarking their progress so as to achieve those ends.⁶⁸ The OMC process is based on the voluntary political cooperation of the Member States.⁶⁹ The process of coordination is designed, and may possibly be amended, by the Member States

⁶⁴ Ibid.

⁶⁵ In my PhD research, I examined the mainstreaming of disability considerations in the OMC process. I focused on the OMC for social inclusion and social protection and on the OMC for growth and employment, because they address disability considerations in a more systematic manner than the education and training and culture OMCs. My analysis of the mainstreaming of disability considerations in the OMC process showed that the mainstreaming has been limited and ineffective in addressing the needs of people with disabilities. My analysis also showed that disability accessibility considerations were barely addressed in the OMC process. For these reasons, I decided to not include my analysis of the OMC as a policy tool to implement Article 9 UNCRPD in my thesis.

⁶⁶ C. Sabel and J. Zeitlin, ‘Active Welfare, Experimental Governance, and pragmatic Constitutionalism: The New Transformation of Europe’, unpublished paper prepared for the International Conference of the Hellenic Presidency of the European Union, *The Modernization of the European Social Model and EU Policies and Instruments*, Ioannina, Greece, May 21–22 2003, p. 24.

⁶⁷ Ibid., p. 24.; D.M. Trubek, P. Cottrell and M. Nance, ‘“Soft Law”, “Hard Law” and EU Integration’, in G. De Burca and J. Scott (eds.), *Law and new governance in the EU and the US* (Hart Publishing, 2006), p. 65. Ibid., p. 76.

⁶⁸ M. Priestley, ‘Disability Policies and the Open Method of Coordination’, in L. Waddington, G. Quinn and E. Flynn (eds.), *European Yearbook of Disability Law: Volume 3* (Intersentia, 2012), p. 9.

⁶⁹ Ibid.

involved.⁷⁰ Lastly, this framework of coordination might involve expectations of compliance with regard to shared objectives, terminology and reporting requirements, including a sanctions option when necessary. Nevertheless, the voluntary participation in this mechanism and the participation of the Member States in the establishment of this mechanism provide certain guarantees to the Member States that there is no supranational entity that could possibly sanction them without them creating such an option first within the confines of the OMC.⁷¹

The procedure that should be followed to design a new OMC is as follows: the representatives of Member States in the Council, in more general terms, decide on the topic that should be addressed through the adoption and the establishment of an OMC.⁷² The Commission usually develops guidelines for the incorporation of stakeholder views in order to initiate the process and increase participation in the OMC.⁷³

As the process begins, common guidelines including objectives, quantitative targets, benchmarks and indicators are defined and adopted by the Member States.⁷⁴ This is usually achieved through the adoption of a Commission Communication which clarifies the coordination actions and processes.⁷⁵ The process of benchmarking should be considered as one of the most fundamental aspects of the OMC process.⁷⁶ At this stage of the process, recommendations may be made as well.⁷⁷

In the next phase of the OMC process, the adopted guidelines are implemented at the national level in the form of national action plans.⁷⁸ This process includes the participation of supranational, national, local and regional actors.⁷⁹ It also involves the exchange of information between the Member States, as both the reports on the current situation and the national

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² H. Pulzl and M. Lazdinis, 'May the Open Method of Coordination be a new instrument for forest policy deliberations in the European Union', 13 *Forest Policy and Economics* (2011), p. 412.

⁷³ Ibid.; I. Homeyer, 'The role and performance of the OMC in EU environmental policy', *Bertelsmann Foundation* (2005), p. 15; M. Eckardt, 'The open method of coordination on pension reforms', 15 *Journal of European Social Policy* (2005), p. 252; S. Regent, 'The Open Method of Coordination: a supranational form of governance?', *International Institute for Labour studies, Decent Work Research Programme, Discussion Paper DP/137/2002* (2002), p. 16.

⁷⁴ H. Pulzl and M. Lazdinis, 13 *Forest Policy and Economics* (2011), p. 412.

⁷⁵ M. Priestley, in L. Waddington, G. Quinn and E. Flynn, (eds.), *European Yearbook of Disability Law: Volume 3*, p. 9.

⁷⁶ J. Arrowsmith, K. Sisson and P. Marginson, 'What can "benchmarking" offer open method of coordination', 11 *Journal of European Public Policy* (2004), p. 312.

⁷⁷ H. Pulzl and M. Lazdinis, 13 *Forest Policy and Economics* (2011), p. 412.

⁷⁸ Ibid.

⁷⁹ Ibid.

plans that are to be implemented are available to the Member States.⁸⁰ In implementing the national action plans, Member States can be assisted by the Commission through benchmarking, guidance notes, working papers, policy entrepreneurship, networks, research studies, advice and recommendations.⁸¹

The next step in the OMC process is the comparison and evaluation of the national action plans.⁸² This step includes the presentation of best practices and the preparation and production of a joint report by the Commission after discussions with the Member States, approval by the Council and consultation with the European Parliament.⁸³ The aim of this step is to reinforce the learning process through a naming and shaming procedure, which if used correctly can put pressure on the Member States to improve their performance.⁸⁴

The last step in the process of the OMC involves the implementation of the recommended measures at the national level.⁸⁵ The process begins, once again, with the establishment or amendment of guidelines, objectives and indicators.⁸⁶ The amendments are based on the results that the OMC process has produced.⁸⁷ The interactive nature of the OMC framework has led some scholars to suggest that this stage can be the key for the success of this coordination framework.⁸⁸

As I have explained above, the OMC is a framework that respects the principle of subsidiarity and promotes decentralised governance. This is essential for the allocation of shared competences between the Member States and the EU, because OMC frameworks are built on the premise of respecting the Member States' particularities. The OMC requires the exchange of experiences, good practices and, in more general terms, knowledge, and thus, it promotes reciprocal learning through the promulgation of guidelines, timetables and benchmarks for reaching generalised goals, which may ultimately take the form of specific national policies and actions.⁸⁹

Therefore, the OMC, similar to the Disability High Level Group, creates a forum for discussion and knowledge exchange that is essential for the delineation of shared competences between the Member States and the EU. It can also involve the participation of civil society⁹⁰, and in our case people with

⁸⁰ Ibid.; M. Eckardt, 15 *Journal of European Social Policy* (2005), p. 252; S. Regent, *Decent Work Research Programme, Discussion Paper DP/137/2002* (2002), p. 16; S. Borrás and R. Greve, 'Preface', 11 *Journal of European Public Policy* (2004), p. 181.

⁸¹ M. Priestley, in L. Waddington, G. Quinn and E. Flynn (eds.), *European Yearbook of Disability Law: Volume 3*, p. 9.

⁸² H. Pulzl and M. Lazdinis, 13 *Forest Policy and Economics* (2011), p. 412.

⁸³ M. Eckardt, 15 *Journal of European Social Policy* (2005), p. 252.

⁸⁴ H. Pulzl and M. Lazdinis, 13 *Forest Policy and Economics* (2011), p. 412.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid., p. 413; I. Homeyer, *Bertelsmann Foundation* (2005), p. 15.

⁸⁹ J.W. Reiss, 'Innovative Governance in a Federal Europe: Implementing the Convention on the Rights of Persons with Disabilities', 20 *European Law Journal* (2014), p. 121.

⁹⁰ Article 4 (3) UNCRPD.

disabilities and their representative organisations, which is essential for both the success of any policy that is adopted by the EU or the Member States and a requirement of the UNCRPD.⁹¹ Lastly, the OMC entails a periodic monitoring and reporting, evaluation and peer review process⁹², which is important for putting political pressure on the Member States to comply with the obligations they have accepted. Moreover, it contributes towards the improvement of national and EU policies through the creation of indicators.

Nevertheless, OMCs suffer from similar problems to that of the Disability High Level Group. The OMC process is based on the voluntary participation of Member States, which implies that the Member States are not required to participate in an OMC framework. This fact could cause several problems with regard to the implementation of the UNCRPD. This may also create a two-speed Europe in relation to the rights that are guaranteed by the Convention. It could also jeopardise the potential agreements between the Member States and the Commission on the allocation of shared competences. Moreover, the decisions taken within OMCs do not have a binding effect, which might be problematic, particularly in cases where an agreement cannot be reached between the Member States and the Commission on the implementation of the Convention. There are also concerns amongst scholars about the lack of transparency in this process, as well as the lack of accountability.⁹³ Lastly, as I have mentioned above, OMCs are often used in areas of supplementary competence, where the EU has no law-making powers, with a view to increasing the Commission's influence in such areas. They are also used in fields of shared competence as mechanisms to help determine the allocation of competences between the EU and the Member States.

Nevertheless, there is a danger that the creation of an OMC framework in a field of shared competence could further complicate the policy responsibility between the EU and the Member States, instead of clarifying it. As a result, and despite the fact that both the Member States and the EU can act in fields of shared competence, there is a danger that the actions that will be adopted through this process will not be decisive or valuable. Thus, it seems that the OMC might not be the most appropriate mechanism for determining whether the Member States or the EU should implement the UNCRPD in fields of shared competences and thereby coordinating the implementation of the Convention within the EU.

⁹¹ J. W. Reiss, 20 *European Law Journal* (2014), p. 121.

⁹² *Ibid.*

⁹³ See, C. de la Porte and P. Nanz, 'The OMC-A Deliberative-Democratic Mode of Governance? The cases of Employment and Pensions', 11 *Journal of European Public Policy* (2004), p. 276–277; P. Craig, *EU Administrative Law* (Oxford University Press, 2006), p. 218; see also, D. Hodson and I. Maher, 'The open Method as a New Mode of Governance: The Case of Soft Economic Policy Coordination', 39 *Journal of Common Market Studies* (2001); A. Beinz, 'Accountable multi-level governance by the open method of coordination?', 13 *European Law Journal* (2007); H. Pulzl and M. Lazdinis, 13 *Forest Policy and Economics* (2011); K.A. Armstrong, *Governing Social Inclusion, Europeanization through Policy* (Oxford University Press, 2010).

V. REGULATIONS ON BILATERAL AGREEMENTS

In this section of Chapter IV, I examine the Regulations on bilateral agreements. These regulations were adopted as a policy response to the challenges that the EU faced with the coordination and allocation of shared competences that followed after the adoption of bilateral agreements.⁹⁴ It is important to note, in that regard, that these agreements involve third countries. The creation of a coordination mechanism is essential for overcoming the challenges that cooperation with third countries engenders. One example of a bilateral agreement is the Regulation on the negotiation and implementation of air services agreements between Member States and Third Countries, which was adopted by the EU as a response to the CJEU's judgment in the *Open Skies* cases.^{95, 96} These cases examined the compatibility of several bilateral agreements that were concluded between Sweden, Finland, Belgium, Luxembourg, Austria, the Netherlands, Denmark and the United Kingdom and the United States with regard to the traffic rights of air carriers of those States. The CJEU declared those bilateral agreements to be incompatible with EU law. In order to prevent uncertainty in the area of air transport, the Commission adopted a Regulation on Bilateral Agreements so as to create a legal framework for all bilateral relations between the EU and third countries in that area.⁹⁷

The Regulations on bilateral agreements do not necessarily share a similar structure. In the case of the Regulation on the negotiation and implementation of air services agreements between Member States and Third Countries, it was the case that after the *Open Skies* cases the EU had to redraft the elements of existing bilateral agreements that were incompatible with EU law.⁹⁸ Nevertheless, due to the large number of bilateral agreements, this regulation allows the Member States to negotiate with third countries with a view to concluding a new agreement or for the purposes of modify an existing one. This is only permitted so long as the Member States include, in the negotiations with

⁹⁴ See, M. Cremona, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, p. 34.

⁹⁵ Case C-466/98 *Commission v. United Kingdom*, EU:C:2002:624; Case C-467/98 *Commission v. Denmark*, EU:C:2002:625; Case C-468/98 *Commission v. Sweden*, EU:C:2002:626; Case C-469/98 *Commission v. Finland*, EU:C:2002:627; Case C-471/98 *Commission v. Belgium*, EU:C:2002:679; Case C-472/98 *Commission v. Luxembourg*, EU:C:2002:670; Case C-475/98 *Commission v. Austria*, EU:C:2002:630; Case C-476/98 *Commission v. Germany*, EU:C:2002:631.

⁹⁶ Regulation No. 847/2004/EC of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries, [2004] OJ L195/3.

⁹⁷ Regulation No. 847/2004/EC of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries, [2004] OJ L195/3.

⁹⁸ See, for air service agreements between Member States and third countries, http://europa.eu/legislation_summaries/internal_market/single_market_services/124260_en.htm (accessed 17 January 2018).

the third countries, any relevant standard clauses that have been developed and jointly laid down by the Member States and the Commission, and where the notification procedure as set out in the regulation is adhered to.⁹⁹

The notification procedure begins when a Member State intends to enter into negotiations with a third country concerning a new air service agreement or the modification of an existing air service agreement. In that case, the regulation obliges the Member State to notify the Commission of their intentions.¹⁰⁰ The notification should include, amongst other things, a copy of the existing agreement and an indication of the provisions that will be addressed during the negotiations with the third country.¹⁰¹ The Commission should then make available to the Member States the notification and, upon request from the Member States, the substantive parts (notes) of the negotiations with other Member States and invite those Member States to comment on the current negotiations of the Member State in question. The Member State that is in negotiations with a third country is required to consider those notes to the fullest extent possible.¹⁰² The Commission should then inform the Member State in question, within 15 days of the receipt of the notification, whether the negotiations are likely to undermine the Union's objectives or that they are incompatible with EU law.¹⁰³ As *Reiss* has argued¹⁰⁴, this dialogue could give the Commission and the Member States the opportunity to limit those agreements which are inconsistent with the bilateral agreements signed by the EU at an earlier stage.¹⁰⁵

Another example of a bilateral agreement can be found in the field of civil justice. The Union, in response to Opinion 1/03¹⁰⁶ on the EU's competence of the EU to conclude the Lugarno Convention, adopted two regulations with regard to international agreements in the areas of the applicable law on

⁹⁹ Article 1 (1) of Regulation No. 847/2004/EC of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries, [2004] OJ L195/3; see, for air service agreements between Member States and third countries, http://europa.eu/legislation_summaries/internal_market/single_market_services/l24260_en.htm (accessed 17 January 2018).

¹⁰⁰ Article 1 of Regulation No. 847/2004/EC of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries, [2004] OJ L195/3.

¹⁰¹ Article 1 (2) of Article 1 (1) of Regulation No. 847/2004/EC of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries, [2004] OJ L195/3.

¹⁰² Article 1 (3) of Article 1 (1) of Regulation No. 847/2004/EC of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries, [2004] OJ L195/3.

¹⁰³ Article 1 (4) of Article 1 (1) of Regulation No. 847/2004/EC of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries, [2004] OJ L195/3.

¹⁰⁴ J.W. Reiss, 20 *European Law Journal* (2014).

¹⁰⁵ *Ibid.*, p. 116.

¹⁰⁶ Opinion 1/03 of the Court of 7 February 2006, EU:C:2006:81.

contractual and non-contractual obligations¹⁰⁷ and on jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, parental responsibility and maintenance obligations, and to issues related to maintenance obligations.^{108, 109} These regulations included a similar notification process¹¹⁰ that are found in the abovementioned regulation, but they also state that if a Member State's proposal to sign an agreement in the areas of these regulations meets the authorisation criteria of these regulations¹¹¹, the Commission is required to approve them.¹¹² Otherwise, the Commission will issue a negative opinion to the Member State in question and to the European Parliament and Council.¹¹³ That Member State is allowed to engage the Commission in intra-Union negotiations with a view to solving the problem.¹¹⁴ If no agreement is reached, the Commission will issue a decision on the Member State's proposal to sign the agreement, which is then sent to the Parliament, the Council and the Member State at hand, as well as the rest of the Member States.¹¹⁵

¹⁰⁷ Regulation No. 662/2009/EC of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations, [2009] OJ L200/25.

¹⁰⁸ Council Regulation No. 664/2009/EC of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations, [2009] OJ L200/46.

¹⁰⁹ J. W. Reiss, 20 *European Law Journal* (2014), p. 117.

¹¹⁰ Article 3 of Regulation No. 662/2009/EC of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations, [2009] OJ L200/35.

¹¹¹ Article 8 (2) of Article 3 of Regulation No. 662/2009/EC of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations, [2009] OJ L200/35; Article 8 (2) of Council Regulation No. 664/2009/EC of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations, [2009] OJ L200/46.

¹¹² *Ibid.*, Article 9 (2).

¹¹³ Article 3 of Regulation No. 662/2009/EC of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations, [2009] OJ L200/35.

¹¹⁴ Article 3 of Regulation No. 662/2009/EC of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations, [2009] OJ L200/35.

¹¹⁵ Articles 9 (3), 9 (5) and 11 of Article 3 of Regulation No. 662/2009/EC of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation

With regard to this regulation, it is important to note that because Opinion 1/03 recognised that the EU had exclusive competence to conclude the Lugarno Convention, the Commission was in a stronger position to force the Member States to comply with the Commission's demands. On the contrary, the EU does not have such power with regard to the implementation of the UNCRRPD, because most of the UNCRRPD's requirements are in policy areas where the EU shares the power to act with the Member States.

The fact that these regulations refer to the coordinated action of the EU and its Member States in their external relations does not mean that the adoption of a regulation on the implementation of the UNCRRPD, which relates to the coordination of actions within the EU, is not possible. However, it may explain why the Commission has not proposed such a regulation to date.

As I analysed in Chapter II of my thesis¹¹⁶, the EU and the Member States have a duty to closely cooperate with a view to implementing the UNCRRPD. This duty is derived from the principle of sincere cooperation that is found in Article 4 (3) TEU. This principle obliges the Member States to ensure the fulfilment of the obligations emanating from the Treaties or resulting from acts of the Union institutions.¹¹⁷ In that regard, the conclusion of the UNCRRPD by the EU is an act of the EU institutions. Thus, the Member States should take action to ensure the implementation of Convention in close cooperation with the EU and to refrain from any action that could endanger the fulfilment of these obligations. However, there is a difference between the cooperation between the Member States and the EU to implement the UNCRRPD, depending on whether it pertains to the EU's internal or external action. As far as the latter is concerned, the CJEU has imposed a duty on Member States to ensure the unity of the Union's international representation.¹¹⁸ Thus, the Member States cannot take action that might endanger the EU's international representation. On the contrary, the duty of close cooperation in the context of the EU's internal actions does not have the same effect as the duty to ensure the unity of the Union's international representation. As *Klamert* has argued¹¹⁹, the duty of close cooperation requires the parties involved to coordinate their actions and to take into consideration each other's interests.¹²⁰ Moreover, the need for cooperation increases proportionally with both the complexity of the mixed agreement and the division of competences.¹²¹

and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations, [2009] OJ L200/35.

¹¹⁶ See, Chapter II, The duty of close cooperation.

¹¹⁷ Article 4 (3) TEU.

¹¹⁸ See Case C-246/07 *Commission v. Sweden (PFOS)*, EU:C:2010:203, para. 73.

¹¹⁹ M. Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press, 2014).

¹²⁰ *Ibid.*, p. 206.

¹²¹ *Ibid.*

From the above analysis, it is evident that while the duty of close cooperation does not impose the same constraints on the Member States as the duty to ensure the unity of the Union's international representation, the former provides a legal argument that can incentivise the Member States and the EU to adopt a regulation to coordinate the implementation of the UNCRPD. Furthermore, the implementation of the UNCRPD is relevant to many areas of EU law, including the internal market, non-discrimination, consumer protection, services of general interest, taxation, the EU customs union, which respectively relate to different types of EU competences. This fact increases the complexity of the implementation of the UNCRPD by the EU and the Member States. Thus, if we consider that the need for cooperation increases with the complexity of the division of competences, the legal incentive for the adoption of a regulation to coordinate the implementation of the UNCRPD becomes stronger. Therefore, it is my view that the duty of close cooperation can provide the legal incentive to motivate the Member States and the EU to adopt such a regulation.

The analysis of my proposal for a regulation with regard to the implementation of the UNCRPD by the EU and the Member States can be found in the next section of this chapter. Nevertheless, it is important to note that there is no sign, from the Commission's side at least, that this type of regulation will be adopted.

VI. A MECHANISM FOR THE COORDINATION OF THE IMPLEMENTATION OF THE UNCRPD WITHIN THE EU

In this part of the chapter, I explain why the Regulations on Bilateral Agreements could be the most appropriate mechanism for determining whether the EU or the Member States should take steps to implement the UNCRPD in the areas where they share the competence to act. I also discuss the coordination of the implementation of the UNCRPD within the EU, and I make a proposal on how this mechanism could be structured.

I have chosen the Regulations on Bilateral Agreements as the most appropriate mechanism to coordinate the implementation of the UNCRPD between the EU and the Member States, because these regulations can be designed to address the particularities of each policy area (in our case disability). They can also be inspired by the existing mechanisms at the EU level and incorporate the positive elements thereof. Furthermore, this type of regulation can facilitate the decision of whether the EU or the Member States should take action to implement the UNCRPD in a field of shared competence, because it can be designed to address this issue, while the other mechanisms I analysed cannot perform such a task. In conclusion, it might be more appropriate to

build a new mechanism that can determine the party that should implement the Convention in the field where the EU shares the competence to act with the Member States, and that can coordinate the implementation of the UNCRPD, instead of using the already formulated mechanisms which fall short of being capable to accomplish those tasks.

If the EU opts for such a regulation, it is arguable that it can be based on one or both, if possible, articles that the conclusion of the Convention was based on. These are Article 114 TFEU on the internal market and Article 19 TFEU on the principle of non-discrimination.¹²² Moreover, it is important to note that, contrary to other bilateral agreements where the EU had the exclusive competence to conclude, the EU does not have such competence in relation to the implementation of the UNCRPD. As I have mentioned above¹²³, most of the fields addressed in the UNCRPD are in policy areas where the EU and the Member States share the competence to take legislative action. This will be reflected in the procedures of the coordinating mechanism.

The primary aim of the proposed regulation should be to create a forum for discussion for the Member States and the Commission that will allow for the exchange of information, experiences, knowledge, good practices, indicators and innovative practices on standardisation, amongst others. The Commission should coordinate the discussions, but it will also participate as an equal member of the group. In this forum, the Member States and the EU should present their existing strategies and clarify the actions that they plan, have adopted, or have implemented. As a result, the EU and the Member States will have a clear picture of what is being done at both levels. The Member States and the EU could also provide relevant advice on each other's actions, especially when they have knowledge in that particular area.

In addition, this regulation should guarantee that the representatives of the Member States and the Commission will be fully trained on disability issues and have experience in dealing with disability issues. Moreover, this mechanism should guarantee transparency by making available the transcripts of the forum discussions and any other information that is related to the process. Further to this, it should also reduce the fragmentation of responsibility between the different levels of governance. The EU and the Member States should raise the public awareness of this mechanism, for example, by making the discussions open to the public via a website. The European Parliament and the national parliaments should be consulted with regard to the discussions therein, and be informed about the progress that is made in relation to the implementation of the UNCRPD.

In addition, this mechanism should also involve a monitoring procedure that will allow for evaluation of Member State and EU actions on the implementation

¹²² Council Decision 2010/48/EC concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L23/35.

¹²³ See, Chapter IV, Regulations on bilateral agreements.

of the Convention. It should also involve a peer-review and a naming and shaming mechanism where political pressure will be put on Member States or the Commission to justify their inactions or their failure to follow the advice of the other Member States or the Commission. It should also use national and EU indicators, and new indicators should be designed to measure the implementation of the actions that the EU and the Member States have taken.

Lastly, periodic reporting on the progress with regard to the implementation of the Convention in the areas where both the Member States and the EU have the power to take action is very important for both the EU and its Member States, but also for the CRPD Committee. At the EU level, these reports could be used as guidelines as to whether the EU or the Member States is going to take action in a field of shared competence. At the international level, the CRPD Committee will be able to use these reports to attribute responsibility for any inaction or action that is incompatible with the Convention to the appropriate State Party. This is because these reports will shed some light with regard to the allocation of shared competences between the EU and the Member States.

I have considered several elements of the OMC and the Disability High Level Group procedures for the design of the coordinating mechanism that should be established through the adoption of this regulation. After the adoption of this regulation, the EU and the Member States should have an initial meeting whereby they present their disability strategies and plans. This meeting should be held within FREMP and include the participation of the Commission. The Commission should also be the body that coordinates this meeting.

The goal of this meeting should be to identify the areas of potential overlap between the strategies of the Member States and the EU, and to coordinate their actions towards the implementation of the Convention. In this process, all the strategies should be evaluated on the ground of the strategies' compatibility with the Convention, the scope of the actions entailed in these strategies, the establishment of appropriate monitoring mechanisms and the most appropriate party to adopt the measures included in these strategies. The inclusion of a discussion and decision on the most appropriate party to adopt the measures identified in the EU's and Member States' disability strategies in this process, in turn opens up the possibility that aspects of Member States' strategies will have to be amended, where the Commission and the Member States decide that EU action is a more suitable legislative or policy option in a particular area.

The same should apply in instances whereby it is agreed that a measure in the EU strategy should be taken at the Member State level. The Commission, along with the Member States, will also adopt common objectives, quantitative targets, indicators and benchmarks to measure their performance with regard to the implementation of these strategies. The decisions that will be made during the strategies' coordination process should be unanimous. In the instance that unanimity is not reached, decisions should be made based on the voting rules that are laid down in the relevant EU Treaties with regard to the subject under

consideration. The participation of a representative of people with disabilities in an advisory role will be of great importance, as he/she will be able to provide insights as to whether, and to what extent, these strategies address the particular needs of people with disabilities. In addition, this meeting should promote the exchange of good practices and knowledge. For reasons of transparency, the transcripts of the meeting should be made available to the public. Lastly, it is important to note that the European Parliament as well as the Committee of the Regions and the European Economic and Social Committee should have an advisory role with regard to the formulation of the Commission's opinions.

The next phase of this process relates to the implementation of the disability plans and strategies and the general implementation of the Convention by the Member States and the EU. The Commission, as the coordinator of the procedures established by this regulation, should provide support and guidance to the Member States, if requested. And it should do this through the issuance of guidance notes, working papers, policy entrepreneurship, research studies, advice and recommendations. The participation of regional and local governments and of representatives of people with disabilities in this process is of crucial importance. The former can advise the central governments of the Member States on the most suitable way to implement the UNCRPD in their region or area, while the latter can provide important guidance on how to make the implementation of the UNCRPD more effective in order to address the particular needs of people with disabilities.

The last step of this procedure is the evaluation meetings. These meetings will be held annually within the context of FREMP and they should be coordinated by the Commission. The aim of these meetings should be to evaluate the progress that the EU and the Member States have made with regard to the implementation of their disability strategies and the UNCRPD in general. For that reason, the Member States and the Commission should publish reports on the implementation of the Convention. The actions of the Member States and the Commission should be evaluated on the basis of common objectives, quantitative targets, indicators and benchmarks that have been agreed in the previous meetings. The evaluation should also consider the extent of the participation of people with disabilities and regional and local governments in the implementation of the Convention. The evaluation should be followed by a peer-review process. Each Member State should be evaluated by the Commission and the other Member States, while the representative of people with disabilities should play an advisory role in this regard. When the performance of the Commission is evaluated, the Member States should perform that evaluation.

After the evaluation process is finished, the Member States and the Commission should provide advice on the evaluated Member States on how the implementation of its disability policy can be improved. At the end of the evaluation of the Commission's performance, the Member States should then provide their advice to the Commission. If a Member State's or the Commission's

performance fails significantly in reaching the common objectives, a naming and shaming process should aim to put political pressure on them to guarantee that the performance will improve in the future. The decisions that are made during the evaluation process should be unanimous. In the case that unanimity is not reached, decisions should be made based on the voting rules that are laid down in the relevant EU Treaties with regard to the subject under discussion. During every reporting cycle to the CRPD Committee, the Commission should send a report to the CRPD Committee on both the implementation of the UNCRPD and the coordination process of the implementation of the Convention within the EU.

Apart from the annual evaluation meetings on the progress of the implementation of the UNCRPD, this mechanism should ensure provision for a meeting every six months on specific policy areas of the Convention that are to be coordinated by the Commission within the competent Council Working groups. These meetings will follow the same process as the evaluation meetings, but they will focus on specific policy areas instead.

In addition, the fact that the decision as to the most appropriate party to implement the UNCRPD will be decided on during the initial coordination of the EU and the Member States' strategies, this does not exclude the possibility that the EU or the Member States will be able to express the intention to adopt different measures than the ones that are included in their strategies. At both the annual and biannual meetings, the EU and the Member States should have the option to present intended actions with regard to the implementation of the UNCRPD that were not included in their original strategies. The evaluation of the intended actions should be based on the scope of application of the measure at hand, whether there is an overlap between EU and national law, the compatibility of the measure with the Convention and whether the implementation of this measure will be appropriately monitored. In the very likely instance that the intended actions of the EU or the Member States fall within an area of shared competence, the State representatives should decide whether these actions should be carried out by the EU or the Member States. The Commission will not have the right to vote when that instance occurs. The voting will be based on the voting rules of the Council with regard to the specific area of EU law that the intended actions relates to. The representatives of people with disabilities should also be able to participate in this discussion.

Finally, in cases where both the EU and the Member States do not show any intention to take action to implement the Convention in a particular field, the CRPD Committee should be able to put pressure on the EU or the Member States to initiate policies in areas where they have indicated no intention to take action. Furthermore, EU citizens should have the right to challenge the inaction of the EU or the Member States at the EU level and through recourse to the national courts. In the Member States that have ratified the optional protocol

of the UNCRPD¹²⁴, citizens can bring a complaint against their State to the CRPD Committee as well. The EU has not, at the time of writing, concluded the optional protocol of the Convention.¹²⁵

VII. CONCLUSION

This chapter's aim was to discuss whether the Disability High Level Group, the OMC, or the Regulations on Bilateral Agreements could be used to coordinate the implementation of the UNCRPD within the EU and help determine which of the two, the EU or the Member States, should implement the Convention in the fields where they share the competence to act.

Before the analysis of the three potential mechanisms that could be used to coordinate the implementation of the UNCRPD between the EU and the Member States, I examined the existing EU coordinating mechanisms with regard to the implementation of the Convention. In that regard, I determined that, while the mechanism involves many of the EU institutions, it is very fragmented and it does not address the challenges that the implementation of the Convention in the fields where the EU and the Member States share the competence to act poses. I also pointed out that COHOM might not be an appropriate mechanism to coordinate the implementation of the UNCRPD between the EU and the Member States, as its work is limited to the examination of human rights issues with regard to the EU's external actions.

To begin with the Disability High Level Group, despite its insight with regard to disability issues, this body does not have a policy-making capacity and its powers are limited to an advisory role only. Therefore, it cannot take on the role of a coordinating mechanism for the implementation of the UNCRPD within the EU.

As far as the OMC is concerned, I presented and described the OMC as a soft-law mechanism that is favoured by national governments because it shows respect for their national autonomy. I analysed both the positive and the negative sides of the OMC process. On the one hand, I noted that the OMC frameworks allow for flexible policies which respect the principle of subsidiarity, reciprocal learning among the Member States and the participation of civil society. They also include a periodic monitoring and reporting, evaluation and peer review process, which are essential for the implementation of the UNCRPD. On the other hand, I showed that the OMC frameworks have attracted criticisms. I pointed out that the participation of the Member States in these frameworks is voluntary, their decisions are not binding on the Member States and they lack

¹²⁴ For more information on the ratifications of the UNCRPD, www.un.org/disabilities/countries.asp?navid=12&pid=166 (accessed 17 January 2018).

¹²⁵ Ibid.

accountability and transparency. In conclusion, and considering all the above-mentioned disadvantages of the OMC process, I determined that the OMC is not the most appropriate mechanism to coordinate the implementation of the UNCRPD within the EU.

Lastly, after examining the Regulations on Bilateral Agreements, I concluded that a similar regulation on the coordination of the implementation of the UNCRPD might be the most appropriate mechanism to address this issue. This is because it would allow the Member States and the EU to build a disability-specific mechanism that could address all of the subject's particularities. In that regard, I identified the essential elements that such a mechanism should include and an example of how this mechanism could work in practice. In so doing, my analysis took into account several of the positive elements of the OMC and the Disability High Level Group procedures.

PART III

WHAT HAS THE EU DONE SO FAR TO MEET THE ACCESSIBILITY REQUIREMENTS OF THE UNCRPD?

CHAPTER V

THE IMPLEMENTATION BY THE EU OF ARTICLE 9 UNCRPD RELATING TO ACCESSIBILITY OF GOODS AND SERVICES

I. INTRODUCTION

In the previous chapters of my thesis, I provided an analysis of the obligations that the UNCRPD has set out with regard to accessibility. I explained the consequences of the fact that the UNCRPD is a EU mixed agreement. I analysed the challenges that the implementation of Article 9 UNCRPD poses in the policy fields where the EU shares the competence to take legislative action with the Member States. I identified several factors that should be taken into account in deciding whether the EU or the Member States should take action to implement Article 9 UNCRPD in a field where they share the competence to act. I also examined the existing mechanism that the EU has established for coordinating, monitoring, promoting and protecting the implementation of the Convention, as well as other EU mechanisms that the EU could use to regulate the implementation of the UNCRPD in the field of shared competences.

In this chapter, I examine the existing EU legislative and non-legislative actions that are related to the accessibility of goods and services for persons with disabilities. In that regard, I determine whether the EU's existing actions meet the requirements of Article 9 UNCRPD and whether the EU or the Member States should take further action to implement Article 9 UNCRPD. The EU has taken measures to address accessibility in the field of goods and services. Examples of such measures can be found in the following fields: customs union¹, taxation², services³ and the internal market.⁴

¹ Council Regulation No. 1186/2009/EC of 16 November 2009 setting up a Community system of reliefs from customs duty, [2009] OJ L324/23.

² Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2006] OJ L347/1.

³ Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), [2010] OJ L95/1.

⁴ Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use as amended by Directive 2002/98/EC of 27 January 2003, [2001] OJ L311/67.

In particular, the purpose of this chapter is to identify the areas where the EU is competent to take measures to implement Article 9 UNCRPD in the field of goods and services and to ask whether it should take such measures. In particular, this chapter reviews the initiatives, both legislative and non-legislative, that the EU has taken in relation to accessibility in the fields of goods and services. It examines the connection between those initiatives and the obligations contained in Article 9 UNCRPD, especially in the field of the accessibility of goods and services, and it specifically examines whether these legal instruments meet the obligations stipulated in Article 9 UNCRPD. Lastly, this chapter examine the proposal for a European Accessibility Act (henceforth EAA) and it provides suggestions for the improvement of this proposal with a view to ensuring the implementation of Article 9 UNCRPD.

Chapter V is divided into three parts. The first part includes an analysis of the EU policies in the field of goods and services from the perspective of disability accessibility [Section II]. The second part examines whether the existing and proposed EU legislative and non-legislative instruments in the field of accessibility of goods and services meet the obligations of Article 9 UNCRPD with regard to the accessibility of goods and services. In particular, it focuses on the obligation to ensure affordability [Section III A], the obligation to ensure information accessibility [Section III B], the obligation to ensure communication accessibility [Section III c], the obligation to ensure physical accessibility [Section III D], the obligation to ensure social accessibility [Section III E] and the obligation to develop minimum standards on accessibility [Section III F]. The third part provides an examination of the proposal for an EAA in the context of the implementation of Article 9 UNCRPD [Section IV].

II. EU POLICIES RELEVANT TO THE ACCESSIBILITY OF GOODS AND SERVICES

In this part of Chapter V, I analyse EU policies in the following fields: the customs union, services of general interest, the internal market, consumer protection and standardisation, which are each relevant to the accessibility of goods and services. By so doing, this analysis provides a better understanding of the context in which the disability accessibility legislation has developed. I also provide a summary of the most recent European strategies on disability. In the next section of Chapter V [Section III], I provide an analysis of the existing EU legal instruments with regard to the accessibility of goods and services. Furthermore, I also determine whether they meet the obligations contained in Article 9 UNCRPD.

i. Disability plans and strategies

As I mentioned in Chapter III in the context of mainstreaming⁵, and Chapter IV in the context of the Disability High Level Group⁶, the EU adopted a disability strategy entitled ‘New European Community Disability Strategy’ in 1996.⁷ This strategy introduced the concept of mainstreaming and heralded it as a means to achieve equal opportunities for people with disabilities.⁸ It also proposed the establishment of the Disability High Level Group.⁹ Lastly, this strategy highlighted the barriers which people with disabilities face in the fields of education, employment, mobility and access.¹⁰

After this strategy came to an end, the EU adopted two further major strategies: the Disability Action Plan¹¹ and the European Disability Strategy 2010–2020.¹² The Disability Action Plan covered the period between 2004 and 2010.¹³ The purpose of this plan was to mainstream disability considerations, such as accessibility, into relevant EU actions and design measures and actions to improve the quality of the life of persons with disabilities.¹⁴ The Action Plan was developed in three biannual phases. The first phase focused on policies regarding the accessibility of employment.¹⁵ The second phase emphasised

⁵ See, Chapter III, Alternative ways the EU can address disability issues.

⁶ See, Chapter IV, Disability High Level Group.

⁷ Communication of the Commission on equality of opportunity for people with disabilities, A New European Community Strategy, COM(1996) 406 final.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A European Action Plan 2004–2006, COM(2003) 650 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A European Action Plan 2006–2007, COM(2005) 604 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A European Action Plan 2008–2009, COM(2007) 738 final.

¹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe, COM(2010) 636 final.

¹³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A European Action Plan 2004–2006, COM(2003) 650 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A European Action Plan 2006–2007, COM(2005) 604 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A European Action Plan 2008–2009, COM(2007) 738 final.

¹⁴ ANED, ‘Annotated review of European Union law and policy with reference to disability’, ANED (2009), <https://www.disability-europe.net/theme/eu-law-and-policy>, p. 8.

¹⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions Equal opportunities for people with disabilities: A European Action Plan, COM(2003) 650 final.

the accessibility of services, transport and ICT, including access to the new generation of assistive technologies.¹⁶ The last phase concentrated on increasing the accessibility of goods, services and facilities through the implementation of legislative frameworks on accessibility in the fields of transport and ICT, and the design of standards for public procurement.¹⁷

The subsequent European Disability Strategy 2010–2020 was adopted on the 15th of November 2010. It aims to empower people with disabilities to enjoy their rights to the fullest extent possible and to benefit from participation in society and the economy through the Single Market.¹⁸ The Strategy proposed the use of legislative and other instruments to eliminate the barriers to accessibility in the following fields: the built environment, transport and ICTs. Examples of such legislative instruments are the Public Procurement Directives¹⁹ and the EAA.²⁰ The Strategy also emphasised stimulating the EU internal market with regard to assistive technologies through EU actions to support and supplement the national actions on accessibility.²¹ Finally, the Strategy focused on raising the awareness of all dimensions of accessibility and the inclusion of the Universal Design principle in educational curricula and in the training of relevant professionals.²²

ii. EU customs union

People with disabilities face challenges in terms of finding and affording disability accessible goods, as was explained above.²³ In that regard, it is my view that the EU policy in the customs union field could both facilitate the

¹⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Situation of disabled people in the enlarged European Union: the European Action Plan 2006–2007, COM(2005) 604 final, p. 5.

¹⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Situation of disabled people in the enlarged European Union: the European Action Plan 2008–2009, COM(2007) 738 final, p.3.

¹⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe, COM(2010) 636 final, p. 4.

¹⁹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, [2014] OJ L94/243, p. 243.

²⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe, COM(2010) 636 final, p. 5.

²¹ Ibid.

²² Ibid.

²³ See, Chapter I, Dimensions of Accessibility.

availability of accessible goods and, at the same time, decrease the cost of such goods for people with disabilities. Thus, it is important to provide a brief analysis of this EU policy field policy.

The free movement of goods has both an internal and an external dimension within the EU: the goods that circulate in the EU and originate from a Member State, enjoy free movement between the Member States.²⁴ By way of contrast, goods originating from a non-Member State are not allowed to freely circulate in the EU, unless a customs duty²⁵ is paid and only in instances where this is required.²⁶ A customs duty is a charge, determined based on a tariff, which specifies the rate of duty to be paid by the importer to the host state.²⁷ The EU has the exclusive competence to regulate the EU customs union.²⁸ This means that the EU is solely responsible for implementing the requirements of the UNCRRP in this policy area.

These customs duties fall within the so-called Common Customs Tariff (CCT). The CCT applies uniform customs duties on goods that originate outside of the EU. These duties are charged on products when they are imported into the EU, regardless of the State of import.²⁹ The importance of the CCT was reiterated by the Court of Justice of the EU (henceforth CJEU) in the *Aprile*³⁰ judgment, whereby the Court stated that the absence of uniformity in tariffs can lead to a distortion of the conditions of competition within the EU.³¹

As I have described above, CCT duties are applicable to all goods that are imported into the European Union. However, in certain well-defined circumstances, by virtue of the special conditions under which goods are imported, the usual need to protect the economy from imported goods is absent.³² In such circumstances, taxation is not justified and it is desirable to allow certain goods to enjoy relief from the application of customs duties.³³ The relief from the application of customs duties might be applicable in the case of goods that are specifically designed for people with disabilities.

²⁴ Case 7/68 *Commission v. Italy*, EU:C:1968:51.

²⁵ A customs duty is an indirect tax imposed by the government of a nation (in the case of EU customs union, the EU) on goods imported or exported during international trade. A tariff is a comprehensive list of goods along with their prices which need to be paid for each good imported or exported, according to the regulations and rules of the government of a nation (in the case of EU customs union, the EU).

²⁶ C. Barnard, *The substantive law of the EU: The four freedoms* (Oxford University Press, 2007), p. 27; Article 29 TFEU.

²⁷ C. Barnard, *The substantive law of the EU: The four freedoms*, p. 36.

²⁸ Article 3 TFEU.

²⁹ C. Barnard, *The substantive law of the EU: The four freedoms*, p. 221.

³⁰ Case C-125/94 *Aprile Srl v. Amministrazione dello Stato*, EU:C:1995:309.

³¹ *Ibid.*, para. 32.

³² Recital 3 of the Preamble to Council Regulation No. 1186/2009/EC of 16 November 2009 setting up a Community system of reliefs from customs duty, [2009] OJ L324/23.

³³ Recital 4 of the Preamble to Council Regulation No. 1186/2009/EC of 16 November 2009 setting up a Community system of reliefs from customs duty, [2009] OJ L324/23.

iii. *Internal market*

The internal market is regulated by several Treaty articles. Article 26 TFEU states that the Union should adopt measures with the view to establishing or ensuring the functioning of the internal market.³⁴ Thus, the EU is competent to adopt measures to ensure the smooth functioning of the internal market. The internal market should be considered as an area ‘without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties’.³⁵

To secure the functioning of the internal market and the free movements of goods, persons, services and capital, the EU is permitted to take measures based on Article 114 TFEU. Article 114(1) empowers the EU to approximate laws, regulations and administrative measures with the view to establishing and improving the functioning of the internal market.³⁶

The functioning of the internal market should not be seen in purely economic terms. The EU is capable of including non-market considerations within internal market legislation.³⁷ According to *de Witte*, an internal market measure may have a double objective: to contribute to the smooth functioning of the internal market and to contribute to the attainment of some non-market objective, and the latter may even be the predominant objective as the Court held, for instance, in the *Swedish Match*³⁸ case.³⁹ The EU has adopted legislation pursuing non-market objectives based on Article 100 EEC (later Article 94 EC, now Article 115 TFEU) and on Article 235 EEC (later Article 308 EC, now Article 352 TFEU).⁴⁰ Directive 73/404 on the biodegradability standards for detergents⁴¹, Directive 85/210 on the lead content of petrol⁴², and the Council Directive 77/187 on the safeguarding of employees’ rights in the event of transfers of undertakings⁴³,

³⁴ Article 26 TFEU.

³⁵ Article 26 TFEU.

³⁶ Article 114 (1) TFEU.

³⁷ B. De Witte, *Non-Market values in the internal market legislation*, in N.N. Shuibne (ed.), *Regulating the Internal Market* (Edward Elgar, 2006); B. De Witte, ‘A competence to protect: The pursuit of non-market aims through internal market legislation’, in P. Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press, 2012).

³⁸ Case C-210/03 *R (on the application of Swedish Match AB and Swedish Match UK Ltd) v Secretary of State for Health (Swedish Match)*, EU:C:2004:802.

³⁹ B. De Witte, in P. Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market*, p. 26. For example, accessibility of goods and services is an objective that will be to a certain extent beneficial for the internal market, but it is not driven by market concerns. Its aim is to provide accessible products to persons with disabilities.

⁴⁰ *Ibid.*, p. 31.

⁴¹ Council Directive 73/404/EEC of 22 November 1973 on the approximation of the laws of the Member States relating to detergents, [1973] OJ L347/51.

⁴² Council Directive 85/210/EEC of 20 March 1985 on the approximation of the laws of the Member States concerning the lead content of petrol, [1985] OJ L96/25.

⁴³ Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of businesses, [2001] OJ L82/16.

are some examples of EU internal market instruments which address non-market values.⁴⁴ This pattern continues today⁴⁵ and it is reaffirmed after the Lisbon Treaty in the TEU. According to Article 3 (3) TEU, among the goals of the internal market are: the elimination of social exclusion and discrimination and the promotion of social justice and protection, equality between women and men, solidarity between generations and the protection of the rights of the child.⁴⁶

Thus, amongst the secondary goals of the internal market are: combatting social exclusion and discrimination and promoting social justice. The inclusion of non-market considerations in internal market legislation is also addressed in paragraph three of Article 114 TFEU. This states that the Commission, when proposing legislation based of Article 114 (1) TFEU, must take into account non-market values such as health and safety, environmental protection and consumer protection.⁴⁷

This provision shows that ensuring the free movement of goods, services and capital from the one Member State to the other is not the only interest that the EU has with respect to the internal market. The EU can also account for and regulate environmental and consumer protection and health and safety while simultaneously aiming to secure the functioning of the internal market. Nevertheless, these non-market aims are not free standing. The EU, when legislating based on the internal market legal basis, should always pursue the establishment and the functioning of the internal market. In that respect, and as *Waddington* has already indicated, there is a clear potential to consider disability accessibility requirements in the light of internal market harmonising measures.⁴⁸ In an attempt to clarify and establish this potential, Declaration 22 was attached to the Amsterdam Treaty.⁴⁹ It states that that when designing measures under Article 100a⁵⁰ (now Article 95)⁵¹ of the Treaty establishing the European Community (now TFEU), the institutions of the Community (now Union) should take into account the needs of persons with disabilities.⁵² Therefore, the inclusion of disability accessibility considerations in legislation based on Article 114 TFEU is possible.

⁴⁴ B. De Witte, in P. Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market*, p. 31.

⁴⁵ See for example, Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), [2010] OJ L95/1; Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, [2001] OJ L272/32.

⁴⁶ Article 3 (3) TEU.

⁴⁷ Article 114 (3) TFEU.

⁴⁸ L. Waddington, 'A Disabled Market: Free Movement of Goods and Services in the EU and Disability Accessibility', 15 *European Law Journal* (2009), p. 584.

⁴⁹ *Ibid.*

⁵⁰ Previous version of Article 114 TFEU (internal market).

⁵¹ *Ibid.*

⁵² Declaration No. 22 regarding persons with a disability, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related Acts, 10 November 1997.

As mentioned above, measures based on the internal market legal basis should aim to establish or ensure the functioning of the internal market. The scope of these requirements, however, is rather nebulous. The first landmark case that defined the EU's competence when harmonising national laws through the internal market legal basis was the *First Tobacco Advertising*⁵³ case. The contested directive in this case barred all forms of advertising of tobacco products and sponsorship of activities promoting those products.⁵⁴ The applicants argued that Article 100a EEC (now Article 114 TFEU) 'was not necessarily concerned with the liberalization of trade but rather with market regulation'.⁵⁵ Many other judgments on the validity of the internal market, as a legal basis for EU measures, have since followed.⁵⁶ In all these cases, the Court repeated the requirements that were introduced in the *First Tobacco Advertising* judgment. The Court held in that judgment that 'Article 95(1) EC (now Article 114 TFEU) establishes that the Council is to adopt measures for the approximation of provisions laid down by law, regulation or administrative action in the Member States which have as their object the establishment and functioning of the internal market'.⁵⁷

However, the Court explained that the competence to adopt these measures does not vest, in the Union's legislature, 'a general power to regulate the internal market'.⁵⁸ The Union's competence to use Article 114 TFEU is subject to certain legal requirements. Firstly, 'while a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 95 EC, it is otherwise where there are differences between the laws, regulations or administrative provisions of the Member States, which are such as to obstruct the fundamental freedoms, and thus, have a direct effect on the functioning of the internal market'.⁵⁹

In particular, the adoption of measures based on Article 114 TFEU are not justified if those measures do not actually contribute to the elimination

⁵³ Case C-376/98 *Germany v. Parliament and Council*, EU:C:2000:544.

⁵⁴ K. Bradley, 'Powers and procedures in the EU constitution: legal bases and the court', in P. Craig and G. De Burca (eds.), *The evolution of EU law*, p. 98–99.

⁵⁵ Case C-376/98 *Germany v. Parliament and Council*, para. 45.

⁵⁶ Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, EU:C:2002:741; Case C-210/03 *Swedish Match AB and Swedish Match UK Ltd v. Secretary of State for Health*; Case C-380/03 *Germany v. Parliament and Council*, EU:C:2006:772; Case C-58/08 *Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform*, EU:C:2010:321.

⁵⁷ Case C-380/03 *Germany v. Parliament and Council*, para 36.

⁵⁸ Case C-376/98 *Germany v. Parliament and Council*, para. 83.

⁵⁹ Case C-491/01 *The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, para. 60; Case C-434/02 *Arnold André GmbH & Co. KG v Landrat des Kreises Herford*, EU:C:2004:800, para. 30; Case C-210/03 *Swedish Match AB and Swedish Match UK Ltd v. Secretary of State for Health*, para. 29 and Joined Cases C-154/04 and C-155/04 *The Queen, on the application of Alliance for Natural Health and Others v. Secretary of State for Health and National Assembly for Wales*, EU:C:2005:449, para. 28.

of obstacles to free movement of goods and services, and to the removal of significant distortions to competition.⁶⁰ Furthermore, it is settled case law that, 'although recourse to Article 95 EC as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them'.⁶¹

Thus, for any good or service to be regulated as per Article 114 TFEU, there must already be national laws that regulate the particular aspect of the good or service under consideration. These national laws must cause barriers to the free movement of goods and services in the internal market or significant distortions of competition. If both these requirements are met, the good or service under examination can be competently regulated through Article 114 TFEU.

Nevertheless, EU actions in the internal market are also justifiable if they possess a preventative effect. In that respect, if it is likely that barriers to the free movement of a particular good or service will emerge due to the development of diverse national legislation, and the EU measure is designed to prevent such barriers, then the measure can be adopted on the basis of Article 114 TFEU.

iv. Services of General Interest

Article 9(1) UNCRPD requires that the States Parties to the Convention take appropriate measures to ensure that services which are open to or provided to the public are accessible to people with disabilities. The EU, as a State Party to the Convention, should therefore take action to fulfil this obligation. In the previous section of this chapter, I argued that disability accessibility considerations could be aligned to the EU's internal market, which includes the free movement of services. Outside of the internal market policy, the EU has developed a regulatory policy that addresses the free movement of particular categories of goods, which are known as Services of General Interest' (henceforth SGIs).

The Commission defines SGIs as services that the public authorities of the Member States classify as being of general interest and, therefore, subject to specific public service obligations. A public service obligation is an obligation imposed on an organisation by legislation or contract to provide a SGI within the EU.⁶² Certain aspects of how SGIs are organised may be subject to other general Treaty rules, such as the principle of non-discrimination.⁶³ SGIs cover a broad range of activities, from the large network industries such as energy,

⁶⁰ Case C-376/98 *Germany v. Parliament and Council*, para. 95.

⁶¹ Case C-350/92 *Spain v. Council*, EU:C:1995:237, para. 35; Case C-377/98 *Netherlands v. Parliament and Council*, EU:C:2001:523, para. 15.

⁶² Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of Regions, A Quality Framework for Services of General Interest in Europe, COM(2011) 900 final, p.3.

⁶³ *Ibid.*

telecommunications, transport, audio-visual broadcasting and postal services, to education, water supply, waste management, health and social services. The term 'SGI' covers both economic activities (Services of General Economic Interest) and non-economic activities (Services of Non-Economic Interest). The latter are not subject to specific EU legislation and are not covered by the Treaty's internal market and competition rules. For that reason, my analysis focuses on the Services of General Economic Interest (henceforth SGEIs).

SGEIs constitutes a legal concept and are mentioned in in many EU instruments such as Articles 14 and 86 TFEU, the Protocol No. 26 of the Treaty of Lisbon, Article 36 of the Charter of Fundamental Rights of the EU (henceforth CFREU) and the Services Directive.⁶⁴ Examples of such services are the electricity, gas, postal, telecommunication and transport services. The Commission defines SGEIs as 'economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention. The Public Service Obligation is imposed on the provider by way of an entrustment and on the basis of a general interest criterion which ensures that the service is provided under conditions allowing it to fulfil its mission'.⁶⁵

The CJEU has confirmed that SGEIs are services which exhibit special characteristics compared to other economic activities.⁶⁶ As the Commission's definition states, the public authorities have an interest in regulating these services, because they essentially contribute to the public good. Thus, the public authorities, instead of allowing the market to regulate those services, have an interest in regulating these services with a view to guaranteeing a minimum level of quality, safety, affordability, equal treatment or universal access. People with disabilities have a right to access such services on an equal basis with others, as they are services that are open or provided to the public.⁶⁷ Thus, it is important for the purposes of this research project to examine the measures the EU has taken to guarantee the quality, safety, affordability and universal access of these services with regard to people with disabilities.

⁶⁴ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, [2006] OJ L376/36.

⁶⁵ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of Regions, A Quality Framework for Services of General Interest in Europe, COM(2011) 900 final, p.3.

⁶⁶ Commission Staff Working Document, Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, SWD(2013) 53 final, p. 16; Case C-179/90 *Merci convenzionali porto di Genova*, EU:C:1991:464, para. 27; Case C-242/95 *GT-Link A/S*, EU:C:1997:376, para. 53 and Case C-266/96 *Corsica Ferries France SA*, EU:C:1998:306, para. 45.

⁶⁷ Article 9 (1) UNCRPD.

Before the Lisbon Treaty, Article 95 EC (now Article 114 TFEU) was used by the Commission to initiate sector specific legislation relating to SGEIs, based on the procedure I analysed in the previous section on the EU internal market policy. The Lisbon Treaty introduced an additional legal basis with a view to regulating SGEIs. Article 14 TFEU now empowers the European Parliament and the Council, in accordance with the ordinary legislative procedure, to adopt regulations with a view to establishing the governing principles of SGEIs.⁶⁸ The new provision is an uncontested legal foundation for establishing common and transversal rules for the implementation of SGEIs.⁶⁹

In addition to Article 14 TFEU, the Lisbon Treaty entailed Protocol No. 26 on SGIs. Article 1 of that Protocol states that ‘differences in the needs and preferences of users [of SGEIs] that may result from different geographical, social or cultural situations’ should be taken into account by the EU legislators.⁷⁰ It also establishes the principles that should be applied with regard to the SGEIs. These are: a high level of quality, security and accessibility, equality of treatment, and promotion of universal access and users’ rights, in line with Declaration No. 13 to the Amsterdam Treaty.⁷¹ Lastly, the CFREU states, in Article 36 thereof, that ‘the Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union’.⁷² The Commission has noted that the right to access SGEIs that is found in the Charter includes ensuring equal treatment between women and men, combating all forms of discrimination in accessing SGEIs and guaranteeing universal access and affordable prices.⁷³ *Micklitz*⁷⁴ has argued that the right to have ‘access’ to services has a technical, an economic and a social dimension.⁷⁵ Access will be left without substance if the consumers are precluded from enjoying the universal services due to a lack of resources.⁷⁶ Thus, access is linked to the affordability aspect of accessibility.⁷⁷

⁶⁸ Article 14 TFEU.

⁶⁹ S. Rodrigues, ‘Towards a General EC Framework Instrument related to SGEI? Political Considerations and Legal Constraints’, in M. Krajewski, J. van de Gronden and U. Neergaard (eds.), *The Changing Legal Framework for Services of General Interest in Europe* (T.M.C. Asser Press, 2009), p. 261.

⁷⁰ *Ibid.*; Article 1 of Protocol (No. 26) on Services of General Interest, [2008] OJ C115/308.

⁷¹ *Ibid.*

⁷² Article 36 CFREU.

⁷³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, accompanying the Communication, A single market for 21st century Europe – Services of general interest, including social services of general interest: a new European commitment, COM(2007) 725 final, p. 10.

⁷⁴ H-W. Micklitz, ‘Universal Services: Nucleus for a Social European Private Law’, in M. Cremona (ed.), *Market Intergration and Public Services in the European Union* (Oxford University Press, 2011).

⁷⁵ *Ibid.*, p. 98.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

The social element relates to the consumers who are victims of social exclusion, including people with disabilities.⁷⁸ In that respect ‘access’, in the context of the CFREU, could be interpreted as requiring, amongst other things, disability accessible services.⁷⁹

Lastly, pursuant to Article 14 TFEU, the EU has the competence to adopt regulations with a view to establishing the governing principles of SGEIs.⁸⁰ Considering that Article 36 CFREU encompasses the notion of non-discriminatory access to goods and services, it is arguable that disability accessibility in the context of equal access should be included as a fundamental principle of SGEIs. In addition, the EU has also concluded the UNCRPD. The Convention obliges the States Parties to ensure the accessibility of services that are open or provided to the public, including SGEIs.⁸¹ Therefore, the EU is obliged to implement the UNCRPD to the extent that its competences allow it to do so. In the field of SGEIs, the EU shares the competence to act with the Member States. Nevertheless, as I have stated in Chapter III of my thesis⁸², the elimination of discrimination within the EU is a common goal of the Member States that could better be achieved by the EU. Furthermore, the EU has developed a pre-existing legislative framework on SGEIs whereby the rights of people with disabilities have been accounted for.⁸³ Thus, while the EU has only a shared competence to regulate SGEIs, it is preferable that the EU take action in this field so as to at least set out the principles which govern SGEIs, including disability accessibility.

v. Consumer protection

People with disabilities face many barriers that limit their ability to make informed decisions as consumers. These barriers are a result of, amongst other things, the fact that people with disabilities do not have access to consumer-related information with regard to goods and services, including information on their accessibility (information accessibility), and because the information relevant for consumers may not be provided in accessible formats (communication accessibility). The EU, in the context of its consumer protection policy, has the capacity to take action to eliminate accessibility barriers in this field and to ensure that people with disabilities are able to make informed decisions as consumers.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Article 14 TFEU.

⁸¹ Article 9 UNCRPD.

⁸² See, Chapter III, The elimination of discrimination in the EU territory.

⁸³ See, Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L 108/51.

EU consumer policy can address problems that individuals lack the capacity to tackle.⁸⁴ It can guarantee that goods and services are safe and that markets are fair and transparent, so that consumers are able to exercise informed choice and to exclude rogue traders.⁸⁵ Consumer policy can help consumers to make rational decisions and take responsibility to promote their own interests.⁸⁶ Consumer confidence in the functioning of the internal market will also serve to make the EU a trusted destination for e-commerce from the rest of the world.⁸⁷

After the entry into force of the Treaty of Lisbon, the consumer protection Chapter of the consolidated version of the TFEU is title XV. Article 169(1) TFEU sets out the objectives of consumer protection policy. These objectives are the promotion of the interests of consumers and the achievement of a high level of consumer protection.⁸⁸ Consumer protection is a shared competence between the EU and the Member States.⁸⁹ As a result, the Member States can only exercise their competence to the extent that the EU has not yet done so. In that case, the Member States can still take actions in the field of consumer protection under the condition that their actions are compatible with the Treaties.⁹⁰

The EU has taken several legislative steps to develop a framework for consumer protection. Examples of adopted measures are the directives on general product safety⁹¹, unfair commercial practices⁹², consumer rights⁹³,

⁸⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, EU Consumer Policy Strategy 2007–2013: Empowering Consumers, Enhancing their welfare, effectively protecting them, COM(2007) 99 final, p.13. The EU Consumer Policy Strategy 2007–2013 was replaced by, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A European Consumer Agenda – Boosting confidence and growth, COM(2012) 225 final.

⁸⁵ Ibid.

⁸⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, EU Consumer Policy Strategy 2007–2013: Empowering Consumers, Enhancing their welfare, effectively protecting them, COM(2007) 99 final, p.13. The EU Consumer Policy Strategy 2007–2013 was replaced by, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A European Consumer Agenda – Boosting confidence and growth, COM(2012) 225 final.

⁸⁷ Ibid.

⁸⁸ Article 169(1) TFEU.

⁸⁹ Article 4 TFEU.

⁹⁰ Article 169 (4) TFEU.

⁹¹ Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, [2002] OJ L11/4.

⁹² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22.

⁹³ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the

misleading advertising⁹⁴, credit agreements for consumers⁹⁵ and the regulation on food information for consumers.⁹⁶ All of these instruments are directly linked to the internal market, as the EU used the internal market legal basis (now Article 114 TFEU) to adopt these measures. However, and as a whole, all of these legislative measures and the EU consumer protection policy do not specifically address the issue of consumers with disabilities, but instead sometimes refer to ‘vulnerable consumers’. EU legislation has not given a clear definition of what constitutes a ‘vulnerable consumer’.

Waddington has pointed out that it is highly questionable how much additional protection these provisions actually provide.⁹⁷ In that regard, normal marketing practices, such as ‘exaggerated statements or statements which are not meant to be taken literally’⁹⁸ should not be hindered by the few measures that are designed to protect the vulnerable consumers found in EU consumer protection legislation.⁹⁹ The EU protection of vulnerable consumers should also not lead to ‘different levels of consumer protection’.¹⁰⁰ Furthermore, the protection awarded to vulnerable consumers by EU law is limited when applied in practice, because it can only be triggered when the seller knew, or could have been expected to know, of the vulnerability of the other party.¹⁰¹

European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, [2011] OJ L304/64.

⁹⁴ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, [2006] OJ L376/21.

⁹⁵ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, [2008] OJ L133/66.

⁹⁶ Regulation No. 1169/2011/EU of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No. 1924/2006 and (EC) No. 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No. 608/2004, [2011] OJ L304/18.

⁹⁷ L. Waddington, ‘Vulnerable and confused: the protection of “vulnerable” consumers under EU law’, 38 *European Law Review* (2013), p.758; see, also, V. Stuyck, ‘The Notion of the Empowered and Informed Consumer in Consumer Policy and How to Protect the Vulnerable under Such a Regime’, in G. Howells et al. (eds.), *The Yearbook of Consumer Law* (Ashgate, 2007), p.178–179.

⁹⁸ Article 5 (3) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22.

⁹⁹ L. Waddington, 38 *European Law Review* (2013), p. 766.

¹⁰⁰ Recital 32 of the Preamble to Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, [2011] OJ L304/64.

¹⁰¹ L. Waddington, 38 *European Law Review* (2013), p. 766.

Lastly, the CJEU seems to follow the footsteps of the EU legislators with regard to the protection that it provides to vulnerable consumers, as it does not allow Member States to require additional levels of protection for certain groups of consumers, or to oblige producers or suppliers to adapt their marketing practices so as to consider of the needs of vulnerable consumers.¹⁰² Therefore, it seems that the narrow protection provided by EU law to vulnerable consumers is further limited by the interpretation of EU consumer protection legislation that has been adopted in practice.

The European Association for the Co-ordination of Consumer Representation in Standardisation (henceforth ANEC) has defined ‘vulnerable’ as being ‘capable of being easily or quickly harmed or injured’.¹⁰³ The concept of ‘vulnerable consumers’ in EU law is based on the idea that vulnerability should be considered as endogenous, and that it targets a heterogeneous group comprised of persons who, on a permanent basis, are considered as such because of their mental, physical or psychological disability, age, credulity¹⁰⁴ or gender.¹⁰⁵ However, in a report on a strategy for strengthening the rights of vulnerable consumers (henceforth European Parliament Report), the European Parliament Committee on the Internal Market and Consumer Protection stated that every consumer might be susceptible to becoming ‘vulnerable’, because of external factors and their interactions with the market, or because they face obstacles in accessing and comprehending relevant consumer information.¹⁰⁶ This emanates from the understanding that ‘vulnerability’ might have both endogenous and exogenous causes.¹⁰⁷ The endogenous causes of ‘vulnerability’, as we have discussed above, might refer to temporary or permanent causes that are inherent to the consumer or his/her physical or mental condition (children, adolescents, seniors, the disabled, etc.).¹⁰⁸ The exogenous causes of ‘vulnerability’, on the other hand, are situated outside of the individual and are related to the external environment.¹⁰⁹ Examples of such cases are the lack of knowledge of the language, lack of education (in general or specific to a sector of the market) or, simply the need to use new technologies with which the consumer is not familiar.¹¹⁰ Therefore, apart from the endogenous causes of ‘vulnerability’, we should also include,

¹⁰² Ibid.

¹⁰³ ANEC position paper, ‘How to protect vulnerable consumers’, ANEC (2011), <https://www.anec.eu/publications/position-papers/240-anec-position-paper-how-to-protect-vulnerable-consumers-december-2011>, p. 5 (accessed 17 January 2018).

¹⁰⁴ A consumer with credulity is a consumer that is too ready to believe that something is real or true.

¹⁰⁵ Committee on the Internal Market and Consumer Protection, Report on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI) A7-0155/2012), (2012), p. 6.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.; L. Waddington, 38 *European Law Review* (2013), p. 767–768.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

within the notion of ‘vulnerable consumers’ people who are placed in a state of temporary powerlessness. This may result from a gap between their individual state and characteristics on the one hand, and their external environment on the other hand. In considering this, account should be had to criteria such as, educational background, social and financial situation, e.g. over-indebtedness, access to the internet and other such criteria.¹¹¹ In particular, the European Parliament report notes that the ‘vulnerability’ of some consumers might be a result of their difficulty or inability to evaluate and analyse the information that is available to them¹¹², or from their lack of awareness of the existing complaint and redress mechanisms, or from their lack of assertiveness and comprehension of the information they acquired.¹¹³

In addition, the European Parliament Report concluded that due to the diversity of the notion of ‘vulnerability’, when consumers are given both statutory protection and in the cases where they are in a specific situation of sectorial or temporary ‘vulnerability’, a uniform approach to protecting vulnerable consumers is extremely difficult to achieve.¹¹⁴ This is because the needs of the different groups of vulnerable consumers are diverse and possibly conflicting. As a result, the existing legislation and policies that are in place to address the notion of ‘vulnerability’ address the issue on a case-by-case basis.¹¹⁵ Therefore, it might be more efficient for the effectiveness of the consumer protection legislation to address the issue of ‘vulnerability’ ‘as a horizontal task, taking into account consumers’ various needs, abilities and circumstances’, as the report suggests.¹¹⁶ This approach will require the adoption of several legal instruments. Each one of these instruments should address the particular needs of different groups of vulnerable consumers, such as people with disabilities, elderly people and children.

Nevertheless, the adoption of legislation should not be the Commission’s only focus in strengthening the protection of vulnerable consumers. The European Parliament Report suggested that ‘strengthening of their [vulnerable consumers] capacity to take optimum decisions by themselves’ is also fundamental.¹¹⁷ It welcomed and strongly supported ‘the Commission’s efforts to promote consumer empowerment through the provision of easily accessible and understandable information and consumer education, as all action in this regard contributes to a more efficient and fair internal market’.¹¹⁸

¹¹¹ Committee on the Internal Market and Consumer Protection, Report on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI) A7-0155/2012) (2012), p. 6.

¹¹² *Ibid.*, p. 7; L. Waddington, 38 *European Law Review* (2013), p. 767-768.

¹¹³ Committee on the Internal Market and Consumer Protection, Report on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI) A7-0155/2012) (2012), p. 7.

¹¹⁴ *Ibid.*, p. 6.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*, p. 7.

¹¹⁸ Committee on the Internal Market and Consumer Protection, Report on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI) A7-0155/2012) (2012), p. 7.

This is of critical importance for people with disabilities and it involves providing information in disability accessible formats. Otherwise, EU laws and policies on the protection of vulnerable consumers that do not ensure the provision of information in disability accessible formats might be insufficient for protecting vulnerable consumers, since their vulnerability may originate from their difficulty in accessing or assessing the information that is given to them.¹¹⁹ Lastly, the European Parliament Report called on the Commission and the Member States to work together to design an extensive and coherent political and legislative strategy to address the issue of consumer vulnerability by giving due consideration to the diversity and complexity of all the situations this issue entails, including the particular needs of people with disabilities.¹²⁰

vi. Standardisation

The development and application of accessibility standards is an essential component of the implementation of Article 9 UNCRPD. Since the EU concluded the UNCRPD, and is therefore bound by the Convention's obligations, it is important to give a brief introduction to the EU's standardisation policy, before then examining the impact of this policy on accessibility in the next parts of this chapter.¹²¹

In 1985, the Commission recognised in its White Paper¹²² that the harmonisation techniques that were used up until that time were slow-moving and had failed to create a link between harmonisation and standardisation. This, in turn, led to inconsistencies in the application of EU legislation at the national level.¹²³ To address these problems, the Commission proposed a New Approach to Technical Harmonisation and Standards.¹²⁴

According to this new approach to harmonisation, the harmonising legislation should focus only on the essential requirements, such as health and safety requirements, which the good or service or the issue that is being regulated should comply with. The formulation of the technical specifications based on what industry needs to manufacture and market the goods or services or the general issue that is to be regulated, in order to address the fundamental requirements specified in EU legislation, is a task that belongs to private standardisation

¹¹⁹ Ibid., p. 7.

¹²⁰ Ibid., p. 11.

¹²¹ See, Chapter V, Obligation to develop minimum standards on accessibility of goods and services.

¹²² White Paper from the Commission to the Council, Completing the internal market, COM(1985) 310 final, p. 64.

¹²³ P. Craig and G. Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 2011), p. 594.

¹²⁴ Ibid.

organs.¹²⁵ The technical specifications that the standardisation organs adopt are not binding and they are regarded as voluntary standards.¹²⁶ Nevertheless, governments are obliged to presume that the issues regulated through European standards comply with the so-called essential requirements of the relevant EU legislation.¹²⁷ This presumption guarantees businesses free market access.¹²⁸ When a standard is approved by the Commission and is published in the Official Journal, all Member States must accept goods or services that conform with these standards.¹²⁹ When a State disputes whether a standard is in conformity with the requirements set out in the EU legislation that it is connected to, the burden of proof lies with that State.¹³⁰ The same applies in the case where a manufacturing company uses technical specifications that are different from those laid down by the standard. In that case, the manufacturer must prove that the good or services meets the requirements of the relevant EU legislation.¹³¹

In Europe, there are three main Standardisation Organisations: the European Committee for Standardisation (CEN)¹³², the European Committee for Electro-technical Standardisation (CENELEC)¹³³ and the European Telecommunications Standards Institute (ETSI).¹³⁴ CEN one focuses on setting standards in the fields of industry and public administration. CENELEC operates in the electro-technical field, while the main area of interest for ETSI is information and communication technologies. CEN and CENELEC are non-profit technical organisations which were established under Belgian law in 1961 and 1973 respectively, and ETSI is a non-profit organisation that was set up under French law in 1986.¹³⁵ These organisations ensure that the standardisation process runs in parallel with the harmonisation that is decided on at Council level and is based on the ‘essential requirements’ approach.¹³⁶ The standards produced by these organisations are likely to be approved by the Commission, provided that they are in compliance with the essential requirements of the directive that they are connected to.¹³⁷

The standards are drafted by a technical committee of the standardisation body.¹³⁸ Standards can be mandated or not mandated.¹³⁹ A standard is mandated when the Commission calls for a standardisation body to create

¹²⁵ J. Pelkmans, ‘The New Approach to Technical Harmonisation and Standardisation’, 25 *Journal of Common Market Studies* (1987), p. 255.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² See, for CEN, <https://www.cen.eu/Pages/default.aspx> (accessed 17 January 2018).

¹³³ See, for CENELEC, www.cenelec.eu/ (accessed 17 January 2018).

¹³⁴ See, for ETSI, www.etsi.org/ (accessed 17 January 2018).

¹³⁵ P. Craig and G. Búrca, *EU Law: Text, Cases, and Materials*, p. 598.

¹³⁶ J. Pelkmans, 25 *Journal of Common Market Studies* (1987), p. 256.

¹³⁷ P. Craig and G. Búrca, *EU Law: Text, Cases, and Materials*, p. 598.

¹³⁸ Ibid.

¹³⁹ Ibid.

a standard.¹⁴⁰ A standard is not mandated when the initiative to draw up the standard comes from the standardisation bodies themselves.¹⁴¹ The standards are published in the Official Journal.¹⁴²

The Resolution of the European Parliament on the future of standardisation emphasised the importance of standardisation for persons with disabilities by stating that ‘standardisation has great potential to remove barriers that prevent persons with disabilities and elderly people from exercising their capabilities and participating on equal terms in all areas of life’.¹⁴³ It called for ‘the development of standards that take into account the diverse needs of the population and create new opportunities for businesses to provide innovative solutions, with a view to fostering the development of products, services and infrastructures that are accessible to everyone’ and stressed ‘the importance of the Design for All concept, which constitutes a creative and ethical challenge for standardisers, designers, entrepreneurs, public authorities and policymakers, since its aim is to enable all people to have equal access to, *inter alia*, the built environment, transportation, education, employment, housing, medical facilities, information and communication, culture, leisure and consumer products and services’.¹⁴⁴

The EU Regulation on European standardisation states, in the Preamble thereto, that the participation of persons with disabilities and of organisations representing their interests should be facilitated by all available means throughout the standardisation process.¹⁴⁵ The EU has taken several steps to fulfil the potential of standardisation in the field of accessibility of goods and services.

III. EU INSTRUMENTS AND THE ACCESSIBILITY OF GOODS AND SERVICES

In the previous part of this chapter, I provided a brief analysis of the areas where the EU could adopt policies to implement Article 9 UNCRPD with regard to goods and services. In this part of Chapter V, I analyse the existing EU legal instruments with regard to the accessibility of goods and services in the areas of the customs union, taxation, SGEIs, the internal market, consumer protection

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ European Parliament Resolution on the future of European standardisation (2010/2051(INI)), 21 October 2010, p. 13.

¹⁴⁴ Ibid.

¹⁴⁵ Regulation No. 1025/2012/EU of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No. 1673/2006/EC of the European Parliament and of the Council, [2012] OJ L316/12.

and standardisation, and I examine whether they meet the obligations of Article 9 UNCRPD. This part of Chapter V is structured by connecting the EU instruments to the corresponding obligations found in Article 9 UNCRPD.

A. OBLIGATION TO ENSURE AFFORDABILITY OF GOODS AND SERVICES

In this section of Chapter V, I describe the measures the EU has taken in the field of affordability of goods and services and consider whether these measures meet the obligations of Article 9 UNCRPD. I also propose new initiatives that the EU could adopt to implement Article 9 UNCRPD in the field of affordability of goods and services. The instruments examined in this part of Chapter V are connected to the fields of EU customs union, taxation and SGEIs.

i. EU customs union

The Regulation on customs duty reliefs¹⁴⁶ provides the legal framework which allows certain goods to enjoy relief from the application of import duties. In particular, and as far as people with disabilities are concerned, the regulation makes reference to goods that can be used exclusively by blind and other handicapped persons.¹⁴⁷ In that regard, this is an EU instrument that mainstreams disability considerations within the EU's customs union.

Article 66 of this Regulation states that articles related to the educational, scientific or cultural advancement of people with visual impairments should be admitted free from the payment of any customs duty.¹⁴⁸ These articles, following Annex III of this Regulation, include printed pictures, designs, photographs and trade advertising material, commercial catalogues and so on.¹⁴⁹ Furthermore, Article 67 thereof states that articles which are specially designed for the educational, scientific or cultural advancement of blind persons, and their accessories, components, spare parts and the tools used for their maintenance, should be admitted free from import duties.¹⁵⁰ According to Annex IV, these articles include, amongst other things, Braille paper, typewrites and word-processing machines, adapted for the use of blind and partially sighted people, recorded material for the blind, magnetic tapes and cassettes for

¹⁴⁶ Council Regulation No. 1186/2009/EC of 16 November 2009 setting up a Community system of reliefs from customs duty, [2009] OJ L324/23.

¹⁴⁷ Articles 66–69 of Council Regulation No. 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty, [2009] OJ L324/23.

¹⁴⁸ *Idem*.

¹⁴⁹ Council Regulation No. 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty, [2009] OJ L324/23, Annex III.

¹⁵⁰ Article 67 of Council Regulation No. 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty, [2009] OJ L324/23.

the production of Braille talking books and electronic orientator and obstacle detector appliances for the blind and partially sighted.¹⁵¹

Apart from the provisions on these goods for blind people, this regulation covers some products that are designed for use by people with physical or intellectual disabilities. In particular, products that are designed for the education, employment or social advancement of physically or intellectually disabled¹⁵² persons (other than blind persons), and their accessories, components, spare parts and the tools used for their maintenance, should be admitted free from import duty.¹⁵³ This provision does not include mainstream products that facilitate the education, employment and social advancement of physically or intellectually disabled people.

Therefore, products for the exclusive use of people who are blind or have visual impairments that are relieved from customs duty should be related to their scientific, educational or cultural advancement, whereas articles for the exclusive use of people who are physically or intellectually disabled, and which are relieved from customs duty, should be related to educational, employment or social advancement. This different choice of wording, in my opinion, is a mistake. It is true that the scientific and cultural integration of blind people is a very important issue. However, the employability and the social life of people with visual impairments are areas of life that are of fundamental importance as well. The same is true for the fields of scientific and cultural life for people with intellectual and physical disabilities. Therefore, it is arguable that the EU legislator should have designed the exception to the payment of customs duties so as to cover products that are used exclusively by people with visual, physical or intellectual impairments, which in turn relate to their scientific, educational, employment, social and cultural advancement. The scope of application of the relief from customs duty should also cover products that are used exclusively by people with hearing impairments and with psychosocial disabilities, who are not mentioned in the regulation at all but who could nevertheless benefit from such measures.

The abovementioned provisions are related to the notion of the economic accessibility of goods that is stipulated in Article 9 UNCRPD. The relief from customs duty makes these products more affordable for people with disabilities. Therefore, I infer that these measures meet, to a certain extent, the obligation of affordability of goods, as per Article 9 UNCRPD. Certainly, there is no guarantee that these products will still be affordable to people with disabilities. However, such a measure could significantly lower the price of these products and it should be considered as a measure that contributes to the improvement of the financial

¹⁵¹ Council Regulation No. 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty, [2009] OJ L324/23, Annex IV.

¹⁵² The directive uses the term 'handicapped'. This term is not used by the author as it is not disability friendly.

¹⁵³ Article 68 of Council Regulation No. 1186/2009 of 16 November 2009 setting up a Community system of reliefs from customs duty, [2009] OJ L324/23.

position of people with disabilities. Considering that the EU has an exclusive competence to regulate the EU customs union¹⁵⁴, the EU has both the power and the responsibility to implement the requirements of Article 9 UNCPRD in the area of the EU customs union by. It could do this by, for example, expanding the list of goods that are exempt from the payment of customs duties, where these goods are used exclusively by disabled persons.

Nevertheless, the EU will have to take into account whether, by eliminating the duties on goods for the exclusive use by people with disabilities, its actions could endanger the competitiveness of the respective domestic products that the customs tariffs aim to protect. It is at the EU's discretion to strike the correct balance between the two different interests and decide whether to take action and remove the customs tariffs on goods for the exclusive use by people with disabilities. Thus, it is my view that the abovementioned provisions only partially meet the obligation to ensure affordability of goods as per Article 9 UNCPRD, at least in the area of the EU customs union. This is because the EU has the power to relieve more goods for the exclusive use of people with disabilities from customs duty.

The second legal instrument that is relevant to this analysis is the Tariff Regulation.¹⁵⁵ This regulation includes the Combined Nomenclature (henceforth CN). The CN is a document that has introduced detailed rules which define the classification of goods and is based on the Harmonized Commodity Description Coding System 1983.¹⁵⁶ The CN is located in Annex I of the Regulation and it is revised annually, together with the relevant rates of duty.¹⁵⁷ The classification of goods according to the CN should be determined according to the terms of the headings and any relative section or chapter notes.¹⁵⁸

The CJEU has discussed the issue of the classification of goods for the use of disabled persons in three cases. The first case¹⁵⁹ related to the classification of a walker-rollator, which consisted of an aluminium frame on four wheels, with two swivel wheels at the front, along with handles and brakes, which were designed to help people who had walking difficulties.¹⁶⁰ The second case¹⁶¹ referred to the classification of various electric scooters that were made in China and Taiwan.¹⁶²

¹⁵⁴ Article 3 TFEU.

¹⁵⁵ Council Regulation No. 2658/87/EEC of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, [1987] OJ L256/1.

¹⁵⁶ C. Barnard, *The substantive law of the EU: The four freedoms*, p. 22.

¹⁵⁷ Article 12 of Council Regulation No. 2658/87/EEC of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, [1987] OJ L256/1.

¹⁵⁸ Commission Implementing Regulation No. 2016/1821/EU of 6 October 2016 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, [2016] OJ L294/1, Annex I.

¹⁵⁹ Case C-273/09 *Premis Medical BV v. Inspecteur van de Belastingdienst/Douane Rotterdam, Kantoort Laan op Zuid*, EU:C:2010:809.

¹⁶⁰ *Ibid.*

¹⁶¹ Case C-12/10 *Lecson Elektromobile GmbH v. Hauptzollamt Dortmund*, EU:C:2010:823.

¹⁶² *Ibid.*, para. 8.

The third case¹⁶³ related to the classification of certain mobility scooters that were imported into the United Kingdom. The importers could only escape customs duties if the goods in question were for the exclusive use of disabled persons. In the first two cases, the Court made a reference to its established case law regarding in the circumstances of the classification of goods.¹⁶⁴ The Court stated that the decisive factor for the classification of goods for customs purposes is their objective characteristics and properties, as they are defined in the text of the relevant heading of the CN and of the section or chapter notes.¹⁶⁵

Furthermore, the Court considered the explanatory notes to the CN, which were drafted by the Commission, to be interpretative tools, even though it clarified that they do not have binding force.¹⁶⁶

These considerations led the Court to different outcomes in these two cases. In the first case, the Court decided that the walker-rollator was invalidly classified in the category of other vehicles and instead it should have been considered as an ‘orthopaedic appliance’ that compensates for a ‘defect or disability’.¹⁶⁷ In the second case, the Court concluded that the electric mobility scooters at hand must be considered as a means of transport for persons within the context of heading 8703 of the CN, and not vehicles for disabled persons according to heading 8713 of the CN.¹⁶⁸ In the third case, the Court stated that the phrase ‘for disabled persons’ mean, in the context of heading 8713 of the CN, that the product is designed solely for disabled persons.¹⁶⁹ The Court also indicated that although a vehicle could be used by non-disabled people, this was irrelevant for its classification under heading 8713 of the CN.¹⁷⁰ Lastly, the Court provided a definition of ‘disabled persons’ under heading 8713. The Court defined ‘disabled persons’ as ‘persons affected by a non-marginal limit on their ability to walk, the duration of that limitation and the existence of other limitations relating to the capacities of those persons being irrelevant’.¹⁷¹

¹⁶³ Case C-198/15 *Invamed Group Ltd, Invacare UK Ltd, Days Healthcare Ltd, Electric Mobility Euro Ltd, Medicare Technology Ltd., Sunrise Medical Ltd, Invacare International SARL v. Commissioners for Her Majesty’s Revenue & Customs*, EU:C:2016:362.

¹⁶⁴ Case C-396/02 *DFDS*, EU:C:2004:536, para. 27; Case C-495/03 *Intermodal Transports*, EU:C:2005:552, para. 47 and Case C-183/06 *RUMA*, EU:C:2007:110, para. 27.

¹⁶⁵ Case C-12/10 *Lecson Elektromobile GmbH v. Hauptzollamt Dortmund*, para. 16.

¹⁶⁶ *Ibid.*, par 17; for more information on the opinion of the CJEU on the binding force of the explanatory notes of the CN see, Case C-250/05 *Turbon International*, EU:C:2006:681, para. 16 and Case C-370/08 *Data I/O*, EU:C:2010:284, para. 30.

¹⁶⁷ Case C-273/09 *Premis Medical BV v. Inspecteur van de Belastingdienst/Douane Rotterdam, Kantoor Laan op Zuid.*,

¹⁶⁸ Case C-12/10 *Lecson Elektromobile GmbH v. Hauptzollamt Dortmund*, para. 24.

¹⁶⁹ Case C-198/15 *Invamed Group Ltd, Invacare UK Ltd, Days Healthcare Ltd, Electric Mobility Euro Ltd, Medicare Technology Ltd, Sunrise Medical Ltd, Invacare International SARL v. Commissioners for Her Majesty’s Revenue & Customs*, para. 27.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*, para. 33.

The latest CN was published by the Commission in 2016.¹⁷² In this document, disability is mentioned several times. Carriages for people with disabilities, regardless of whether they are motorised or otherwise mechanically propelled, should be imported free from any customs duty.¹⁷³ As it is stated in the explanatory notes of the CN, these carriages differ from the category of ‘Motor cars and other motor vehicles principally designed for the transport of persons’¹⁷⁴, because they have a maximum width of 80 cm, a maximum speed of 10 km per hour, two sets of wheels touching the ground and special features which alleviate the disability.¹⁷⁵ Apart from the carriages, the CN also exempts their parts and accessories which are intended for their manufacture, equipping or repair.¹⁷⁶ Moreover, the CN exempts orthopaedic appliances, splints and other fracture appliances, artificial parts of the body, hearing aids and other appliances worn, carried or implanted in the body, to compensate for a defect or disability from customs duty.¹⁷⁷ The expression ‘to compensate for a defect or disability’ refers to appliances that take over or substitute for the function of the defective or disabled part of the body.

The EU, as I have already discussed above, has the competence to regulate which products will be included in this Combined Nomenclature. The EU, also, renews this catalogue of goods every year. Therefore, we can infer that the EU has the power to extend the number of goods which are exempt from duty for the exclusive use by people with disabilities. In that respect, it can be concluded that the EU has not fully exercised the competence to regulate this field with regard to affordability.

ii. Taxation

The EU has a shared competence in the field of taxation. Under Article 113 TFEU, the EU has the competence to regulate issues related to taxation in the Union. This article empowers the Council, acting by unanimous decision and after consulting the European Parliament and the Economic and Social Committee, to adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation in order to

¹⁷² Commission Implementing Regulation No. 2016/1821/EU of 6 October 2016 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, [2016] OJ L294/1, Annex I.

¹⁷³ *Ibid.*, Annex I, No. 8713.

¹⁷⁴ *Ibid.*

¹⁷⁵ Explanatory notes to the combined nomenclature of the European Union, (2015), OJ C76/1, No. 8713.

¹⁷⁶ Commission Implementing Regulation No. 2016/1821/EU of 6 October 2016 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, [2016] OJ L294/1, Annex I, No. 8714.

¹⁷⁷ Commission Implementing Regulation No. 2016/1821/EU of 6 October 2016 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, [2016] OJ L294/1, Annex I, No. 9021.

contribute to the establishment and functioning of the internal market and to avoid distortions of competition.¹⁷⁸

Article 93 EC (now Article 113 TFEU) has provided the legal basis for a series of EU. The directive that is relevant to disability is the Directive on a common system of value added tax (henceforth VAT Directive).¹⁷⁹ The goal of this directive is to eliminate distortions of competition at national and Community level by harmonising national legislation on turnover taxes through a system of value added tax (VAT).¹⁸⁰

The standard rate of VAT pursuant to this directive cannot be less than 15%.¹⁸¹ Under Article 98 of this Directive, Member States may apply either one or two reduced VAT rates to goods and services, including medical equipment, aids and other appliances that are designed to alleviate or treat disability, as well as the repair of such goods¹⁸², domestic care services, *inter alia*, home help and care for young, elderly, sick or disabled people.¹⁸³ The reduced rates should be designated as a percentage of the taxable amount, which cannot be less than 5%.¹⁸⁴ These provisions exhibit the EU's power to mainstream disability considerations in the field of taxation

The CJEU has addressed the issue of reduced VAT rates and disability in its case law. The Commission brought a case against Spain on the ground that it failed to fulfil its obligations under Article 98 of the VAT Directive.¹⁸⁵ Spain applied a reduced VAT rate to 'aids and equipment essentially or primarily used to treat human disabilities, but which are not intended for the exclusive personal use of the disabled'.¹⁸⁶ Annex III of the VAT Directive allows for a reduced VAT rate for 'medical equipment, aids and other appliances normally intended to alleviate or treat disability, for the exclusive personal use of the disabled, including the repair of such goods, and supply of children's car seats'.¹⁸⁷ The

¹⁷⁸ Article 113 TFEU.

¹⁷⁹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2006] OJ L347/1.

¹⁸⁰ Recital 4 of the Preamble to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2006] OJ L347/1.

¹⁸¹ Article 97 (1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2006] OJ L347/1; Council Directive 2010/88/EU of 7 December 2010 amending Directive 2006/112/EC on the common system of value added tax, with regard to the duration of the obligation to respect a minimum standard rate, [2010] OJ L326/1.

¹⁸² Article 98 and Annex III of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2006] OJ L347/1.

¹⁸³ Council Directive 2009/47/EC of 5 May 2009, amending Directive 2006/112/EC as regards reduced rates of value added tax, [2009] OJ L116/18, Annex.

¹⁸⁴ Article 99 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2006] OJ L347/1.

¹⁸⁵ Case C-360/11 *European Commission v. Kingdom of Spain*, EU:C:2013:17; see, also, Case C-678/13 *European Commission v. Republic of Poland*, EU:C:2015:358.

¹⁸⁶ Case C-360/11 *European Commission v. Kingdom of Spain*, para. 12–14.

¹⁸⁷ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2006] OJ L347/1, Annex III.

Court found that the words ‘personal’ and ‘exclusive’ that are mentioned in point 4 of Annex III of the VAT Directive implied that reduced VAT rates could not be applied to devices for general use.¹⁸⁸ In addition, it pointed out that the application of a reduced VAT rate to a product, which may be put to different uses, is subject to the product being used for its designated purpose by the buyer.¹⁸⁹ For these reasons the Court concluded that a reduced VAT rate could not be applied in the case of devices for general use.¹⁹⁰

In another similar case, the Court received a preliminary reference¹⁹¹ regarding the application of Article 98(2) and Annex III of the VAT Directive.¹⁹² In this case, Oxycure Belgium SA applied a reduced rate of VAT of 6% to the hire and sale of oxygen concentrators¹⁹³ and their accessories. Belgium set this VAT rate on the basis of Article 98(2) and Annex III of the VAT Directive.¹⁹⁴ As I mentioned in the previous paragraph, Point 4 of Annex III of the VAT Directive is relevant to accessibility. Point 4 of Annex III states that a reduced VAT rate can be applied by the Member States to ‘medical equipment, aids and other appliances normally intended to alleviate or treat disability, for the exclusive personal use of the disabled, including the repair of such goods, and supply of children’s car seats’.¹⁹⁵ The reasoning of the CJEU in this case is not very relevant to disability issues¹⁹⁶, but the Opinion of the Advocate General is. The Advocate General argued, with regard to Point 4 of Annex III, that by using the adverb ‘normally’, the EU legislature intended to refer to medical equipment and other appliances that, usually and in general, are meant to alleviate or treat disability.¹⁹⁷ In that regard he found that, in principle, oxygen concentrators are usually and in general intended to treat or alleviate the situation of people with disabilities, namely through oxygen therapy.¹⁹⁸ In addition, he pointed out that the use of the term ‘personal use’ implies that Point 4 of Annex III does not concern medical devices and appliances for general use in hospitals

¹⁸⁸ C-360/11 *European Commission v. Kingdom of Spain*, para. 85.

¹⁸⁹ *Ibid.*, para. 87.

¹⁹⁰ *Ibid.*, para. 90.

¹⁹¹ A preliminary reference is a request for a preliminary ruling submitted by a court or tribunal of a Member State to the CJEU. A preliminary ruling is a decision of the CJEU on the interpretation of EU law, provided at the request of a court or tribunal of a Member State. See, Article 267 TFEU.

¹⁹² Case C-573/15 *État belge v. Oxycure Belgium SA*, EU:C:2017:189.

¹⁹³ Oxygen concentrators are appliances for medical use which run on electricity and operate on the principle of concentrating oxygen in the ambient air in order to extract nitrogen therefrom, thereby offering a higher oxygen concentration.

¹⁹⁴ Opinion of Advocate General Mengozzi in Case C-573/15 *État belge v. Oxycure Belgium SA*, EU:C:2016:792, para. 1.

¹⁹⁵ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2006] OJ L347/1, Annex III.

¹⁹⁶ C-573/15 *État belge v. Oxycure Belgium SA*.

¹⁹⁷ Opinion of Advocate General Mengozzi in Case C-573/15 *État belge v. Oxycure Belgium SA*, para. 33.

¹⁹⁸ *Ibid.*

and by healthcare professionals.¹⁹⁹ Lastly, the Advocate General stated that the term ‘exclusive use of the disabled’ excludes, from the scope of Point 4 of Annex III, appliances which may be used by persons other than persons with disabilities.²⁰⁰ The Advocate General applied the interpretation of these three terms to the application of Article 98(2) and Annex III to the VAT Directive with regard to oxygen concentrators, and he concluded that oxygen concentrators do not fall within the ambit of Point 4 because these appliances were not used exclusively by people with disabilities.²⁰¹ From the cases analysed in the context of the interpretation of Article 98(2) and Point 4 Annex III to the VAT Directive, it can be concluded that Point 4 refers to medical devices that are intended for disabled people. Furthermore, they are not of general use and they are for the exclusive use of disabled people.

Furthermore, the possibility to reduce VAT for services used by people with disabilities is connected to the obligation to ensure economic accessibility (affordability) in the field of goods and services. Considering that taxation is a shared competence of the EU²⁰², the provisions on reduced VAT rate should be considered as uniform rules as they allow the Member States to apply a reduced VAT rate to certain goods and services. Thus, the Member States cannot apply the reduced VAT rate to a good or service outside that which is provided by the directive. In other words, the actions of the Member States are pre-empted by the EU. Thus, the EU has *de facto* exclusive competence to regulate the cases where a reduced VAT rate can be applied to goods and services. It establishes a list of goods and services that Member States can choose from when setting a reduced VAT rate.

As already reiterated, the EU has concluded the UNCRPD. Among the obligations of this Convention is the obligation to provide affordability of goods and services. Considering that the EU has *de facto* exclusive competence to regulate certain aspects of the reduced VAT rates, it carries the burden of implementing this obligation to that extent.

The implementation of this obligation in the field of EU tax law could take the form of, for example, a legal provision in the existing VAT Directive which addresses the situation of people with disabilities, which in turn allows the Member States to impose reduced VAT rates on goods and services that are specifically designed for people with disabilities. However, any such action should respect the rules which govern EU tax law and, in particular, the subject of reduced VAT rates.

The CJEU case law has developed two main principles that apply in cases of reduced VAT rates: the principle of strict interpretation and the principle of

¹⁹⁹ Ibid., para. 23.

²⁰⁰ Ibid., para. 36.

²⁰¹ Ibid., para. 41.

²⁰² Article 4 TFEU.

fiscal neutrality.²⁰³ The former means that reduced VAT rates should be strictly interpreted. The Court has indicated that the possibility of applying reduced VAT rates should be considered as an exception to the rule that the standard rate applies. Therefore, as with all exceptions, it should be interpreted very strictly.²⁰⁴

The second principle is the principle of fiscal neutrality. This principle precludes treating similar products (and thus in direct competition with one another) differently.²⁰⁵ This principle includes the sub-principles of VAT uniformity or equal treatment, as well as the principle of eliminating distortions in competition.²⁰⁶ Therefore, the imposition of different VAT rates is not permitted by the Court, at least insofar as it related to goods or services that are in direct competition with one another.

The question that arises is whether the addition of a provision to the VAT Directive that provides the option for the Member States to adopt reduced VAT rates for goods and services that are for the exclusive use of people with disabilities is compatible with these principles. To begin with the principle of strict interpretation, this principle was applied by the Court in relation to the existing options for reduced VAT rates and how they should be interpreted. Thus, I do not think that this principle excludes the addition of a new option to the VAT exception rules. It only requires that these exceptions be interpreted strictly.

With regard to the principle of fiscal neutrality, the policy that I suggest, namely the addition of a provision in the VAT Directive that allows the Member States to implement reduced VAT rates for goods and services that are specifically designed for people with disabilities, will not violate this principle. This is because the goods and services that I refer to will not be in competition with the similar mainstream products (products available to all), because they target different consumers. The fact that computer software for general use is subject to higher VAT than computer software that performs the same functions as the one for general use, but it is designed to meet the needs of people with disabilities, does not violate the principle of fiscal neutrality, because these products are not in competition with each other. From this analysis, it can be concluded that the EU has the competence to subject goods and services, which are designed for the exclusive use of persons with disabilities, to a reduced VAT rate.

As far as the current EU measures with regard to affordability of goods and services in the field of taxation are concerned, these measures only partially meet the obligations contained in Article 9 UNCRPD in the field of taxation. This is

²⁰³ R. de la Feria, *The EU VAT System and the Internal Market* (IBFD, 2006), p. 228.

²⁰⁴ Case C-83/99 *Commission v. Spain*, EU:C:2001:31; Case C-384/01 *Commission v. France*, EU:C:2003:264; Case C-251/05 *Talacre Beach Caravan Sales*, EU:C:2006:451.

²⁰⁵ Case C-481/98 *Commission v. France*, EU:C:2001:237; C-109/02 *Commission v. Germany*, EU:C:2004:586; C-384/01 *OHIM*, EU:C:2003:264.

²⁰⁶ R. de la Feria, *The EU VAT System and the Internal Market* (IBFD, 2006), p. 229.

because the EU has the power to allow Member States to impose a reduced VAT rate on all goods and services that are designed for the exclusive use of persons with disabilities.

However, the affordability of goods and services for persons with disabilities through reductions in taxation does not seem to be high on the EU's agenda. In a 2016 Commission communication to the European Parliament, the Council and the European Economic and Social Committee on the action plan on VAT, there is no reference to disability or any new measures for achieving the economic relief of persons with disabilities.²⁰⁷

iii. Services of General Economic Interest

The first directive that I analyse in the field of SGEIs is the Postal Services Directive, as amended.²⁰⁸ The goal of this directive is to complete the internal market for postal services and to ensure that efficient, reliable and good-quality postal services are available throughout the European Union to all citizens at affordable prices.²⁰⁹ With respect to people with disabilities, this directive points out that the opening of the market of postal services should not prevent the continuation of the provision by universal service provider(s) of certain free services for blind and partially-sighted persons that are already in place in the Member States.²¹⁰ It also provides, in Article 12 thereof, that Member States are permitted to maintain or introduce the provision of free postal services

²⁰⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, on an action plan on VAT, Towards a single EU VAT area – Time to decide, COM(2016) 148 final; see also Copenhagen Economics, 'Study on reduced VAT applied to goods and services in the Member States of the European Union', *European Commission* (2007), https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/rates/study_reduced_vat.pdf.

²⁰⁸ Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, as amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, and Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, [1998] OJ L15/14.

²⁰⁹ See, for the purpose of the Postal Services Directives: European Commission, 'Postal Services', *European Commission* (2018), http://ec.europa.eu/internal_market/post/legislation_en.htm (accessed 17 January 2018).

²¹⁰ Recital 37 of the Preamble to Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, [2008] OJ L52/3; Similar suggestion in Recital 16 of the Preamble to Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, [1998] OJ L15/14.

for use by blind and partially-sighted persons.²¹¹ In that regard, this is an EU instrument which mainstreams disability considerations in the policy area of postal services.

Therefore, Member States are allowed a margin of appreciation on whether to introduce or maintain a provision that provides free postal services to people with visual impairments. This provision is not mandatory for the Member States. Therefore, this provision does not fully meet the obligation of affordability of the postal service, but it is a sign that the EU is willing to consider the importance of social justice, even if it comes in the form of a small distortion to the open market.

In the last report on the developments in the EU postal sector of 2016, there was no reference to whether the Member States have used the option to implement free postal services to blind people.²¹² Furthermore, the EU has been working closely with CEN since 1993 to promote and support the process of technical standardisation in the postal sector. However, these standards do not relate directly to accessibility issues for persons with disabilities.²¹³

From the accessibility perspective, the most interesting directive related to SGEIs is the Universal Service Directive, which covers electronic communication networks and services.²¹⁴ The legal basis of this directive is Article 95 EC (now Article 114 TFEU). This directive aims to guarantee the availability of good-quality and publicly available services through effective competition and choice throughout the Community.²¹⁵ Before the 2009 amendment of this directive, a progress report on the single European electronic communications market noted that ‘users with disabilities and special needs continue to face numerous limitations on their access to services which are essential for social and economic

²¹¹ Article 12 of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, as amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, and Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, [1998] OJ L15/14.

²¹² A. Claes and W. Vergote, ‘Report prepared for the Commission, Econometric study on parcel list prices’, *European Commission* (2016), <https://ec.europa.eu/docsroom/documents/14647/attachments/1/translations/en/.../pdf>.

²¹³ See, for reference to the work of CEN on standards for postal services, www.centc331.eu/publicaties/4578 (accessed 17 January 2018).

²¹⁴ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

²¹⁵ Article 1 (1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

life’ and ‘while the framework encourages Member States to take measures to facilitate access to the services enjoyed by the majority of users, the measures taken and the results achieved vary greatly across the EU’.²¹⁶ In 2009, the EU adopted an amendment to this directive with a view to removing the access barriers that people with disabilities and special needs face with regard to the services covered by the Universal Service Directive. One of the purposes of the Universal Service Directive (post amendment) is to facilitate access to electronic communication networks and services for disabled end-users.²¹⁷ It is therefore evident that the EU has mainstreamed disability considerations in this directive, which shows the capacity of the EU to mainstream disability considerations in the telecommunications field.

In Article 7(1) thereof, the Universal Service Directive obliges the Member States to take specific measures to guarantee that the affordability of publicly available telephone services and directory enquiry services for disabled end-users is equivalent to the level that is enjoyed by other, non-disabled end-users.²¹⁸ This is a horizontal obligation of the directive, and it aims to ensure that the Member States consider affordability for persons with disabilities.

The directive, however, has taken more concrete steps towards realising affordability. In particular, it gives the power to the Member States to require that designated undertakings offer consumers tariff options or packages that are different from those provided under normal commercial conditions. This is so as to ensure that people with special social needs are not excluded from accessing the services that are covered by this directive.²¹⁹ This is not, however, a measure targeting the specific group of people with disabilities. Nevertheless, many people with disabilities fall within the group of people on ‘low income or with special social needs’.²²⁰ This low-price option that the Member States can provide will certainly be of great importance to people with disabilities. However, this not a very strong requirement that burdens the Member States, as it is at their discretion as to whether they will apply such a measure. Therefore,

²¹⁶ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of Regions, Progress report on the single European electronic communications market, COM(2008) 153 final, p. 13.

²¹⁷ Article 1(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

²¹⁸ Article 7 (1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

²¹⁹ Article 9 (2) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

²²⁰ See, Chapter I, Economic accessibility or affordability.

this policy option cannot be considered as fulfilling the obligation to provide affordability to people with disabilities in the telecommunications sector.

Overall, the provisions of this directive with regard to affordability partially meet the obligation to provide affordability for people with disabilities in relation to the telecommunications sector. As I have mentioned in the context of the EU policy on SGEIs, this policy field is one where the EU has a shared competence to act. Thus, both the EU and the Member States can take action to regulate this field. In the latter sections of Chapter V, I will provide an analysis of whether the EU or the Member States should take action to improve affordability in the area of telecommunications.

B. OBLIGATIONS TO ENSURE INFORMATION ACCESSIBILITY OF GOODS AND SERVICES

In this section of Chapter V, I describe the measures the EU has taken in the field of information accessibility in relation to goods and services and whether these measures meet the obligations of Article 9 UNCRPD. The instruments examined in this part of Chapter V are connected to SGEIs and consumer protection.

i. Services of General Economic Interest

The first legal instrument that I analyse with regard to the information accessibility of goods and services is the Universal Service Directive. Article 21(3) of that directive states that Member States should guarantee that the national regulatory authorities are able to force undertakings that provide public electronic communications networks and/or publicly available electronic communications services to regularly inform their disabled subscribers about the details of disability-specific products and services.²²¹ Furthermore, Article 22(1) thereof provides that the Member States should also guarantee that national regulatory authorities are able to oblige such undertakings to publish comparable, adequate and up-to-date information on both the quality of their services and the measures they have adopted to ensure equivalence of access for disabled end-users.²²²

These provisions are related to information on accessibility of telecommunications. These articles require that the Member States ensure

²²¹ Article 21(3) (h) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

²²² Article 22(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

that their regulatory authorities are able to take certain measures in relation to disability accessibility. Thus, these provisions are connected to the capacity of the regulatory authorities to impose these disability accessibility measures, and not their obligation to take such measures. These provisions do not meet the obligation that is found in Article 9 UNCRPD to ensure that people with disabilities can, on an equal basis with others, seek, receive and impart information in the telecommunication sector (information accessibility).

Furthermore, considering that these measures are specifically taken with a view to guaranteeing access to telecommunication services for people with disabilities, the reference to 'equivalent' access in Article 22(1) could imply that national regulatory authorities should have the capacity to require that the information mentioned in the two abovementioned provisions is provided by the undertakings in accessible formats (communication accessibility). Nevertheless, these provisions do not contain a specific obligation for the regulatory authorities to actually require this. Therefore, these measures do not meet the obligation to provide information to people with disabilities in accessible formats.

The second legal instrument that I analyse with regard to information accessibility of goods and services is the Patients' Rights Directive.²²³ Before moving to the analysis of this instrument, it is important to provide some background on EU healthcare policy. The CJEU's ruling that health care is a service within the meaning of the Treaty was not welcomed by the health ministers of the Member States.²²⁴ This created a movement calling for a Treaty amendment detailing that the internal market principles do not apply to healthcare.²²⁵ In the end, such a Treaty amendment was never adopted because the Member States did not prioritise the matter sufficiently when negotiating the Treaty of Nice.²²⁶ At the same time, the CJEU expanded the scope of application of EU internal market rules to include hospital care in the *Geraets-Smits and Peerbooms* case.^{227, 228} The first attempt to respond to the Court's rulings, by integrating the area of health care within the proposal for a directive on services in the internal market, failed.²²⁹ However, a year and a half later,

²²³ Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, [2011] OJ L88/45.

²²⁴ Case C-120/95 *Decker*, EU:C:1998:167; Case C-158/96 *Kohll*, EU:C:1998:171.

²²⁵ D.S. Martinsen and G. Falkner, 'Social Policy: problem solving gaps, partial exits and court-decision traps', in G. Falkner (ed.), *The EU's decision traps: comparing policies* (Oxford University Press, 2011).

²²⁶ *Ibid.*

²²⁷ Case C-157/99 *Geraets-Smits and Peerbooms*, EU:C:2001:404.

²²⁸ D.S. Martinsen, 'Welfare States and Social Europe', in W. van de Gronden et al., (eds.), *Legal Issues of Services of General Interest* (T.M.C. Asser Press, 2013), p. 58; For a more comprehensive approach to the CJEU judgments on cross-border health care see D. Chalmers, G. Davies and G. Monti, *European Union Law* (Cambridge University Press, 2010), p. 814.

²²⁹ D.S. Martinsen, in W. van de Gronden et al. (eds.), *Legal Issues of Services of General Interest*, p. 59.

the Commission proposed the Directive on patients' rights (henceforth Patient Rights Directive)²³⁰, which was adopted on the 9th of March 2011.²³¹

The Patients' Rights Directive facilitates the access to safe and high-quality cross-border healthcare and it promotes cooperation on healthcare between Member States, fully respecting the national competencies for organising and delivering healthcare.²³² This directive is not applicable to long-term care services, the purpose of which is to support people in need of assistance in carrying out routine, everyday tasks. It also does not cover the allocation of, and access to, organs for the purpose of organ transplants or and public vaccination programmes against infectious diseases, which exclusively target the health of the population on the territory of a Member State, and which are subject to specific planning and implementation measures.²³³

Moving to how this directive addresses accessibility, Article 4(2) provides that Member States should guarantee that people with disabilities receive information on the accessibility of hospitals.²³⁴ The provision covers a wide variety of information that should be available to all patients, including people with disabilities. Such information should relate to the accessibility of the hospitals of the affiliation state²³⁵, the availability of healthcare providers in the state of affiliation, information about specific providers, patient rights in the affiliation state and the mechanisms for making complaints and settling disputes. In that respect, it is my view that these provisions meet the obligations of Article 9 UNCRPD. This is because they ensure that people with disabilities can, on an equal basis with others, seek, receive and impart information in the field of cross-border health services. This directive, however, does not cover the domestic health care systems and the patient rights that should be protected in that sector.

Apart from adopting legislation, the Commission launched an interactive information service (IIS) in 2008 in order to answer questions from citizens, public authorities and service providers with regards to the application of

²³⁰ Proposal for a Directive of the European Parliament and the Council on the Application of Patient's Rights in Cross-Border Health Care, COM(2008) 414 final.

²³¹ D.S. Martinsen, in W. van de Gronden et al. (eds.), *Legal Issues of Services of General Interest*, p. 61.

²³² Article 1(1) of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, [2011] OJ L88/45.

²³³ Article 1 (3) of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, [2011] OJ L88/45.

²³⁴ Article 4 (2) of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, [2011] OJ L88/45.

²³⁵ The state of affiliation is the Member State that is competent to grant to the insured person a prior authorisation to receive appropriate treatment outside the Member State of residence according to Regulations.

EU legislation to SGEIs.²³⁶ The Commission does not answer questions on individual cases and their facts, nor does it provide a formal interpretation of EU law in relation to specific instances. The Commission does not provide legal advice on issues of national law, advice on how to structure calls for tender, contracts or on how to organise compensation mechanisms. Before sending in a question to the Commission, the IIS users should check whether a reply to his/her questions can already be found in the list of frequently asked questions.²³⁷ The information service is currently available in English, French and German. This means that questions can only be asked in these three languages and answers will only be given in English, French or German. Commission services are working, however, towards making the information services available in all official EU languages.²³⁸ Nevertheless, there is no reference to whether this information will be available in accessible formats for people with disabilities.

ii. *Consumer protection*

The instrument that I analyse in this section of Chapter V is the Unfair Commercial Practices Directive.²³⁹ Before the Unfair Commercial Practices Directive was adopted, there was no comprehensive EU framework for business-to-consumer commercial practices.²⁴⁰ The Commission criticised the vertical harmonisation approach to consumer contract law and unfair trade law, and thereby decided to alter its approach (by no longer adopting sector specific directives) in the area of business-to-consumer commercial practices.²⁴¹ The main justification for the need to further harmonise this field was the existence of divergent national legislation and the CJEU's case law. This led to barriers to the smooth functioning of the internal market and distortions of competition

²³⁶ Social Platform, 'Report: Ensuring access to services of general interest: A mapping of existing European Commission's processes which guarantee universal access to basic services with a particular focus on access of groups facing exclusion and/or discrimination', *Social Platform* (2010), p. 9.

²³⁷ Ibid.

²³⁸ Social Platform, 'Report: Ensuring access to services of general interest: A mapping of existing European Commission's processes which guarantee universal access to basic services with a particular focus on access of groups facing exclusion and/or discrimination', *Social Platform* (2010), p. 9.

²³⁹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22.

²⁴⁰ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Commission's Green Paper on EU Consumer protection, COM(2001) 531 final, p. 5.

²⁴¹ Ibid., p. 11.

relating to cross-border supply and demand.²⁴² This is evident from Recital 3 of the Preamble to the directive which states that the divergent national legislation on unfair commercial practices can cause distortions in competition and the emergence of barriers to the functioning of the internal market.²⁴³

The directive aims to contribute to the smooth functioning of the internal market by harmonising national legislation on unfair commercial practices, which in turn harm consumers' economic interests.²⁴⁴ It also aims at reducing the market costs which result from different national requirements on unfair trade and by increasing consumer confidence in the market.²⁴⁵ These are the reasons why the legal basis of the directive is Article 95 EC (now 114 TFEU). The directive bans unfair commercial practices.²⁴⁶ Unfair commercial practices are defined as practices that do not comply with the requirement of professional diligence and which materially distort the economic behaviour of the average consumer.²⁴⁷ The directive refers to

²⁴² B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law* (Hart Publishing, 2011), p. 167; Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Commission's Green Paper on EU Consumer protection, COM(2001) 531 final, p. 5–8.

²⁴³ Recital 3 of the Preamble to Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22.

²⁴⁴ Article 1 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22.

²⁴⁵ Recital 4 of the Preamble to Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22; Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), COM(2003) 356 final.

²⁴⁶ Article 5(1) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22.

²⁴⁷ Article 5(2) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22.

certain commercial practices that can be identified as ‘unfair’. Misleading²⁴⁸ and aggressive²⁴⁹ commercial practices belong to this category.²⁵⁰ Article 5(5) of the directive refers to Annex I, which that contains a list of commercial practices that in all circumstances should be considered as unfair.²⁵¹ In conclusion, the directive provides for a three-layer structure. For a practice not to be considered as unfair, this practice will be firstly tested against a blacklist of misleading or aggressive practices (level 3), two small general clauses prohibiting misleading and aggressive practices (level 2)²⁵² and a general clause that defines what should be considered as a unfair commercial practice (level 1).^{253, 254}

That being said, the directive does not explicitly mention consumers with disabilities. It refers instead to ‘particularly vulnerable’ consumers.²⁵⁵ In order to determine whether a commercial practice is ‘unfair’, the directive uses the objective standard of the *average consumer*, who is reasonably well informed,

²⁴⁸ Articles 6 and 7 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22.

²⁴⁹ Articles 8 and 9 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22.

²⁵⁰ Article 5 (4) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22.

²⁵¹ Article 5(5) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22.

²⁵² See the suggestion in G. Schricker and F. Henning-Bodewig, *Elemente einer Harmonisierung des Rechts des unlauteren Wettbewerbs in der Europäischen Union* (WRP, 2001), p. 1379.

²⁵³ See in favour of a general clause, *ibid.*, p. 1378–1379.

²⁵⁴ B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, p. 142.

²⁵⁵ Article 5(3) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22.

reasonably observant and circumspect.²⁵⁶ In cases, however, where the consumer is particularly vulnerable, the standard is changed.²⁵⁷

In Article 5(1) of the directive, it is indicated that unfair commercial practices should be prohibited.²⁵⁸ Paragraph 3 of the same article adds that, in the cases where it is likely that the economic behaviour of a particular group could be materially distorted by commercial practices because of the group's vulnerability to such practices or the underlying product in a way that could be foreseen by the trader, then those commercial practices should be assessed on the basis of the average member of that group.²⁵⁹ The product or practice that is under examination should be connected to the particular vulnerability.²⁶⁰ This list of vulnerabilities is exhaustive.²⁶¹ The vulnerable groups, in the context of this provision, include people with mental and physical infirmities.²⁶² The Commission Guidance Document on the implementation of the Directive on Unfair Commercial Practices (henceforth Commission Guidance Document) provides a definition of 'mental or physical infirmity'.²⁶³ This concept

²⁵⁶ Recital (18) of the Preamble to Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22; see also Case C-122/10 *Konsumentombudsmanned v. Ving Sverige*, EU:C:2011:299, para. 22 in which the Court stated: 'That directive [Directive 2005/29] takes as a benchmark the average consumer, who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors'; L. Waddington, 38 *European Law Review* (2013), p. 759.

²⁵⁷ L. Waddington, 38 *European Law Review* (2013), p. 759.

²⁵⁸ Article 5 (1) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22.

²⁵⁹ Article 5 (3) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22; L. Waddington, 38 *European Law Review* (2013), p. 760.

²⁶⁰ I. Scherer, *Ende der Werbung in Massenmedien*, p. 567; B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, p. 290.

²⁶¹ B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, p. 290.

²⁶² Article 5(3) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22.

²⁶³ Commission Staff Working Document Guidance on the implementation/ application of Directive 2005/29/EC on Unfair Commercial Practices, SWD(2016) 163 final, p. 48.

includes people with sensory impairments, limited mobility and other types of impairments.²⁶⁴ For example, consumers in wheelchairs might be vulnerable to advertising claims about ease of access to holiday accommodation or an entertainment facility, and people with hearing impairments may be a vulnerable to advertising claims about the compatibility of a hearing aid with a telephone device in the advertisement of that device.²⁶⁵ Therefore, people with disabilities are included within the concept of ‘vulnerable groups’ in the context of Article 5 of the Unfair Commercial Practices Directive. Unfortunately, there is no definition of age or children in the text of the directive.²⁶⁶ In the Commission Guidance Document, there is a reference to age, but no definition is provided.²⁶⁷ Indeed, the addition of the group of teenagers, as opposed to children, creates more confusion than clarity.²⁶⁸

Furthermore, it is important to note that the group of consumers who are vulnerable to the practice under examination should be ‘clearly identifiable’, according to Article 5(3) of this directive.²⁶⁹ This requirement makes it difficult to rely on this provision.²⁷⁰ Furthermore, the practice under review must be likely to distort the economic behaviour, ‘only’, of the particular vulnerable group.²⁷¹ Lastly, the ‘foreseeability’ of the material distortion of the economic behaviour of only one group of vulnerable consumers adds an element of proportionality, in the sense that it only requires the trader not to do more than what is reasonable with regard to both the potential unfairness of his/her practices, and to mitigate the impact of the unfairness of his/her practices where necessary.²⁷²

Article 5(3) of the Unfair Commercial Practices Directive seems to overlap with Article 5 (2) of the same directive. Article 5(2) (b) applies whenever a

²⁶⁴ Ibid.

²⁶⁵ Ibid., p. 48.

²⁶⁶ Ibid.

²⁶⁷ Ibid., p. 49–50.

²⁶⁸ B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, p. 291.

²⁶⁹ Article 5(3) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22.

²⁷⁰ I. Scherer, *Ende der Werbung in Massenmedien*, p. 568; B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, p. 291.

²⁷¹ Article 5 (3) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22.

²⁷² M. Radeideh, *The Principle of fair Trading in EC law* (Europa Law Publishing, 2005), p. 263; B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, p. 292; L. Waddington, *European Law Review* (2013), p.760.

commercial practice targets a particular group of consumers.²⁷³ This group of consumers might be also a group of vulnerable consumers.²⁷⁴ Article 5 (3) is applicable only to vulnerable consumers.²⁷⁵ Therefore, when a commercial practice targets a particular group of vulnerable consumers, both articles are applicable.²⁷⁶ In that regard, it appears that Article 5(3) is superfluous in such circumstances.²⁷⁷ Considering also, that to be applicable, Article 5(2) requires only a commercial practice that targets any particular group of vulnerable consumers, while Article 5(3) has a number of requirements and restrictions in respect of its application; it seems that it might be more effective for vulnerable consumers to rely on Article 5(2) instead of Article 5(3).

Moving now, to the connection between accessibility and this provision, it is my view that this measure is connected to the obligation to ensure information accessibility of goods and services. The person that is the victim of an unfair commercial policy is deprived of his/her right to make an informed decision. People with disabilities should receive information in relation to the goods and services they are interested in purchasing, and they should be able to do so on an equal basis with others, as part of the information accessibility obligations. If they receive false information that can materially distort their economic behaviour because of their vulnerability to such a practice, their right to make an informed decision is violated as a consequence.

Therefore, it is my view, that the abovementioned provision partially meets the obligation to provide people with disabilities with information accessibility of goods and services. In other words, this provision, which protects, among others, people with disabilities from misleading advertising, as I analysed above, partially ensures the right of people with disabilities, on an equal basis with others, to seek, receive and impart information and ideas. The reasons behind this statement are that a uniform approach to guaranteeing the rights of vulnerable consumers is extremely difficult to achieve, because the needs of different groups of vulnerable consumers are diverse and potentially conflicting. Furthermore, it is also the case that some EU consumer legislation, including the Unfair Commercial Practices Directive, has a very wide scope with regard the commercial practices that are addressed.²⁷⁸ Furthermore, the provisions

²⁷³ Article 5 (2) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] OJ L149/22.

²⁷⁴ B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, p. 292.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*; R. Incardano and C. Poncibo, 'The average consumer, the unfair commercial practices directive, and the cognitive revolution', 30 *Journal of Consumer Protection* (2007).

²⁷⁸ L. Waddington, 38 *European Law Review* (2013), p.775.

of the Unfair Commercial Practices Directive deal with the issue of unfairness of commercial practices on a case-by-case basis, instead of adopting a more comprehensive approach that could be provided through a horizontal approach to vulnerable consumers. This approach would involve group-specific directives on consumer rights, including a directive on the rights of disabled consumers. An analysis of what such directive should entail is provided later in this chapter.

The Commission, on the 12th of December 2007, observed that only 14 Member States had transposed the Directive on Unfair Commercial Practices.²⁷⁹ The United Kingdom, Germany, the Netherlands and France were late in their efforts to implement the directive.²⁸⁰ Luxembourg and Spain, on the other hand, were very late in transposing the directive. As a result, the Commission initiated infringement proceedings against those countries for failing to implement this directive on time.²⁸¹ The Commission launched infringement proceedings against Belgium and France for certain mistakes that were present in the implementation of the directive.²⁸² In general terms, it can be said that Belgium, France and Germany faced many challenges in the implementation of this directive.²⁸³ In that regard, it is fair to say that a more proactive Commission – in its role as the guardian of the Treaty – might have contributed to a timelier, more correct and more uniform transposition of this directive.²⁸⁴

To date, all Member States have transposed the Directive on Unfair Commercial Practices.²⁸⁵ As far as Article 5 (3) of this Directive is concerned, the United Kingdom and Belgium have chosen to copy the provisions of the

²⁷⁹ Commission Press Release, Consumers: New Rules crackdown on misleading advertising and aggressive sales practices, IP/07/1915, 12 December 2007, p. 2; B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, p. 164–165.

²⁸⁰ B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, p. 165.

²⁸¹ *Ibid.* Case C-282/08 *Commission v. Luxembourg*, EU:C:2009:55; Case C-321/08 *Commission v. Spain*, EU:C:2009:265; Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee, Report on the application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), COM(2013) 139 final, p. 3.

²⁸² B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, p. 165.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*; Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee, Report on the application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), COM(2013) 139 final, p. 3.

directive into their domestic legal order.²⁸⁶ Other countries such as Germany²⁸⁷, the Netherlands²⁸⁸ and France²⁸⁹ have failed to correctly implement its provisions.²⁹⁰ In a 2013 Report, the feedback that the Commission received from the consultation on the implementation of the Unfair Commercial Practices Directive did not signal any significant problems in relation to vulnerable consumers.²⁹¹ The report suggested that ‘experience and data gathered show that further efforts should be made to strengthen the enforcement of the Unfair Commercial Practices Directive in relation to vulnerable consumers, such as elderly persons, children/teenagers and other categories of citizens who find themselves in a situation of weakness’.²⁹² These positives developments might also focus on persons with disabilities, even though the focus of the efforts seems to be more on elderly persons and children.²⁹³

C. OBLIGATION TO ENSURE COMMUNICATION ACCESSIBILITY OF GOODS AND SERVICES

In this section of Chapter V, I describe the measures the EU has taken in the field of communication accessibility of goods and services and I consider whether these measures meet the obligations of Article 9 UNCRPD. The instruments examined in this part of Chapter V are connected to the fields of the internal market, SGEIs and consumer protection.

²⁸⁶ B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, p. 289.

²⁸⁷ For a critical analysis of the vulnerable consumer benchmark as implemented, B. Keirsbilck, ‘The Implementation of the Unfair Commercial Practices Directive in the United Kingdom, Germany and the Netherlands’, in G. Straetmans, J. Stuyck and E. Terry (eds.), *De Wet Handelspraktijken anno 2008* (Kluwer, 2008), p. 248–249; I. Scherer, *Ende der Werbung in Massenmedien*, p. 563–571; B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, p. 290.

²⁸⁸ The reference to the specific vulnerabilities of consumers has been inserted only after informal expert meetings with Commission officials in September 2007; B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, p. 290.

²⁸⁹ Inserted by the Second Amending Act (the vulnerable consumer benchmark has not been explicitly implemented by the first Amending Act); B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, p. 290.

²⁹⁰ Ibid.

²⁹¹ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee, Report on the application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’), COM(2013) 139 final, p. 13.

²⁹² Ibid.

²⁹³ In the Commission Report the UK has made a suggestion on improving the status of the elderly consumers, while Denmark made a proposal for strengthening the protection of children consumers.

i. Internal market

The legal instrument that is relevant to the communication accessibility of goods and services in this part of Chapter V is the Medical Products for Human Use Directive.²⁹⁴ Article 56 of this directive provides that the name of the medical product should be provided in Braille format on the packaging of that product.²⁹⁵ It also requires that, after being requested by patients' organisations, the package information leaflet should be made available in accessible formats for people with visual impairments.²⁹⁶ This provision introduces an obligation to print indications in Braille on certain types of medical products. In other words, the directive ensures that information on certain types of medical products is provided in an accessible format for people with visual impairments. National competent authorities are responsible for the enforcement of this measure.²⁹⁷ In terms of the Article 9 UNCRPD obligation to ensure communication accessibility, this measure fully meets the relevant obligation. Nevertheless, this directive can also be related to the obligation to ensure the physical accessibility of medical products, as it promotes the usability of the product and it facilitates disabled persons' safety when using the product.

ii. Services of General Economic Interest

According to Article 6(4) of the Patients' Rights Directive, the information referred to in this article should be accessible to all types of persons with disabilities. In that regard, Article 6 of this directive states that patients are entitled to information on a specific provider's services or any restrictions on its practice, information on supervision provisions and the assessment of healthcare providers, as well as information on patients' rights, complaints procedures and mechanisms for seeking remedies and the legal and administrative options available to settle disputes.²⁹⁸ They are also entitled to information on standards and guidelines on quality and safety laid down by the Member State of treatment

²⁹⁴ Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use as amended by Directive 2002/98/EC of 27 January 2003, [2001] OJ L311/67.

²⁹⁵ Article 56a of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use as amended by Directive 2002/98/EC of 27 January 2003, [2001] OJ L311/67.

²⁹⁶ Article 56a of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use as amended by Directive 2002/98/EC of 27 January 2003, [2001] OJ L311/67.

²⁹⁷ Article 42 (1) of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use as amended by Directive 2002/98/EC of 27 January 2003, [2001] OJ L311/67.

²⁹⁸ Articles 6 and 4 (2) of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare Directive, [2011] OJ L88/45.

that healthcare providers are subject to, and information on the accessibility of hospitals for persons with disabilities.²⁹⁹ Thus, we can conclude that this directive fully meets the obligation of communication accessibility of healthcare services in a cross-border context.

iii. Consumer protection

The instrument that I examine in this part of Chapter V, with regard to the obligation to ensure communication accessibility to people with disabilities, is the Consumer Rights Directive.³⁰⁰ The legal basis of this directive is Article 114 TFEU. This directive lays down harmonised rules for the ‘common aspects of distance and off-premises contracts’.³⁰¹ Further, ‘[t]he purpose of this directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by approximating certain aspects of the laws, regulations and administrative provisions of the Member States concerning contracts concluded between consumers and traders’.³⁰² It ensures a high level of consumer protection and aims at establishing a real retail internal market, making it easier and less costly for traders to sell their goods or services in a cross-border manner. Further, it provides consumers with greater choice and competitive prices. The directive’s scope covers sales made through the internet, mail order, telephone or fax, and other contracts negotiated away from business premises.³⁰³ The directive provides for full or uniform harmonisation with regard to the provisions it contains.³⁰⁴ Consequently, the

²⁹⁹ Articles 6 and 4 (2) of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients’ rights in cross-border healthcare Directive, [2011] OJ L88/45.

³⁰⁰ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, [2011] OJ L304/64.

³⁰¹ Recital (2) of the Preamble to Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, [2011] OJ L304/64.

³⁰² Article 1 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, [2011] OJ L304/64.

³⁰³ Article 3 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, [2011] OJ L304/64.

³⁰⁴ Article 4 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive

directive sets uniform standards of protection for all EU consumers. Thus, the Member States cannot deviate from those standards and cannot apply either higher or lower levels of protection.

The Consumer Rights Directive does not specifically address consumers with disabilities. It refers, however, to consumers ‘who are particularly vulnerable’. Recital 34 of the Preamble to the directive states that the traders should consider the particular needs of consumers with mental, physical or psychological infirmities, age or credulity when providing information to those consumers.³⁰⁵ This is the only reference to ‘vulnerable consumers’ in this directive. However, that does not preclude the fact that the EU has the competence to regulate accessibility and to specifically regulate the information that this directive refers to, by requiring that it is provided in accessible formats. Article 5, read together with Article 6 of this directive, states that the trader should provide the consumer with information in a clear and comprehensive manner.³⁰⁶ Furthermore, this directive requires traders, in the case of off-premises contracts, to provide information on paper or in another durable medium and in plain and intelligible language.³⁰⁷ These articles show that the EU has the competence to regulate the format that the information is to be provided in.

In addition, Articles 5 and 6 of the Consumer Rights Directive could be interpreted in a way that they ensure communication accessibility for people with disabilities. The Preamble to this Directive states the traders should consider the needs of ‘vulnerable consumers’ when providing the information specified in the directive. Among the groups of ‘vulnerable consumers’ is people with disabilities. Thus, the needs of this group should be taken into account by the trader when providing the information that the directive considers to be mandatory. If the information that the traders provide to people with disabilities does not take into consideration their particular

1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, [2011] OJ L304/64.

³⁰⁵ Recital 34 of the Preamble to Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, [2011] OJ L304/64.

³⁰⁶ Articles 5 (1) and 6 (1) of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, [2011] OJ L304/64.

³⁰⁷ Article 7(1) of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, [2011] OJ L304/64.

needs, then a number of people with disabilities will not be able to understand it. People with visual impairments, or any other type of impairment that prevents a person from being able to read and understand the information provided, will therefore be excluded from the benefits of the EU's consumer protection law. Considering that the Preamble reveals the purpose of a legal provision and the direction that the implementation of that provision should take³⁰⁸, it is arguable that Articles 5 and 6 of the Consumer Rights Directive should be interpreted in the light of Recital 34 and be interpreted as including an obligation on traders to provide the information in accessible formats to people with disabilities. In support of this argument is the fact that the EU has concluded the UNCRPD, which can be used as an interpretative tool for secondary EU legislation.³⁰⁹ Considering that Article 9 UNCRPD obliges the States Parties to ensure that the information that people with disabilities receive is provided in accessible formats, the failure of the EU legislator to impose such an obligation on traders might be addressed through this interpretation.

The European Parliament Committee on the Internal Market and Consumer Protection, in a Report on a strategy for strengthening the rights of vulnerable consumers, has recognised the weaknesses of this directive and of the consumer protection framework as a whole and has called for further action.³¹⁰

As I have analysed in this part of Chapter V³¹¹, the EU's policy on consumer protection has not taken into consideration the particular needs of people with disabilities. Some instruments in this field refer to the needs of vulnerable consumers, including people with disabilities, but as I mentioned in this part of Chapter V, this categorisation cannot ensure that the rights of consumers with disabilities are protected. Thus, instead of relying on the concept of 'vulnerable consumers' to address the particular needs of several groups of consumers, the EU should address the needs of each group separately. As far as disability is concerned, this implies that in order to protect the rights of people with disabilities as consumers, the EU should adopt a disability-specific instrument. However, in order to address disability considerations in the area of consumer protection, the EU must have competence to act in this field. In that regard, it is important to note that the EU has a shared competence in the field of consumer protection and that all the EU instruments on EU consumer protection that I analysed above use a version of Article 114 TFEU as their legal

³⁰⁸ A. Bredimas, *Methods of Interpretation and Community Law* (North Holland, 1978), p. 71; T. Ahmed, *The impact of EU law on Minority Rights* (Hart Publishing, 2011), p. 57.

³⁰⁹ See, Chapter II, The UNCRPD as an international agreement under EU law.

³¹⁰ Committee on the Internal Market and Consumer Protection, Rapporteur: Maria Irigoyen Pérez, Report on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI) A7-0155/2012) (2012), p. 6-7.

³¹¹ Chapter V, EU policies relevant to accessibility of goods and services, Consumer Protection.

basis. The purpose of EU consumer protection directives is to contribute to the smooth functioning of the internal market through the achievement of a high level of consumer protection, by ensuring among others, that the consumer has access to information.³¹² EU instruments in this field also aim to limit market costs that result from different national requirements vis-a-vis consumer protection. In that regard, the rights of people with disabilities as consumers cannot be guaranteed by the existing legal framework on consumer protection, because their particular needs are not addressed within this legal framework. Thus, in order guarantee a high level of protection for disabled consumers, the EU should adopt a disability-specific measure that is based on Article 114 TFEU.

Nevertheless, even if the EU has the competence to adopt a disability-specific instrument in the field of consumer protection, it does not mean that such action should be taken by the EU. This is due to the fact that in the area of consumer protection, the EU shares the power to take action with the Member States. In that regard, there are two reasons why it is preferable that the EU should take such action and not the Member States. First, such a measure could improve the functioning of the EU internal market. Second, the EU has already developed a pre-existing legislative framework in the field of consumer protection. As I have shown in Chapter III³¹³, the Member States are less likely to take action in fields that the EU has already regulated. Thus, it is logical that the EU is the most appropriate party to adopt a disability-specific measure in the field of consumer protection.

This disability-specific measure should review the rights of consumers that the existing EU legal framework on consumer protection provides, and take action to adjust this framework so that it addresses the particular needs of people with disabilities. In that regard, this measure should primarily focus on the information and communication dimensions of accessibility. As *Waddington* argues, it would be relatively easy to impose an obligation on the Member States to ensure that information is provided in accessible formats to disabled consumers.³¹⁴ After all, such an obligation already exists under the Patients' Rights Directive, as I analysed above.³¹⁵ Therefore, this measure should guarantee that disabled consumers can, on an equal basis with others, seek, receive and impart information – including information on the accessibility of goods and services in the field of consumer protection (information accessibility) – and ensure that this information is provided to them in accessible formats (communication accessibility).

³¹² L. Waddington, 38 *European Law Review* (2013), p.776.

³¹³ See, Chapter III, The effective implementation of the requirements of the UNCRPD by the EU.

³¹⁴ L. Waddington, 38 *European Law Review* (2013), p.777.

³¹⁵ *Ibid.*; See, Chapter V, Obligation to provide accessible forms of communication in the field of goods and services, Services of General Economic Interest.

D. OBLIGATION TO ENSURE PHYSICAL ACCESSIBILITY OF GOODS AND SERVICES

In this section of Chapter V, I describe the measures the EU has taken in the field of physical accessibility of goods and services and consider whether these measures meet the obligations of Article 9 UNCRPD. The instruments examined in this part of Chapter V are connected to the fields of SGEIs and consumer protection.

i. Services of General Economic Interest

In this part of this Chapter V, I firstly examine the Audio-Visual Media Services Directive³¹⁶ and the connection that this directive has with the obligation found in Article 9 UNCRPD to ensure physical accessibility of goods and services. This directive aims to establish a framework for cross-border audio-visual media services in order to strengthen the internal programme production and distribution market and to guarantee conditions of fair competition. It codifies Council Directive 89/552/EEC³¹⁷ (known as the Television without Frontiers Directive), which was amended by Directive 2007/65/EC (known as the Audio-visual Media Services – AVMS – Directive).³¹⁸

The first reference to people with disabilities in this instrument is found in Recital 46 of the Preamble thereto. It states that people with disabilities' participation in the social and cultural life of the Union is connected to the accessibility of audio-visual media services. In that regard, it points out that the accessibility of those services can be achieved through sign language, subtitling, audio-description and easily understandable menu navigation.³¹⁹ This statement shows the importance that the EU attaches to the issue of the accessibility of audio-visual media services and its capacity to mainstream disability considerations in the field of SGEIs. The reference to people with disabilities in the area of audio-visual services should not come as a surprise

³¹⁶ Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Audio-visual Media Services Directive), [2010] OJ L95/1.

³¹⁷ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, [1989] OJ L298/23.

³¹⁸ Directive 2007/65/EC of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, [2007] OJ L332/27.

³¹⁹ Recital 46 of the Preamble to Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Audio-visual Media Services Directive), [2010] OJ L95/1.

because the Commission has been focusing on the inclusion of people in this area for some time.³²⁰

Moving to the substantive part of the directive, Article 7 provides that Member States should encourage media service providers to guarantee that their services are gradually made accessible to people with visual or hearing impairments.³²¹ The directive obliges the Member States to ‘encourage’ the media service providers to gradually make their services accessible to people with hearing and visual disabilities. The use of the word ‘encourage’ seems to allow for a wide level of discretion to the media services providers regarding their actions to make their services accessible to people with visual and hearing impairments. However, this does not preclude that the actions of the Member States may be far reaching. This obligation on the Member States can be connected to the obligation to ensure physical accessibility to audio-visual media services. In my opinion, this provision only partially meets the obligation to provide physical accessibility to audio-visual media services which results from Article 9 UNCRPD, because it does not impose an obligation on the media services providers to ensure disability accessibility of audio-visual media services.

Lastly, it is important to note that the Commission has recently proposed a new directive that, if adopted, will amend the Audio-visual Media Services Directive.³²² The proposal eliminates Article 7 of the current directive on accessibility. The Commission argues that the proposed EAA³²³ will address the accessibility of audio-visual media services. Thus, according to the Commission, there is no reason to retain Article 7 in the proposed Audio-visual Media Services Directive.³²⁴ The European Disability Forum (henceforth EDF) is concerned that the progress that has been made with regard to the accessibility of audio-visual media services could be lost, if the proposed EAA is not adopted.³²⁵ It also argues that the EAA should be supplementary to the existing

³²⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, accompanying the Communication on ‘e-accessibility’, COM(2005) 425 final.

³²¹ Article 7 of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Audio-visual Media Services Directive), [2010] OJ L95/1.

³²² Proposal for a Directive of the European Parliament and the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM(2016) 287 final.

³²³ 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 the accessibility requirements for products and services, COM(2015) 0615.

³²⁴ EDF, ‘Statement on the Proposal for a Directive amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities (COM(2016)287)’, *EDF* (2016), www.edf-feph.org/sites/default/files/final_edf_position_avmsd_revision.pdf, p. 4 (accessed 17 January 2018).

³²⁵ *Ibid.*

accessibility requirements in EU law and policy, and that it should not lead to their elimination.³²⁶

According to the report 'Monitoring e-Accessibility in Europe' of 2010, accessibility requirements for digital television services are less developed than for analogue television services.³²⁷ Spain, United Kingdom and Greece appear to be particularly developed in this field, while, Germany, Hungary, Italy, Portugal and Norway have not introduced any accessibility requirement for digital television.³²⁸ In general, the level of accessibility of television in the European Union is low-medium. The level of accessibility of seven of the 13 Member States studied (Denmark, France, Germany, Greece, Portugal, Sweden, The Netherlands) is low. The United Kingdom is the country with the highest level of accessibility, followed by Spain and Italy, although all of them have medium scores. The lowest level is found in Greece.³²⁹

In addition, the report 'Monitoring e-Accessibility in Europe' of 2011 has shown that the level of accessibility of digital television services hardly varied between 2010 and 2011. Although there were some improvements in Ireland, Spain, the United Kingdom, Germany and the Czech Republic, these were offset by the reversals in other Member States, such as Greece, the Netherlands, France and Denmark.³³⁰ In addition, a 2013 report on assessing and promoting e-accessibility stated that there had been some progress across the Member States with regard to television accessibility.³³¹ Nevertheless, the report indicated that there was significant room for improvement with regard to the accessibility of audio-visual media services.³³²

Lastly, a recent 2016 study entitled 'Ex-post REFIT evaluation of the Audio-visual Media Services Directive 2010/13/EU', found that the accessibility of audio-visual media services for people with visual or hearing disabilities has increased in some Member States, either due to the regulatory action by the Member States or voluntary commitments made by the audio-visual media service.³³³ Nevertheless, commercial broadcasting channels lag behind in comparison to public service broadcasters, which are usually subject to stricter

³²⁶ Ibid.

³²⁷ Technosite et al., 'Annual Report: Monitoring e-accessibility in Europe: 2010', *European Commission* (2010), p. 143.

³²⁸ Ibid.

³²⁹ Technosite et al., 'Annual Report: Monitoring e-accessibility in Europe: 2010', *European Commission* (2010), p. 143.

³³⁰ Ibid., p. 294.

³³¹ Technosite et al., 'Study on assessing and promoting e-accessibility', *European Commission* (2013), p.3.

³³² Ibid.

³³³ Commission Staff Working Document, Ex-post REFIT evaluation of the Audiovisual Media Services Directive 2010/13/EU Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, SWD(2016) 170 final, p. 47.

rules in many countries with regard to the provision of accessible services.³³⁴ In addition, the availability of access services for people who are visually impaired is very low.³³⁵ However, the provision of sign language interpretation is the least available access service.³³⁶ Overall, people with disabilities still face significant barriers when accessing audio-visual content in the EU.³³⁷

From the foregoing reports, it is clear that the level of accessibility of audio-visual media services is low. EU action in the field of physical accessibility of audio-visual media services is not significant. Yet, at the Member State level, it appears that there is also not much interest in improving the current low levels of accessibility of audio-visual media services. One factor that could help to explain the lack of national action on accessibility of audio-visual media services is the fact that the Member States might be reluctant to take action in a field which the EU has already adopted regulatory action.

The second instrument that I will analyse from the perspective of the accessibility of goods and services in this part of Chapter V is the Universal Service Directive. Article 6 of this directive provides that Member States are obliged to ensure that national regulatory authorities have the power to require from the undertakings that provide publicly available electronic communication services, that public pay telephones or other public voice telephony access points are accessible to disabled end-users.³³⁸ Moreover, the Member States should enable the relevant national authorities to introduce certain requirements so as to ensure that end-users with disabilities have access to electronic communications services and can benefit from the availability of undertakings and services on an equal basis with others.³³⁹ Lastly, the Member States are obliged to guarantee access for end-users with disabilities to emergency services on equal basis with others³⁴⁰ and to services provided under the '116' number³⁴¹, to the greatest extent possible.³⁴²

³³⁴ Ibid.

³³⁵ Ibid.

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ Article 6 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

³³⁹ Article 23 (a) (1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

³⁴⁰ Ibidem, Article 26(4) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

³⁴¹ 116 is a range of easy-to-remember and free-of-charge phone numbers to assist children and adults in need, See European Commission, 'About 116 helplines', *European Commission* (2018), <http://ec.europa.eu/digital-agenda/en/about-116-helplines> (accessed 17 January 2018).

³⁴² Article 27 (a) (2) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications

In 2016, the Commission adopted a proposal for a European Electronic Communications Code in an attempt to modernise the current EU telecoms framework.³⁴³ The purpose of this Code is to stimulate competition, drive investment and strengthen consumer rights.³⁴⁴ The Code will merge four existing telecoms directives (Framework, Authorisation, Access and Universal Service Directive).³⁴⁵ The proposal makes a direct reference to the UNCRPD, but it more or less retains the existing provisions of the Universal Service and Framework Directives with regard to people with disabilities. As of October 2017, the proposal was being discussed by the European co-legislators.

The abovementioned provisions contain a variety of measures that are connected to the physical accessibility of telecommunication services. These measures include the accessibility of public pay phones and public voice telephony access points, electronic communication services and access to the emergency services and the missing children hotline number. Article 6 of the Universal Service Directive obliges the Member States to ensure that national regulatory authorities are capable of imposing obligations on undertakings to ensure that public telephones or other public voice telephony access points are accessible to people with disabilities. This provision does not, however, impose an obligation on the undertakings to ensure accessibility of public telephones or other public voice telephony access points to people with disabilities. That being said however, it allows the regulatory authorities to impose such obligations. Contrary to Article 6, Articles 26 (4) and 27 (2) of this directive impose a direct obligation on the Member States to ensure that people with disabilities are able to access emergency services and services provided under the '116' number. Lastly, Article 23 (a) imposes an obligation on the Member States to

networks and services, as amended by Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

³⁴³ Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast), COM(2016) 0590 final.

³⁴⁴ ANED, 'Annotated review of European Union law and policy with reference to disability, January 2017', ANED (2017), <https://www.disability-europe.net/theme/eu-law-and-policy>, p. 10.

³⁴⁵ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, as amended by Directive 2009/136/EC of 25 November 2009 (Framework Directive), [2002] OJ L108/33; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, [2002] OJ L108/21; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (Access Directive), [2002] OJ L108/7; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

enable national regulatory authorities to specify access-oriented requirements. However, the regulatory authorities have the discretion as to whether they will impose these requirements. Therefore, in my view, the measures of Articles 26 (4) and 27 (2) fully meet the obligation to ensure physical accessibility of the telecommunication services, with regard to emergency services; Articles 6 and 23 (a) of the Directive partially meet the obligations to ensure physical accessibility in the field of telecommunications.

A report on the implementation of e-accessibility in Europe of 2010 showed that the level of accessibility achieved in the field of telephony can be broadly described as medium.³⁴⁶ Additionally, ‘The correlation between the degree of implementation of accessibility policies and the accessibility level reached in the different EU countries studied is medium, except in the case of countries such as Italy, where it reaches a relatively high level of accessibility with a very low level of implementation of policies, and the opposite in countries like Greece, where, in spite of showing a certain degree of policy implementation, the level of accessibility achieved is very low. Sweden and the Czech Republic also have lower levels of telephony accessibility than would be expected from the degree of development of their accessibility policies in this field, by contrast, Germany and the Netherlands achieved better levels of accessibility than the degree of development of telephony accessibility policies would have predicted’.³⁴⁷

Moreover, a report on the implementation of e-accessibility in Europe from 2011 showed that the level of accessibility in telephony improved slightly between 2010 and 2011, mainly due to advances that were recorded in Ireland, Spain, Germany and the Czech Republic, in the case of EU countries.³⁴⁸ The same study revealed that only 47% of Member States provided direct access to emergency services via text telephony and only 38% provided direct access to emergency services via a video phone device.³⁴⁹ Lastly, a report on assessing and promoting e-accessibility of 2013 indicated that there had been a small amount of progress in a number of Member States in relation to telecom accessibility.³⁵⁰ However, the report stated that much more effort was needed in order to improve the accessibility of telecommunication services.³⁵¹

There are two main points that can be drawn from these reports. First, the level of accessibility of telecommunication services presented in these reports is low, even in areas such as emergency services, where the EU has established a strong obligation to guarantee accessibility. Second, the Member

³⁴⁶ Technosite et al., ‘Monitoring e-accessibility in Europe: 2010’, *European Commission* (2011), p. 96.

³⁴⁷ *Ibid.*

³⁴⁸ *Ibid.*

³⁴⁹ *Ibid.*, p. 291.

³⁵⁰ Technosite et al., ‘Study on assessing and promoting e-accessibility’, *European Commission* (2013), p. 3.

³⁵¹ *Ibid.*

States have failed to take action to implement accessibility in the field of telecommunications. This could be a result of their reluctance to take regulatory actions in fields where the EU has already established a legislative framework or it could be a result of their lack of interest in regulating accessibility.

The third legal instrument that I will examine in the area of SGEIs – from the perspective of the accessibility of goods and services – in this part of Chapter V is the Directive on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment.³⁵² This directive guarantees a single market for radio equipment by introducing essential requirements for health and safety, electromagnetic compatibility and the efficient use of the radio spectrum.³⁵³ The scope of application of this directive includes all products that use the radio frequency spectrum.³⁵⁴ Article 3(3) (h) of this directive states that radio equipment within certain categories or classes should support accessibility features for people with disabilities.³⁵⁵ The Commission has the power to adopt delegated acts with a view to specifying which categories or classes of radio equipment are concerned by each of the requirements, including the requirements related to disability accessibility.³⁵⁶ As of October 2017, the Commission has not specified the categories or classes of radio equipment that are relevant to the disability accessibility requirement. Thus, the potential that this instrument has to address the physical accessibility of equipment has not been fulfilled.

To sum up, it is evident from my analysis of EU disability policies in the field of SGEIs, and particularly in the telecommunication and audio-visual services, that the EU has used mainstreaming as a policy tool to implement accessibility considerations. These measures, however, do not seem to successfully implement Article 9 UNCRPD. There are many reasons that could explain this. First, these measures do not generally include actual obligations on the service providers to ensure the accessibility of their services. Second, most of these measures are not

³⁵² Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC, [2014] OJ L153/62.

³⁵³ Article 1 of Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC, [2014] OJ L153/62.

³⁵⁴ Article 1 of Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC, [2014] OJ L153/62.

³⁵⁵ Article 3 (3) (h) of Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC, [2014] OJ L153/62.

³⁵⁶ Article 3 (3) (h) of Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC, [2014] OJ L153/62.

very detailed, as they usually entail a small number of provisions that address accessibility. Third, from the available data on the level of accessibility in the field of telecommunication and audio-visual media services, we can conclude that the mechanisms that monitor the implementation of these measures have not been very effective in ensuring the implementation of the EU measures. Indeed, in the area of the accessibility of the direct telephony and emergency numbers, where the obligations to the service providers were concrete enough to guarantee the accessibility of these services, the reports on monitoring e-accessibility from 2010, 2011 and 2013 showed that the levels of accessibility of these services was medium.

In addition, the reports on monitoring e-accessibility from 2010, 2011 and 2013 show that the level of accessibility of audio-visual and telecommunications services is medium to low. This implies that EU measures to ensure accessibility in these fields are not sufficient, but also, that the Member States are not particularly interested in guaranteeing accessibility in these fields or that they are reluctant to take actions in fields where the EU has already regulated to a large extent.

In that regard, it is my opinion that the EU should take action to implement accessibility considerations in the fields of telecommunication and audio-visual services for two reasons. First, the Member States are either not particularly interested in, or they are reluctant to take action, to improve the accessibility levels in these fields. Moreover, in the areas where existing EU disability legislation does not effectively guarantee the implementation of the UNCRPD, it is my view that the EU should take action to amend this legislation with a view to effectively implementing Article 9 UNCRPD. Second, due to the fact that accessibility is a technical issue, it is highly likely that the divergent implementation of Article 9 UNCRPD in the field of telecommunication and audio-visual services by the Member States could endanger the functioning of the internal market. Thus, it would be preferable for the EU to take action in the field of telecommunication and audio-visual services. In that regard, the Commission presented a proposal for an EAA that addresses the issue of accessibility of telecommunication and audio-visual media services.³⁵⁷ Thus, if adopted as proposed, that instrument will comprehensively address the accessibility of the telecommunication and audio-visual services.

ii. Consumer protection

The instrument that I examine with regard to the obligation to provide physical accessibility in the field of consumer protection is the proposed Regulation on consumer product safety.³⁵⁸ As of October 2017, the proposal has been discussed

³⁵⁷ 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 the accessibility requirements for products and services, COM(2015) 615 final.

³⁵⁸ Proposal for a Regulation of the European Parliament and the Council on consumer product safety and repealing Council Directive 87/357/EEC and Directive 2001/95/EC, COM(2013) 78

in the Council (first reading). The legal basis of the proposed regulation is Article 114 TFEU. This proposed regulation will establish the rules on the safety of consumer products that are either placed or made available on the EU market.³⁵⁹ In particular, the proposal states that those categories of consumers, who are at risk when using products, including vulnerable consumers, should be taken into account when assessing the safety of a product that is available on the market.³⁶⁰ As I have analysed earlier in relation to consumer protection policy³⁶¹, people with disabilities should be considered as part of the group of vulnerable consumers. Thus, this provision requires that products available or placed on the market should take into account the safety needs of people with disabilities in order to be considered safe.

As I analysed in Chapter I of my thesis³⁶², safety should be considered as part of the physical dimension of accessibility. The drawback of regulating the safety of a product instead of regulating all aspects of physical accessibility together is that the safety approach only implements a small part of physical accessibility. In the first chapter of my thesis³⁶³, I explained that physical accessibility entails the availability of accessible goods and services and facilities, usability of a good, service or facility and the user-friendliness of a good, service or facility. Thus, the adoption of the safety approach to accessibility with a view to implementing Article 9 UNCRPD will have very limited results. Therefore, it is not the most appropriate way for the EU to fulfil the Article 9 UNCRPD obligation to ensure the physical accessibility of goods and services. Yet, this does not mean that the adoption of measures, such as this regulation, to guarantee the safety of products used by people with disabilities is not an important part of complying with the physical accessibility requirements that are set out in Article 9 UNCRPD. In that regard, the proposed regulation partially meets the obligation to ensure physical accessibility in the field of consumer protection.

E. OBLIGATION TO ENSURE SOCIAL ACCESSIBILITY OF GOODS AND SERVICES

In this section of Chapter V, I describe the measures the EU has taken in the field of social accessibility of goods and services and consider whether these measures meet the obligations of Article 9 UNCRPD. Social accessibility, as I have noted in Chapter I³⁶⁴, refers to the removal of stigma and other negative behaviours that

final.

³⁵⁹ Ibid., Article 1.

³⁶⁰ Ibid., Article 6.

³⁶¹ See, Chapter V, EU policies on accessibility of goods and services, Consumer Protection.

³⁶² See, Chapter I, Dimensions of Accessibility.

³⁶³ Ibid.

³⁶⁴ Ibid.

people with disabilities, their families and their caretakers experience in their everyday lives. The instrument examined in this part of Chapter V is connected to the field of SGEIs.

Services of General Economic Interest

Article 9 of the Audio-Visual Media Services Directive stipulates that Member States should guarantee that audio-visual commercial communications that are provided by media service providers do not include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation.³⁶⁵ This provision might not seem to be directly related to the issue of accessibility of goods and services, but that does not necessarily lead to the conclusion that there is no connection between the two. The removal of societal barriers and the elimination of the stereotypes that society has created about people with disabilities can naturally facilitate their enjoyment of goods and services. Nevertheless, this argument cannot lead to the assessment that Article 9 of this directive fully meets the obligation to provide social accessibility of goods and services.

This is not the first time that the EU has declared the need to avoid discrimination against people with disabilities in the audio-visual media services field. A recommendation of the Parliament and the Council stated that ‘the audio-visual and on-line information services industry and other parties concerned: consider effective means of avoiding and combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation in audio-visual and on-line information services and of promoting a diversified and realistic picture of the skills and potential of men and women in society’.³⁶⁶ This recommendation is certainly of great importance. Nevertheless, stronger and more concrete obligations on service providers are needed if the EU wants to achieve more substantive results. In that regard, and as I have mentioned above³⁶⁷, the Commission has recently proposed a new directive that will amend the Audio-visual Media Services Directive.³⁶⁸ The proposal foresees an amendment to the

³⁶⁵ Article 9 (1) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), [2010] OJ L95/1.

³⁶⁶ Recommendation of the European Parliament and the Council on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry, 20 December 2006, p. 4.

³⁶⁷ See, Chapter V, Obligation to provide physical accessibility of goods and services, Services of General Economic Interest.

³⁶⁸ Proposal for a Directive of the European Parliament and the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM(2016) 287 final.

reference to disability discrimination in Article 9 (1) of the Audio-visual Media Services Directive. Article 6 of the proposed directive obliges the Member States to ensure that audio-visual media services that are provided by media service providers do not entail any incitement of violence or hatred directed against a group of persons, including people with disabilities.³⁶⁹ While the wording of this provision is different from Article 9 (1) of the current Audio-visual Media Services Directive, it is my view that the application of the proposed provision will address similar issues in practice. In other words, this proposed amendment to Article 9 (1) of the Audio-visual Media Services Directive is not a substantive change. More importantly, Article 6 the proposed directive is not a substantive improvement over the existing provisions of the current Audio-visual Media Services Directive.

Lastly, the first report on the application of the AVMS Directive indicated, following an analysis of sex discrimination and gender stereotypes in the 100 most frequently broadcast advertising spots in eight Member States, that stereotypical representation of gender roles were found in 21% to 36% of the spots analysed.³⁷⁰ However, it is a fact that in some Member States a number of positions, professions or products are more systematically associated with a specific gender than in other Member States.³⁷¹ The report also showed that none of the countries surveyed were immune to such stereotypical representations.³⁷² As far as disability is concerned, there was no data in the report, either on discrimination and stereotyping or on the accessibility of audio-visual programmes. This shows that disability might not be very high on the Commission's agenda in the field of audio-visual media services.

F. OBLIGATION TO DEVELOP MINIMUM STANDARDS ON ACCESSIBILITY OF GOODS AND SERVICES

In this section of Chapter V, I describe the measures that the EU has taken in the field of standardisation concerning accessibility of goods and services. The instruments examined in this part of Chapter V are connected to the fields of the internal market, SGEIs and consumer protection.

i. Internal market

On the 1st of September 2010, the Commission issued a mandate that asked CEN, CENELEC and ETSI to include 'Design for All' in all relevant

³⁶⁹ Ibid., Article 6.

³⁷⁰ First Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2010/13/EU, COM(2012) 203 final, p. 8.

³⁷¹ Ibid.

³⁷² Ibid.

standardisation initiatives.³⁷³ The objective of this mandate is, firstly, to ‘initiate a standardisation work programme for addressing the needs of persons with disabilities and older persons in European standardisation, dealing with accessibility by applying the Design for All approach’, secondly, to ‘update a number of standards in priority areas according to the Design for All Approach’ and thirdly, to ‘develop a new standard (or other adequate deliverable to be proposed by the ESOs and accepted by the European Commission) that would address the development and production process of goods manufacturing and services provision in the priority areas and that would describe how to consider accessibility for persons with disabilities and older persons following the “Design for All approach”’.³⁷⁴

CEN, CENELEC and ETSI accepted this mandate in spring 2011. To achieve the task, CEN set up a new working group – CEN BT WG 213 SAGA ‘Strategic Advisory Group on Accessibility’ (SAGA) – which will be responsible for the realisation of that mandate. SAGA works on developing a work programme on how to take accessibility into consideration when developing or revising European standards, updating standards in priority areas and drafting a new deliverable on how to take into account disability accessibility considerations in the development and production process of goods and the provision of services.³⁷⁵ In that regard, SAGA developed a Protocol for Technical Bodies or standardisers on how to determine, if and how, accessibility should be addressed when reviewing an existing, or developing a new standardisation project following a ‘Design for All’ approach.³⁷⁶ It also produced a report that analyses the priority areas for standardisation with respect to the needs of people with disabilities and older people.³⁷⁷ Lastly, SAGA produced a Work Plan for the roll out of priority areas of work in standardisation with regard to the particular needs of people with disabilities and older persons.³⁷⁸ The Work Plan includes a series of recommendations on how to ensure that accessibility is mainstreamed into the European Standardisation process, by applying a ‘Design for All’ approach during the development of standards, proposals for the training

³⁷³ Standardisation Mandate M/473 to CEN, CENELEC and ETSI to include ‘Design for All’ in relevant standardization initiatives, 1 September 2010.

³⁷⁴ Standardisation Mandate M/473 to CEN, CENELEC and ETSI to include ‘Design for All’ in relevant standardization initiatives, 1 September 2010, p. 7.

³⁷⁵ See, for information about Standardisation Mandate M/473, <https://www.cencenelec.eu/standards/Sectors/Accessibility/DesignForAll/Pages/default.aspx> (accessed 17 January 2018).

³⁷⁶ CEN, ‘Protocol on accessibility following a Design for All approach in standardization’, CEN (2018), http://ftp.cencenelec.eu/EN/EuropeanStandardization/Fields/Accessibility/DfA/protocol/Doc_1TheProtocol.pdf (accessed 17 January 2018).

³⁷⁷ CEN, M/ 473 Deliverable 1.2, Analysis of main areas of Standardisation & Prioritisation of work in standardisation in relation to the needs of people with disabilities and older persons, 26 May 2015.

³⁷⁸ CEN, M/ 473 Deliverable 2.1, Workplan for Roll out of priority areas of work (D1.2) in standardisation in relation to the needs of people with disabilities and older persons, 26 May 2015.

of technical bodies on how to address accessibility and the establishment of a 'Helpdesk' on accessibility for specific queries.³⁷⁹ Lastly, CEN-CENELEC continue to work towards the development of a European Standard on implementing a 'Design for All' approach in the design, development and production processes for manufactured goods and service provisions.³⁸⁰

ii. Services of General Economic Interest

In parallel with the negotiations on the Services Directive³⁸¹, the Commission issued Mandate M/341 and transmitted it to CEN on the 19th of July 2005.³⁸² The focus of the mandate was European standardisation in the service sector.³⁸³ The mandate requested the delivery of a programme of standardisation work in order to support the internal market for services, with an emphasis on areas where intra-community trade already existed or would be desirable.³⁸⁴ The mandate also required the issuance of subsequent standardisation mandates.³⁸⁵ These new mandates will focus on a particular service area, industry or process.³⁸⁶ The criteria for deciding whether to adopt these mandates should be either the need to impact upon trade or users of services at the European level.³⁸⁷ Among the outcomes of the mandate was a feasibility study on accessibility services in transport and tourism. After carrying out the Study, CEN published a report on this mandate and made recommendations on the direction of standardisation in the fields of transport and tourism. The recommendations included in the 'accessibility services in transport and tourism' study include the creation of a CEN Workshop Agreement for accessibility services (including: signs, terminology, criteria, services specifications).³⁸⁸ CEN's report from early 2009 was approved by the Commission and the follow-up is currently under consideration. In that regard, the 2014 Annual Union Work Programme for European Standardisation the Commission stated that it would begin to

³⁷⁹ Ibid.

³⁸⁰ See, for information about Standardisation Mandate M/473, <https://www.cencenelec.eu/standards/Sectors/Accessibility/DesignForAll/Pages/default.aspx> (accessed 17 January 2018).

³⁸¹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, [2006] OJ L376/36.

³⁸² Standardisation Mandate M/370 to CEN in the field of services, 19 July 2005.

³⁸³ Ibid., p. 2.

³⁸⁴ Ibid.

³⁸⁵ Ibid., p. 3.

³⁸⁶ Ibid.

³⁸⁷ Ibid.

³⁸⁸ A CEN Workshop agreement (CWA) is a standardisation document, developed in a CEN Workshop. The latter is open to the direct participation of anyone with an interest in the development of the agreement. There is no geographical limit on participation and hence participants may be from outside Europe. The development of a CWA is fast and flexible, on average taking between 10–12 months. A CWA does not have the status of a European Standard and there is no obligation for the National Standards Bodies to adopt it as a national standard.

examine the use of standardisation deliverables with a view to identifying commonly agreed specifications for the Universal Design of tourism services, and to developing training requirements to ensure that tourism services are more accessible.³⁸⁹

Furthermore, Committee CEN/TC 315 is preparing standards to specify the general design criteria for spectator facilities, in order to enable their functionality.³⁹⁰ The Committee particularly focuses on the safety and design characteristics of entry and exit elements of passage, either singularly or in combination, that are used at spectator facilities.³⁹¹ The provision and nature of facilities for persons with special needs will, at some point, make an impact upon spectator facilities.³⁹² Spectators with special needs are regarded as those spectators with learning difficulties, impaired hearing, impaired vision and mobility impairment.³⁹³ CEN has also drafted a Technical Report, CEN/TR 15913:2009 'Spectator facilities – Layout criteria for viewing area for spectators with special needs', which is not yet available to the public.³⁹⁴ Lastly, in the 2012 Annual Union Work Programme for European Standardisation, the Commission indicated the need to address the needs for the next generation of 112 emergency services infrastructures.³⁹⁵

iii. Consumer protection

In 1999, the European Commission published two mandates intended for CEN, CENELEC and ETSI: Mandates M/273³⁹⁶ and M/283.³⁹⁷ The former aimed to guarantee that European Standards integrate requirements for disabled and elderly people in terms of access to Information and Communications

³⁸⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, The annual Union work programme for European standardisation, COM(2013) 561 final, p. 13.

³⁹⁰ See, for more information about the work of CEN on spectator facilities, https://standards.cen.eu/dyn/www/f?p=204:7:0:::FSP_ORG_ID:6296&cs=1CB6C89614E80FEA5204158516349F867 (accessed 17 January 2018).

³⁹¹ *Ibid.*

³⁹² *Ibid.*

³⁹³ *Ibid.*

³⁹⁴ See, for more information about the work of CEN on spectator facilities, https://standards.cen.eu/dyn/www/f?p=204:7:0:::FSP_ORG_ID:6296&cs=1CB6C89614E80FEA5204158516349F867.

³⁹⁵ Commission Staff Working Document, Annual European standardisation work programme 2012, SWD(2012) 0301 final, p. 11; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, The annual Union work programme for European standardisation for 2015, COM(2013) 561 final.

³⁹⁶ Standardisation Mandate M/273, to CEN, CENELEC and ETSI on ICT for disabled and elderly people, 29 September, 1998.

³⁹⁷ Standardisation Mandate M/283, to CEN, CENELEC and ETSI on safety and usability of products by people with special needs, 24 June 1999.

Technologies (ICT) products and services.³⁹⁸ The latter aimed at drafting a document that provides guidance on how to address the needs of elderly and disabled people in product standards.³⁹⁹ The outcome of these mandates was the production of CENELEC Guide 6 ‘Guidelines for standards developers to address the needs of elderly persons and persons with disabilities’ and Guide 28 on ‘Accessibility in interfaces in low voltage electrical installations’.

Guide 6 ‘Guidelines for standards developers to address the needs of elderly persons and persons with disabilities’ is a document that was intended to be part of the overall framework that standardisation bodies could rely upon in their efforts to support and promote the need for more accessible products and services.⁴⁰⁰ This guide provides guidance to writers of relevant international standards, particularly on the way in which they can incorporate the needs of older persons and persons with disabilities in standards which address goods and services.⁴⁰¹ Although it is probable that some people with very extensive and complex disabilities may have requirements beyond the levels that are addressed in this guide, a very large number of people have minor impairments which can be easily addressed by relatively small changes that are set out in standards.⁴⁰² The purpose of this guide is ‘to inform, increase understanding and raise awareness about how human abilities impact on the usability of products, services and environments, to outline the relationship between the requirements in standards and the accessibility and usability of products and services, and to raise awareness about the benefits of adopting accessible design principles in terms of a wider market’.⁴⁰³ Currently, this guide is being revised by CEN BT WG 213 SAGA ‘Strategic Advisory Group on Accessibility’.

The CENELEC Guide 28 – on ‘Accessibility in interfaces in low voltage electrical installations – is a guide for standards writers which aims to provide guidance to constructors of technical standards concerning safety and accessibility in low voltage electrical systems for all users, regardless of their capabilities (in both private houses and public places).⁴⁰⁴ It addresses the special needs of people with disabilities as potential users of these low voltage electrical systems.⁴⁰⁵ The design of interfaces, locations, installation and minimum

³⁹⁸ See, for information on Standardisation Mandates M/273 and M/283, www.cenelec.eu/standards/HotTopics/Accessibility/GuidanceDocs/Pages/default.aspx (accessed 17 January 2018).

³⁹⁹ Ibid.

⁴⁰⁰ CEN/CENELEC Guide 6, Guidelines for standards developers to address the needs of older persons and persons with disabilities, January 2002.

⁴⁰¹ Ibid., p. 1.

⁴⁰² Ibid.

⁴⁰³ Ibid.

⁴⁰⁴ CENELEC GUIDE 28, Accessibility in Interfaces in Low Voltage Electrical Installations A Guide for Standard Writers, March 2006.

⁴⁰⁵ CENELEC GUIDE 28, Accessibility in Interfaces in Low Voltage Electrical Installations A Guide for Standard Writers, March 2006, p. 5.

infrastructure fall under the scope of its application.⁴⁰⁶ Its main objectives are to ‘inform and raise awareness on how the installation of low voltage electrical systems should be designed and the circumstances that need to be considered so that any user is able to interact with it in his daily life, to draw attention to the importance of taking into account the needs of people with disabilities when developing standards and to raise awareness of the social importance of accessible low voltage electrical systems for all’.⁴⁰⁷

These two guidance documents are of fundamental importance for the implementation of the UNCRPD with regard to the accessibility of goods and services. This is because they provide instructions on how to incorporate the needs of persons with disabilities in standards that address goods and services.

Regarding the standards implementing safety legislation, it is worth noting that, until very recently, these did not cover the use of electrical household appliances by vulnerable consumers.⁴⁰⁸ One of the results of the exclusion of vulnerable consumers from the safety legislation was the limited scope of the EN 60335 series of standards implementing the Low Voltage Directive⁴⁰⁹ on the safety of household appliances.⁴¹⁰ The CENELEC Technical Committee 61 Working Group 4 entitled ‘Safety of household appliances by vulnerable people’ revised the following standards so as to take into account the safety of children, older people and people with disabilities: EN 60335-2-2 (vacuum cleaners), 2-3 (electric irons), 2-6 (cooking ranges, hobs, ovens), 2-7 (washing machines), 2-23 (appliances for skin or hair care), 2-52 (oral hygiene appliances).⁴¹¹ More revisions will be adopted in the future in relation to kitchen appliances, ice-cream and ice-cream makers, appliances for heating liquids and refrigerating appliances.⁴¹² In that regard, the CEN-CENELEC working programme of 2015 reaffirmed the commitment of CENELEC Technical Committee 61 (entitled ‘Safety of household and similar electrical appliances’) to continue to develop standards that are intended to ensure the safe use of electrical appliances and to protect the safety of users, taking into account the diversity of potential users, including people with disabilities.⁴¹³

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid.

⁴⁰⁸ ANEC, ‘Position paper, How to protect the vulnerable consumers’, ANEC (2011), <https://www.anec.eu/publications/position-papers/240-anec-position-paper-how-to-protect-vulnerable-consumers-december-2011>, p. 9 (accessed 17 January 2018); ANEC, ‘Annual Report 2010’, ANEC (2010), <https://www.scribd.com/document/61671109/ANEC-Annual-Report-2010>, p. 16 (accessed 17 January 2018).

⁴⁰⁹ Directive 2006/95/EC of the European Parliament and of the Council of 12 December 2006 on the harmonisation of the laws of Member States relating to electrical equipment designed for use within certain voltage limits, [2006] OJ L374/10.

⁴¹⁰ ANEC, ‘Position paper: How to protect the vulnerable consumers’, ANEC (2011), p. 9; ANEC, ‘Annual Report’, ANEC (2010), p. 16.

⁴¹¹ Ibid.

⁴¹² ANEC, ‘Annual Report’, ANEC (2010), p. 16.

⁴¹³ CEN-CENELEC working programme of 2015, European Standardisation and related activities, 15 December 2014, p. 13.

In conclusion, the EU and the European standardisation organisations are developing a large number of standards in the field of goods and services. It is, on the one hand, unfortunate that the adoption of standards takes a long time, but on the other hand it is important that the EU is committed to taking action in the field of standardisation. This is because it shows that the EU understands the critical role that standardisation plays in the implementation of Article 9 UNCRPD. I believe that it is essential for the EU to continue on this path with regard to the development of standards, but it is important that it focuses its standardisation efforts in areas where the EU has adopted relevant accessibility obligations.

IV. THE EUROPEAN ACCESSIBILITY ACT

The EU has been trying for years to improve the accessibility of goods and services in Europe through soft measures with limited results.⁴¹⁴ Following the European Disability Strategy 2010–2020, the European Commission decided to adopt a proposal to initiate legislation in this area. The Commission's legislative proposal was accompanied by other instruments, i.e. standardisation initiatives, to improve accessibility for persons with disabilities and elderly persons.⁴¹⁵ The purpose of the legislative proposal was to develop a regulatory framework that focused on the accessibility of goods and services through a 'European Accessibility Act'. The Act was to be a business-friendly proposal that would substantially improve the proper functioning of the internal market for accessible goods and services.⁴¹⁶

The Communication on the European Disability Strategy 2010–2020 defines 'accessibility' as meaning that 'people with disabilities have access, on an equal basis with others, to goods and services, transportation, information and communications including technologies and systems (ICTs), and other facilities and services in line with Article 9 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD), to which the EU is a party'.⁴¹⁷

On the 12th of December 2011, the public consultation on the legislative proposal for the EAA was opened by the Commission and it eventually closed on the 29th of February 2012. According to the initial plan to implement the European Disability Strategy 2010–2020, the legislative proposal should have

⁴¹⁴ Roadmap, European Accessibility Act: legislative initiative to improve accessibility of goods and services in the Internal Market.

⁴¹⁵ Consultation Document, European Accessibility Act, 12 December 2011.

⁴¹⁶ Ibid.

⁴¹⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe, COM(2010) 636 final.

been published by the end of 2012.⁴¹⁸ However, following several delays, the Commission published a legislative proposal for an EAA on the 2 December 2015.⁴¹⁹ The proposed EAA took the form of a directive. The decision to propose a minimum harmonisation directive for the EAA, as I argued in Chapter III⁴²⁰, is a policy option that can guarantee a good level of accessibility, while at the same time respecting the particularities of the Member States.

The legal basis of the proposed EAA is Article 114 TFEU (internal market). Thus, in order for the EAA to comply with the EU Treaty rules, it must meet the requirements of the CJEU's settled case law on the internal market.⁴²¹ Firstly, there must be national laws that dictate accessibility requirements for each good or service that is intended to be regulated through the Act. The second requirement is that these national laws must cause barriers to the free movement of goods and services in the internal market or significant distortions of competition. If both these requirements are met, the good or service under examination can be included in the Act.

Nevertheless, EU actions in the internal market are also justifiable if they have a preventative effect. In that respect, the EU will be able to include any good or service within the proposed EAA, insofar as it can prove that it is likely that barriers to the free movement of that good or service will emerge due to the development of diverse national legislation and that the EAA is designed to prevent that. The implementation of the UNCRPD by the Member States is relevant to this analysis. As all the Member States, with the exception of Ireland, have ratified the Convention, it can be argued that national measures to implement the accessibility requirements of the Convention might lead to new obstacles to the free movement of goods and services within the internal market. The Member States are likely to adopt laws that will have this impeding effect. Without any actual proof that the Member States' particular plans or policies will have that impeding effect, the emergence of obstacles to the free movement of goods and services can only be considered as a possibility, which is not likely. Thus, the requirements of the internal market legal basis would not be fulfilled. In the next part of Chapter V, I will provide a critical analysis of the EAA's main elements.

i. Purpose

The Commission, in the impact assessment of the proposed EAA, described the EU market problems that led to the introduction of this proposal. The

⁴¹⁸ Commission Staff Working Document, Initial plan to implement the European Disability Strategy 2010–2020, List of Actions 2010–2015, SEC(2010) 1324 final, p. 3.

⁴¹⁹ 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 the accessibility requirements for products and services, COM(2015) 0615 final, Recital 1 of the Preamble.

⁴²⁰ See, Chapter III, State autonomy and the form of EU action implementing the UNCRPD.

⁴²¹ See, Chapter V, EU policies on accessibility of goods and services, Internal Market.

Commission stated that there was a divergence in national accessibility requirements with regard to goods and services placed on the market or provided in EU.⁴²² The national accessibility requirements implemented by the Member States are different in regard to their scope and level of detail, according to the Commission.⁴²³ Industry stakeholders have stated that these differences among Member States have a negative effect on economic operators that conduct cross-border business, because they are forced to carry the extra costs of complying with the different accessibility requirements among the Member States or within each Member State separately.⁴²⁴ Due to the extra costs attached to the adjustment to the different accessibility standards within the EU, the Commission explained that economic operators become less competitive which discourages them to explore other markets.⁴²⁵ In addition, the need for economic operators to conform to divergent accessibility standards could lead to an increase in the prices of the goods or services they offer to the public.⁴²⁶ If the goods or services are not adapted to the different accessibility requirements, economic operators might not be able to sell their goods and services to public authorities. In other cases, their goods and services will not work across borders.⁴²⁷ As such, the existence of divergent accessibility requirements within the internal market could result in customers not being able to compare goods and services using transparent criteria and thereby not being able to make an informed decision concerning the purchase of a particular good or service, hence leading to unfair competition.⁴²⁸

The future of the functioning of the internal market with regard to accessible products does not appear promising. Most of the Member States have ratified the UNCRPD. As a result, the Member States are expected to take action to implement Article 9 UNCRPD. The same is applicable to the EU, as it concluded the Convention in 2010. Currently, not all areas of the Convention's accessibility requirements have been addressed by the EU or by the Member States through legislative or other policy action.⁴²⁹ Furthermore, there has been no coordination between the Member States to take further action to implement

⁴²² Commission Staff Working Document, 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, SWD(2015) 0278 final, p. 11.

⁴²³ Ibid.

⁴²⁴ Ibid., p. 12.

⁴²⁵ Ibid.

⁴²⁶ Ibid.

⁴²⁷ Ibid.

⁴²⁸ Commission Staff Working Document, 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, SWD(2015) 0278 final, p. 12.

⁴²⁹ Ibid.

the accessibility requirements of the Convention.⁴³⁰ Therefore, the Commission expects that divergence in national accessibility requirements in the EU will probably increase in the near future.⁴³¹

For the reasons described above, the Commission decided that EU action to prevent the fragmentation of the internal market with regard to accessible products was necessary. This is in line with my arguments in Chapter III concerning the instances of required EU action for the implementation of Article 9 UNCRPD.⁴³²

The purpose of the proposed EAA is to improve the proper functioning of the internal market through the harmonisation of laws, regulations and administrative provisions of the Member States and through the elimination of barriers to the free movement of certain accessible products and services.⁴³³ The adoption of this directive will lead to an increase in the availability of accessible goods and services on the internal market.⁴³⁴ In addition, the EAA aims to facilitate the implementation of Article 9 UNCRPD by establishing common EU rules.⁴³⁵

The European Economic and Social Committee (EESC) stated, in its opinion on the proposed directive⁴³⁶, that it demonstrates a remarkable potential to increase transparency, clarity and consistency within the internal market for economic operators, including manufacturers and service providers. The increase in transparency, clarity and consistency across the internal market could lead to a decrease in the price of accessible goods and services within the EU.⁴³⁷ Moreover, the EAA could lead to a lowering of the threshold for smaller economic operators that provide accessible goods or services to expand their consumer base in furtherance of and beyond their (often) narrow national markets.⁴³⁸ Lastly, the EAA has the potential to increase the confidence of consumers with disabilities in the cross-border purchases of goods and services.⁴³⁹

⁴³⁰ Ibid.

⁴³¹ Ibid.

⁴³² See, Chapter III, The principle of subsidiarity.

⁴³³ 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 the accessibility requirements for products and services, COM(2015) 0615 final, Recital 1 of the Preamble.

⁴³⁴ Ibid.

⁴³⁵ Ibid., Recital 14 of the Preamble.

⁴³⁶ Opinion of the European Economic and Social Committee on the 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 the accessibility requirements for products and services, COM(2015) 0615 final, para. 4.2.

⁴³⁷ Ibid.

⁴³⁸ Ibid.

⁴³⁹ Ibid., para. 4.3.

ii. Accessibility requirements

Before I analyse the scope of the proposed directive, it is important to mention the main obligations with regard to accessibility which are set out in the EAA. The EAA obliges the Member States to ensure that the goods and services falling within the scope of this directive comply with a set of accessibility requirements that are set out in Annex I.⁴⁴⁰ In other words, this directive imposes a number of requirements to ensure that goods and services in circulation in the internal market are accessible to people with disabilities. Goods and services which are in conformity with harmonised standards or parts thereof that have been published in the Official Journal of the EU should be considered as being in conformity with the accessibility requirements covered by those standards or parts thereof.⁴⁴¹ In the instances where there are no harmonised standards published in the Official Journal of the EU, and where further detail on the accessibility requirements of certain goods and services is necessary for the harmonisation of the market, the Commission is empowered to adopt implementing acts to establish common technical specifications for the accessibility requirements set out in the EAA.⁴⁴² The Member States are, also, obliged by the EAA to abstain from impeding the circulation of goods and services in their national markets which comply with the accessibility requirements of the directive.⁴⁴³

Apart from the Member States, the proposed directive entails obligations for manufacturers, importers, distributors, service providers and authorised representatives. Manufacturers, importers, service providers and distributors of goods and services that operate within the internal market are required to ensure that the products they design and produce, place and make available on the market, are in conformity with the EAA's requirements.⁴⁴⁴ The authorised representatives of the manufacturers are obliged to act within the mandate that is given to them by the manufacturers.⁴⁴⁵ In particular, they are required to provide information to the national competent authorities that demonstrate the conformity of a good with the EAA's requirements. They are also required to cooperate with the national competent authorities to eliminate any danger that a good within their mandate poses to the consumer or the functioning of the market.⁴⁴⁶ With regard to the requirements imposed by the EAA on the former actors, EDF has argued that the EAA should cover all economic operators (both

⁴⁴⁰ 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 the accessibility requirements for products and services, COM(2015) 0615 final, Article 3.

⁴⁴¹ *Ibid.*, Article 13.

⁴⁴² *Ibid.*, Article 14.

⁴⁴³ *Ibid.*, Article 14.

⁴⁴⁴ *Ibid.*, Articles 5 (1), 7 (1), 8(1) and 11 (1).

⁴⁴⁵ *Ibid.*, Article 6 (1).

⁴⁴⁶ *Ibid.*, Article 6 (2).

public and private) without exception, so as to ensure that the whole product chain is included and to guarantee multiple points of control.⁴⁴⁷

iii. Scope

The proposed EAA, as expected, is based on Article 114 TFEU. As a result, the scope of the EAA is based on the internal market principles. This means, as I mentioned in this part of Chapter V, that for a good or service to be included within the scope of the EAA two requirements should be satisfied. First, there must be national legislation which regulates accessibility requirements for that particular good or service. Second, these national laws must cause or be likely to cause barriers to the free movement of that good or service in the internal market or significant distortions of competition. If both these requirements are fulfilled, the good or service at hand can be included within the Act. The Commission, in order to determine the scope of this legislative initiative, decided that it was imperative to identify the goods and services that are relevant to accessibility and subject to barriers with regard to their circulation in the internal market.⁴⁴⁸ The drafting of a concrete list of goods and services would facilitate the identification of the various options that can be relied upon to remove the market barriers with regard to those goods and services and the calculation of the impacts of those options.⁴⁴⁹ From this list of goods and services, the Commission concluded that the goods and services that pass the internal market requirements are the following: general purpose computer hardware and operating systems, automatic teller machines (henceforth ATMs), ticketing machines, check-in machines, consumer terminal equipment with advanced computing capability related to telephony services, consumer terminal equipment with advanced computing capability that is related to audio-visual media services, telephony services and related consumer terminal equipment with advanced computing capability, audio-visual media services and related consumer equipment with advanced computing capability, air, bus, rail and waterborne passengers transport services, banking services, e-books and e-commerce.⁴⁵⁰

In general terms, the proposed EAA seems to entail the elements for an effective legislative act in the field of accessibility, as I analysed in Chapter

⁴⁴⁷ EDF, 'Initial response to the proposal for a European Accessibility Act', *EDF* (2016), p. 9. www.edf-feph.org/sites/default/files/edf_initial_response_european_accessibility_act_feb_2016_-_final_1.pdf (accessed 17 January 2018).

⁴⁴⁸ Commission Staff Working Document, 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, SWD(2015) 0278 final, p. 15.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ 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 the accessibility requirements for products and services, COM(2015) 0615 final, Article 1.

III.⁴⁵¹ This includes strong obligations and a holistic approach to ensuring accessibility in the field of goods and services. To be more specific, the directive contains clear and strong obligations for the Member States and for manufacturers, importers, distributors and authorised representatives so as to ensure accessibility within the scope of the EAA. It also takes a holistic approach in guaranteeing accessibility in the field of goods and services. This means, as I analysed in Chapter III⁴⁵², that when regulating the accessibility of a good or service, an instrument should regulate the accessibility of that good or service in its entirety. The EAA extensively regulates the accessibility of telephony, audio-visual media, banking and passenger transport, services. The extensive regulation of those services does not mean that there are no aspects of the services that the EAA does not cover. However, it is evident from the content of the EAA that the Commission has adopted a holistic approach with regard to the regulation of accessibility with the view to ensuring, as far as possible, the effective implementation of the requirements of the EAA.

While the scope and obligations set out in the proposed EAA seem to include several elements that can ensure the effective implementation of accessibility of goods and services covered, they also include areas that need to be improved, and which should be improved

First, the proposed EAA does not cover the accessibility of all websites, including the websites of private companies. The EAA covers those websites which are connected to e-commerce, transport and banking services, but it leaves the remaining websites, including the websites of economic operators, uncovered. This choice is problematic for three reasons. Firstly, the choice not to regulate the accessibility of all websites may create problems for the functioning of the internal market, as it is possible that the Member States will end up with different rules on the accessibility of the remaining private and public websites. In addition, as I argued in Chapter III⁴⁵³, the Member States very rarely take action to fully cover the areas that the EU has left to their discretion. For example, the Audio-visual Media Services Directive and the Universal Service Directive have left room to the Member States to take action to improve accessibility in their field of application, but the Member States have failed to adopt such actions.⁴⁵⁴ In addition, the EU has recently adopted a Directive on the accessibility of the websites and mobile applications of public sector bodies.⁴⁵⁵ This obliges the Member States to ensure accessibility of various websites and mobile phone applications that are related

⁴⁵¹ See, Chapter III, The effective implementation of the requirements of the UNCRPD by the EU.

⁴⁵² Ibid.

⁴⁵³ See, Chapter III, The effective implementation of the requirements of the UNCRPD by the EU.

⁴⁵⁴ Technosite et al., 'Monitoring e-accessibility in Europe: 2011', *European Commission* (2011).

⁴⁵⁵ Directive 2016/2102/EU of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies, [2016] OJ L327/1.

to public bodies.⁴⁵⁶ The impact assessment report for this directive stated that private websites would not be addressed by the proposed this directive, because the Commission was preparing a proposal for an EAA that would regulate the accessibility of private websites.⁴⁵⁷ Therefore, it was expected that the accessibility of private websites would be addressed in the EAA. However, the EAA proposal does not fully address the accessibility of private websites. In that regard, it is important that the EAA and the Directive on the accessibility of the websites and mobile applications of public sector bodies complement each other and they should not create gaps regarding web accessibility obligations in Europe. Otherwise, it is likely that the functioning of the market for accessible web-sites will be impeded, especially with regard to the free movement of services. The problems will arise as a result of divergent (existing and subsequent) EU and national requirements and standards that implement Article 9 UNCRPD in the field of websites.

Secondly, it is important to note that the expansion of the accessibility requirements to all websites is also essential for the functioning of the internal market. It is important for consumers to be informed about the goods and services circulating in the internal market. The requirement to ensure the accessibility of e-commerce is a positive step towards ensuring access to information for people with disabilities, but it is not sufficient to ensure that disabled consumers will make informed decisions, which is an essential aspect of the functioning of the internal market. Furthermore, people with disabilities have a right to political participation and cultural participation and a set of other rights that are dependent on them having access to information.⁴⁵⁸ These aspects of life, either directly or indirectly, affect the functioning of the market. For example, if a consumer reads on the news that a chocolate company uses child labour in the production process, the consumer may decide against buying the company's product. Such information, though, will not be found on an e-commerce website.

Thirdly, both the impact assessment report of the EAA and an Academic Network of European Disability experts (ANED) report on national accessibility requirements and standards for products and services in the European single market show that there is legislation in the Member States that regulates the accessibility of both public and private web-sites.⁴⁵⁹ This is the first criterion that determines whether the EU can regulate a good or

⁴⁵⁶ Article 1 of Directive 2016/2102/EU of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies, [2016] OJ L327/1.

⁴⁵⁷ Commission Staff Working Document, Impact assessment accompanying the document, Proposal for a Directive of the European Parliament and of the Council on the accessibility of public sector bodies' websites, SWD(2012) 401 final, p. 21.

⁴⁵⁸ Articles 21, 29 and 30 UNCRPD.

⁴⁵⁹ M. Priestley, 'National accessibility requirements and standards for products and services in the European single market: overview and examples', *ANED* (2013), p. 50; Commission Staff Working Document Impact assessment accompanying the document, Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws,

service in the field of the internal market. The second criterion is that national legislation on a good or service must create, or be likely to create, barriers to the free movement of that good or service in the internal market or cause significant distortions of competition. In that regard, I argued above that the regulation of a limited number of websites by the EAA in combination with the scope of application of the Directive on the accessibility of the websites and mobile applications of public sector bodies will create disruptions to the smooth functioning of the internal market of accessible websites. Therefore, I submit that the EU has the power to include all websites within the scope of the EAA.

Second, the proposed EAA, in Article 3, states that Member States may decide, in the light of national circumstances, that the built environment used in the field of passenger transport services, banking services and customer services centres and shops falling under the scope of telephony operators should comply with the accessibility requirements of the Act.⁴⁶⁰ In other words, the Member States are free to choose whether they should take action to implement the accessibility requirements of the directive in the field of the built environment. In that regard, it is important to note that the built environment in the context of passenger transport services, hospitality services and banking services was examined in the EAA impact assessment.⁴⁶¹

As far as the passenger transport services are concerned, it is arguable that the proposed EAA could include a strong obligation that will require the Member States to take action to implement accessibility requirements with regard to the built environment in the field of passenger transport services. The inclusion of such an obligation in the EAA could happen through the addition of a second legal basis to the EAA, namely Article 172 TFEU on trans-European networks. This article empowers the EU to take action to promote the interconnection and interoperability of national networks, as well as access to such networks.⁴⁶² The most relevant measure that was founded on this legal basis is the Commission's Regulation on the technical specifications for interoperability relating to accessibility of the Union's rail system for disabled persons and persons with reduced mobility (TSI PRM Regulation).⁴⁶³ This regulation sets out accessibility

regulations and administrative provisions of the Member States as regards accessibility requirements for products and services, SWD(2015) 264 final, p. 75, Annex VI.

⁴⁶⁰ 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 the accessibility requirements for products and services, COM(2015) 0615 final, Article 3 (10).

⁴⁶¹ Commission Staff Working Document, 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, SWD(2015) 0278 final, p. 16.

⁴⁶² Articles 154–156 TFEU.

⁴⁶³ Commission Regulation No. 1300/2014/EU of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for

requirements with regard to rail vehicles and infrastructure.⁴⁶⁴ In that regard, Article 172 TFEU could be used to regulate the accessibility of infrastructure and vehicles that are connected to air, bus, and waterborne passenger transport services. The CJEU has established two criteria with respect to the permissibility of a dual legal basis. First, the measure at hand should simultaneously pursue several objectives which are inseparably linked without one being secondary and indirect in relation to the other.⁴⁶⁵ In other words, if the legal measure pursues more than one objective which cannot be separated and the one is not subordinated to the other, the measure must be based on corresponding legal basis. It is arguable that the use of Article 172 TFEU as a second legal basis for the EAA is possible, especially if one considers that a trans-European aspect of accessibility of passenger transport services – in terms of the built environment – could be pursued through this legal basis. The accessibility of ticketing, check-in machines and websites in the context of passenger transport services is currently addressed in the EAA on the basis of Article 114 TFEU.

The second criterion of the CJEU with regard to the permissibility of a dual legal basis is that the procedures laid down for each legal basis should be compatible with each other.⁴⁶⁶ Thus, if the legislative procedures applicable to the two legal bases are incompatible, then the inclusion of a second legal basis is not possible. Article 172 TFEU and Article 114 TFEU both provide for the ordinary legislative procedure. Therefore, the legal bases are compatible. In that respect, Article 172 TFEU could be included in the EAA as a corresponding legal basis. The use of Article 172 TFEU will allow the EU to provide for accessibility of the built environment for transport infrastructure and vehicles. The addition of a requirement that ensures the accessibility of transport infrastructure and vehicles in the EAA is supported by the EESC opinion as well.⁴⁶⁷

As far as the rest of the services that are regulated by the proposal for an EAA are concerned, namely banking services and customers' services and shops falling under the scope of telephony operators, it can be argued that the EU has the power to oblige the Member States to ensure that the built environment relevant to those services are accessible to disabled persons. As I explained

persons with disabilities and persons with reduced mobility, [2014] OJ L356/110.

⁴⁶⁴ Article 1 of Commission Regulation No. 1300/2014/EU of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility, [2014] OJ L356/110.

⁴⁶⁵ Case C-336/00 *Huber*, EU:C:2002:509, para. X; Case C-281/01 *Commission v. Council*, EU:C:2002:761, para. 35; Case C-211/01 *Commission v. Council*, EU:C:2003:452, para. 40; Opinion 2/00 of the Court of 6 December 2001, EU:C:2001:664, para. 23; Case C-338/01 *Commission v. Council*, EU:C:2004:253, para. 56.

⁴⁶⁶ Joined Cases C-164/97 and C-165/97 *Parliament v. Council*, EU:C:1999:99, para. 4; Case C-338/01 *Commission v. Council*, para. 56.

⁴⁶⁷ Opinion of the European Economic and Social Committee on the 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 the accessibility requirements for products and services, COM(2015) 0615 final, para. 5.3.

above⁴⁶⁸, the purpose of the EAA is twofold. The directive aims to improve the functioning of the internal market for accessible goods and services and to ensure the implementation of Article 9 UNCRPD. The Commission's impact assessment of the EAA found that there was not enough evidence of existing internal market barriers in the area of the built environment, particularly when it comes to immovable goods.⁴⁶⁹ This meant that the accessibility of the built environment could not be regulated by the EAA.

Nevertheless, it may be possible for the EU to regulate the built environment vis-à-vis goods and services. Under the current EAA proposal, banking services should be made accessible for people with disabilities. This means that websites, mobile device-based banking services and self-service terminals, including ATMs used for the provision of banking services, should be disability accessible. However, if an ATM is located inside the premises of a bank, it might not be accessible for people with disabilities, because the EAA does not cover the accessibility of the physical environment relevant to the services that are included in the EAA. As a result, while the ATMs might be disability accessible, people with disabilities might not be able to use them because the premises where they are located may not be accessible. This example shows that it is necessary to include a provision in the EAA that ensures that the built environment relevant to the services is disability accessible, with a view to ensuring the effective implementation of the EAA's requirements. Otherwise, consumers with disabilities will not be able to enjoy the disability accessible goods and services that are provided for by the EAA and the implementation of Article 9 UNCRPD will be ineffective as a consequence.

Third, among the initial list of goods and services that were examined in the preparation of the proposed EAA were hospitality services, which included the relevant built environment and web-sites.⁴⁷⁰ The EAA does not include this type of services. The impact assessment report of the EAA and the ANED report on national accessibility requirements and standards for products and services in the European single market, show that there is legislation in the Member States which regulates the accessibility of both public and private websites.⁴⁷¹ Thus, the first criterion – that which determines whether the EU can regulate a good

⁴⁶⁸ See, Chapter V, European Accessibility Act, Purpose.

⁴⁶⁹ Commission Staff Working Document, 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, SWD(2015) 634 final, p. 47.

⁴⁷⁰ *Ibid.*, p. 16.

⁴⁷¹ M. Priestley, 'National accessibility requirements and standards for products and services in the European single market: overview and examples', *ANED* (2013), p. 111; Commission Staff Working Document SWD(2015) 264, 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, SWD(2015) 264 final, p. 111, Annex VI.

or service in the field of the internal market – is fulfilled. The second criterion is that national legislation concerning a good or service must create or be likely to create barriers to the free movement of that good or service in the internal market or lead to significant distortions of competition. In that regard, the EAA impact assessment report indicates that the existence of divergent legislation in the field of accessibility of hospitality services has negative consequences for the hospitality industry.⁴⁷² Industry professionals argue that they are confronted with the difficulty of applying divergent accessibility requirements across the Member States, because of their number and fragmentation of the relevant requirements, the costs of implementation and the timetable for application.⁴⁷³ In other words, the divergent national laws and standards in the field of accessible hospitality services create barriers to the free movement of this type of service in the internal market. Therefore, the EU has the power to include accessible hospitality services within the scope of the EAA.

iv. Fundamental alterations and disproportionate burden

The accessibility requirements of the proposed EAA apply to the extent that they do not require a significant adjustment to an aspect or feature of a product or service that would result in the alteration of the basic nature of that good or service.⁴⁷⁴ They also apply as long as they do not impose a disproportionate burden on the economic operators concerned.⁴⁷⁵ The EAA introduces two criteria that determine whether compliance with the accessibility requirements constitutes a disproportionate burden. These are: (i) the size, resources and nature of the economic operator and (ii) the estimated costs and benefits for the economic operator with regard to the estimated benefit for persons with disabilities, considering the frequency and duration of use of the specific good or service.⁴⁷⁶ Economic operators are responsible for determining whether compliance with the accessibility requirements constitutes a disproportionate burden.⁴⁷⁷ If the burden is compensated by funding from resources, other than the economic operator's own resources, it cannot be deemed disproportionate.⁴⁷⁸ If economic operators determine that the accessibility requirements would lead

⁴⁷² Commission Staff Working Document, 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, SWD(2015) 0278 final, p. 112, Annex VI.

⁴⁷³ Ibid.

⁴⁷⁴ 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 the accessibility requirements for products and services, COM(2015) 0615 final, Article 12 (1).

⁴⁷⁵ Ibid., Article 12 (2).

⁴⁷⁶ Ibid., Article 12 (3).

⁴⁷⁷ Ibid., Article 12 (5).

⁴⁷⁸ Ibid., Article 12 (4).

to a fundamental alteration or a disproportionate burden, then they are obliged to notify the market surveillance authority of the Member State in the market where their good or service is placed or made available.⁴⁷⁹

The proposed directive introduces two exceptions to the implementation of the accessibility requirements. It is essential that these exceptions are interpreted in a way that does not allow for them to be used as a means to avoid compliance with the directive's requirements. In particular, the use of the 'disproportionate burden' exception is troubling. As I analysed in Chapter I⁴⁸⁰, 'disproportionate burden' is a term that is used in the UNCRPD as an exception to the duty to provide reasonable accommodation. Article 9 UNCRPD, which lays out the accessibility obligations of the Convention, does not contain a reference to 'disproportionate burden'. The obligations with regard to accessibility, as I analysed in Chapter I⁴⁸¹, are to be realised progressively. This means that the States Parties to the UNCRPD are required to use the maximum of their available resources to implement Article 9 UNCRPD. The Committee on the Rights of Persons with Disabilities stated, in General Comment No. 2, that States Parties are not allowed to use austerity measures as an excuse to avoid the gradual implementation of the UNCRPD's accessibility requirements, because the obligation to implement accessibility is unconditional.⁴⁸²

Therefore, the entity that is obliged to provide accessibility may not excuse omissions by referring to the burden attached to the implementation of the UNCRPD's accessibility requirements.⁴⁸³ States Parties are required to use the maximum of their available resources to implement Article 9 UNCRPD. It is understandable for the Commission to include some limitations on the duty to meet accessibility requirements in the directive, especially for the benefit of small and medium enterprises (SMEs). That being said, even when the private sector cannot carry the burden of the costs of implementing the directive's accessibility requirements, the State, which is the actor that is responsible for implementing the UNCRPD, should take action to ensure the gradual implementation of these requirements. It should do so by, amongst other things, providing funding to those economic operators who face an undue burden, directly or via subsidies. In that regard, it is my view that a provision which requires the Member States to develop funds to provide financial assistance to those economic operators who are overwhelmed by the costs related to the implementation of the EAA's accessibility requirements, should be included within the EAA. These national funds can ensure the gradual implementation of the EAA's requirements, while limiting the instances where economic operators place an inaccessible product on the market because it would be too expensive to make it accessible.

⁴⁷⁹ Ibid., Article 12 (6).

⁴⁸⁰ See, Chapter I, The differences between accessibility and reasonable accommodation.

⁴⁸¹ See, Chapter I, The progressive realisation of Article 9 UNCRPD.

⁴⁸² Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014, para. 25.

⁴⁸³ Ibid.

Another way that the gradual implementation of the requirements of the proposed EAA could be ensured, is to develop and establish a structured dialogue between representatives of organised civil society, including social partners, and in particular representatives of organisations of persons with disabilities, and the Market Surveillance Authorities with regard to the application of the concepts of fundamental alteration and disproportionate burden.⁴⁸⁴ The structured dialogue between the Market Surveillance Authorities and representatives of people with disabilities could ensure the effective and cohesive application of the criteria for the assessment of undue burden and fundamental alteration exceptions that arise vis-a-vis the directive's implementation.⁴⁸⁵

v. *Compliance of goods and services*

The proposed EEA states that the manufacturer or the manufacturer's authorised representative is obliged to draft an EU declaration of conformity which states that the fulfilment of the relevant accessibility requirements referred to in the proposed EEA have been demonstrated.⁴⁸⁶ In addition, manufacturers should use the CE-marking to show that their good conforms with the EAA.⁴⁸⁷ The CE-marking is a marking by which the manufacturer indicates that the manufactured good is in conformity with the requirements set out in EU harmonisation legislation.⁴⁸⁸ The inclusion of references to the CE-marking is a positive measure that can contribute to the implementation of the proposed EEA. This is particularly so because manufacturers are obliged to draw up the EU declaration of conformity and the related technical file so that they comply with the appropriate requirements.

However, the use of the CE-marking is problematic for several reasons. First, the CE-marking – in the context of the proposed EAA – is not meant to signal

⁴⁸⁴ Opinion of the European Economic and Social Committee on the 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 the accessibility requirements for products and services, COM(2015) 615 final, para. 5.10.

⁴⁸⁵ EDF, 'Initial response to the proposal for a European Accessibility Act, February 2016', *EDF* (2016), p. 9. www.edf-feph.org/sites/default/files/edf_initial_response_european_accessibility_act_feb_2016_-_final_1.pdf (accessed 17 January 2018).

⁴⁸⁶ 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 the accessibility requirements for products and services, COM(2015) 0615 final, Article 15(1); Article 30 (1) of Regulation No. 765/2008/EC of the European Parliament and the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, [2008] OJ L218/30.

⁴⁸⁷ Article 15 (2) of Regulation No. 765/2008/EC of the European Parliament and the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, [2008] OJ L218/30.

⁴⁸⁸ Article 2 (20) of Regulation No. 765/2008/EC of the European Parliament and the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, [2008] OJ L218/30.

accessibility to disabled consumers.⁴⁸⁹ The consumer with disabilities cannot be expected to be familiar with the EAA's scope of application.⁴⁹⁰ As a result, disabled consumers will not be able to determine whether the CE-marking on a given good shows compatibility with the EAA or compatibility with another applicable piece of EU legislation.⁴⁹¹ Therefore, CE-marking should be seen as a way to show compliance with EU legislation and not as information to consumers concerning the accessibility a good.⁴⁹²

Second, the CE-marking only applies to goods and not to services.⁴⁹³ This means that the EAA entails two different methods of determining compliance of goods and services with the requirements of the proposal. Article 18 of the EAA states that the Member States should establish, implement and periodically update adequate procedures with the view to checking the compliance of services that are covered by the EAA with the accessibility requirements and the assessment of the exceptions relating to fundamental alterations and disproportionate burden.⁴⁹⁴ Therefore, it is clear that the EAA does not currently provide a method to certify the compliance of services with accessibility requirements. This means that service providers will not have to draft a technical file and notify the authorities, as is the case for products.⁴⁹⁵

Third, CE-marking is self-assessed by manufacturers and they are not awarded by an independent body.⁴⁹⁶ This means it is possible for inaccessible products with a CE-mark to be circulating on the market without the Market Surveillance Authority having evaluated its compatibility with the EAA's accessibility requirements.⁴⁹⁷ To solve these problems, the EESC proposed the creation of a new accessibility label for the EU as a consequence of the EAA.⁴⁹⁸ In that regard, economic operators should receive the necessary training so that they are aware of the accessibility requirements for persons with disabilities.⁴⁹⁹

⁴⁸⁹ Opinion of the European Economic and Social Committee on the 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 the accessibility requirements for products and services, COM(2015) 615 final, para. 5.6.

⁴⁹⁰ Ibid.

⁴⁹¹ Ibid.

⁴⁹² Ibid.

⁴⁹³ 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 the accessibility requirements for products and services, COM(2015) 0615 final, Article 18.

⁴⁹⁴ Ibid.

⁴⁹⁵ EDF, 'Initial response to the proposal for a European Accessibility Act', *EDF* (2016), p. 12.

⁴⁹⁶ Ibid., p. 11.

⁴⁹⁷ Ibid.

⁴⁹⁸ Opinion of the European Economic and Social Committee on the 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 the accessibility requirements for products and services, COM(2015) 615, OJ C 303, 19.8.2016, p. 103, par 5.7.

⁴⁹⁹ Ibid.; EDF, 'Initial response to the proposal for a European Accessibility Act', *EDF* (2016), p. 11.

vi. Transposition

The period for the Member States to transpose the proposed EAA is two years.⁵⁰⁰ Nevertheless, the requirements of the EAA will come into effect six years after the entry into force of the EAA. Given the short life span of information and communication technology-related products and services, it is reasonable to shorten the time frame of six years for entry into effect of the EAA's requirements, at least, with regard to provisions applying to information and communication technologies and the related services.⁵⁰¹

vii. Opinion of the European Parliament

On the 8th of May 2017, the European Parliament issued a report expressing its opinion on the proposed EAA.⁵⁰² The European Parliament argued that the EAA should strike the right balance between the needs of persons with disabilities, and two other considerations, namely, creating possibilities for innovative goods and services and reducing disproportionate costs for companies.⁵⁰³ The need to improve the balance between the needs of persons with disabilities and particularly the costs of companies informed the proposals for change that were expressed by the European Parliament.

To be more specific, the European Parliament argued that micro-enterprises would not be able to cope with the requirements imposed by the proposed EAA.⁵⁰⁴ In particular, it believes that it is not proportionate to require a small independent retailer or a bookseller who builds a website to sell his or her product to make that website fully accessible to people with disabilities.⁵⁰⁵ For that reason, the European Parliament proposed amendments to the EAA that exclude microenterprises from the obligation to make their products and services accessible to people with disabilities.⁵⁰⁶ These amendments, also, exempt both Small and Medium Enterprises (SMEs) and microenterprises from

⁵⁰⁰ 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 the accessibility requirements for products and services, COM(2015) 0615 final, Article 27.

⁵⁰¹ Opinion of the European Economic and Social Committee on the 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 the accessibility requirements for products and services, COM(2015) 615, OJ C 303, 19.8.2016, p. 103, par 5.4.

⁵⁰² European Parliament, 'Report on the 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 the accessibility requirements for products and services, (A8-0188/2017)', *European Parliament* (2017), www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2017-0188&language=EN.

⁵⁰³ *Ibid.*, p. 112.

⁵⁰⁴ *Ibid.*

⁵⁰⁵ *Ibid.*

⁵⁰⁶ *Ibid.*, p. 43.

the obligation to notify the market surveillance authorities where they rely on the disproportionate burden exception.⁵⁰⁷ Lastly, the European Parliament proposed amendments that will grant longer transition periods for making self-service terminals disability accessible.⁵⁰⁸

In addition, the European Parliament pointed out that the Commission's proposal uses the EAA as a tool to ensure that the same level of accessibility is maintained throughout Europe for a selection of products and services by applying requirements to all relevant EU legislation.⁵⁰⁹ The European Parliament argued, in that regard, that this approach is only justified when the existing legislation does not provide guidelines for the implementation of accessibility requirements, and not when there is EU legislation implementing new accessibility requirements or where accessibility requirements are already implemented.⁵¹⁰ For this reason, the European Parliament proposed amendments that removed the link between the EAA and public procurement and structural funds. In particular, the European Parliament proposed the removal of the obligation on the EU and the Member States to ensure that EU structural funds and public procurement legislation comply with the EAA.⁵¹¹

Lastly, the European Parliament declared that it considers the sector specific approach with regard to the implementation of accessibility to be a better option than the horizontal approach that is provided for in the proposed EAA.⁵¹² This might explain why the proposed amendments limit the accessibility requirements in areas where the EU has already implemented accessibility requirements to some extent, as is the case in the areas of audio-visual media and transport services. In particular, the European Parliament proposed narrowing the scope of application of the proposed EAA with regard to audio-visual media services to only websites and mobile applications, and with regard to transport services, both in terms of the number of transport services covered by the proposed EAA and in terms of the accessibility requirements that transport services should comply with.⁵¹³

EDF has strongly criticised this opinion of the European Parliament. Overall, EDF argued that the European Parliament seems to consider the proposed EAA as a burden on enterprises instead of an opportunity for enterprises to reach more consumers by taking into account the particular needs of persons with disabilities.⁵¹⁴ EDF also pointed out that the opinion of the European Parliament

⁵⁰⁷ Ibid., p. 62.

⁵⁰⁸ Ibid., p. 79.

⁵⁰⁹ Ibid., p. 113.

⁵¹⁰ Ibid.

⁵¹¹ Ibid., p. 72.

⁵¹² Ibid., p. 113.

⁵¹³ Ibid., p. 97.

⁵¹⁴ See, EDF, 'Opinion on the European Parliament's opinion on the proposed European Accessibility Act', *EDF* (2017), www.edf-feph.org/newsroom/news/accessibility-act-business-over-people (accessed 17 January 2018).

does not fully recognise the full potential of the EAA as an instrument for implementing Article 9 UNCRPD by the EU and the Member States.⁵¹⁵ The EU and the Member States, with the exception of Ireland, have ratified the UNCRPD. This means that they are required to take action to implement the UNCRPD. In that regard, the European Parliament does not seem to consider that the limitations on the scope of the EAA will have to be addressed by Member State action. The European Parliament analysis seems to focus on the proportionality of the costs to companies, but it seems to ignore that ultimately either the EU or the Member States will have to take action to implement Article 9 UNCRPD, irrespective of the costs that it may create for companies.

In regard to the specific amendments proposed by the European Parliament, EDF is concerned because the exemption of microenterprises from the requirements of the proposed EAA means that many e-commerce services and the e-books of small publishers will be inaccessible.⁵¹⁶ In addition, companies with up to 250 employees can continue making inaccessible goods without having to notify the authorities, as long as they consider that making their goods and services accessible would be a disproportionate burden for them.⁵¹⁷ Furthermore, ATMs or ticketing machines will be used until the end of their economic lives, even if they are not disability accessible, and they will not have to be replaced by accessible ones.⁵¹⁸ EDF also pointed out that every TV broadcaster will decide for themselves how their accessibility services will be offered to their audience and what quality these will be.⁵¹⁹ Lastly, EDF stated that important aspects of audio-visual services, such as the Electronic Program Guides, will remain inaccessible to people with disabilities.⁵²⁰

viii. Conclusion

Overall, the proposed EAA is a very important step towards the improvement of accessibility within the EU, the implementation of Article 9 UNCRPD and the increase in the availability of accessible goods and services in the internal market. This proposal adopts a holistic approach to accessibility and entails strong obligations. These characteristics of the EAA could increase its effectiveness in ensuring accessibility. The scope of application of the EAA covers several goods and services, which is a positive development in itself. However, it is my view that the EAA could have included, as well, all web-sites, accommodation services, transport infrastructure and vehicles and the built environment relevant to the services regulated in the proposal.

⁵¹⁵ Ibid.

⁵¹⁶ Ibid.

⁵¹⁷ Ibid.

⁵¹⁸ Ibid.

⁵¹⁹ Ibid.

⁵²⁰ Ibid.

The EAA contains two exceptions from the application of the accessibility requirements, the fundamental alternations and the undue burden exception. Particularly with regard to the undue burden exception, I argued that the Member States should create funds to provide assistance in the instances where economic operators cannot cover the costs of implementing the requirements of the EAA. In addition, the EAA introduces the application of a CE-marking to indicate the conformity of goods that are placed on the market with the requirements of the proposal. In that regard, I argued that the use of the CE-marking with regard to accessibility is problematic, because the CE-marking is not meant to show to disabled consumers whether a good is disability accessible; it only applies to goods and not to services; it is self-assessed by manufacturers; and not awarded by an independent body. I also proposed the design of an accessibility label to indicate compliance with the requirements of EAA and the UNCRRPD. The accessibility label will also help disabled consumers make informed decisions.

Furthermore, while the transposition period of the EAA is short, the requirements entailed in the proposal will come into force six years after the entry into force of the proposal. Particularly with regard to information and communication technologies, I argued that the EAA should be transposed within a shorter period.

Lastly, the European Parliament's opinion on the EAA seems to be overly concerned with the costs of the implementation of the Act for companies, while it does not pay much attention to the fact that both the EU and the Member States are obliged to implement Article 9 UNCRRPD. In broad terms, the European Parliament proposed amendments that will significantly limit the scope of application of the EAA, both in terms of the goods and services covered and in terms of the public and private sector bodies that will be bound by its obligations.

V. CONCLUSION

The main policy tool that the EU has used in the field of disability policy with regard to the accessibility of goods and services is mainstreaming. Most of the measures I have analysed in Chapter V were disability mainstreaming legislative instruments. The EU has mainstreamed disability considerations in the field of the EU customs union, taxation, the internal market and SGEIs. In the field of consumer protection, the EU has included disability considerations through the use of the concept of 'vulnerable consumers', which includes several groups of consumers, including people with disabilities. In that regard, I argued that a uniform approach to protecting the rights of vulnerable consumers cannot be easily achieved because of the diverse and conflicting needs of each group of

people who are considered to be vulnerable consumers. That is why I argued that such a policy approach cannot effectively address the particular needs of people with disabilities, and to that end I proposed the adoption of a disability-specific instrument in the field of consumer protection by the EU.

The overall assessment of the effectiveness of the accessibility mainstreaming measures in the field of goods and services is not particularly positive. The wording of the provisions of most of the legislative instruments I have analysed did not entail strong obligations. Instead, it left the discretion to the Member States, regulatory authorities and to providers of goods and services as to whether to take action to ensure accessibility. Furthermore, the instruments that I have analysed do not take a holistic approach to guaranteeing accessibility in the field of goods and services. Instead, these instruments are focused on a very limited aspect of accessibility. Moreover, most of the measures addressed a particular dimension of accessibility and not accessibility as a whole, even though they could have addressed more dimensions of accessibility. Lastly, most of the measures did not have an effective monitoring mechanism in place that could ensure the implementation of the accessibility related provisions.

In an attempt to summarise the main points of this part of Chapter V, I will make references to the obligations of Article 9 UNCRPD and whether existing or proposed EU legislation can meet them.

To begin with the obligation to ensure affordability, both the existing legislation on taxation and customs tariff partially meets this obligation. Nevertheless, the EU customs union is an exclusive competence of the EU and thus, the EU could certainly take measures to fully meet the obligations of the Convention. In the field of taxation, I argued that the VAT Directive pre-empts the Member States from using reduced VAT rates outside of the options that are provided for in the directive. Thus, the EU has a *de facto* exclusive competence in the field of reduced VAT rates. In that regard, the EU can allow reduced VAT rates that will cover goods and services that are designed for the exclusive use by persons with disabilities. The postal legislation, also, does not fully meet this obligation.

The obligation to ensure information accessibility is fully met by the Patient Rights' Directive. The Universal Service Directive partially meets this obligation, as the directive does not oblige the telecommunication service providers to provide information related to their services to people with disabilities. The Unfair Commercial Practices Directive only partially meets the obligation to ensure information accessibility, because the concept of 'vulnerable consumers' cannot address the particular needs of people with disabilities.

The obligation to ensure communication accessibility of goods and services is fully met by the Patient Rights' Directive and the Medical Products for Human Use Directive. The Consumer Rights Directive can be interpreted as requiring that the information provided to consumers should be provided in disability

accessible formats when this is needed. Even if this interpretation is far-fetched, the EU still has the competence to provide for such a measure as the directive regulates the formats that the information is provided in.

The obligation to ensure the physical accessibility of goods and services is partially met by the Universal Service Directive, the Audio-Visual Media Services Directive and the Directive on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment. The first, as far as public telephones are concerned, does not impose obligations on undertakings in order to ensure that public pay telephones or other public voice telephony access points are accessible for disabled users. However, it fully meets the obligation to provide physical accessibility for the emergency services. The second does not oblige audio-visual service providers to make their services disability accessible. It rather simply obliges the Member States to encourage them to do so. The third requires that radio equipment within the meaning of this directive is disability accessible. However, the Commission has not yet taken action to specify the particular categories or classes of radio equipment that are relevant to this accessibility requirement, which renders the requirement that radio equipment should be disability accessible currently inapplicable.

The obligation to ensure the social accessibility of goods and services is partially met by the Audio-Visual Media Services Directive. This directive has taken an important step towards combating prejudice and in general, attitudinal or social barriers that people with disabilities face. Nevertheless, the EU is competent to adopt other measures that could contribute to the removal of prejudice on the ground of disability, which is based on Article 19 TFEU on the implementation of the principle of non-discrimination, as we will see in Chapter VI.

Lastly, the proposed EAA is a very important development with regard to the enhancement of accessibility within the EU, the implementation of Article 9 UNCRPD and the increase in the availability of accessible goods and services in the internal market. Nevertheless, there are several aspects of the proposal, such as the scope of application, the two exceptions from the application of the accessibility requirements and the application of a CE-marking which certainly requires some improvement. Unfortunately, the European Parliament's opinion on the EAA seems, instead of improving upon these issues, to be more focused on limiting the scope of application of the EAA so as to ensure that the costs of the implementation of this proposal are reduced to protect private sector companies.

CHAPTER VI

THE IMPLEMENTATION BY THE EU OF ARTICLE 9 UNCRPD RELATING TO ACCESSIBILITY OF THE BUILT ENVIRONMENT

I. INTRODUCTION

In the previous chapter, I analysed the existing EU legislative and non-legislative measures related to accessibility of goods and services. In this chapter, I analyse the actions taken by the EU in the field of the built environment with regard to accessibility. The EU has not been very active in addressing accessibility in the field of the built environment. This might be a result of the fact that the field does not entail a cross-border element that justifies EU action, as I analysed in Chapter III.¹ However, the EU has adopted some measures to address accessibility in the field of the built environment in the areas of public procurement² and the Structural and Investment Funds (henceforth ESI Funds)³, among others.

In this chapter, I analyse the existing EU legislative and non-legislative instruments related to the accessibility of the built environment for persons with disabilities. In that regard, I determine whether the EU's existing measures meet the requirements of Article 9 UNCRPD and whether the EU or the Member States should take further action to implement Article 9 UNCRPD.

To be more specific, the purpose of this chapter is to identify the areas where the EU has legislative power to take measures to implement Article 9 UNCRPD in the field of the built environment and whether it should adopt such measures. The chapter adopts a similar approach to that found in Chapter V. In particular,

¹ See, Chapter III, The principle of subsidiarity.

² Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65.

³ Regulation No. 1303/2013/EU of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, [2013] OJ L347/320.

this chapter reviews the initiatives, both legislative and non-legislative, that the EU has taken with regard to accessibility in the area of the built environment. It examines the relation between those initiatives and the requirements of Article 9 UNCRPD, and specifically whether these legal measures meet the obligations contained therein.

This chapter is divided into two parts. The first part entails an overview of EU policies in the field of the built environment from the point of view of disability accessibility [Section I]. The second part includes an analysis of existing EU instruments regarding accessibility of the built environment, and it examines whether the legal instruments meet the obligations of Article 9 UNCRPD. Particularly, it addresses the obligation to ensure the physical accessibility of the built environment [Section II A] and the obligation to develop minimum standards on accessibility of the built environment [Section II B].

II. EU POLICIES RELEVANT TO ACCESSIBILITY OF THE BUILT ENVIRONMENT

In this part of Chapter VI, I analyse EU policies regarding the ESI Funds and public procurement that are relevant to accessibility of the built environment, in order to better understand the context in which disability accessibility legislation has developed. In the next Section [Section III], I provide an analysis of the existing EU instruments with regard to the accessibility of the built environment and I determine whether these legal instruments meet the obligations of Article 9 UNCRPD.

i. Structural funds

The ESI Funds are the fundamental instruments of the EU's cohesion policy. The goal of this policy is to reduce the disparities between regions and communities through investment in local, regional and national economies.⁴ This policy aims to support the poorer and disadvantaged regions and enable them to overcome their financial and societal problems by investing in human capital, local businesses and basic infrastructure.⁵ The successful implementation of such policies will lead to more competitive local, regional and national economies.⁶ In addition, the mainstreaming of disability accessibility considerations in the EU's cohesion policy, particularly in the ESI Funds, can play an important role in

⁴ R. Smail, L. Broos and E. Kuijpers, *Managing Structural Funds: A step by step Practical Handbook* (EIPA, 2008), p. 9.

⁵ Ibid.

⁶ Ibid.

both the prevention of the emergence of barriers to the accessibility of the built environment and the elimination of current accessibility barriers in relation to the built environment.

The ESI Funds focus on removing barriers to economic activity which affect the functioning and development of the internal market.⁷ It would be unacceptable to allow the internal market to function in an unbalanced way and not to intervene when the internal market failed to self-regulate and correct systemic or accumulated economic disadvantages.⁸ The economic integration of the Member States and the achievement of a European internal market itself can therefore be aided by EU cohesion policies.⁹ Similarly, the unbalanced development of the living standards of EU citizens across the Member States might lead to uneven economic activity and development between these states.¹⁰ These factors show the economic and societal necessity of ESI Funds and how they can contribute towards the successful development of the EU internal market.¹¹

The Treaty on the Functioning of the EU (henceforth TFEU) refers to ESI Funds in the chapter on economic, territorial and social cohesion. Article 174 (former 158 TEC) sets out the purpose of EU cohesion policies and, subsequently, of the ESI Funds. It states that the EU should take action to strengthen its economic, social and territorial cohesion and to promote the harmonious development thereof.¹² This goal is to be achieved through the implementation of ESI Funds (such as, European Regional Development Fund, European Social Fund, Cohesion Fund, European Agricultural Fund for Rural Development, European Maritime and Fisheries Fund), the European Investment Bank and the other existing Financial Instruments.¹³

The ESI Funds are focused on investing in developing infrastructure, such as energy and transport, supporting the modernisation, re-structuring and investment in enterprises and providing training and job opportunities for workers.¹⁴ The implementation of such activities is mainly an obligation of national and regional authorities.¹⁵ The relationship between the Member States and the EU (the Commission in particular) with regard to the ESI Funds is governed by the principle of subsidiarity. A crucial consequence of the

⁷ G. Quinn and S. Doyle, 'Taking the UN Convention on the Rights of Persons with Disabilities Seriously – The Past and Future of the Structural Funds as a Tool to Achieve Community Living', 9 *The Equal Rights Review* (2012), p. 79.

⁸ Ibid.; A. Evans, *The Structural Funds* (Oxford University Press, 2004), p. 10.

⁹ G. Quinn and S. Doyle, 9 *The Equal Rights Review* (2012), p. 79.

¹⁰ Ibid.

¹¹ Ibid.

¹² Article 174 TFEU.

¹³ Article 175 TFEU.

¹⁴ R. Smail, L. Broos and E. Kuijpers, *Managing Structural Funds: A step by step Practical Handbook*, p. 10.

¹⁵ Ibid.

application of this EU principle is the creation of a decentralised administrative structure which regulates the allocation of these funds.¹⁶

The ESI Funds are distributed to the (chosen) Member States over a standard programming period of seven years.¹⁷ The tasks of the Member States and the EU and the procedure and aim of ESI Funds are set out in EU regulations. According to Article 177 TFEU, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, should adopt regulations with a view to defining the tasks, priority objectives and the organisation of the ESI Funds.¹⁸

The EU has adopted a General Regulation for the ESI Funds which is consistent with the guidelines set out in Article 174 TFEU.¹⁹ In addition the European Social Fund, the European Regional Development Fund and the Cohesion Fund each have a separate regulation which governs the application of each respective Fund.²⁰ Nevertheless, each of the funds must follow the rules that are imposed by the General Regulation.²¹

The two funds that are most relevant to accessibility are the European Social Fund (henceforth ESF) and the European Regional Development Fund (henceforth ERDF). The ESF was established so as to minimise the disparities in prosperity and living standards across the EU and thus, raise the levels of economic affluence.²² It focuses on the promotion of employment opportunities through, amongst other things, the advancement of the education and skills of workers.²³ It assists the EU Member States to reach the goals which are set out in the European Employment Strategy and the European Disability Strategy.²⁴

The ERDF supports investments that aim to generate and maintain jobs, infrastructure and local development initiatives and the business activities of

¹⁶ Ibid., p.11.

¹⁷ G. Quinn and S. Doyle, 9 *The Equal Rights Review* (2012), p. 79.

¹⁸ Article 177 TFEU.

¹⁹ Open Society Foundation, 'The European Union and the Right to Community Living Structural Funds and the European Union's Obligations under the Convention on the Rights of Persons with Disabilities', *Open Society Foundation* (2012), <https://www.opensocietyfoundations.org/sites/default/files/europe-community-living-20120507.pdf>, p. 46.

²⁰ Ibid.

²¹ Ibid.

²² European Coalition of Community Living, 'Wasted Time, Wasted Money, Wasted Lives... a Wasted opportunity?', *European Coalition of Community Living* (2010), <http://community-living.info/documents/ECCL-StructuralFundsReport-final-WEB.pdf>, p. 67 (accessed 17 January 2018).

²³ European Commission Factsheet on EU Funding Programmes, What social Europe can do for you, 2010 p. 37.

²⁴ European Commission, 'Toolkit for using Structural and Cohesion Funds, Ensuring accessibility and non-discrimination of people with disabilities', *European Commission* (2009), <http://ec.europa.eu/social/BlobServlet?docID=2740&langId=en>, p. 13; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe, COM(2010) 636 final.

small and medium enterprises.²⁵ The ERDF also supports investment in the areas of health and social infrastructure which may lead to regional and local growth and consequently raise living standards.²⁶

The current EU budgetary package is laid out for the period between 2014 and 2020. The amount of 351.8 billion Euros has been allocated to support and promote the EU's cohesion policy and in particular the ERDF, ESF and the Cohesion Funds.²⁷ More than 51% of this amount will be distributed among the least developed areas of the Union.²⁸ These funds are currently tied to the Europe 2020 Strategy and they aim at increasing growth and investment, competitiveness, employment and promoting sustainable development.²⁹

All the Member States are to prepare a National Strategic Reference Framework (NSRF), which sets out the priorities for the application and realisation of ESI Funds for the current period. This framework contains the overall strategy to raise the levels of economic growth and employment.³⁰ Apart from the overall strategy, Member States prepare more detailed operational programmes in relation to different fields which include specific references to their budget that is to be used alongside EU funds.³¹

ii. Public procurement

The international and regional public procurement legislation that has been adopted in the past has been initiated because of a concern about opening up national procurement markets to competition from tenderers established abroad.³² In the EU, the CJEU has reiterated that 'the principal objective of the Union rules in the field of public procurement is to ensure the free movement of services and the opening-up to undistorted competition in all the Member States'.³³

²⁵ European Commission, 'Toolkit for using Structural and Cohesion Funds, Ensuring accessibility and non-discrimination of people with disabilities', *European Commission* (2009), p. 13.

²⁶ Article 4 of Regulation No. 1080/2006/EC of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No. 1783/1999, [2006] OJ L210/1.

²⁷ See, the website of the European Commission, 'Available Budget 2014–2020', *European Commission* (2018), http://ec.europa.eu/regional_policy/en/funding/available-budget/ (accessed 17 January 2018).

²⁸ *Ibid.*

²⁹ *Ibid.*; G. Quinn and S. Doyle, 9 *The Equal Rights Review* (2012), p. 80.

³⁰ *Ibid.*

³¹ *Ibid.*

³² S. Arrowsmith and P. Kunlik, 'Public procurement and horizontal policies in EC law: general principles', in S. Arrowsmith and P. Kunlik (eds.), *Social and Environmental Policies in EC Procurement Law: New Directions and New Directives* (Cambridge University Press, 2009), p. 30.

³³ Case C-454/06 *pressetext*, EU:C:2008:351, para. 31; see also Case C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne*, EU:C:2002:495, para. 81.

This does not necessarily mean that public procurement law is isolated from other policy areas.³⁴ The environmental impact assessment has, for a long time, been a necessary component for the realisation of many public work contracts, while social legislation that ranges from health and safety in the workplace to accessibility for all is relevant for both the design and the implementation of such contracts.³⁵ Over the last ten years, a variety of different policy considerations have acquired growing relevance with regard to public procurement legislation.³⁶ The primary consideration in public procurement might still be ensuring fair and open competition, but other considerations now appear to be significantly relevant.³⁷ These are named 'secondary considerations'.³⁸ These groups of secondary policies can be classified into industrial, environmental and social policies.³⁹

The industrial policies refer to the actions of states which promote and support their national businesses with a view to increasing their economic activity.⁴⁰ Many states have applied 'buy national' programmes with a view to promoting employment or a favourable balance of payments.⁴¹ For example, Brazil adopted new legislation that has been in force since 2007 which establishes requirements that aim to increase the participation of smaller businesses in the ambit of public procurement.⁴²

Environmental concerns in public procurement have been increasingly addressed, as they are considered to be a very important component of national policies.⁴³ The Canadian Government, for example, has taken action in the area of environmental policies through public procurement with a view to minimising the environmental damage that is caused by its purchases and to promoting the development and use of green products and technologies.⁴⁴

³⁴ R. Caranta, 'Sustainable Public Procurement in the EU', in R. Caranta and M. Trybus (eds.), *The Law of Green and Social Procurement in Europe* (Djoef Publishing, 2010), p. 15.

³⁵ Ibid.

³⁶ See S. Arrowsmith, 'The EC procurement directives, national procurement policies and better governance: the case for a new approach', 27 *European Law Review* (2000); C. McCrudden, *Buying Social Justice: Equality, Government of Procurement & Legal Change* (Oxford University Press, 2007).

³⁷ J. Arnould, 'Secondary policies in public Procurement: Innovations in the new directives', 13 *Public Procurement Law Review* (2004), p.187.

³⁸ Ibid.

³⁹ S. Morettini, 'Public Procurement and Secondary Policies in the EU and global Administrative law', in E. Chiti and B.G. Mattarella (eds.), *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison* (Springer, 2011), p. 187.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Federal Law, 8666/93, Article 3, para. 2; A.P.M. Muller, 'A critical study of Brazilian procurement law', *George Washington University* (1998), www.gwu.edu/~ibi/minerva/Fall1998/Andre.Mueller.html (accessed 17 January 2018).

⁴³ S. Morettini, in E. Chiti and B.G. Mattarella (eds.), *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison*, p. 187.

⁴⁴ Ibid.

Social concerns have been mainstreamed in public procurement by both developed and developing States. These policies aim at reducing unemployment, raising labour standards, providing employment opportunities for disabled people or taking into account accessibility and promoting gender, racial and ethnic equality.⁴⁵ In South Africa, the Preferential Procurement Policy Framework Act 2000 established a preference points system in awarding public contracts in order to support the advancement of people who are historically disadvantaged by unfair discrimination on the basis of race.⁴⁶

Social considerations, particularly equality considerations, in the field of EU public procurement appeared for the first time during the debates on the reform of the Public Procurement Directives in the 1980s.⁴⁷ During the 1990s, the debate on whether a linkage between social considerations and procurement should be made took centre stage in the procurement reform discussions.⁴⁸ Since the 1990s, the EU has considered the issue of secondary policies in public procurement and how to balance the realisation of the single market with the pursuit of secondary non-economic interests.⁴⁹ The Commission, in a Communication on regional and social aspects of public procurement, recognised the importance for the Member States to balance the social and environmental protection aims of public procurement with the aim of promoting fair and efficient public procurement in the internal market.⁵⁰ Nevertheless, the Commission did not, until 2001, specify the way in which these considerations should be applied.

On the 15th of October 2001, the Commission published a Communication on incorporating social aspects in public procurement.⁵¹ The aim of the Communication was to clarify the way social considerations could be implemented in public procurement legislation.⁵² Through this Communication⁵³, the Commission provided precise guidelines to national contracting authorities on how and at which stage of the procurement process these considerations should be included.⁵⁴ The Commission's main priority was to increase the discretion

⁴⁵ Ibid., p. 188.

⁴⁶ Preferential Procurement Policy Framework Act No 5, 2000.

⁴⁷ C. McCrudden, *Buying Social Justice: Equality, Government of Procurement & Legal Change* (Oxford University Press, 2007), p. 317.

⁴⁸ Ibid., p. 447.

⁴⁹ S. Moretini, in E. Chiti and B.G. Mattarella (eds.), *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison*, p. 189.

⁵⁰ Communication from the Commission, Public procurement: regional and social aspects, COM(89) 400 final, p. 7.

⁵¹ Commission interpretative communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM(2001) 566 final, p. 27.

⁵² Ibid., p. 3.

⁵³ S. Moretini, in E. Chiti and B.G. Mattarella (eds.), *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison*, p. 190.

⁵⁴ Commission interpretative communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, COM(2001) 274 final, p. 12; Commission interpretative communication on the

of governmental authorities during the process of evaluating tenders by introducing secondary considerations into this process.⁵⁵ This was addressed by placing secondary considerations among the additional criteria that could be used to determine the most advantageous tender.⁵⁶ Moreover, the Communication indicated that the pursuit of social objectives by the contracting authorities could be pursued at the execution stage of the contract, which is the stage after the contract is awarded.⁵⁷

In addition, the CJEU held in its early case law that it is possible to limit internal market considerations with a view to promoting social concerns.⁵⁸ In the *Beentjes* case⁵⁹, the Court recognised the possibility for the contracting authorities to consider social concerns with a view to benefiting local communities.⁶⁰ The Court found that the criterion of ‘employment of long-term unemployed persons’ could be used as a criterion for awarding public contracts, if it was part of the contract notice and it was not discriminatory towards tenderers from other EU Member States.⁶¹ In subsequent cases, the Court seemed to adopt a more limited approach to the inclusion of secondary considerations in public procurement decisions. For example, in the *Concordia Bus Finland* case⁶², the Court stated that contracting authorities can take criteria relating to the preservation of the environment into consideration when awarding a public contract, ‘provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community (now Union) law, in particular the principle of non-discrimination’.⁶³

In response to the debate about the inclusion of secondary considerations in the public procurement process, the EU, after an intense debate⁶⁴, adopted directives on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Public Sector

Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM(2001) 566 final, p. 27.

⁵⁵ S. Morettini, in E. Chiti and B.G. Mattarella (eds.), *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison*, p. 190.

⁵⁶ Ibid.

⁵⁷ Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM(2001) 566 final, p. 27, para. 3.

⁵⁸ S. Morettini, in E. Chiti and B.G. Mattarella (eds.), *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison*, p. 191.

⁵⁹ Case 31/87 *Beentjes v. The Netherlands*, EU:C:1988:422.

⁶⁰ Ibid.

⁶¹ Ibid., para. 37.

⁶² Case C-519/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne*.

⁶³ Ibid., para. 64.

⁶⁴ See, C. McCrudden, *Buying Social Justice: Equality, Government of Procurement & Legal Change*.

Directive)⁶⁵ and on the coordination of the procurement procedures of entities operating in the water, energy, transport and postal services sectors (Utilities Directive).⁶⁶ These directives took into account several secondary considerations, including disability accessibility.

The issue of secondary considerations in EU public procurement law, as seen above, is a highly controversial subject. Social and environmental considerations are allowed '[...] provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents of the tender notice and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination'.⁶⁷ Nevertheless, the subject-matter of the contract is defined by the contracting authorities, thereby allowing a great discretion concerning what to buy, so long as the definition of the subject matter is not contrary to EU law principles.⁶⁸ However, this does not imply an endorsement of social and green procurement by EU law.⁶⁹

In addition, the concept of secondary considerations is unclear. Secondary considerations might be seen as secondary objectives of public procurement, though this connection disregards the fact that green and social considerations can sometimes be considered as primary objectives too.⁷⁰ The Public Sector Directive states that the objectives of public contracts are the execution of works, the supply of products or the provision of services.⁷¹

In that regard, *Comba*⁷² has argued that – strictly speaking – everything that is not necessary for the execution of works, the supply of products or the provision of services is a 'secondary consideration'.⁷³ He explains that in some cases it is possible that what appears to be a secondary consideration might actually constitute part of the subject matter.⁷⁴ To prove that point, he

⁶⁵ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004] OJ L134/114.

⁶⁶ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, [2004] OJ L134/1.

⁶⁷ Case C-519/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne*, para. 64.

⁶⁸ M.E. Comba, 'Green and Social Considerations in Public Procurement Contracts: A Comparative Approach', in R. Caranta and M. Trybus (eds.), *The Law of Green and Social Procurement in Europe*, p. 307.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004] OJ L134/114.

⁷² M.E. Comba, in R. Caranta and M. Trybus (eds.), *The Law of Green and Social Procurement in Europe*, p. 308.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, p. 309.

refers to the purchase of buses for urban transportation.⁷⁵ The contracting authorities must provide the technical specifications, which include several environmentally friendly devices that are required by EU and national legislation respectively.⁷⁶ Thus, if the law requires the use of a particular standard, the contracting authorities do not have any option but to include it within the technical specifications.⁷⁷ Thus, the environmental standard cannot be considered as a secondary consideration but, like the engine, seats and wheels, is a primary consideration.⁷⁸ Consequently, secondary considerations are those considerations which are required by the contracting authorities, even if they are not objectively necessary to reach the aim of the procurement contract.⁷⁹

The same can be argued for disability accessibility, given that the EU and most of the Member States have ratified the UNCPRD and are obliged to implement the Convention's obligations. The Convention obliges the Member States to ensure that accessible transportation is provided to people with disabilities. Actions which create new obstacles to accessibility, such as the purchase of new disability inaccessible buses by the States Parties to the Convention, are in violation of the Convention. Taking this into consideration, it is arguable that accessibility can be considered as part of the subject-matter of the contract and, thus, a primary objective of the public procurement law.

III. EU INSTRUMENTS AND ACCESSIBILITY OF THE BUILT ENVIRONMENT

In this part of Chapter VI, I analyse the existing EU instruments with regard to the accessibility of the built environment in the fields of ESI Funds, public procurement, the internal market and non-discrimination. I also examine whether these legal instruments meet the obligations of Article 9 UNCPRD. This part of Chapter VI is structured by connecting the EU instruments to the corresponding obligations of Article 9 UNCPRD.

A. OBLIGATION TO ENSURE PHYSICAL ACCESSIBILITY OF THE BUILT ENVIRONMENT

In this section of Chapter VI, I describe the measures that the EU has taken in the field of physical accessibility of the built environment and consider

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid., p. 308.

whether these measures meet the obligations contained in Article 9 UNCRPD. The instruments examined in this part of Chapter VI are connected to the ESI Funds, public procurement, the internal market and non-discrimination.

i. Structural funds

The legal instruments that I analyse with regard to the physical accessibility of the built environment in this part of Chapter VI are the ESI Funds' Regulations. Before moving to the analysis of these regulations, it is important to note that the previous set of ESI Funds' Regulations for the programming period 2007–2013 included some provisions that addressed the particular needs of people with disabilities. Most prominently, Article 16 of the General Regulation obliged the Member States and the Commission to take action to prevent any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation and to guarantee accessibility throughout the implementation of the funds.⁸⁰ However, the effectiveness of the implementation of the previous ESI Funds' Regulations has been questioned in many reports.⁸¹ The implementation of the Funds from the perspective of disability is no exception to these criticisms.⁸² The European Coalition for Community Living (ECCL) published a report in 2010 which identified reasons for the unsuccessful implementation of the programmes funded by ESI Funds (lack of transparency in the operational of ESI Funds and a lack of coherent efforts in monitoring and evaluating ESI Funds).⁸³ This report also criticised the use of ESI Funds to build new institutions for people with disabilities, which has the effect of violating their right to independent living.⁸⁴

In the field of the horizontal implementation of the principle of accessibility in the programmes, the news is not very positive. A study conducted by the Public Policy and Management Institute (Lithuania) in partnership with Net Effect (Finland) and Racine (France), revealed disappointing results concerning

⁸⁰ Article 16 of Council Regulation (EC) No. 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No. 1260/1999, [2006] OJ L210/25.

⁸¹ See, European Coalition of Community Living, 'Report, Wasted Time, Wasted Money, Wasted Lives... a Wasted opportunity?', *European Coalition of Community Living* (2010); European Commission, 'Study on the Translation of Article 16 of Regulation EC 1083/2006 for Cohesion policy programmes 2007–2013 co-financed by the ERDF and the Cohesion Fund (Public Policy and Management Institute (PPMI, Lithuania) in partnership with Net Effect (Finland) and Racine (France), September 2009', *European Commission* (2009), http://ec.europa.eu/regional_policy/en/information/publications/evaluations/2009/study-on-the-translation-of-article-16-of-regulation-ec-n10832006-on-the-promotion-of-gender-equality-non-discrimination-and-accessibility-for-disabled-persons-into-cohesion-policy-programmes-2007-2013-co-financed-by-the-erdf-and-the-cohesion-fund.

⁸² *Ibid.*

⁸³ European Coalition of Community Living, 'Report, Wasted Time, Wasted Money, Wasted Lives... a Wasted opportunity?', *European Coalition of Community Living* (2010), p. 35.

⁸⁴ *Ibid.*, p.37.

accessibility. The purpose of the study was to examine to what extent Article 16 of the previous General Regulation of the ESI Funds was reflected in the cohesion policy programmes 2007–2013 and to present some good practice examples.⁸⁵ The study found that only 64% of the operational programmes made reference to one of the principles (gender equality, non-discrimination and accessibility) mentioned in Article 16 of the previous General Regulation of the ESI Funds.⁸⁶ However, the majority, 70%, of the operational programmes (henceforth OPs) took the partial mainstreaming approach.⁸⁷ This means that they declared one or more of these principles as being amongst its priorities, yet few OPs actually integrated these principles in the realisation of the projects.⁸⁸ Indeed, many of the programmes put emphasis on only one principle and did not take action to thoroughly implement the rest of the principles.⁸⁹ The principle that was least utilised was accessibility.⁹⁰ Furthermore, only 8% of the OPs reviewed involved comprehensive integration (these programmes designed practices for all stages of the programme implementation, which included these principles), whereas 22% followed a declarative integration approach (these programmes hardly mentioned these principles or if they did, they only did so in a declarative way).⁹¹ Finally, as far as accessibility is concerned, only 38% of the OPs made reference to this principle in the strategy section.⁹²

The study offers two main reasons to explain this lack of reference to accessibility. The first reason is the lack of experience in implementing this principle, because it was only introduced in the last funding period.⁹³ The second reason relates to the fact that accessibility can often be found in national legislation and thus some OPs did not have to refer to it because they were bound by national law requirements.⁹⁴

The intense criticism of the previous ESI Funds' Regulations and their failure to effectively regulate the realisation of the operational programmes (particularly in the field of disability and accessibility for disabled people), the weak implementation of the principles found in Article 16 of the previous General Regulation on the ESI Funds, seems to have been noted by the Commission.⁹⁵

⁸⁵ European Commission, 'Study on the Translation of Article 16 of Regulation EC 1083/2006 for Cohesion policy programmes 2007–2013 co-financed by the ERDF and the Cohesion Fund (Public Policy and Management Institute (PPMI, Lithuania) in partnership with Net Effect (Finland) and Racine (France), September 2009', *European Commission* (2009), p. 12.

⁸⁶ *Ibid.*, p. 81.

⁸⁷ *Ibid.*, p. 81.

⁸⁸ *Ibid.*, p. 12.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*, p. 82.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ European Commission, 'Cohesion Policy 2014–2020 – Investing in Growth and Jobs', *European Commission* (2011), http://ec.europa.eu/regional_policy/sources/docoffic/official/regulation/pdf/2014/proposals/regulation2014_leaflet.pdf, p. 3.

The new set of regulations established for managing the current programming period of the ESI Funds took some positive steps towards a more firm and efficient protection of the rights of people with disabilities. This new version of the ESI Funds Regulations is an example of the EU using the path dependency process to improve the previous ESI Funds' regulations, which proved to be ineffective in guaranteeing accessibility of the built environment.

The Commission adopted the new legislative package on the ESI Funds for the period between 2014 and 2020 on the 17th of December 2013.⁹⁶ The new General Regulation has not altered the status of accessibility as a principle which governs the implementation of the funds. Article 7 of this regulation states that accessibility should be taken into account throughout the preparation, design and implementation of programmes related to ESI Funds.⁹⁷

Article 96(7) (b) of the General Regulation provides that the operational programmes should include a description of the specific actions that will be used to promote equal opportunities and prevent any discrimination based on several grounds, including disability, and that will take into account accessibility for disabled persons throughout the preparation, design and implementation of the operational programme.⁹⁸ In that regard, managing authorities should take measures to ensure – throughout the programme lifecycles – that all products, goods, services and infrastructures that are open or provided to the

⁹⁶ Regulation No. 1303/2013/EU of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, [2013] OJ L347/320; Regulation No. 1301/2013/EU of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No. 1080/2006, [2013] OJ L347/289; Regulation No. 1304/2013/EU of the European Parliament and of the Council of 17 December 2013 on the European Social Fund and repealing Council Regulation (EC) No. 1081/2006, [2013] OJ L347/470.

⁹⁷ Article 7 of Regulation No. 1303/2013/EU of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, [2013] OJ L347/320.

⁹⁸ Article 97 (7) (b) (3) of Regulation No. 1303/2013/EU of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, [2013] OJ L347/320.

public and co-financed by ESI Funds are accessible to people with disabilities.⁹⁹ The inclusion of accessibility in the context of the preparation, design and implementation of the operational programme is a very positive development. Instead of accessibility only being part of a more declaratory provision, as in Article 16 of the previous General Regulation on ESI Funds which failed to guarantee accessibility throughout the implementation of the operational programmes¹⁰⁰, accessibility is now considered to be an important element of the programming and execution of the operational programmes.

The ESI Funds' Regulations address several fields of everyday life that are connected to disability. Particularly, the European Regional Development Fund can play an important role in achieving accessibility of the built environment, as it finances projects that are related to infrastructure, according to Article 3 of the European Regional Development Fund Regulation.¹⁰¹ In particular, this Fund supports projects that are focused on, amongst other things, the information society – such as electronic communications infrastructure, services and applications – the secure access to and development of on-line public services and others, tourism, culture and the protection of cultural heritage, like cultural infrastructure and sustainable cultural services, transport, energy, education, health and social infrastructure.¹⁰² All these investments, which are related to the built environment of the EU regions, should consider accessibility considerations from their design through to their execution and realisation. In conclusion, Article 97(7) (b) of the General Regulation fully meets the obligation of Article 9 UNCRPD with regard to physical accessibility in the field of ESI Funds.

A very important element of the new General Regulation on Structural Funds is the new general *ex ante* conditionalities, which are fundamental pre-conditions for the receipt of ESI Funds.¹⁰³ They are found in Annex XI of the new General

⁹⁹ Regulation No. 1303/2013/EU of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, [2013] OJ L347/320, Annex I.

¹⁰⁰ European Commission, 'Study on the Translation of Article 16 of Regulation EC 1083/2006 for Cohesion policy programmes 2007–2013 co-financed by the ERDF and the Cohesion Fund (Public Policy and Management Institute (PPMI, Lithuania) in partnership with Net Effect (Finland) and Racine (France), September 2009', *European Commission* (2009), p. 81.

¹⁰¹ Article 3 of Regulation No. 1301/2013/EU of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No. 1080/2006, [2013] OJ L347/289.

¹⁰² Article 3 of Regulation No. 1301/2013/EU of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No. 1080/2006, [2013] OJ L347/289.

¹⁰³ G. Quinn, and S. Doyle, 9 *The Equal Rights Review* (2012), p. 82.

Regulation on ESI Funds entitled ‘Ex ante conditionalities’.¹⁰⁴ The Annex includes both thematic and general *ex ante* conditionalities.¹⁰⁵ Attached to each thematic priority, there is a list of ‘fulfilment criteria’ in order to offer some indication as to the kinds of actions that should be initiated by the Member States.¹⁰⁶

The *ex ante* conditionality which relates to accessibility is part of the general conditionalities, and it focuses on the transversal thematic priority of disability.¹⁰⁷ This conditionality requires Member States to design a mechanism to ensure the effective implementation and application of the UNCRPD in the context of the ESI Funds.¹⁰⁸ It is important to note, in that regard, that the reference in the General Regulation to the *ex ante* conditionalities of the UNCRPD shows the influence that the Convention has had on the drafting of the ESI Funds Regulations.

Furthermore, the *ex ante* conditionality pertaining to accessibility requires Member States to provide training for staff involved in the management of the ESI Funds in the fields of applicable Union and national disability law and policy, including accessibility.¹⁰⁹ The purpose of the general *ex ante* conditionality on the transversal thematic priority of disability is to guarantee administrative capacities for the implementation and application of the UNCRPD in the field of ESI Funds.¹¹⁰

¹⁰⁴ Article 3 of Regulation No. 1301/2013/EU of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No. 1080/2006, [2013] OJ L347/289, Annex XI.

¹⁰⁵ Article 3 of Regulation No. 1301/2013/EU of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No. 1080/2006, [2013] OJ L347/289, Annex XI.

¹⁰⁶ Article 3 of Regulation No. 1301/2013/EU of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No. 1080/2006, [2013] OJ L347/289, Annex XI.

¹⁰⁷ G. Quinn and S. Doyle, 9 *The Equal Rights Review* (2012), p. 83.

¹⁰⁸ Regulation No. 1303/2013/EU of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, [2013] OJ L347/320, Annex XI.

¹⁰⁹ Regulation No. 1303/2013/EU of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, [2013] OJ L347/320, Annex XI.

¹¹⁰ Regulation No. 1303/2013/EU of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social

This provision can be translated into an obligation to establish effective mechanisms to implement the Convention within the scope of the ESI Funds. Member States should ensure the establishment of adequate structures in order to provide the necessary expertise in the preparation, monitoring and evaluation of the ESI Funds with regard to accessibility.¹¹¹ Furthermore, Member States are required by the General Regulation to perform *ex ante* evaluations so as to improve the quality of the design of each programme by examining, among others, the adequacy of planned measures with regard to accessibility.¹¹² In that regard, these provisions fully meet the obligation to establish an effective monitoring mechanism with regard to the implementation of accessibility in the field of ESI Funds.

The failure of a Member State to complete the actions needed to realise an *ex ante* conditionality by the deadline introduced in the programme, justifies the suspension of Commission payments to this programme.¹¹³ In that regard, it can be concluded that the *ex ante* conditionalities, as they are currently formulated, meet the obligation to consider accessibility from the initial stages of the national policies within the scope of ESI Funds.

The new Regulation on the ESF is also quite important due to the role of the fund as a promoter of social innovation and change.¹¹⁴ The new ESF Regulation introduces two elements that were not included within the scope of the old ESF Regulation. The first one is found in the Preamble of the ESF Regulation. It states that the implementation of the actions financed by the ESF should contribute to

Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, [2013] OJ L347/320, Annex XI.

¹¹¹ Regulation No. 1303/2013/EU of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, [2013] OJ L347/320, Annex I.

¹¹² Article 55(3) (l) of Regulation No. 1303/2013/EU of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, [2013] OJ L347/320.

¹¹³ Article 142(1) (e) of Regulation No. 1303/2013/EU of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, [2013] OJ L347/320.

¹¹⁴ G. Quinn and S. Doyle, 9 *The Equal Rights Review* (2012), p. 86.

combating discrimination, including disability, and that the ESF should support the fulfilment of the UNCRPD's requirements, including accessibility.¹¹⁵

This provision reinforces the provisions on accessibility which are included in the General Regulation on ESI Funds. The same can be said for Article 8 of the new ESF Regulation. This article states the Member States and the Commission should promote equal opportunities for all, including accessibility for disabled persons. This is done through mainstreaming the principle of non-discrimination, and through specific actions within the context of the investment priorities, in order to increase disabled persons' labour market participation and social inclusion, to reduce inequalities in terms of educational attainment and health status and to facilitate the transition from institutional to community-based care.¹¹⁶ Lastly, the reference to accessibility as a principle that should be mainstreamed in the actions taken through this fund shows the importance and the gravity that the Commission has attached to the application of accessibility, especially in the ESF.

In conclusion, the new ESI Funds Regulations constitute a massive improvement with regard to the implementation of Article 9 UNCRPD. In addition to accessibility being a principle that applies throughout the implementation of the ESI Funds' processes, it also applies to the preparation, design and implementation of OPs. Furthermore, the *ex ante* conditionality on disability guarantees both the effective monitoring of accessibility and the appropriate training of the stakeholders who are responsible for implementing the OPs. Nevertheless, time will tell whether these measures will ensure the effective implementation of Article 9 UNCRPD in the context of ESI Funds.

ii. Public procurement

The first legal instrument that I analyse with regard to physical accessibility of the built environment in this part of Chapter VI is the Directive on Public Procurement (henceforth Public Procurement Directive).¹¹⁷ My analysis is focused on the relationship between the Public Procurement Directive and the obligation to ensure the physical accessibility of the built environment. This analysis is also applicable to the relationship between the new Utilities Directive¹¹⁸ and the obligation to ensure the accessibility of goods and services.

¹¹⁵ Recital 19 of the Preamble to Regulation No. 1304/2013 of the European Parliament and of the Council of 17 December 2013 on the European Social Fund and repealing Council Regulation (EC) No. 1081/2006, [2013] OJ L347/470.

¹¹⁶ Article 8 of Regulation No. 1304/2013 of the European Parliament and of the Council of 17 December 2013 on the European Social Fund and repealing Council Regulation (EC) No. 1081/2006, [2013] OJ L347/470.

¹¹⁷ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65.

¹¹⁸ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, [2014] OJ L94/243.

The Public Procurement Directive is based on Articles 57 TFEU, 62 TFEU and 114 TFEU. It applies to public works contracts, public supply contracts and public service contracts over or equal to specified amounts of money, depending on the type of procurement contracts at hand, according to the procurement thresholds which are laid down in Article 4 of the Directive.¹¹⁹

The public procurement contracts are offered, following this directive, by State, local and regional authorities, associations formed by these bodies and bodies that function under public law.¹²⁰ These entities offer all types of procurement contracts. The directive defines public contracts as contracts which have as their object the execution of works, the supply of products or the provision of service contracts for pecuniary interest between one or more economic operators and one or more contracting authorities.¹²¹ Moreover, the directive also specifies that public works contracts' are public contracts, having as their object, the design or the execution (or both) of works related to one of the activities referred to in Annex II or the realisation of a work corresponding to the requirements set out by the contracting authority.¹²² According to Annex II of this Directive, examples of public works contracts are the construction of new buildings and works, the restoration and reparation of old buildings, the construction of bridges, including those for elevated highways, viaducts, tunnels and subways and the construction of highways, streets, roads, other vehicular and pedestrian ways.¹²³

Recital 3 of the Preamble to this directive states that the UNCRPD should be taken into account in the implementation of this directive, particularly with regard to the choice of communication means, technical specifications, award criteria and the contract performance conditions.¹²⁴ This reference to the UNCRPD shows the importance that the EU attaches to the implementation of the UNCRPD. It also reveals, as I will demonstrate in the following paragraphs, the positive effect that the UNCRPD has had on the improvement of the

¹¹⁹ Article 4 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65.

¹²⁰ Articles 2 (2), (3) and (4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65.

¹²¹ Article 2 (5) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65.

¹²² Article 2 (6) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65.

¹²³ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65, Annex II.

¹²⁴ Recital 3 of the Preamble to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65.

accessibility-related provisions, especially when compared to the previous Public Sector Directive.¹²⁵

Recital 76 of the Preamble to the Public Procurement Directive provides that the contracting entities should lay down technical specifications so as to take into account disability accessibility or design for all users, except in duly justified cases.¹²⁶ Furthermore, Recital 101 states that contracting entities should be allowed to exclude candidates or tenderers, where they have violated environmental or social obligations, including accessibility rules.¹²⁷ I conclude from these declarations that the Commission believes that the discretion given to the Member States to regulate the issue of accessibility did not have the expected results. Furthermore, it can also be concluded that there was a grave need to take accessibility seriously for people with disabilities in public procurement tenders.

As in the previous Public Sector Directive, accessibility is part of the technical specifications chapter of the Public Procurement Directive.¹²⁸ Though, by way of contrast to the previous provision, the provision relating to accessibility in the current directive is substantially different. Article 23 of the previous Public Sector Directive encouraged contracting authorities to use, whenever possible, accessibility criteria when defining the technical specification of the desired product or service.¹²⁹ This article stated that authorities were advised to take accessibility considerations into account in the technical specifications of the contact documentation. This provision mainstreamed disability considerations into public procurement legislation.

The wording of this provision gave the authorities a large amount of discretion on whether to include accessibility in the technical specifications. This measure might be considered an important development in the field of accessibility, yet, in reality, looking at the tenders published in the Official Journal of the European Union, the picture is rather bleak.¹³⁰ Looking at the

¹²⁵ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004] OJ L134/114.

¹²⁶ Recital 29 of the Preamble to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65.

¹²⁷ Recital 101 of the Preamble to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65.

¹²⁸ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65.

¹²⁹ Article 23(1) of Directive 2004/18/EC of 31 March 2004, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004] OJ L134/114.

¹³⁰ I have examined all the current notices up to 31 October 2017. I have included all the tenders available at: Tenders Electronic Daily, 'Business Opportunities', *European Commission* (2018), <https://ted.europa.eu/TED/browse/browseByBO.do> (accessed 17 January 2018).

76,752 tenders under the previous directives¹³¹ from the EU's Official Journal, there were very few tenders that contained references to disability or accessibility criteria. One example of a tender that did refer to disability or accessibility criteria was a contract notice that related to both language interpretation and included face to face interpretation, telephone on-the-line interpretation and written translation to and from English, which included references to Braille and sensory interpretation including sign language, lip speaking and deafblind communication.¹³²

The very limited consideration in tender calls reveals the weakness of the provision that is found in Article 23(1) of the Public Sector Directive. However, it is important to note that since the adoption of the current Public Procurement Directive in 2014, and especially since the directive came into effect in 2016, the number of tenders that include references to disability or accessibility criteria has significantly increased.

The ineffectiveness of Article 23 of the previous Public Sector Directive, combined with the increasing pressure on public authorities to ensure procurement contracts contribute to broader social objectives – such as the consideration of accessibility for people with disabilities and the conclusion of the UNCRPD by the EU¹³³ led to the inclusion of stronger accessibility provisions in the new public procurement directives.¹³⁴ In that regard, the Public Procurement Directive is another example of the EU relying on the path dependency process to improve legislation that has not been very effective in achieving its accessibility goals.

Article 42(1) of the Public Procurement Directive states that when the subject of the procurement is intended for use by persons, contracting entities should draw up the technical specifications of the tender documents so as to take into account disability accessibility or Design for All criteria, except in

¹³¹ For all the entities that their activities were regulated by the previous public procurement directives, tenders over 130.000 euro for supplies and services and 5.000.000 euro for works had to be published in the Official Journal of the EU. For all the other entities, tenders over 400.000 euro for supplies and services and 5.000.000 euro for works had to be published in the Official Journal of the EU. The thresholds for publication of tenders in the Official Journal of the EU have changed under the current public procurement directives. See, for more information on this subject, SIMAP, 'European Public Procurement', *European Commission* (2018), <https://simap.ted.europa.eu/european-public-procurement> (accessed 17 January 2018).

¹³² Contract award notice (Call for tender), UK-Middlesbrough: translation services, 2012/S 112–185908.

¹³³ European Commission Consultation document, Citizens' summary entitled, Modernising public procurement in the EU-consultation stage, European Commission (2011), http://ec.europa.eu/internal_market/consultations/docs/2011/public_procurement/citizen_summary_en.pdf.

¹³⁴ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, [2014] OJ L94/243.

duly justified cases.¹³⁵ This provision imposes, on the one hand, an obligation on the contracting authorities to design the technical specifications of the tenders so as to take into account accessibility in order to develop a project that is intended for use by people. On the other hand, it indirectly forces tenderers to include accessibility requirements. This provision does not leave the issue to the discretion of the contracting parties, as did the previous provision by including a reference to the phrase ‘whenever possible’. It is a strong and clear obligation that accessibility must be included from the initial stages of the project. The Public Procurement Directive also provides that, in the case of the existence of mandatory accessibility standards that have been adopted by a legislative act, the technical specifications should be based on those standards insofar as it is possible to do so.¹³⁶

Consequently, in cases where the EU standardisation bodies have developed mandatory standards that relate to a procurement contract, these standards should be followed. This measure, in my view, fully meets both the obligation to ensure the physical accessibility of the built environment and the obligation to consider accessibility of the built environment during the initial stages of policy formulation. Nevertheless, as in the case of the new ESI Funds’ Regulations, time will tell whether these measures can effectively guarantee physical accessibility in the context of public procurement.

The second legal instrument that I will analyse with regard to the physical accessibility of the built environment is the Regulation laying down harmonised conditions for the marketing of construction products.¹³⁷ This regulation aims to ensure the proper functioning of the internal market for construction products by harmonising technical specifications to express the performance of construction products.¹³⁸ It also aims to guarantee that construction works are designed and executed so as to not put at risk the safety of persons, domestic animals or property, nor damage the environment.¹³⁹ For that reason, among others, the regulation establishes the basic health and safety requirements for construction works.¹⁴⁰ This regulation states that disability accessibility is

¹³⁵ Article 42 (1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65.

¹³⁶ Ibid.

¹³⁷ Regulation No. 305/2011/EU of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, [2011] OJ L88/5.

¹³⁸ Recital 58 of the Preamble to Regulation No. 305/2011/EU of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, [2011] OJ L88/5.

¹³⁹ Recital 1 of the Preamble to Regulation No. 305/2011/EU of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, [2011] OJ L88/5.

¹⁴⁰ Article 3 of Regulation No. 305/2011/EU of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, [2011] OJ L88/5.

among the basic requirements for construction works.¹⁴¹ To be more specific, this regulation indicates that construction works must be designed and built taking into consideration accessibility and use by disabled persons.¹⁴² Construction works include both buildings and civil engineering works.¹⁴³ The basic requirements for construction works, which include disability accessibility, should be the basis for the preparation of standardisation mandates and harmonised technical specifications.¹⁴⁴ To sum up, this regulation requires the Member States to ensure that buildings and civil engineering works should be accessible. This measure, in my view, fully meets the obligation to ensure the physical accessibility of construction works.

iii. Internal market

The only instrument I analyse with regard to the physical accessibility of the built environment is the Directive on lifts.¹⁴⁵ This directive is based on the internal market legal basis, namely Article 114 TFEU. This directive aims to guarantee that lifts and safety components for lifts on the market provide a high level of protection of health and safety, whilst also ensuring the functioning of the internal market of lifts.¹⁴⁶ Article 4 of the directive provides that Member States should take all appropriate measures to ensure the placing on the market of lifts and/or safety components for lifts which comply with this directive.¹⁴⁷ This provision is important for people with disabilities, because it prevents lifts that do not include accessibility requirements from being placed on the internal market.

The question that arises is what these accessibility requirements are and how they are connected to the accessibility of the built environment. Annex I

¹⁴¹ Regulation No. 305/2011/EU of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, [2011] OJ L88/5, Annex I.

¹⁴² Regulation No. 305/2011/EU of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, [2011] OJ L88/5, Annex I.

¹⁴³ Article 2 (3) of Regulation No. 305/2011/EU of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, [2011] OJ L88/5.

¹⁴⁴ Article 3 (1) of Regulation No. 305/2011/EU of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, [2011] OJ L88/5.

¹⁴⁵ Directive 2014/33/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to lifts and safety components for lifts, [2014] OJ L96/251.

¹⁴⁶ Recital 48 of the Preamble to Directive 2014/33/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to lifts and safety components for lifts, [2014] OJ L96/251.

¹⁴⁷ Article 4(1) of Directive 2014/33/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to lifts and safety components for lifts, [2014] OJ L96/251.

to the Directive states that lifts intended for the transport of persons should be designed and constructed in such a way that they do not obstruct or impede access and use for people with disabilities, and so as to permit any appropriate adjustments with a view to facilitating use by disabled persons.¹⁴⁸ Furthermore, the controls of lifts intended for use by unaccompanied people with disabilities should be designed and located accordingly.¹⁴⁹ Thus, this directive mainstreams disability considerations into the internal market legislation on lifts. These two requirements suggest that the design of the lifts should be adjusted to the needs of persons with disabilities, so that they are accessible to them and can also be used by them. These obligations relate to the obligations to ensure the physical accessibility of the built environment. The reason behind this statement is that, according to this directive, lifts should be designed so as not to obstruct and impede their use by people with disabilities. Thus, this directive should be considered as fully meeting the obligations to ensure physical accessibility of lifts as parts of the built environment.

iv. Non-discrimination

The first EU treaties did not include any references to disability discrimination. The Treaty establishing the European Economic Community¹⁵⁰ contained the first references to discrimination. Article 6 of that Treaty prohibited discrimination on the basis on nationality within the scope of the European Community.¹⁵¹ Furthermore, Article 119 of that same Treaty introduced the principle of equal pay for men and woman for equal work.¹⁵² Since 1975, many legislative steps have been taken at the European level to promote the principle of equal treatment between men and women.¹⁵³ At the same time, national courts and the European Court of Justice (now Court of Justice of the EU) have developed case law on the application of these legislative measures.¹⁵⁴

¹⁴⁸ Directive 2014/33/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to lifts and safety components for lifts, [2014] OJ L96/251, Annex I.

¹⁴⁹ Directive 2014/33/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to lifts and safety components for lifts, [2014] OJ L96/251, Annex I, section 1.6.

¹⁵⁰ This Treaty was renamed after the Maastricht Treaty in European Community (EC or TEC) and after the Lisbon Treaty in Treaty on the Functioning of the EU (TFEU).

¹⁵¹ Article 6 EEC.

¹⁵² Article 119 EEC.

¹⁵³ S. Burri, 'EU Anti-Discrimination law: Historical Development and Main Concepts', in Y. Li and J Goldschmidt (eds.), *Taking Employment Discrimination Seriously: Chinese and European Perspectives* (Martinus Nijhoff Publishers, 2009), p. 211; see for an overview: S. Burri and S. Prechal, *EU Gender Equality Law* (Office for Official Publications of the European Communities, 2008).

¹⁵⁴ S. Burri, in Y. Li and J Goldschmidt (eds.), *Taking Employment Discrimination Seriously: Chinese and European Perspectives*, p. 211; See for overview: S. Burri and S. Prechal, *EU Gender Equality Law*.

The adoption and entry into force of the Treaty of Amsterdam in 1999 resulted in the declaration that equality between men and women was one of the essential principles of the Community.¹⁵⁵ Moreover, among the aims of the Community actions, according to this Treaty, were the elimination of inequalities and the promotion of equality between men and women.¹⁵⁶ The most important development, though, in EU discrimination law that was introduced via the Amsterdam Treaty was Article 13 EC (now Article 19 TFEU). This article, as I analysed in Chapter III¹⁵⁷, empowers the EU to take action to combat discrimination on the ground of disability, as well as on the basis of sex, racial or ethnic origin, religion or belief, age or sexual orientation.¹⁵⁸ The phrase ‘without prejudice to any special provisions contained therein’, which was included in Article 13 EC, appears to indicate that nothing within this article should be considered as limiting the scope or the effects of any other provision of the Treaty.¹⁵⁹ Based on this legal basis, the EU has adopted the Directive establishing a general framework for equal treatment in employment and occupation (henceforth Employment Equality Directive)¹⁶⁰ and the Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (henceforth Racial Equality Directive).¹⁶¹ Both directives establish a general framework for combating discrimination, the former on the grounds of religion or belief, disability, age or sexual orientation¹⁶² and the latter on the grounds of racial or ethnic origin.¹⁶³ The scope of application of the former includes the fields of employment and occupation and vocational training, membership of employer and employee organisations¹⁶⁴ and the scope of application of the latter entails, in addition to fields of the former directive, the fields of social protection, including social security and health care, education and access to goods and services which are available to the public, including housing.¹⁶⁵ The directive that is relevant to disability is the Employment

¹⁵⁵ Article 2 TEC.

¹⁵⁶ Article 3(2) TEC.

¹⁵⁷ See Chapter III, The elimination of discrimination in the EU territory.

¹⁵⁸ Article 13 EC (now Article 19 TFEU).

¹⁵⁹ M. Bell, ‘The new article 13 EC Treaty: a platform for a European policy against racism?’, G. Moon (ed.), *Race discrimination developing and using a new legal framework* (Hart Publishing, 2000), p. 87.

¹⁶⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16.

¹⁶¹ 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 L180/22.

¹⁶² Article 1 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16.

¹⁶³ Article 1 of 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 L180/22.

¹⁶⁴ Article 3 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16.

¹⁶⁵ Article 3 of 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 L180/22.

Equality Directive. The directive contains provisions on direct and indirect discrimination¹⁶⁶, as well as reasonable accommodation.¹⁶⁷

Before I move on to the analysis of the connection between the principle of non-discrimination and accessibility, it is important to make some clarifications. The principle of non-discrimination is different from the principle of accessibility.¹⁶⁸ Accessibility is an independent principle. Therefore, there is neither the obligation on the States Parties to the Convention (including the EU) to take measures to implement the principle of accessibility by including it in the context of non-discrimination, nor is there an obligation to consider a violation of accessibility as discrimination. Nevertheless, the fact that the States Parties to the Convention do not have an obligation to consider a violation of accessibility as a form of discrimination, does not exclude the possibility of the adoption of a measure providing for such an event by the States Parties, with a view to progressively realising the obligation to ensure accessibility of the built environment, as is established in Article 9(1) UNCRPD.¹⁶⁹

The Austrian Federal Disability Act is a good example of considering inaccessibility as a form of discrimination. This Act was adopted in 2005 and came into force on 1 January 2006.¹⁷⁰ The Austrian law includes provisions on both direct and indirect discrimination. The Austrian law differs from the Employment Equality Directive in that the prohibition of indirect discrimination in the Austrian law applies to 'properties of arranged/constructed areas of life'.¹⁷¹ This term entails, among others, the structural and communicational-technical fields, as well as barriers to the access or supply of goods and services.¹⁷² The principle of accessibility is not defined in this law. Instead, the emphasis of this law is on whether indirect discrimination exists in a specific instance.¹⁷³ The law also refers to the notion of unreasonableness, which refers to the cases where the removal of the identified barriers constitutes an unreasonable burden.¹⁷⁴ In an attempt to promote and facilitate the implementation of this law, the Austrian government has offered certain subsidies to support the adjustment of services

¹⁶⁶ Article 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16.

¹⁶⁷ Article 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16.

¹⁶⁸ Article 3 UNCRPD. Accessibility is a different principle than non-discrimination.

¹⁶⁹ Article 9(1) UNCRPD.

¹⁷⁰ A. Williams, 'An Introduction to the Austrian Federal Disability Equality Act', in G. Quinn and L. Waddington (eds.), *European Yearbook on Disability Law* (Intersentia, October 2009), p. 147. This examined the Austrian Federal Disability Act before it was amended in 2008 and 2010.

¹⁷¹ *Ibid.*, p. 148.

¹⁷² A. Williams, in G. Quinn and L. Waddington (eds.), *European Yearbook on Disability Law*, p. 147. This examined the Austrian Federal Disability Act before it was amended in 2008 and 2010.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*, p. 148.

and facilities that are open or provided to the public so as to meet the needs of people with disabilities.¹⁷⁵ Finally, in the field of public transport and buildings, the law provides for a transitional period for adjusting the environment and removing the barriers to accessibility.¹⁷⁶

Since the adoption of the Federal Disability Act, there have been several amendments to that act, which have significantly limited the scope of its application.¹⁷⁷ The most important amendment stated that the federal government and some federal institutions cannot be held accountable for indirect discrimination, because of existing accessibility barriers, until 2020.¹⁷⁸ This Federal Disability Act shows that either the EU or the Member States can make the policy choice of considering the inaccessibility of a facility or a good or a service open or provided to the public as a form of discrimination.

In addition, and as I argued in Chapter III of my thesis¹⁷⁹, one could consider accessibility as part of the principle of non-discrimination because the removal of existing and future barriers to accessibility contributes to the elimination of discrimination that people with disabilities encounter in their everyday lives.¹⁸⁰ In that regard, Article 19 TFEU does not offer a definition or indicate the possible content of the notion of discrimination. It is valid to say that the Employment Equality Directive, which had Article 13 EC as its legal basis, provides definitions of direct and indirect discrimination.¹⁸¹ In this directive, there is no reference to accessibility, even though there is a reference to reasonable accommodation, which is a term that is not found in the legal basis of the directive. However, a directive is secondary law and can be easily amended (at least in comparison with a Treaty amendment). Therefore, it is my view that Article 19 TFEU can be used as a legal basis to enact legislation on combating discrimination that could include accessibility provisions, or that will declare accessibility as part of the non-discrimination principle.

This argument is supported, also, by the Commission's original 2008 proposal for a Council Directive on implementing the principle of equal treatment between persons, irrespective of religion or belief, disability, age

¹⁷⁵ Ibid., p. 147.

¹⁷⁶ Ibid., p. 149; Zero Project Report, 'International Study on the Implementation of the UN Convention on the Rights of Persons with Disabilities', *Zero Project Report* (2012), <https://zeroproject.org/wp-content/uploads/2013/12/Zero-Project-Report-2012.pdf>, p. 154 (accessed 17 January 2018).

¹⁷⁷ See, European Equality Law Network, Austria – Country report, non-discrimination 2017, by Dieter Schindlauer, *European Equality Law Network* (2017), <https://www.equalitylaw.eu/downloads/4459-austria-country-report-non-discrimination-2017-pdf-1-57-mb>, p. 48.

¹⁷⁸ Ibid.

¹⁷⁹ See, Chapter III, The elimination of discrimination in the EU territory.

¹⁸⁰ L. Waddington, 'Future Prospects for EU Equality Law: Lessons to be Learnt from the Proposed Equal Treatment Directive', 36 *European Law Review* (2011), p. 177.

¹⁸¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16.

or sexual orientation (henceforth proposed Equal Treatment Directive).¹⁸² The purpose of this proposal is to implement the principle of equal treatment between persons, irrespective of their religion or belief, disability, age or sexual orientation outside the labour market.¹⁸³ This proposal supplements the existing EU legal framework with regard to the prohibition of discrimination on grounds of religion or belief, disability, age or sexual orientation. If adopted, the proposal will add, to the existing scope of protection, the fields of social protection, health care, education and access to goods and services, including housing that is available to the public.¹⁸⁴ Article 4(1) of the proposed directive states:

‘The measures necessary to enable persons with disabilities to have effective non-discriminatory access to social protection, social advantages, health care, education and access to and supply of goods and services which are available to the public, including housing and transport, shall be provided by anticipation, including through appropriate modifications and adjustments’.¹⁸⁵

The wording of this provision is similar to the wording of Article 9 UNCRPD. This article states that States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to several fields, including the ones mentioned in Article 4 (1) of the proposed Equal Treatment Directive. As I analysed in Chapter I¹⁸⁶, the right of access entails not only the principle of non-discrimination and reasonable accommodation, but also that of accessibility. In that regard, it is evident that this proposal for a directive entails an obligation with regard to accessibility.

Disability accessibility appears more clearly in the wording of the amended version of this proposal. The legislative resolution of the European Parliament of the 2nd of April 2009, on a proposal for an Equal Treatment Directive, stated that Member States should take measures to guarantee accessibility in the areas of public transport, the built environment, communications and information with a view to effectively implementing the principle of equal treatment.¹⁸⁷

The use of Article 19 TFEU to adopt legislation on accessibility might be possible if the Member States are able to reach a unanimous agreement within the Council, which is one of the challenges to the use of this legal basis, as

¹⁸² For more information on the proposal for the Equal Treatment Directive see, L. Waddington, 36 *European Law Review* (2011).

¹⁸³ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 0426 final.

¹⁸⁴ *Ibid.*, Article 3.

¹⁸⁵ *Ibid.*, Article 4(1).

¹⁸⁶ See, Chapter I, Accessibility of and Access to.

¹⁸⁷ European Parliament legislative Resolution on 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, P6_TA(2009)0211; L. Waddington, 36 *European Law Review* (2011), p. 178.

I stated in Chapter III.¹⁸⁸ The scope of application of a measure based on Article 19 TFEU could include the areas that the Racial Equality Directive¹⁸⁹ includes and the proposed Equal Treatment Directive attempts to include. Thus, a measure based on Article 19 TFEU could cover employment and occupation, vocational training, membership of employer and employee organisations, social protection, including social security and health care, education and access to goods and services which are available to the public, including housing.¹⁹⁰ Nevertheless, as I have mentioned in Chapter III¹⁹¹, the power of the EU to use this legal basis is limited by the principle of subsidiarity. In that regard, it is quite possible that the provisions of a legal instrument based on Article 19 TFEU might affect the economic, social and cultural situation of the Member States significantly. Thus, due to subsidiarity concerns, the Member States might provide stern opposition to the adoption of such a proposal. Indeed, subsidiarity concerns are one of the reasons that the proposed the Equal Treatment Directive has not yet been adopted.¹⁹²

This option, the initiation of legislation on accessibility through Article 19 TFEU, was considered as a possible option for the legal basis for the European Accessibility Act.¹⁹³ Indeed, Austria's Federal Disability Act was considered by the EDF to be a model for the EAA.¹⁹⁴ Nevertheless, Article 114 TFEU was ultimately chosen as the legal basis for the proposed Act.

My analysis in this section of Chapter VI shows that it is arguable for the EU to use Article 19 TFEU to initiate legislation on disability accessibility. Yet, such legislation will have to overcome the obstacles of unanimity and subsidiarity. Considering that the proposed Equal Treatment Directive is still under discussion within the Council, it will be very difficult for the Commission to propose a new measure based on Article 19 TFEU with a view to regulating accessibility. Thus, the Commission should either withdraw the proposal and adopt a different policy approach with regard to EU legislation in the field of discrimination, or significantly alter the proposal with a view to reaching an agreement within the Council. With regard to the former, it might be preferable for the EU to propose legislation on each ground of discrimination that is covered by Article 19 TFEU, including disability. A disability-specific instrument

¹⁸⁸ See, Chapter III, The elimination of discrimination in the EU territory.

¹⁸⁹ 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 L180/22.

¹⁹⁰ 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 L180/22.

¹⁹¹ See Chapter III, The elimination of discrimination in the EU territory.

¹⁹² See, L. Waddington, 36 *European Law Review* (2011).

¹⁹³ Zero Project Report, 'International Study on the Implementation of the UN Convention on the Rights of Persons with Disabilities', *Zero Project Report* (2012), <https://zeroproject.org/wp-content/uploads/2013/12/Zero-Project-Report-2012.pdf>, p. 154 (accessed 17 January 2018).

¹⁹⁴ *Ibid.*

on the principle of non-discrimination could address accessibility. In that regard, the Commission could use this proposed instrument to supplement the scope of the proposed European Accessibility Act.¹⁹⁵ With regard to the latter, if the Commission wants to keep supporting the proposed Equal Treatment Directive, it might be more effective to significantly amend the text of the proposal and submit a new proposal that amounts to a significant compromise. By so doing, it will increase the chances of that directive being adopted by the Council.¹⁹⁶

To conclude, it is highly unlikely that the legal basis of Article 19 TFEU – at least under the current circumstances – will be used to adopt legislation in the field of accessibility.

B. OBLIGATION TO DEVELOP MINIMUM STANDARDS ON ACCESSIBILITY OF THE BUILT ENVIRONMENT

In this section of Chapter VI, I describe the measures that the EU has taken in the field of standardisation on disability accessibility of the built environment. The instruments examined in this part of Chapter VI are connected to public procurement and the internal market.

i. Public procurement

Improving the integration of disabled persons in society and ageing populations are major challenges for Europe. Standardisation can be an important tool for promoting inclusion in society and increasing accessibility for people with disabilities in their everyday life. Currently, the CEN has not designed a standard for the built environment which contains references to accessibility requirements. However, the CEN, CENELEC and ETSI have accepted Mandate M/420 on accessibility in the built environment.

On the 21st of December 2007, the Commission issued a standardisation mandate to CEN, CENELEC and ETSI.¹⁹⁷ The key objectives of the mandate were to facilitate the public procurement of an accessible built environment pursuant to the ‘Design for All’ principles, by designing a set of standards/technical specifications that would entail a set of European accessibility requirements for the built environment and a range of minimum technical data to comply with

¹⁹⁵ 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 the accessibility requirements for products and services, COM(2015) 0615 final.

¹⁹⁶ See, Article 293(2) TFEU; P. Craig and G. Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 2011), p. 126.

¹⁹⁷ Standardisation Mandate M/420 to CEN CENELEC and ETSI in support of European accessibility requirements for public procurement in the built environment, 21 December 2007.

those requirements.¹⁹⁸ Furthermore, the objective was also to facilitate the access of procurers to an online toolkit which would then allow them to make easy use of these harmonised requirements during the procurement process.¹⁹⁹

The mandate was to be executed in two phases. The first phase, which has already concluded, included an inventory of existing accessibility standards for the built environment, information on their use in public procurement, an analysis of standardisation gaps, a proposal for a standardisation work programme, an analysis of existing conformity assessment schemes for the built environment, an analysis of suppliers' technical capacities in the domain of accessibility in public procurement, proposals for possible ways to improve the selection of suppliers with technical capacity for publicly procured services and products and proposals for the deliverables in Phase II.²⁰⁰ The second phase, which is subject to the outcomes of the first phase and EU approval, will entail the delivery of a European standard (EN). This will include a set of common functional accessibility requirements of the built environment which can be used as either technical specifications or as award criteria for public contracts which can be usable in public procurement and also in the context of other policies and legislation, including in private settings. It also entails the promulgation of two technical reports that lay out the technical performance criteria that are to be used to fulfil the functional accessibility requirements of the European standard, as well as developing a conformity assessment procedure.²⁰¹

The technical report that concluded the first phase was delivered on the 21st of November 2011.²⁰² The report makes certain recommendations. It proposes that the EU should develop:

‘a strategy that will adopt principles of inclusivity and Design-for-All and establish them as fundamental deliverables of any procurement process for publicly funded projects, an EU legislation to ensure the enforcement of the standards, including effective measures to deal with non-compliance, an EU wide accreditation system for professionals involved in the delivery of accessible built environments, a toolkit for public procurers, showing how to clearly identify the legal requirements for equality and inclusion, how they should be addressed in developing accessible, inclusive built environments, who should be involved in the process and who is responsible for ensuring delivery, a common EU normative document for Accessibility in the Built Environment for all EU Member States, with basic functional requirements and technical specifications, that will apply to both new buildings and renovations of existing ones and an EU model for tendering and conformity assessment including

¹⁹⁸ Ibid, p.4.

¹⁹⁹ Ibid.

²⁰⁰ CEN ESO Phase One – Final Technical Report, SA/CEN/ENTR/420/2009/07 (2009), p. 10.

²⁰¹ See, with regard to the second phase of Standardisation Mandate M/420, CENELEC, ‘Built Environment’, *CENELEC* (2018), <https://www.cencenelec.eu/standards/Sectors/Accessibility/BuiltEnvironment/Pages/default.aspx> (accessed 17 January 2018).

²⁰² CEN ESO Phase One – Final Technical Report, SA/CEN/ENTR/420/2009/07 (2009), p. 12.

the adoption of an Access Statement process and competent person schemes designed to address accessibility throughout the public procurement process'.²⁰³

With regard to the implementation of these recommendations, the EU has taken action to adopt legislation which ensures the implementation of accessibility requirements in the field of the built environment, such as the Public Procurement Directives²⁰⁴ and the ESI Funds Regulations.²⁰⁵

The mandate is currently in its second phase. The final product of the mandate is of great importance to the EU. With the Public Procurement Directives and the ESI Funds Regulations being recently adopted, the EU, but most importantly the Member States, will certainly welcome any type of clarification as to how the Public Procurement Directives and the ESI Funds Regulations should be applied, especially in the field of infrastructure. The result of this mandate will, surely, provide great support and assistance to both the Member States and their citizens when they rely on these instruments in the future.

ii. Internal market

The CEN Mandate M/466 on Eurocodes is an important standardisation development in the field of accessibility of the built environment. It was issued by the Commission on the 19th of May 2010. The Eurocodes are a set of harmonised technical rules that were developed by CEN for the structural design of construction works taking place within the European Union.²⁰⁶ The existing framework of structural Eurocodes²⁰⁷ was adopted in 2001 and was implemented across the European Economic Area, which brings together the 28 EU Member States and the three EEA States (Iceland, Liechtenstein and Norway) into an internal market via the use of the same basic technical rules for

²⁰³ Ibid.

²⁰⁴ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, [2014] OJ L94/243.

²⁰⁵ Regulation No. 1303/2013/EU of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, [2013] OJ L347/320; Regulation No. 1301/2013/EU of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No. 1080/2006, [2013] OJ L347/289.

²⁰⁶ CEN-CENELEC, 'Working programme of 2017, European Standardisation and related activities', *CEN-CENELEC* (2016), https://www.cencenelec.eu/News/Publications/Publications/cen-cenelec-wp2017_en.pdf, p. 24.

²⁰⁷ EN 1990:2002 E, Euro-code – Basis of Structural Design, CEN, 29 November 2001.

construction design.²⁰⁸ The Eurocodes introduced a common technical language and culture in structural design which promotes the creation of an effective internal market.²⁰⁹ One of the most important reasons that justified the initiation of this mandate by the Commission was the necessity to take into account new societal demands and needs, including among others, accessibility for people with disabilities.²¹⁰ The overall objective of this mandate was to initiate the process of further developing the Eurocodes. This mandate included a set of ten priority actions to facilitate implementation at the national level and to take on board market developments, innovation and research through both modifications/additions to existing standards as well as the development of new standards.²¹¹

In order to fulfil this mandate, CEN developed new standards or new parts of existing standards with a view to formulating new performance requirements and design methods, in more than one of the existing standards.²¹² In that regard, the Commission issued a standardisation mandate to CEN. Mandate M/515 requires the revision of the existing Eurocodes and the extension of their scope by incorporating new performance requirements and design methods.²¹³

This work is currently being carried out by CEN's Technical Committee 250 on Structural Eurocodes in cooperation with stakeholders, including structural design companies and the scientific community, along with the support of the European Commission.²¹⁴ This mandate, similar to that of Mandate M/466 on Eurocodes, requires CEN to take into account new societal demands and needs in the revision and development of the new Eurocodes.²¹⁵ However, it does not specify if the particular needs of people with disabilities are included within the context of the new societal demands. CEN will begin the work on the execution of Mandate M/515 in 2017.²¹⁶ The execution of this mandate will include the assessment and retrofitting of existing structures, and the use of new materials, such as structural glass, fibre reinforced polymers and membrane structures.²¹⁷

The last standard that will be analysed in this part of Chapter VI is EN 81-70:2003 'Accessibility to lifts for persons including persons with disability'.

²⁰⁸ Standardisation Mandate M/466 to CEN, in the field of the structural Eurocodes, 19 May 2010, p. 3.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Ibid., p. 1.

²¹² Ibid., p. 5.

²¹³ Standardisation Mandate M/515 to CEN for amending existing Eurocodes and extending the scope of structural Eurocodes, 12 December 2012, p. 3.

²¹⁴ CEN-CENELEC, 'Working programme of 2017, European Standardisation and related activities', *CEN-CENELEC* (2016), p. 24.

²¹⁵ European Commission, 'Standardisation Mandate M/515 to CEN for amending existing Eurocodes and extending the scope of structural Eurocodes', *European Commission* (2012), http://eurocodes.jrc.ec.europa.eu/doc/mandate/m515_EN_Eurocodes.pdf, p. 2.

²¹⁶ CEN-CENELEC, 'Working programme of 2017, European Standardisation and related activities', *CEN-CENELEC* (2016), p. 24.

²¹⁷ Ibid.

This standard is connected to the Directive on lifts.²¹⁸ This standard specifies the minimum requirements for the safe, independent access and use of lifts by persons, including persons with disabilities.²¹⁹

However, national building regulations may supersede the requirements of this standard. The application of this standard varies across Europe.²²⁰ The requirements for people with mobility impairments are frequently considered by the national authorities, whereas there is less awareness about the requirements for people with sensory disabilities.²²¹ A revision of this standard is in process.²²²

Furthermore, the European standard on stair-lifts and inclined lifting platforms intended for persons with impaired mobility²²³ deals with safety requirements for the construction, manufacturing, installation, maintenance and dismantling of electrically operated stair-lifts.²²⁴ This standard addresses the design of chair, standing platform and wheelchair platform lifts that are connected to a building structure, and which move in an inclined plane.²²⁵ This standard addresses the needs of persons with impaired mobility when travelling between fixed levels, over a staircase or an accessible inclined surface with hold-to-run control and with rated speed not exceeding 0.15 m/s.²²⁶

From all the analysis in this section, it is evident that the EU standardisation bodies are in the process of adopting a large volume of standards. Currently, only a few standards have been adopted, such as the standard on lifts. As I mentioned in Chapter V, in the context of the obligation to develop minimum standards on the accessibility of goods and services, it is encouraging that the EU standardisation bodies are developing standards, as it shows that the EU is aware of the critical importance that standards have for the implementation of accessibility.

IV. CONCLUSION

To sum up, the EU has implemented several initiatives that relate to the accessibility of the built environment. All of these initiatives are disability mainstreaming instruments. This shows that the EU has the power to mainstream accessibility

²¹⁸ Directive 2014/33/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to lifts and safety components for lifts, [2014] OJ L96/251.

²¹⁹ CEN ESO Phase One – Final Technical Report, SA/CEN/ENTR/420/2009/07, 2009, p. 195. See, with regard to the accessibility standard on lifts, CEN, ‘Sectors’, CEN (2018), www.cen.eu/cen/Sectors/Sectors/Accessibility/Construction/Pages/Accessibilitylifts.aspx (accessed 17 January 2018).

²²⁰ Ibid.

²²¹ Ibid.

²²² Ibid.

²²³ E.1.2.1.2 EN 81–40 Stair lifts and inclined lifting platforms intended for persons with impaired mobility.

²²⁴ CEN ESO Phase One – Final Technical Report, SA/CEN/ENTR/420/2009/07, 2009, p. 195.

²²⁵ Idem.

²²⁶ Idem.

considerations in the fields of public procurement, the ESI Funds and the internal market. Furthermore, I pointed out that the Public Procurement Directive²²⁷ and the new ESI Funds regulations²²⁸ are examples of where the EU has used path dependency to improve legislative instruments which have not previously implemented accessibility in an effective manner.

As far as the particular policy areas are concerned, I argue that Article 19 TFEU can be used as a legal basis to address issues that relate to the accessibility of the built environment. Yet, I pointed out that until a decision on the future of the proposed Equal Treatment Directive is made, it is unlikely that the EU will use this legal basis to address accessibility concerns.

Furthermore, the obligation to ensure the physical accessibility of the built environment is fully met by the Directive on lifts. It is also fulfilled in the field of the ESI Funds by the General Regulation on Structural Funds and the ERDF. According to the General Regulation on ESI Funds, accessibility is a principle which applies throughout the implementation of the ESI Funds process and it is also applicable in the preparation, design and implementation of operational programmes. In that regard, the EU ESI Funds Regulations fully meet the obligation to consider the accessibility of the built environment at the initial stages of policy formulation. In addition, the introduction of the *ex ante* conditionality on disability ensures the effective monitoring of accessibility and the appropriate training of the stakeholders who are responsible for the implementation of the operation programmes.

Moreover, the obligation to ensure the physical accessibility of the built environment and the obligation to consider the accessibility of the built environment at the initial stages of policy formulation is fully met by the Public Procurement Directives in the field of public procurement. This directive imposes an obligation on the contracting authorities to design the technical specifications of tenders, taking into account accessibility whenever the project attached to the tender is intended for use by disabled people. Lastly, the Regulation laying down harmonised conditions for the marketing of construction products and the basic health and safety requirements for construction works, fully meets the obligation to ensure the physical accessibility of construction works.

²²⁷ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/655.

²²⁸ Regulation No. 1303/2013/EU of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, [2013] OJ L347/320; Regulation No. 1301/2013/EU of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No. 1080/2006, [2013] OJ L347/289; Regulation No. 1301/2013/EU of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No. 1080/2006, [2013] OJ L347/289.

CHAPTER VII

THE IMPLEMENTATION BY THE EU OF THE OBLIGATIONS OF ARTICLE 9 UNCRPD RELATING TO ACCESSIBILITY OF TRANSPORT

I. INTRODUCTION

In the previous chapter, I examined the existing EU legislative and non-legislative measures in relation to the accessibility of the built environment. In this chapter, I provide an analysis of the legislative measures that have been adopted by the EU in the area of transport with regard to accessibility. The EU has shown a great interest in ensuring the rights of persons with disabilities in the field of transport are respected. It has adopted several legislative instruments that ensure accessibility in the field of transport, including the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air¹, the Regulation concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor² and the Regulation on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility.³

In this chapter, I examine the legislative actions that have been adopted by the EU in the field of the transport vis-à-vis accessibility. In that regard, I explore whether the EU's existing legislative measures meet the obligations of Article 9 UNCRPD and whether the EU or the Member States should take further action to implement Article 9 UNCRPD in the field of transport.

¹ Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

² Regulation No. 661/2009/EC of the European Parliament and of the Council of 13 July 2009 concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor, [2009] OJ L200/1.

³ Commission Regulation No. 1300/2014/EU of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility, [2014] OJ L356/110.

The purpose of this chapter is to identify the areas where the EU has the competence to take action to implement Article 9 UNCRPD in the field of the transport and whether it should adopt such measures. In particular, this chapter reviews the initiatives – legislative and non-legislative – that the EU has adopted in relation to accessibility in the field of transport. It explores the relation between those initiatives and the requirements of Article 9 UNCRPD in the field of accessibility of transport, and it specifically considers whether these legal measures meet the requirements of Article 9 UNCRPD.

Chapter VII is divided into two parts. In the first part, I provide an overview of disability policy in the field of transport [Section II]. In the second part, I review the existing EU instruments with regard to accessibility in the field of transport and I consider whether these legal instruments meet the obligations of Article 9 UNCRPD [Section III]. In particular, this chapter focuses on the obligation to avoid discrimination on the basis of disability in the field of transport [Section III A], the obligation to ensure the affordability of transport [Section III B], the obligation to ensure the information accessibility of transport [Section III C], the obligation to ensure the communication accessibility of transport [Section III D], the obligation to ensure the physical accessibility of transport [Section III E], the obligation to provide assistance to people with disabilities in the field of transport [Section III F], the obligation to provide training for stakeholders on accessibility in the field of transport [Section III G] and the obligation to develop minimum standards on the accessibility of transport [Section III H].

II. EU POLICY RELEVANT TO THE ACCESSIBILITY OF TRANSPORT

Before I move on to the analysis of existing EU instruments in the field of transport, I would like to first emphasise the different terms used by the EU and the UNCRPD to refer to people with disabilities. EU law uses the term ‘disabled persons and persons with reduced mobility’ in this field. The wording of the Convention, on the other hand, uses the term ‘people with disabilities’. The EU defines a ‘disabled person’ or a ‘person with reduced mobility’ as ‘any person whose mobility when using transport is reduced as a result of any physical disability (sensory or locomotory, permanent or temporary), intellectual disability or impairment, or any other cause of disability, or as a result of age, and whose situation needs appropriate attention and adaptation to his particular needs of the services made available to all passengers’.⁴ On the other hand, the Convention

⁴ Article 3 (j) of Regulation No. 181/2011/EU of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L55/1.

does not offer a concrete definition of disability. Nevertheless, Article 1 UNCRPD provides some guidance on what constitutes disability within the context of the Convention. This article states: ‘Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’.⁵ However, from the EU definition it can be inferred that, besides people with disabilities, the EU definition also includes people who are not considered to have a disability. Therefore, and without entering into a discussion that falls outside the scope of this chapter, I will consider the EU definition as having a broader scope than the scope of the Convention and I will consider that the Convention’s approach is included within the EU’s definition. As for the use of the terms, I will use the Convention’s term when I am referring to the Convention and the EU term when referring to EU law.

The creation of a single market for trans-European transport has been part of the agenda of the European Union since the adoption of the Treaty establishing the European Economic Community (EEC) in 1957.⁶ Articles 74 to 84 EEC (now 90–100 TFEU) constitute the legal basis for the Common transport policy of the European Economic Community (now, European Union).⁷

Despite being part of the agenda of the EU since the Treaty of Rome, and despite the completion of the EU’s internal market which took place in 1992, the EU transport policy, until the beginning of the 1990s, was fragmented and not comprehensively developed.⁸ Transport policy at the EU level was considered as one of the greatest failures of the single market.⁹ Transport policy is a relatively recent EU policy area, despite it being mentioned in the Treaty of Rome. The integration process in the context of transport subsectors has been gradual, uneven and very complex.¹⁰ Every mode of transport has been regulated and de-regulated by different legislative packages, without any semblance of consistency. In the mid-1980s, EU transport policy aimed at removing the barriers to the free movement of goods and services, while, since the mid-1990s, EU transport policy has encouraged the harmonisation of the national policies in the field of transport.¹¹ The approach of the EU policy has also shifted from focusing on creating equal conditions of competition within each transport mode, to a more integrated approach, which aims at building equal competitive conditions between the different modes of transport.¹² This policy change in the field of

⁵ Article 1 UNCRPD.

⁶ M. Kaeding, *Better Regulation in the European Union: Better Regulation or Full Steam Ahead? The transposition of EU transport directives across the Member States* (Leiden University Press, 2007), p. 55.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*, p. 59.

¹² *Ibid.*

transport is evident from the Commission's White Paper on transport policy: 'European Transport Policy for 2010: Time to Decide', a document which proposes several measures which EU transport policy must in order to meet the future challenges in the field and to improve the status thereof.¹³ In this White Paper, the Commission recognised the importance of promoting, among others, the increased use of forms of public transport accessible to all users, including people with reduced mobility, and particularly those with disabilities and the elderly.¹⁴

From the above, it can be concluded that disability policy in the field of transport has been developing continuously and very rapidly throughout the 2000s, both in terms of policy documents and legislative measures. This shows that the EU has put great emphasis on ensuring the accessibility of persons with disabilities in the field of transport.

The EU has a shared competence in regulating the field of transport.¹⁵ This means that both the EU and the Member States are allowed to take measures to regulate the area of transport. The main source of EU legislation in this field is provided by Article 91 TFEU. In its first paragraph, the article empowers the European Parliament and the Council to regulate the field of transport, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.¹⁶

Even though this article was the legal basis for many disability-oriented measures and legal instruments, it does not include or refer to disability. I also note that the same observation holds for the rest of the Treaty articles included in the transport chapter.¹⁷ Furthermore, the systematic examination of all the articles (90–100 TFEU) within the transport chapter of the TFEU shows that the scope of application of the Treaty in the field of transport is not limited to trans-European travel. Within the text of the transport chapter of the Treaty, there is no reference to a limitation of the scope of application of EU measures to trans-European travel or a reference to domestic transport being excluded from EU regulation. This is also evident from the fact that EU legislative measures, for example the Regulation concerning the rights of passengers in bus and coach transport, entail provisions that regulate domestic travel too.¹⁸ Thus, from the above I infer that the EU has competence to regulate both domestic and trans-European travel. This competence, though, is limited by the principle of subsidiarity which is applicable in the case of EU shared competences.

¹³ White Paper submitted by the Commission, European transport policy for 2010: time to decide, COM(2001) 370 final.

¹⁴ Ibid.

¹⁵ Article 4(2) (g) TFEU.

¹⁶ Article 91 TFEU.

¹⁷ See, Articles 90–100, TFEU.

¹⁸ Article 2 (3) of Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L55/1.

III. EU INSTRUMENTS AND ACCESSIBILITY OF TRANSPORT

In this part of the chapter, I analyse the existing instruments of the EU with regard to accessibility of transport and I examine whether the legal instruments meet the obligations of Article 9 UNCRPD. This part of Chapter VII is structured by connecting the EU instruments to the corresponding obligations contained in Article 9 UNCRPD.

A. OBLIGATION NOT TO DISCRIMINATE ON THE GROUND OF DISABILITY IN THE FIELD OF TRANSPORT

In this section of Chapter VII, I describe the measures that the EU has taken in the field of non-discriminatory access to transport and consider whether these measures meet the obligations found in Article 5(2) UNCRPD. The instruments examined in this part of the chapter are connected to the field of transport.

Transport

Because the regulations concerning the rights of passengers when travelling by air, bus and coach, sea and inland waterway and rail confer similar rights on people with disabilities, I will focus on the provisions of the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air.¹⁹ I will also point out the instances where there is a difference between this regulation and the rights conferred in the other regulations.²⁰ Before moving on to the analysis of this regulation, it is important to provide a short analysis of the other three passenger rights regulations.²¹

The legal basis of the Regulation on rail passengers' rights and obligations²² is Article 71(1) EC (now 91(1) TFEU). This regulation applies to all rail journeys

¹⁹ Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

²⁰ Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L315/14; Regulation No. 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L55/1; Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L334/1.

²¹ Ibid.

²² Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L315/14.

and services throughout the Union that are provided by one or more railway undertakings.²³ It aims at creating a minimum level of protection for passengers when travelling by rail. The purpose of this regulation, among others, is to protect and assist disabled persons and persons with reduced mobility who are travelling by rail.²⁴ In particular, the EU legislators were concerned about the lack of equal opportunities for persons with disabilities when travelling by rail and this regulation was an attempt *inter alia* to tackle this issue and promote equality in rail travel for persons with disabilities.

The Regulation concerning the rights of passengers by bus and coach transport²⁵, as with the Regulation on the passenger rights when travelling by rail, has Article 91(1) TFEU as its legal basis. It aims at creating a minimum level of protection for the protection of passengers when travelling by bus or coach.²⁶ The regulation applies to all passengers that are travelling by regular services where the boarding or the alighting point of passengers is situated within a Member State and where the scheduled distance of the service is 250 km or more.²⁷ When the scheduled distance of the service is shorter than 250 km, the only articles of the regulations that are applicable are those on non-discriminatory access to bus and coach travel on the ground of disability²⁸, disability-training for carriers and terminal managing bodies²⁹, compensation with regard to mobility equipment and wheelchairs³⁰ and the general rules on information and complaints.^{31, 32}

²³ Article 2 (1) of Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L315/14.

²⁴ Article 1 (d) of Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L315/14.

²⁵ Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L 55/1.

²⁶ Recital 2 of the Preamble to Regulation No. 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L 55/1.

²⁷ Article 2 (1) of Regulation No. 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L 55/1.

²⁸ Article 10(1) of Regulation No. 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L 55/1.

²⁹ Article 16 (1) (b) and 16 (2) of Regulation No. 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L 55/1.

³⁰ Articles 17 (1) and (2) of Regulation No. 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L 55/1.

³¹ Articles 24 to 28 of Regulation No. 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L 55/1.

³² Article 2 (2) of Regulation No. 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and

Moreover, by way of contrast to the Regulation on rail passengers' rights and obligations and the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air, the Regulation concerning the rights of passengers travelling by bus and coach contains a specific reference to Article 9 UNCRPD. In Recital 8 of the Preamble to that regulation, it states that rules on non-discrimination on the ground of disability and assistance in the field of bus and coach travel should be established in the light of Article 9 UNCRPD and with a view to providing disabled persons and persons with reduced mobility opportunities for bus and coach travel which is comparable to those of other citizens.³³ The reference to the UNCRPD shows that the Convention served as an inspiration for the inclusion of disability considerations in the passenger rights legislative framework. It can also be argued that the reference to the UNCRPD shows the EU's commitment to implementing the Convention.

The Regulation concerning the rights of passengers when travelling by sea and inland waterway is also based on Article 91(1) TFEU.³⁴ It aims at creating a minimum level of protection for passengers when travelling by sea and inland waterways. The justification for the inclusion of accessibility provisions is found in the Preamble, whereby it declares that disabled persons and persons with reduced mobility should have comparable opportunities to, and the same rights for using passenger services and cruises, as all other citizens.³⁵ This regulation, similar to the Regulation concerning the rights of passengers travelling by bus and coach, includes a direct reference to Article 9 UNCRPD.³⁶ Moreover, the scope of this regulation includes passenger services, where the port of embarkation is within the EU territory and where the port of disembarkation is situated outside the EU and the port of disembarkation is within the EU territory, provided that the service is operated by a Union carrier. Lastly, this regulation applies in the case of cruise ships where the port of embarkation is within an EU Member State. However, in the latter case, the provisions of this regulation on the carriers' and the terminal operators' obligation to make reasonable efforts to inform the affected passengers of alternative connections in the case where the passengers misses a connecting transport service due to a

amending Regulation (EC) No. 2006/2004, [2011] OJ L 55/1.

³³ Recital 8 of the Preamble 8 to Regulation No. 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L 55/1.

³⁴ Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L334/1.

³⁵ Recital 4 of the Preamble to Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L334/1.

³⁶ Recital 5 of the Preamble to Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L334/1.

cancellation or delay, the carriers' obligation to provide re-routing options and reimbursement in the event of cancelled or delayed departures and the carrier's obligation to offer compensation of the ticket price in the event of delay in arrival, are not applicable.³⁷

Let me now turn to the instrument that I will focus my analysis on: the Regulation on the rights of disabled persons and persons with reduced mobility when travelling by air.³⁸ The legal basis of this regulation is Article 80(2) EC (now 100(2) TFEU). This regulation is disability-specific, and it is not a mainstreaming instrument. It is, indeed, one of the few disability-specific instruments that have been adopted by the EU. The fact that it is a disability-specific instrument means, as I analysed in Chapter III³⁹, that this regulation refers to measures that specifically address the situation of persons with disabilities. Moreover, the fact that this regulation is a disability-specific instrument implies that it was adopted in the context of a specific EU competence (transport) and according to the requirements of a specific legal basis of the EU Treaties (Article 80(2) EC (now 100(2) TFEU)).

The fact that this regulation was enacted in accordance with Article 80(2) EC (now 100(2) TFEU) means that while Article 80(2) EC did not explicitly mention that the EU has a power to regulate disability-accessibility considerations in the context of transport, and while there is no reference to disability in the TFEU chapter on transport policy, this chapter of the TFEU can confer a power on the EU to adopt disability-specific legislation. The interpretation of the TFEU in a way that it confers the power on the EU to regulate disability considerations can be used in the context of other legal bases too. Therefore, the EU has a general competence to address accessibility considerations, as I have showed in this paragraph.

While the Regulation on the rights of disabled persons and persons with reduced mobility when travelling by air is a disability-specific instrument, the three other passenger rights regulations are disability mainstreaming instruments.⁴⁰ These regulations provide certain rights to all passengers and, at the same time, they address some disability accessibility considerations. Thus,

³⁷ Article 2 of Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L334/1.

³⁸ Article 2 of Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L334/1.

³⁹ See Chapter III, Alternative ways the EU can address disability issues.

⁴⁰ Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L315/14; Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L55/1; Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L334/1.

accessibility considerations have been mainstreamed in legislative instruments in the field of transport.

Furthermore, the fact that the EU chose to produce a disability-specific instrument with regard to the rights of disabled passengers when travelling by air, and to mainstream similar disability considerations in the three other instruments that regulate the rights of all passengers when traveling by rail, bus and coach and sea and inland waterway, is peculiar. One factor that could have played a role in the EU's decision to adopt a disability-specific instrument is the fact that two years before the adoption of the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air, the EU adopted the Regulation establishing uniform rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. This regulation did not address the particular needs of people with disabilities in the field of air travel. To fix this problem, the EU adopted a separate legislative instrument that provided certain rights to people with disabilities. For the later Regulations on passenger rights when travelling by rail, bus and coach and sea and inland waterway⁴¹, the EU chose to adopt one instrument for each area, probably due to exigencies of time.

Having analysed the consequences of the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air being a disability-specific instrument, it is important to return to the analysis of this regulation's content. The aim of this regulation is to enable disabled persons and persons with reduced mobility to have the same possibility to travel by air as other EU citizens.⁴² The regulation attempts to balance the need to combat discrimination and the need to meet the operational requirements of airline operators by establishing a general principle of non-discrimination and requiring operators to comply with a set of obligations relating to the information and assistance that is provided to disabled persons and persons with reduced mobility and, on the other hand, obliging disabled persons and persons with reduced mobility to provide pre-notification of their need for assistance and allowing for strictly defined exemptions from the obligation to provide such assistance.⁴³

⁴¹ Regulation No. 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L315/14; Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L55/1; Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L334/1.

⁴² Report from the Commission to the European Parliament and the Council on the functioning and effects of Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, COM(2011) 166 final, p. 2.

⁴³ Ibid.

This regulation applies to disabled persons and persons with reduced mobility, who are using or intending to use commercial passenger air services, when they depart from, are on transit through, or arrive at an airport that is situated in the territory of an EU Member State.⁴⁴ Moreover, the articles about the prevention of refusal of carriage and about assistance by air carriers apply also to disabled persons and persons with reduced mobility who are departing from a third country airport to an EU Member State airport in the case they use an EU air carrier.⁴⁵

Now, to begin with the analysis of the main body of the regulation, Article 3 of the Regulation states that an air carrier or its agent or tour operator should not refuse to accept a reservation for a flight or to embark a person at an airport on the grounds of disability or reduced mobility.⁴⁶ This provision addresses the obligation of UNCRPD States Parties that is found in Article 5(2) UNCRPD to not discriminate against people with disabilities in the area of transport. This obligation applies to both the embarkation and the reservation phase of the air travel. However, this regulation offers some exceptions to this obligation. It is permitted for an air carrier or its agent to refuse to permit a disabled person to board a plane, or to refuse to accept a reservation from a disabled persons and persons with reduced mobility when this would pose a threat to the health and safety rules that are established in international, EU or national law.⁴⁷ This article has been a source of discrimination against persons with disabilities⁴⁸ because the grounds for justification of this difference in treatment (health and safety concerns) are not very precise and could be interpreted in a manner that could prevent disabled persons and persons with reduce mobility travelling by air when air carriers or their agents or tour operators see fit. In the absence of clear guidelines on how to interpret the term ‘safety requirements’ under Article 4 of this Regulation, it is highly likely, as *Varney* argues⁴⁹, that this regulation, instead of serving the purpose of guaranteeing that ‘disabled persons

⁴⁴ Article 1 (2) of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

⁴⁵ Article 1 (3) of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

⁴⁶ Article 4 of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

⁴⁷ Article 4 (1) of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

⁴⁸ See, for more information about this case. www.e-include.eu/en/news/806-passenger-with-disabilities-denied-boarding-on-a-flight-against-eu-regulation (accessed 17 January 2018).

⁴⁹ E. Varney, ‘Social Regulation in the Air Transport Industry – An Examination of Regulation 1107/2006 concerning the Rights of Disabled Persons and Persons with Reduced Mobility when travelling by Air’, 28 *Comparative Socio-Legal Research* (2007).

and persons with reduced mobility have the same right as all other citizens to free movement, freedom of choice and non-discrimination⁵⁰, will actually favour the adoption of protectionist measures, at the expense of the rights of disabled persons and persons with reduced mobility.⁵¹ Protectionist measures in the context of disability are measures that paternalistically dictate ‘the removal of a disabled person’ from a particular context ‘for his own good’ or ‘for the greater good of many’.⁵² Thus, there is an obvious and potential danger of health and safety requirements operating as a mechanism for unjustified discrimination where those fears, rooted perhaps in ignorance or prejudice, are ill-founded.⁵³ Nevertheless, it can be concluded from the Steer Davies Gleave Report of the study on the application and enforcement of the Regulation concerning the rights of disabled people and persons with reduced mobility when travelling by air, that this regulation, despite the fact there are some areas where it needs improvements, has empowered people with disabilities to travel by air by removing barriers to accessibility.⁵⁴ The evidence presented in this report does not lead to the conclusion that this regulation, particularly Article 4 thereof, results in the adoption of protectionist measures to the detriment of people with disabilities.⁵⁵

The Commission has recognised that Article 4 of the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air has created difficulties for disabled persons and persons with reduced mobility in enjoying their right to access air transport.⁵⁶ With a view to clarifying the issue of denial of access to air travel, the Commission has reiterated that any derogation from the right of disabled persons and persons with reduced mobility to access air travel should be based on one or more legally binding flight safety standards and not on simple recommendations or on the commercial policy of the air carriers.⁵⁷ The Commission has stated that a person’s inability to understand the safety instructions given by the crew, to follow the safety instructions without help, for example, by being

⁵⁰ Recital 1 of the Preamble to Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

⁵¹ E. Varney, 28 *Comparative Socio-Legal Research* (2007), p. 199.

⁵² J. Davies and W. Davies, ‘Reconciling Risk and the Employment of disabled Persons in a Reformed Welfare State’, 29 *Industrial Law Journal* (2000), p. 349.

⁵³ *Ibid.*, p. 350.

⁵⁴ Steer Davies Gleave ‘Report of the study, Application and enforcement of the regulation concerning the rights of disabled people and persons with reduced mobility when travelling by air’, *Steer Davies Gleave* (2010).

⁵⁵ *Ibid.*

⁵⁶ Report from the Commission to the European Parliament and the Council on the functioning and effects of Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, COM(2011) 166 final.

⁵⁷ *Ibid.*, p. 5.

able to fasten and unfasten the safety belt, taking hold of and adjusting the oxygen mask or the safety vest, participating independently in the evacuation of the plane, even to a limited extent, and the inability to provide the necessary treatment or medical care for oneself during the flight, are considered valid reasons for air carriers to justify the refusal of access to air transport.⁵⁸ These reasons that the Commission considers as being justified for preventing disabled persons and persons with reduced mobility from travelling by air could be applied in many instances to children. Yet many children can travel unaccompanied, despite the fact that the above-mentioned reasons to deny access to air travel to disabled persons and persons with reduced mobility could be relevant to their situation as well. Furthermore, another justification for refusing access to transport might be that the maximum number of disabled persons and persons with reduced mobility allowed on a flight should not exceed the number of non-disabled passengers who are able to provide assistance in the instance of an emergency evacuation.⁵⁹ Based on that principle, some authorities have suggested that the number of disabled persons and persons with reduced mobility who are allowed on board an aircraft should amount to no more than half of the non-disabled passengers present on the flight.⁶⁰

In addition to these interpretive suggestions, the Commission has developed a set of interpretive guidelines to assist air transport stakeholders in implementing this regulation.⁶¹ On the issue of denying access to disabled persons and persons with reduced mobility to air travel, the interpretive guidelines of the Commission suggest that comfort cannot and should not be, in itself, a sufficient ground to deny carriage or require disabled persons and persons with reduced mobility to be accompanied.⁶² Without prejudice to any overriding safety requirements, it is the passengers' decision as to whether or not they wish to travel.⁶³ The same should apply in instances where it would be impossible for a disabled person or person with reduced mobility to use the toilet facilities.⁶⁴ The inaccessibility of a toilet is not necessarily connected to safety requirements and as such it might not be a valid reason to refuse transportation, especially in the case of short-distance flights.⁶⁵ Lastly, the Commission's interpretive guidelines have noted the importance of air carriers implementing

⁵⁸ Ibid., p. 5.

⁵⁹ Ibid., p. 5.

⁶⁰ Ibid.

⁶¹ Commission Staff Working Document, Interpretative Guidelines on the application of Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, SWD(2012) 171 final.

⁶² Ibid., p.4.

⁶³ Ibid.

⁶⁴ Ibid., p. 22.

⁶⁵ Ibid.

their obligation⁶⁶ to inform disabled persons and persons with reduced mobility as soon as possible, preferably at the stage of booking, that they are not able to provide carriage. This is so that disabled persons or persons with reduced mobility are able to make alternative arrangements.⁶⁷ In that regard, and if possible, modern, preferably on-line, communication and notification tools which take into consideration the particular needs of the passenger concerned should be used.⁶⁸

To sum up, the use of health and safety standards or guidelines to deny people with disabilities access to air transport entails the danger that the regulation will be implemented in a way that patronises people with disabilities and thus reinforces their societal isolation. At the same time, the regulation may provide be abused by air carriers to the detriment of disabled persons and persons with reduced mobility vis-à-vis their right to use air transport. Therefore, and considering that this regulation, according to its Preamble, aims at ensuring ‘disabled persons and persons with reduced mobility have the same right as all other citizens to free movement, freedom of choice and non-discrimination’⁶⁹, the exception to the right of disabled persons and persons with reduced mobility to have access to air transport should be interpreted restrictively.

In addition, Article 4(2) of the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air stipulates that an air carrier or its agent or a tour operator can require that a disabled person or person with reduced mobility is accompanied by another person who will provide the assistance required by that person, when this is justified in the light of health and safety prerogatives.⁷⁰ This provision, like the one analysed above, has created difficulties in the implementation of this regulation and, consequently, the enjoyment of the right of people with disabilities to have access to air transport.⁷¹ The Commission’s interpretive guidelines state, in an attempt to clarify the issue of accompanying persons, that only where the

⁶⁶ Article 4 (4) of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

⁶⁷ Commission Staff Working Document, Interpretative Guidelines on the application of Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, SWD(2012) 171 final, p. 7.

⁶⁸ Ibid.

⁶⁹ Recital 1 of the Preamble to Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

⁷⁰ Article 4 (2) of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

⁷¹ Report from the Commission to the European Parliament and the Council on the functioning and effects of Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, COM(2011) 166 final.

disabled person or person with reduced mobility is not self-reliant, can the air carrier require that person to be accompanied.⁷² In the event that such a requirement is imposed, air carriers must give the disabled person or the person with reduced mobility detailed reasons for imposing such a requirement.⁷³ The Commission's interpretive guidelines also suggest that one way for the air carriers to determine if disabled persons and persons with reduced mobility cannot travel unaccompanied, might be to ask them questions related to the criteria which are laid down in applicable safety rules.⁷⁴

The Commission was not the only body to attempt clarify the issue of denial of access of disabled persons and persons with reduced mobility to air transport because air carriers required them to travel with an accompanying person. In one case, three disabled persons filed penal complaints against 'EasyJet' in France, on the basis that they were denied the right to embark a plane on the basis that they were not accompanied by another person.⁷⁵ On the 13th of January 2012, the Bobigny Correctional Court found that the company's systematic refusal to allow unaccompanied disabled persons to board a plane, without firstly examining whether they were self-reliant amounted to disability discrimination.⁷⁶ EasyJet appealed this decision.⁷⁷ The case ultimately ended up in the Paris Court of Appeal.⁷⁸ That court upheld the decision of the Bobigny Correctional Court and condemned EasyJet to a fine of 70 000 Euros and subjected the subcontracting operating company to a fine of 25 000 Euros.⁷⁹ The court also ordered the publication of the decision in the French newspaper 'Le Monde'.⁸⁰ Both companies were also jointly ordered to compensate the plaintiffs to the amount of 2000 Euros each.⁸¹

Three years before that case, three deaf people who were refused boarding by Iberia in Spain because they were unaccompanied, filed a complaint against that air carrier.⁸² The Madrid Provincial Court ruled, based on the Regulation concerning the rights of disabled persons and persons with reduced mobility

⁷² Commission Staff Working Document, Interpretative Guidelines on the application of Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, SWD(2012) 171 final, p. 8.

⁷³ Ibid., p. 8.

⁷⁴ Ibid.

⁷⁵ European network of legal experts in gender equality and non-discrimination, News Report, Access to air transport to people with disabilities, 7 March 2013, p. 1.

⁷⁶ Ibid.

⁷⁷ Ibid., p. 2.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Steer Davies Gleave 'Report of the study, Application and enforcement of the regulation concerning the rights of disabled people and persons with reduced mobility when travelling by air', *Steer Davies Gleave* (2010), p. 62.

when travelling by air, that Iberia had to change its Flight Operation Manual as it was indirectly discriminatory towards disabled people.⁸³

Both of these cases show that there is a need for the development of guidelines on whether a disabled person or person with reduced mobility can travel unaccompanied, in order to ensure that people with disabilities will not be denied access to air travel. A good practice in the development of such guidelines is the UK Department for Transport's Access to Air Travel for Disabled Persons and Persons with Reduced Mobility – Code of Practice. This document suggests that an accompanying person might be required to be accompanied when the disabled persons or persons with reduced mobility cannot, 'unfasten their seat belts, leave their seat and reach an emergency exit unaided, retrieve and fit a lifejacket, don an oxygen mask without assistance or are unable to understand the safety briefing and any advice and instructions given by the crew in an emergency situation, including information communicated in accessible formats'.⁸⁴

This Code of Practice also states that passengers who require a level of personal assistance which cabin crew cannot provide should be informed beforehand that they should be accompanied. This includes assistance with breathing (reliance on supplementary oxygen), feeding, toileting and medicating.⁸⁵

In conclusion, as with the denial of access on the ground of safety requirements, the right of air carriers to require that disabled persons and persons with reduced mobility should be accompanied needs further elaboration. This should be done through the development of guidelines, in order to minimise the instances whereby people with disabilities are denied access to air travel. Certainly, there will be cases where a person might need specialised assistance that air carriers cannot provide, such as ensuring a breathing tube remains open, or communicating with someone using language skills that are specifically developed to satisfy the particular needs of that disabled person. Nevertheless, common sense suggests that a person with an extreme disability would also feel uncomfortable receiving assistance from people who are not trained to meet their particular needs and, as a result, they would have to ask for an accompanying person to assist them. Of course, there will always be cases where these people will fail to find assistance and their access to transport will be denied. However, the cases where the air carriers take advantage of their right to require disabled persons and persons with reduced mobility to be accompanied, as illustrated by the Court cases above, are less extreme cases than the ones I described in this paragraph.

Therefore, as in the analysis on the denial of access of disabled persons and persons with reduced mobility to air transport for safety reasons, it is essential to interpret the right of air carriers to require persons with mobility to be

⁸³ Ibid.

⁸⁴ Ibid., p. 62.

⁸⁵ Ibid., p. 63.

accompanied restrictively and to emphasise that the purpose of the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air is to establish the right of people with disabilities to have access to air transport and not the right of the carriers to require that people with disabilities are assisted by an accompanying person. A provision similar to that of Article 4(2) of the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air⁸⁶ exists in the other three regulations.⁸⁷

Indeed, as far the Regulation on rail passengers' rights and obligations is concerned, a study by Steer Davies Gleave on the evaluation of this regulation found that, according to most of the operators selected for the study, the operators never refused to accept reservations on the basis of a passenger's level of mobility.⁸⁸ Several operators added that where there was insufficient space (e.g. on a train with limited wheelchair spaces) or where infrastructure for a journey was not suitable, they tried to find suitable alternatives for the passenger.⁸⁹ Others stated that they would oblige passengers to be accompanied in the instances where disabled persons and persons with reduced mobility cannot perform basic functions without assistance, such as feeding themselves, using the toilet or breathing without additional oxygen, or in cases where passengers requested a journey from an unstaffed and non-accessible station, or on non-accessible stock. Unfortunately, most railway undertakings stated that they did not keep statistics on how frequently they had to refuse carriage, but from the three that provided statistics, the highest percentage of requests for access to rail travel that was denied was 3%.⁹⁰

B. OBLIGATION TO ENSURE AFFORDABILITY OF TRANSPORT

In this section of Chapter VII, I describe the measures that the EU has taken in the field of affordability of transport and consider whether these measures meet the obligations of Article 9 UNCRPD. The instruments examined in this part of Chapter VII are connected to the field of transport.

⁸⁶ Article 19 (2) of Regulation No. 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L315/14.

⁸⁷ Article 9 of Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L55/1; Article 7 of Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L334/1; Article 19 (2) of Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L315/14.

⁸⁸ Steer Davies Gleave Report, 'Evaluation of Regulation 1371/2007, on the application and enforcement in the Member States of the Regulation on rail passengers' rights and obligations', *Steer Davies Gleave* (2012), p. 81–82.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

Transport

Pursuant to Article 8 of the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air, the managing bodies of airports should ensure the provision of assistance to disabled persons and persons with reduced mobility that is specified in Annex I and they should do so without additional charge.⁹¹ The same applies to air carriers⁹² when they are offering assistance to disabled persons and persons with reduced mobility and in the case of carriage of assistance dogs.⁹³ Nevertheless, the Steer Davies Gleave report on the implementation of this regulation found that some air carriers that use special telephone lines for pre-notification of the assistance needs of persons with reduced mobility, actually charge extra for these calls. However, that being said the rates are usually moderate⁹⁴ with the exception of Air Baltic that only provides international numbers; Ryanair provides national phone numbers in most Member States but the rates in some states are high, such as € 0.50 per minute in Belgium. Brussels Airlines provides (for calls from the UK) either a Belgian telephone number, or a contact number for the UK reservations centre which charges £0.40 (€ 0.44) per minute. SAS provides (for calls from the UK) a UK reservations number, which charges £0.25 (€ 0.28) per minute. In the case of the last two carried, the contact numbers are not just for providing services for persons with reduced mobility.⁹⁵

As far as the transportation of assistance dogs is concerned, the same report found that for all of the air carriers which refer to assistance dogs, almost all accept them in the cabin free of charge, as is required by Annex II of the Regulation. However, TAP Portugal, Thomas Cook and Wizz Air provided insufficient information regarding charging and carriage in cabin, TUI offers carriage of assistance dogs for a nominal charge, and Air France and EasyJet do not state whether carriage of assistance dogs are to be admitted free of charge.⁹⁶

It is interesting to point out that neither this regulation nor the Regulation on rail passengers' rights oblige the carrier (air carrier or railway undertaking) to provide the ticket of an accompanying person free of charge, unlike the passenger

⁹¹ Article 8(1) of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

⁹² Article 10 of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

⁹³ Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1, Annex II.

⁹⁴ Steer Davies Gleave 'Report of the study, Application and enforcement of the regulation concerning the rights of disabled people and persons with reduced mobility when travelling by air', *Steer Davies Gleave* (2010), p. 75.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

rights regulations in the areas of bus and coach and sea and inland waterway.⁹⁷ ⁹⁸ As far as the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air is concerned, where the air carrier requires disabled persons and persons with reduced mobility to be accompanied, the Commission recommends that the seat should be offered free of charge or at a significantly discounted rate.⁹⁹ It is also important to note that certain airlines, depending on the particular circumstances, will ask another passenger on a flight to take on the role of an accompanying person.¹⁰⁰ With regard to the Regulation on rail passengers' rights and obligations, many railway undertakings, according to the Steer Davies Gleave Report on the evaluation of this regulation, offer disabled persons and persons with reduced mobility and their passengers accompanying them ticket discounts.¹⁰¹ In some instances, as in the case of Thalys, persons that accompanying disabled passengers or passengers with reduced mobility may access first class with a second class ticket, or even travel free of charge, as in Belgium.¹⁰² In addition, this study found that none of the reviewed railway undertakings charged explicitly higher prices for requesting assistance.¹⁰³ Nevertheless, in the instances where assistance has to be requested by phone, there is sometimes a fee for calling the number.¹⁰⁴ For example, in some instances disabled persons and persons with reduced mobility are required to call a number which has a fee of € 1 plus a local call cost.¹⁰⁵ Other railway undertakings provided standard geographic telephone numbers, rather than 'toll free' numbers, for booking tickets or requesting assistance.¹⁰⁶

Lastly, according to the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air, in case of loss or damage of wheelchairs, of other mobility equipment and assistive

⁹⁷ Regulation No. 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L55/1; Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, OJ L334/1.

⁹⁸ Article 19 (2) of Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L315/14.

⁹⁹ Commission Staff Working Document, Interpretative Guidelines on the application of Regulation (EC) N° 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, SWD(2012) 171 final, p. 9.

¹⁰⁰ Ibid.

¹⁰¹ Steer Davies Gleave Report, 'Evaluation of Regulation 1371/2007, on the application and enforcement in the Member States of the Regulation on rail passengers' rights and obligations', *Steer Davies Gleave* (2012), p. 85.

¹⁰² Ibid., p. 84.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

devices, disabled persons and persons with reduced mobility have the right to be compensated according to international, EU and national law.¹⁰⁷ Annex I to this regulation indicates that airports are responsible for the ground handling of mobility equipment.¹⁰⁸ However, according to the Commission's guidelines on the implementation of this regulation, Annex I does not change the legal liability with regard to the handling of such equipment, as air carriers and their agents remain liable in case of damage to mobility equipment in accordance with international, EU and national law.¹⁰⁹ The provisions of the Montreal Convention¹¹⁰ normally apply in these situations.¹¹¹ This convention places limits on such compensations to the amount of 1131 SDR (approximately € 1260), which would be inadequate for technologically advanced wheelchairs or other equipment which can in some cases cost up to € 20,000.¹¹² Nevertheless, several air carriers have stated that these limits would be waived in practice, both in part to avoid bad publicity associated with the provision of insufficient compensation and for the reason that it is generally acknowledged that such events are rare.¹¹³ Air France, Iberia, KLM, TAROM, Thomas Cook and TUI have stated to the researchers of the Steer Davies Gleave study that they compensate passengers for the full value of the equipment, while TUI Travel¹¹⁴ also indicated that all UK airlines have agreed to waive the Montreal limits.¹¹⁵ On the contrary, disability organisations informed the conductors of this study us that they were aware of cases where airlines had not waived the limits.¹¹⁶

Contrary to this provision of the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air, the other three regulations prescribe that there should be no financial limit in place

¹⁰⁷ Article 12 of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L 204/1.

¹⁰⁸ Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L 204/1, Annex I.

¹⁰⁹ Commission Staff Working Document, Interpretative Guidelines on the application of Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, SWD(2012) 171 final, p. 19.

¹¹⁰ The Montreal Convention 1999, provides a common liability regime in relation to all carriage (including domestic services within the European Union) by means of European Regulation No. 2027/97/EC.

¹¹¹ *Ibid.*

¹¹² Steer Davies Gleave 'Report of the study, Application and enforcement of the regulation concerning the rights of disabled people and persons with reduced mobility when travelling by air', *Steer Davies Gleave* (2010), p. 75.

¹¹³ *Ibid.*

¹¹⁴ TUI Travel PLC is an international leisure travel group.

¹¹⁵ Steer Davies Gleave 'Report of the study, Application and enforcement of the regulation concerning the rights of disabled people and persons with reduced mobility when travelling by air', *Steer Davies Gleave* (2010), p. 72.

¹¹⁶ *Ibid.*, p. 73.

in relation to the compensation that disabled persons and persons with reduced mobility are entitled to in cases where the relevant undertaking is liable for the total or partial loss of, or damage to, mobility equipment or other specific equipment that is used by them.¹¹⁷

All the provisions of the four regulations concerning the rights of disabled persons and persons with reduced mobility when travelling by air, rail, sea and inland waterway and bus and coach that I analysed above are related to the obligation of the States Parties to the UNCRPD to ensure the affordability aspect of accessibility in the area of travel. Nevertheless, these instruments are not sufficient to fully meet this obligation. Issues, such as the cost of the carriage of assistance dogs in some cases and the sometimes unreasonable telephone charges for pre-notification of the need for assistance by disabled persons and persons with reduced mobility, need to be addressed in order for these instruments to fully meet the obligations of Article 9 UNCRPD with regard to affordability in the field of air, water and inland waterway, bus and coach and rail travel. Furthermore, as far as the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air is concerned, the policy option of offering the ticket of the accompanied person for free and the removal of the limit on the compensation that disabled persons and persons with reduced mobility are entitled to in case of total or partial loss of, or damage to mobility equipment or other specific equipment, would certainly improve the affordability of air travel for people with disabilities and contribute towards the implementation of Article 9 UNCRPD.

The measures that these instruments establish with regard to affordability establish a framework of minimum protection for disabled persons and persons with reduced mobility. This implies that both the Member States and the EU can take further measures to implement Article 9 UNCRPD with regard to affordability. Measures addressing the accompanying person's ticket expenses, the costs of the carriage of assistance dogs and the cost of telephone charges for pre-notification of the need for assistance of disabled persons and persons with reduced mobility in order to improve the affordability of air and rail travel can be taken by both the EU and the Member States. The same applies to measures that will expand the application of the relevant regulations to the exempted areas, such as the domestic services exceptions in the area of bus and coach and sea and inland waterway travel.

¹¹⁷ Article 17 of Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L55/1; Article 15 (1) of Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L334/1; Article 17 of Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L315/14.

C. OBLIGATION TO ENSURE INFORMATION ACCESSIBILITY OF TRANSPORT

In this section of Chapter VII, I describe the measures that the EU has taken in the field of information accessibility of transport and consider whether these measures meet the obligations of Article 9 UNCRPD. The instruments examined in this part Chapter VII are connected to the field of transport.

Transport

According to the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air, an air carrier or its agent should make the safety rules that it applies to the carriage of disabled persons and persons with reduced mobility, as well as any restrictions on their carriage or on that of mobility equipment due to the size of aircraft publicly available.¹¹⁸ The same applies to the tour operator which must make publicly available the safety rules and restrictions that operate for flights that are included in package travel, package holidays and package tours which the operator offers to the public.¹¹⁹ Moreover, disabled persons and persons with reduced mobility are entitled to receive information from air carriers or their agents or tour operators on the reasons for their denial of access to air transport.¹²⁰ In addition, the points of departure and arrival of disabled persons and persons with reduced mobility in the airport should offer basic information about the airport.¹²¹ Lastly, disabled persons and persons with reduced mobility are entitled to the information that is needed to take flights and other essential information concerning the flight. The former should be provided by the managing bodies of the airport in the context of assistance and the latter by the air carriers in the same context.¹²²

One of the weakest points regarding the implementation of this regulation is the amount and quality of information that disabled persons and persons with reduced mobility receive when travelling by air. The information is often

¹¹⁸ Article 4 (3) of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

¹¹⁹ Article 4 (3) of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

¹²⁰ Article 4 (4) of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

¹²¹ Article 5 (2) of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

¹²² Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1, Annex I and II.

considered to be insufficient or inaccessible.¹²³ In relation to safety rules, the information published by airlines is sometimes provided in the form of a document labelled 'safety rules' or 'information pursuant to Regulation 1107/2006', but more commonly information is provided on the internet without these descriptions.¹²⁴ The Steer Davies Gleave report on the evaluation of this regulation found that seven carriers' Conditions of Carriage also refer to other requirements (often described as 'Our regulations' or 'Other regulations') which are applicable to the carriage of persons with reduced mobility.¹²⁵ Nevertheless, there is a lack of information on the scope of these regulations or where they can be found.¹²⁶ As such, there is a lack of transparency when it comes to the rules that are applicable to the carriage of disabled persons and persons with reduced mobility.¹²⁷

As far as the Regulation on rail passengers' rights and obligations is concerned, the implementation of this regulation with regard to the information that disabled persons and persons with reduced mobility are entitled to receive is very satisfactory according to the same study.¹²⁸ An example of good practice with regard to the implementation of this regulation can be found in Denmark where organisations of disabled persons and persons with reduced mobility worked together with the railway undertakings to include accessibility information in the official Danish on-line route planner.¹²⁹ Another example of good practice that shows how the development of technology could facilitate accessibility is the development of mobile applications, such as, m.bahn.de, which helps disabled persons and persons with reduced mobility to find information about accessibility via their mobile phone.¹³⁰ This application offers a journey planner, an estimate of the actual arrival time and options to book tickets.¹³¹

In conclusion, the information that disabled persons and persons with reduced mobility are entitled to receive because of all the passenger rights

¹²³ Report from the Commission to the European Parliament and the Council on the functioning and effects of Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, COM(2011) 166 final, p. 3.

¹²⁴ Steer Davies Gleave 'Report of the study, Application and enforcement of the regulation concerning the rights of disabled people and persons with reduced mobility when travelling by air', *Steer Davies Gleave* (2010), p. 56.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ Steer Davies Gleave, 'Report of the study, Evaluation of Regulation 1371/2007, on the application and enforcement in the Member States of the Regulation on rail passengers' rights and obligations', *Steer Davies Gleave* (2012), p. 82.

¹²⁹ *Ibid.*

¹³⁰ Community of European Railway and Infrastructure Companies, A European overview of the implementation of Regulation (EC) No 1371/2007: The Rail Sector Report, October 2012, p. 21.

¹³¹ *Ibid.*

regulations¹³² is connected to the obligation of the States Parties to the UNCRRP to ensure the information accessibility of bus and coach, sea and inland waterway and rail transport, because these Regulations guarantee that people with disabilities are able to seek, receive and impart information on an equal basis with others. Nevertheless, the measures included in all the passenger rights regulations with regard to information accessibility do not fully meet this obligation of Article 9 UNCRRP, as there are other types of information that should be available to people with disabilities when travelling by air, bus and coach, sea and inland waterway and rail travel, such as information on the urban transport schedule that will facilitate the arrival of disabled persons and persons with reduced mobility at their destination, or information on the accessibility of the transport vehicles and facilities. The provision of the additional information mentioned above will contribute to the fulfilment of the obligation of Article 9 UNCRRP with regard to information accessibility. The additional information should also be provided in accessible formats (communication accessibility). The rights of disabled passengers provided by the regulations in the fields of air, bus and coach, sea and inland waterway and rail travel with regard to information accessibility should be considered as minimum standards for the protection of disabled persons and persons with reduced mobility. This implies that both the Member States and the EU can take further measures to implement Article 9 UNCRRP with regard to information accessibility.

D. OBLIGATION TO ENSURE COMMUNICATION ACCESSIBILITY OF TRANSPORT

In this section of Chapter VII, I describe the measures that the EU has taken in the field of communication accessibility of transport and consider whether these measures meet the obligations of Article 9 UNCRRP. The instruments examined in this part of Chapter VII are connected to the field of transport.

Transport

The Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air states that all the information that

¹³² Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L315/14; Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L55/1; Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L334/1; Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

disabled persons and persons with reduced mobility are entitled to receive according to that regulation, should be provided in accessible formats. In particular, the information on the safety rules for the carriage of disabled persons and persons with reduced mobility, the information on the denial of carriage of disabled persons and persons with reduced mobility, the general information on the subject of the airport at the points of departure and arrival and the information concerning assistance should all be provided in accessible formats.¹³³

According to the Commission, a major problem in the implementation of this regulation is the inaccessibility of the information.¹³⁴ Although the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air contains strong provisions addressing information accessibility, if these provisions are not monitored and enforced effectively by the Member States in order to ensure that the information is provided in accessible formats, the EU and the Member States will fail to meet the obligation of the Convention to ensure communication accessibility in the field of air travel. The same applies to bus and coach and sea and inland waterway travel. In the case of rail transport, the Regulation on rail passengers' rights and obligations does not guarantee that people with disabilities will receive information in accessible formats. Thus, the EU's obligation to ensure communication accessibility is not implemented in the field of rail transport.

E. OBLIGATION TO ENSURE PHYSICAL ACCESSIBILITY OF TRANSPORT

In this section of Chapter VII, I describe the measures that the EU has taken in the field of physical accessibility of transport and consider whether these measures meet the obligations of Article 9 UNCRPD. The instruments examined in this part of Chapter VII are connected to the internal market and transport.

i. Internal market

The legal instrument that is relevant with regard to the physical accessibility of transport is the Regulation concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and

¹³³ See Articles 4 (3), 5 (2) and Annex and II of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

¹³⁴ Report from the Commission to the European Parliament and the Council on the functioning and effects of Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, COM(2011) 166 final, p. 3.

separate technical units intended therefor.¹³⁵ The purpose of this regulation is to ensure the general safety of motor vehicles and the environmental performance of tyres.¹³⁶

The scope of this regulation includes motor vehicles in the categories M, N, and O. Category M includes motor vehicles with at least four wheels designed and constructed for the carriage of passengers, category N involves motor vehicles with at least four wheels designed and constructed for the carriage of goods and category O includes trailers (including semi-trailers).¹³⁷ It is important to note in that regard that M1 vehicles are designed and constructed for the carriage of passengers, comprising no more than eight seats in addition to the driver's seat; M2 vehicles are designed and constructed for the carriage of passengers, comprising more than eight seats in addition to the driver's seat, and having a maximum mass not exceeding 5 tonnes and M3 are vehicles designed and constructed for the carriage of passengers, comprising more than eight seats in addition to the driver's seat, and having a maximum mass not exceeding 5 tonnes.¹³⁸ In addition, Class I M2 and M3 vehicles have a capacity exceeding 22 passengers in addition to the driver and are constructed with areas for standing passengers to allow frequent passenger movement.¹³⁹

The Regulation concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor in Article 7 (3) states that vehicles in Class I M2 and M3 should be accessible for persons with reduced mobility.¹⁴⁰ This means that the obligation on the Member States to provide accessible vehicles covers

¹³⁵ Regulation No. 661/2009/EU of the European Parliament and of the Council of 13 July 2009 concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor, [2009] OJ L200/1.

¹³⁶ Recital 34 of the Preamble to Regulation No. 661/2009/EU of the European Parliament and of the Council of 13 July 2009 concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor, [2009] OJ L200/1.

¹³⁷ Article 2 of Regulation No. 661/2009/EU of the European Parliament and of the Council of 13 July 2009 concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor, [2009] OJ L200/1; Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive), [2007] OJ L263/1, Annex II.

¹³⁸ Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive), [2007] OJ L263/1, Annex II.

¹³⁹ Article 3 (2) of Regulation No. 661/2009/EC of the European Parliament and of the Council of 13 July 2009 concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor, [2009] OJ L200/1.

¹⁴⁰ Article 7 (3) of Regulation No. 661/2009/EC of the European Parliament and of the Council of 13 July 2009 concerning type-approval requirements for the general safety of motor vehicles,

only those vehicles that are constructed with areas for standing passengers and have a capacity capable of exceeding 22 passengers. Therefore, vehicles that are constructed exclusively or principally for the carriage of seated passengers and vehicles that are constructed exclusively or principle for the carriage of standing passengers but have a capacity not exceeding 22 passengers are not addressed by this regulation in relation to accessibility. The EU and the Member States can take action to expand the obligation to ensure physical accessibility to the rest of the vehicles addressed in this regulation, due to the fact that the internal market is a shared competence.

In conclusion, the Regulation concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor addresses the issue of physical accessibility for people with disabilities as it is expressed in Article 9 UNCRPD. The obligation on the Member States that this regulation establishes with regard to the accessibility of Class I M2 and M3 vehicles meets the obligation of Article 9 UNCRPD as far that class of vehicles are concerned. Nevertheless, the EU and the Member States have the competence to regulate the accessibility of the remaining vehicles that are covered by this regulation, as the internal market is a shared competence.

In that regard, I argue that the EU should take action to regulate the remaining vehicles under the scope of application of this regulation for two reasons. First, as I argued in Chapter III of my thesis¹⁴¹, the Member States are generally hesitant to regulate the areas where the EU has adopted a legal instrument. Second, in the same chapter I stated that where the EU has established a pre-existing framework, it is logical for the EU to mainstream disability considerations in that framework instead of leaving the regulation of accessibility to the Member States. Nevertheless, because the EU has a shared competence in the field of the internal market, the EU should fully respect the principle of subsidiarity.

A study conducted by the Zero Project in 2012 with regard to the status of the physical accessibility of buses in Europe concluded that the level of physical accessibility is not ideal. The study included, among others, 21 EU Member States.¹⁴² It found that in only two EU Member States (the Netherlands and the UK) were buses fully accessible with trained drivers.¹⁴³ Moreover, in some countries, it was only the newer buses that were accessible.¹⁴⁴ An encouraging

their trailers and systems, components and separate technical units intended therefor, [2009] OJ L200/1.

¹⁴¹ See Chapter III, The effective implementation of the requirements of the UNCRPD by the EU.

¹⁴² Zero Project Report, 'International Study on the Implementation of the UN Convention on the Rights of Persons with Disabilities', *Zero Project Report* (2012), <https://zeroproject.org/wp-content/uploads/2013/12/Zero-Project-Report-2012.pdf>, p. 36 (accessed 17 January 2018).

¹⁴³ Ibid.

¹⁴⁴ Ibid.

fact, though, was that there were no EU Member States surveyed that did not provide any accessible buses.¹⁴⁵ It is important to note, however, that this study considered the accessibility of the bus system in the capital of the country as an indicator for measuring the accessibility of the country's transportation system as a whole.¹⁴⁶

ii. Transport

The last instrument that I analyse in this field is the Directive on safety rules and standards for passenger ships.¹⁴⁷ The legal basis of this directive is Article 80(2) EC (now 100(2) TFEU). The purpose of this directive is to establish a uniform level of safety for life and property on new and existing passenger ships and high-speed passenger craft in the context of domestic travel.¹⁴⁸ As far as people with disabilities are concerned, the directive aims at ensuring safe access for disabled people to passenger ships and high-speed passenger craft operating in domestic services in the Member States.¹⁴⁹ This is therefore a disability mainstreaming instrument.

Article 8 of this directive requires the Member States to ensure the adoption of appropriate measures with a view to enabling disabled persons and persons with reduced mobility to have safe access to all passenger ships and to all high-speed passenger craft used for public transport.¹⁵⁰ In the instance of modification of passenger ships and high-speed passenger craft used for public transport, Member States are required to apply the guidelines in Annex III, which ensure that disabled persons and persons with reduced mobility have safe access to these ships as far as it is reasonable and practicable to do so in light of the costs.¹⁵¹

On the 6th of June 2016, the Commission proposed a new directive to amend Directive 2009/45/EC on safety rules and standards for passenger ships.¹⁵² The new proposal does not affect the provisions of the current directive with regard to disabled persons.¹⁵³ It excludes, from the scope of application of the

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Directive 2009/45/EC of the European Parliament and of the Council of 6 May 2009 on safety rules and standards for passenger ships (Recast), [2009] OJ L163/1.

¹⁴⁸ Article 1 of Directive 2009/45/EC of the European Parliament and of the Council of 6 May 2009 on safety rules and standards for passenger ships (Recast).

¹⁴⁹ Recital 17 of the Preamble to Directive 2009/45/EC of the European Parliament and of the Council of 6 May 2009 on safety rules and standards for passenger ships (Recast).

¹⁵⁰ Article 8 of Directive 2009/45/EC of the European Parliament and of the Council of 6 May 2009 on safety rules and standards for passenger ships (Recast).

¹⁵¹ Article 8 of Directive 2009/45/EC of the European Parliament and of the Council of 6 May 2009 on safety rules and standards for passenger ships (Recast).

¹⁵² Proposal for a Directive of the European Parliament and the Council amending Directive 2009/45/EC on safety rules and standards for passenger ships, COM(2016) 369 final.

¹⁵³ Ibid.

current directive, ships less than 24 metres in length.¹⁵⁴ The proposal has been discussed in the European Parliament and the Council and it seems that it will be approved at the first reading.

Article 8 of the Directive on safety rules and standards for passenger ships is related to Article 9 UNCPRD, particularly, the obligation of the States Parties of the Convention to ensure the physical accessibility of people with disabilities in the field of water travel. Safety should be considered as part of physical accessibility, as I mentioned in Chapter I.¹⁵⁵ This is because without guaranteeing the safe use of a passenger ship by people with disabilities, it will be dangerous for them to use the transport vehicle, even though that vehicle might have enough space for a wheelchair user to move throughout its corridors or includes accessible toilets. Therefore, this provision partially meets the obligation of the States Parties to the Convention to ensure physical accessibility, as this directive only regulates the safety and not, for example, the usability of passenger ships.

F. OBLIGATION TO PROVIDE ASSISTANCE TO PEOPLE WITH DISABILITIES IN THE FIELD OF TRANSPORT

In this part of Chapter VII, I describe the measures that the EU has taken in the field of assistance to people with disabilities regarding transport, and consider whether these measures meet the obligations that are contained in Article 9 UNCPRD. The instruments examined in this part of Chapter VII are connected to the field of transport.

Transport

Article 5 of the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air obliges the managing body of the airport to designate points of arrival and departure within the airport or at a point under the managing bodies' control, at which disabled persons and persons with reduced mobility can announce their arrival and request assistance.¹⁵⁶ The points of arrival and departure should be clearly signed and should offer basic information about the airport in accessible formats.¹⁵⁷

¹⁵⁴ Ibid., Article 2.

¹⁵⁵ See Chapter I, Dimensions of accessibility.

¹⁵⁶ Article 5 (1) of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

¹⁵⁷ Article 5 (2) of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

According to Article 7 of the regulation, the managing bodies of the airport are obliged to guarantee the provision of the assistance to disabled persons and persons with reduced mobility upon their arrival at the airport in a way that disabled persons and persons with reduced mobility are able to take the flight that they hold a reservation for.¹⁵⁸ The content of the assistance provided by the managing bodies includes, *inter alia*, assistance to enable disabled persons and persons with reduced mobility to move from a designated point to the check-in counter and to disembark from the aircraft, and assistance through the provision of lifts and wheelchairs.¹⁵⁹

The assistance that the managing bodies are obliged to provide to disabled persons and persons with reduced mobility is offered on the condition that a notification of their particular needs are made to the air carrier or its agent or the tour operator concerned at least 48 hours before the flight's departure.¹⁶⁰ Furthermore, this notification should include a reference to an assistance dog, if such a dog is accompanying the disabled person or the person with reduced mobility.¹⁶¹ Moreover, this article does not restrict its application to the obligation to provide assistance on the arrival of the disabled person or the person with reduced mobility at the airport. It also covers the transfer to flights and the arrival of the disabled person or person with reduced mobility at his or her point of departure. In addition, this assistance should be adjusted to the needs of individual passengers. Lastly, Article 7 (3) of the Regulation states that the managing bodies are obliged to make all reasonable efforts to provide assistance so as to allow the person concerned to take the flight for which he or she holds a reservation in case the person concerned has not pre-notified their arrival.¹⁶²

In addition to these assistance measures, the Regulation establishing uniform rules on compensation and assistance to passengers in the event of being denied boarding and of cancellation or long delay of flights¹⁶³, requires

¹⁵⁸ Article 7 (1) of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

¹⁵⁹ Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1, Annex I.

¹⁶⁰ Article 7 (1) of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

¹⁶¹ Article 7 (2) of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

¹⁶² Article 7 (3) of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

¹⁶³ Regulation No. 261/2004/EC of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, [2004] OJ L46/1.

that ‘in cases of denied boarding, cancellation and delays of any length, disabled persons or persons with reduced mobility and any persons accompanying them, as well as unaccompanied children, shall have the right to care as soon as possible’.¹⁶⁴ The right to care includes, amongst other things, ‘meals and refreshments, hotel accommodation, and transport between the airport and place of accommodation’.¹⁶⁵

The Commission has declared with regard to pre-notification that in order to improve the rate of pre-notification, it is fundamental to systematically inform passengers about the assistance they can receive and the importance of providing the air carriers or its agent with a notification of their assistance needs in advance.¹⁶⁶ A reminder of the need for disabled persons and persons with reduced mobility to pre-notify their assistance needs could always be included in the tickets, purchase orders and invoices.¹⁶⁷ Air carriers, their agents and tour operators should establish mechanisms to facilitate pre-notification, particularly, but not only, where disabled persons and persons with reduced mobility book and purchase their ticket online.¹⁶⁸

In addition, with a view to improving the level of assistance that disabled persons and persons with reduced mobility receive when travelling by air, air carrier may request additional information at the pre-notification stage. Such information might include the nature and description of the assistance needs and a description of any mobility or medical equipment.¹⁶⁹

As far as assistance to disabled persons and persons with reduced mobility by air carriers is concerned, pursuant to Article 10 of this regulation, air carriers should provide the assistance specified in Annex II to disabled persons and persons with reduced mobility departing from, arriving at or transiting through an airport.¹⁷⁰ Annex II of this Regulation analyses the content of the assistance that air carriers are obliged to provide to disabled persons and persons

¹⁶⁴ Article 11 of Regulation No. 261/2004/EC of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.

¹⁶⁵ Article 9 of Regulation No. 261/2004/EC of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.

¹⁶⁶ Report from the Commission to the European Parliament and the Council on the functioning and effects of Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, COM(2011) 166 final, p. 9.

¹⁶⁷ Ibid.

¹⁶⁸ Commission Staff Working Document, Interpretative Guidelines on the application of Regulation (EC) N° 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, SWD(2012) 171 final, p. 10.

¹⁶⁹ Ibid., p. 9.

¹⁷⁰ Article 10 of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

with reduced mobility, which includes, *inter alia*, the arrangement of seating, if possible, so as to meet the needs of individuals with disability or reduced mobility on request and subject to safety requirements and the availability and assistance in gaining access to toilet facilities if required.

Steer Davies Gleave's report on the implementation of this regulation by air carriers and managing bodies found that 12 of the air carriers examined in the study provided an indication of the level and the content of in-flight assistance offered to disabled persons and persons with reduced mobility, though mostly with regard to what type of assistance their staff were unable to provide.¹⁷¹ This generally included 'feeding, lifting passengers, administering medication and assisting in personal hygiene or toilet functions'.¹⁷² The level of assistance which is actually provided is generally limited to 'preparation for eating, assistance in moving around the aircraft and stowing and retrieving luggage'.¹⁷³

The same report stated that, of the airports that participated in the research, most reported that there was little or no difference in the service received by passengers who had not pre-notified compared to those who had, and differences in service quality only occurred in the instances where the services were particularly busy.¹⁷⁴ Some airports also stated that even in the cases where a choice had to be made between assisting a pre-notified and non-pre-notified passenger, they would make their decision on the basis of trying to ensure that all passengers could make their flights.¹⁷⁵ A factor that played a role in adopting this approach was the fact that the levels of pre-notification were rather low in some airports and there was no reason for making a distinction between disabled persons or persons with reduced mobility who pre-notified and those who do not.¹⁷⁶ Only a small minority of the case study airports mentioned that a slower or lower level service was provided to passengers who failed to pre-notify.¹⁷⁷

Despite the willingness and good practice of air carriers and managing bodies in treating disabled persons and persons with reduced mobility who pre-notified equally with the persons who did not, the Commission has stated that a major problem with regard to the implementation of this regulation is the quality of the service provided and the insufficient adaptation of the assistance provided by the air carriers and managing bodies to the individual needs of disabled persons and persons with reduced mobility.¹⁷⁸ The quality of the

¹⁷¹ Steer Davies Gleave 'Report of the study, Application and enforcement of the regulation concerning the rights of disabled people and persons with reduced mobility when travelling by air', *Steer Davies Gleave* (2010), p. 74.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*, p. 25.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ Report from the Commission to the European Parliament and the Council on the functioning and effects of Regulation (EC) No 1107/2006 of the European Parliament and of the Council

assistance services offered varies, and the services are sometimes poorly adapted to the specific needs of passengers, in particular of persons with totally or nearly totally reduced mobility.¹⁷⁹

As far as the assistance for disabled passengers and passengers with reduced mobility in the context of rail travel is concerned, the Steer Davies Gleave study on the evaluation of Regulation on rail passengers' rights and obligations found that undertakings had effectively implemented the majority of the regulation's requirements in this area.¹⁸⁰ This does not mean, though, that the regulation has been perfectly implemented. According to the European Disability Forum (henceforth EDF), few stations are staffed and therefore assistance can be difficult to obtain, especially during off-peak periods and in rural areas.¹⁸¹ In addition, there is a shortage of trained staff that area able to provide appropriate assistance.¹⁸² A good practice example that could provide guidance in solving the challenges that person with reduced mobility face when they arrive at unstaffed stations is the National Belgian Railway Company's policy of providing a taxi service from some unstaffed stations to stations which offer assistance to disabled persons.¹⁸³

Furthermore, this study found that it is helpful when disabled persons and persons with reduced mobility notify their need for assistance at the point when they purchase their tickets.¹⁸⁴ Several railway undertakings have adopted such a policy.¹⁸⁵ The regulation does not explicitly refer to the possibility of disabled persons and persons with reduced mobility to notify their needs for assistance at the point of sale.¹⁸⁶ Yet, Article 24 (a) of the regulation requires that disabled persons and persons with reduced mobility must be able to give notification of assistance needs to ticket vendors and tour operators, which implies that passengers should be able to notify their needs at the point of sale, at least when purchasing through ticket vendors and tour operators.¹⁸⁷

A good practice that demonstrates the alternative ways for disabled persons and persons with reduced mobility to notify their need for assistance can be found in Italy. In addition to the usual means (phone, website), passengers with

of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, COM(2011) 166 final, p. 3.

¹⁷⁹ Ibid.

¹⁸⁰ Steer Davies Gleave, 'Evaluation of Regulation 1371/2007, on the application and enforcement in the Member States of the Regulation on rail passengers' rights and obligations', *Steer Davies Gleave* (2012), p.126.

¹⁸¹ Ibid.

¹⁸² Ibid., p. 88.

¹⁸³ Ibid.

¹⁸⁴ Ibid., p. 87.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid., p. 126; Article 24 (a) of Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L315/14.

reduced mobility that are travelling in Italy may notify their need for assistance to the dedicated service centres which are established by the infrastructure manager Rete Ferroviaria Italiana, which has provided assistance in rail stations since December 2010.¹⁸⁸ Fourteen major stations in the country have these service centres.¹⁸⁹

The Steer Davies Gleave study also found, on the subject of pre-notification by persons with disabilities of their assistance needs 48 hours prior to the travel, that several railway undertakings require only 24 hours' advance notice, including Czech Railways and German Railways.¹⁹⁰ Some even provide for shorter periods, such as Eurostar and Renfe Operadora.¹⁹¹ However, there are very few other operators that have not implemented the regulation successfully by requiring 48 hours' notice, but in these instances notification may only be received on working days.¹⁹² It is, however, important to note that none of the railway undertakings that participated in this study explicitly stated that they would not accept passengers if they did not give sufficient notice. That being said, they also implied that a less optimum level of service would be provided, particularly if staff were not available in such circumstances. This shows a significant difference between the implementation of this regulation's rules in comparison with the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air, especially where the majority of the managing bodies of the airport did not base the quality of their assistance on pre-notification.

Lastly, the Steer Davies Gleave study on the evaluation of the Regulation on rail passengers' rights and obligations found that the provision on the right to care in cases where disabled persons are denied boarding, cancellation or where there are delays of any length tend to be less effective, because not all railway undertakings provide refreshments, some railway undertakings limit the refreshments available and some limit the amount that they will pay in hotel costs.¹⁹³

As far as the assistance for disabled passengers and passengers with reduced mobility in the context of bus and coach transport is concerned, the Steer Davies Gleave's comprehensive study on passenger transport by coach in Europe found that the quality of assistance provided to people with disabilities in bus terminals varies widely between Member States and between terminals within a Member

¹⁸⁸ Community of European Railway and Infrastructure Companies, A European overview of the implementation of Regulation (EC) No 1371/2007: The Rail Sector Report, October 2012, p. 20.

¹⁸⁹ Ibid.

¹⁹⁰ Steer Davies Gleave, 'Evaluation of Regulation 1371/2007, on the application and enforcement in the Member States of the Regulation on rail passengers' rights and obligations', *Steer Davies Gleave* (2012), p.86.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ibid., p. 126.

State or even within a city.¹⁹⁴ The study also indicated that a large number of Member States have designated a very small number of bus and coach terminals where assistance for disabled persons and persons with reduced mobility is provided.¹⁹⁵

In conclusion, the measures on assistance that are provided to disabled persons and persons with reduced mobility in all the passenger rights regulations¹⁹⁶ relate to the obligation to provide forms of live assistance to persons with disabilities, in order to facilitate their access to transport. This obligation is set out in Article 9 (2) (e) UNCRPD. This obligation, however, is not fully met by these regulations as there are several types of assistance that are not included within these legislative instruments, such as assistance when purchasing a ticket from an air carrier booth or a ticket machine. Therefore, measures taken at EU level with regard to securing assistance for people with disabilities in the areas of air, sea and inland waterway and bus and coach and rail do not fully meet the obligations that are set out in Article 9 UNCRPD.

Since the EU measures constitute minimum standards, both the Member States and the EU are able to regulate this field with a view to fully implementing Article 9 (2) (e) UNCRPD. An example of such measures might be a legislative or policy measure to ensure that assistance when purchasing a ticket via air carrier booth or a ticket machine is provided to disabled persons.

G. OBLIGATION TO PROVIDE TRAINING FOR STAKEHOLDERS ON ACCESSIBILITY IN THE FIELD OF TRANSPORT

In this section of the Chapter VII, I describe the measures and actions that the EU has taken in the field of training of stakeholders on disability accessibility in the field of transport and consider whether these measures meet the obligations contained in Article 9 UNCRPD. These stakeholders are persons, groups or organisations or legal entities that have an interest in accessibility, such as the personnel of the rails, bus and coach, sea and inland waterway and air carriers and terminal undertakings that provide services to people with disabilities. The

¹⁹⁴ Ibid., p. 118.

¹⁹⁵ Ibid.

¹⁹⁶ Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L315/14; Regulation No. 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L55/1; Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L334/1; Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

instruments examined in this part of Chapter VII are connected to the field of transport.

Transport

Article 11 of the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air, states that air carriers and airport managing bodies should guarantee that all their personnel who provide direct assistance to disabled persons and persons with reduced mobility have knowledge of how to address the needs of persons with various disabilities or mobility impairments. It also demands that they provide all their personnel working at the airport who deal directly with the travelling public with disability-equality and disability-awareness training. Lastly, air carriers and airport managing bodies should guarantee that all new employees attend disability-related training upon their recruitment and that their personnel receive refresher training courses when this is deemed appropriate.¹⁹⁷ The regulation requires airports to provide specialised disability-training for staff that directly assist disabled persons and persons with reduced mobility. Despite the fact that in the Steer Davies Gleave report all sample airports had done so, there were significant variations in relation to the length and format of this training.¹⁹⁸ The shortest training course within the scope of the research carried out by Steer Davies Gleave was three days, while the longest lasted 14 days.¹⁹⁹ Similar results with regard to the variation in the length of training appeared in the cases of passenger facing staff that did not provide direct assistance.²⁰⁰ Lastly, a number of airports participating in this study stated that they did not provide disability-awareness training for staff that did not work in public-facing roles, or only provided it on a voluntary basis.²⁰¹

It is important to note in this section that the Regulation on rail passengers' rights and obligations does not include provisions on the disability-related training of stakeholders. Moreover, in the context of the Regulation concerning the rights of passengers in bus and coach transport, there is a difference between the training that bus drivers are required to receive and the training that the rest of transport personnel are obliged to receive. As is stated in Annex II of this

¹⁹⁷ Article 11 of Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

¹⁹⁸ Steer Davies Gleave 'Report of the study, Application and enforcement of the regulation concerning the rights of disabled people and persons with reduced mobility when travelling by air', *Steer Davies Gleave* (2010), p.54.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*, p. 54.

Regulation, drivers ought only to receive disability awareness training, whereas the people who provide direct assistance to disabled persons and persons with reduced mobility will receive disability assistance training as well.²⁰² This difference might create problems with regard to the quality of assistance that disabled persons and persons with reduced mobility are entitled to receive on board a vehicle, in the instance where there are no other personnel on board of the vehicle but the driver.

As far as the assistance for disabled passengers and passengers with reduced mobility in the context of bus and coach transport is concerned, the Steer Davies Gleave comprehensive study on passenger transport by coach in Europe pointed out that it is problematic that carriers can be granted an exemption from the obligation to train their staff, especially in relation to disability-related training.²⁰³ The study also showed that there are attitudinal barriers and a lack of awareness of disability issues amongst transport undertakings and drivers.²⁰⁴ In that regard, the study recommended that these barriers be eliminated by consistently training the staff of transport undertakings and by providing bus drivers with training on disability awareness and disability assistance.²⁰⁵

Lastly, with regard to sea and inland waterways, a Commission Report on the implementation of the Regulation concerning the rights of passengers when travelling by sea and inland waterway stated that there is a need to improve the training that carrier and terminal staff receive with a view to providing appropriate assistance to people with disabilities and reduced mobility.²⁰⁶

These provisions on the training of air, bus and coach and inland waterway travel personnel relate to the obligation of States Parties to the UNCRPD to provide training for stakeholders on accessibility issues facing persons with disabilities.²⁰⁷ Compared to the passenger rights regulations in the areas of road and sea and inland waterway travel, the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air obliges the air travel stakeholders to provide training to all new personnel, even the ones who are not responsible for providing services to or deal with passengers. At the same time, though, this regulation does not provide any direction as to what the content of the training should be. By way of contrast,

²⁰² Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L55/1.

²⁰³ Steer Davies Gleave, 'Comprehensive Study on Passenger transport by coach in Europe', *Steer Davies Gleave* (2016), p. 115.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No. 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, COM(2016) 274 final, para. 4.1.

²⁰⁷ Article 9 (2) (c) UNCRPD.

the road and sea and inland waterway passenger rights regulations²⁰⁸ actually provide some minimum standards for the content of the disability-training of stakeholders. Furthermore, in practice it is the case that some managing authorities and air carriers do not comply with the regulation with regard to disability-training of stakeholders and there are also noticeable differences in terms of the amount of training that each stakeholder receives, which in turn is dependent on the relevant managing authority or air carrier. Thus, it is arguable that these regulations partially meet the obligation of States Parties to the UNCRPD to provide training for stakeholders on accessibility issues facing persons with disabilities. The measures taken at the EU level in that regard provide for a minimum level of training for stakeholders on accessibility-training.

Furthermore, the area of transport policy is an area where the EU and the Member States have the power to take action to implement Article 9 (2) (c) UNCRPD to provide accessibility-training in the field of transport. Thus, both the Member States and the EU can regulate this issue. Therefore, the EU or the Member States should take action to fully implement Article 9 (2) (c) UNCRPD by, for example, defining the amount of training that each stakeholder should have and ensuring the provision of general disability-awareness training to all the personnel of terminals or vehicles.

From the analysis of all the passenger rights regulations, it is evident that the EU has successfully implemented some of the obligations set out in Article 9 UNCRPD. Because the area of transport is a shared competence and because these regulations implement minimum standards, both the EU and the Member States can take further action to comply with Article 9 UNCRPD. It is my view that this further action might more appropriately be taken by the EU because, as I have argued in the context of the physical accessibility of transport, the Member States are reluctant to take actions in fields where the EU has already regulated, particularly in the case of the passenger rights regulations where the EU has regulated that area rather substantially. In addition, in the cases where the EU disability legislation has not effectively implemented the UNCRPD, as in the case of passenger rights regulations²⁰⁹, it is my view that the EU should

²⁰⁸ Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L55/1; Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L334/1; Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

²⁰⁹ Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L55/1; Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of

take action to improve these regulations so as to fulfil the obligations of Article 9 UNCRPD that are connected to these regulations.

H. OBLIGATION TO DEVELOP MINIMUM STANDARDS ON ACCESSIBILITY OF TRANSPORT

In this section of the Chapter VII, I describe the measures and actions that the EU has taken in the field of standardisation concerning disability accessibility of transport and consider whether these measures meet the obligations of Article 9 UNCRPD. The instruments examined in this part of Chapter VII are connected to the fields of transport and trans-European networks.

i. Transport

The instrument that I examine in this part of Chapter VII is the Directive on safety rules and standards for passenger ships. Annex III of this directive includes guidelines on how to design passenger ships and high-speed passenger crafts so as to guarantee safe access for people with disabilities. The main issues that Annex III refers to are the access to the ship, signs, means to communicate messages, alarms and additional requirements that ensure mobility inside the ship.²¹⁰ Furthermore, Member States are obliged to cooperate with and to consult organisations which represent disabled persons and persons with reduced mobility on the implementation of the guidelines included in Annex III. This directive regulates safety rules with regard to disabled persons and persons with reduced mobility. Safety should be considered as part of physical accessibility, as explained above.

Therefore, these guidelines partially meet the obligations contained in Article 9 (2) (a) UNCRPD to develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of water travel, because these guidelines are focused only on safety and not accessibility as a whole. It also fully meets, within the context of this directive, the obligation to involve representative organisations within the mechanisms of developing, promulgating and monitoring the implementation of minimum standards and guidelines in the area of water travel.

passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L334/1; Regulation No. 1107/2006/EU of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

²¹⁰ Directive 2009/45/EC of the European Parliament and of the Council of 6 May 2009 on safety rules and standards for passenger ships (Recast), [2009] OJ L163/1, p. 1, Annex III.

ii. *Trans-European networks*

The first instrument that I examine in this part of the chapter is the Commission's Regulation on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility (henceforth TSI PRM Regulation).^{211, 212} This regulation was adopted in the context of the EU policy to develop trans-European networks in the field of, *inter alia*, transport, which is based on Articles 170 to 172 TFEU. This policy aims at strengthening economic and social cohesion and enabling citizens of the Union, economic operators and regional and local communities to derive full benefit from the establishment of an area without internal frontiers by promoting the interconnection and interoperability of national networks, as well as access to such networks.²¹³ This policy can be achieved, among others, through the set-up of a series of guidelines covering the objectives, priorities and broad lines of measures in the sphere of trans-European networks and through the implementation of any measures that may prove necessary to ensure the interoperability of the networks, particularly in the area of technical standardisation.²¹⁴

The aim of the TSI PRM Regulation is to establish the technical specifications for the interoperability of the Union's rail system that relates to disability accessibility.²¹⁵ This instrument is disability-specific, as it specifically addresses the situation of persons with disabilities. This shows that disability accessibility can be regulated through the legal basis of Article 172 TFEU on trans-European networks. The TSI PRM Regulation, with a view to following technological evolution and encouraging modernisation, promotes and allows the implementation of innovative solutions under certain conditions.²¹⁶

The Annex of this Regulation states that the objective of TSI PRM Regulation is to enhance the accessibility of rail transport for persons with reduced mobility.²¹⁷ The scope of this TSI covers the infrastructure, operation and

²¹¹ Technical specifications for interoperability (TSIs) mean the specifications by which each sub-system or part thereof is covered in order to meet the essential requirements and to ensure the interoperability of the trans-European high speed and conventional rail systems.

²¹² Commission Regulation No. 1300/2014/EU of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility, [2014] OJ L356/110.

²¹³ Articles 154–156 TFEU.

²¹⁴ Article 155 (1) TFEU.

²¹⁵ Article 1 of Commission Regulation No. 1300/2014/EU of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility, [2014] OJ L356/110.

²¹⁶ Recital 10 of the Preamble to Commission Regulation No. 1300/2014/EU of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility, [2014] OJ L356/110.

²¹⁷ Commission Regulation No. 1300/2014/EU of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility, [2014] OJ L356/110, Annex.

traffic management, telematics applications and rolling stock subsystems that are relevant to disability accessibility.²¹⁸ The scope of the TSI PRM Regulation includes the trans-European conventional and high speed rail system network and all other parts of the network.²¹⁹ This TSI PRM Regulation applies in full to new infrastructure and rolling stock subsystems of the EU rail systems.²²⁰ The TSI PRM Regulation is not applicable when new rolling stock subsystems of the rail system in the EU or infrastructure are placed in service on the network (or part of it) of any Member State before 1 January 2015.²²¹ Nevertheless, the TSI PRM Regulation is applicable to existing infrastructure and the rolling stock of the rail system in the Union when that is subject to renewal or upgrading.²²² Lastly, the TSI PRM Regulation applies to all the public areas of stations which are dedicated to the transport of passengers that are managed by the railway undertaking, infrastructure manager or station manager.²²³ This covers, amongst other things, the provision of information, the purchase and validation of a ticket, and the possibility to wait for the train.²²⁴ This instrument offers a systematic approach to the standardisation of trans-European rail travel, as it provides technical requirements on how to ensure accessibility of infrastructure and of rolling stock in the context of rail travel.

Inaccessible railway stations are the primary barrier which prevents persons with disabilities from accessing railway services.²²⁵ In Finland, some stations and new local trains are not accessible because of old low platforms.²²⁶ In Romania, only the stations in the larger towns are accessible to people with

²¹⁸ Article 2 (1) of Commission Regulation No. 1300/2014/EU of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility, [2014] OJ L356/110.

²¹⁹ Article 2 (2) of Commission Regulation No. 1300/2014/EU of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility, [2014] OJ L356/110.

²²⁰ Article 2 (3) of Commission Regulation No. 1300/2014/EU of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility, [2014] OJ L356/110.

²²¹ Article 2 (4) of Commission Regulation No. 1300/2014/EU of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility, [2014] OJ L356/110.

²²² Article 2(5) of Commission Regulation No. 1300/2014/EU of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility, [2014] OJ L356/110.

²²³ Commission Regulation No. 1300/2014/EU of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility, [2014] OJ L356/110, Annex.

²²⁴ Commission Regulation No. 1300/2014/EU of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility, [2014] OJ L356/110, Annex.

²²⁵ EDF, 'Response to Steer and Davies Gleave's questionnaire on review of Regulation 1371/2007 on rail passengers' rights and obligations', *EDF* (2012), www.edf-feph.org/rail-passengers-rights-obligations (accessed 17 January 2018).

²²⁶ *Ibid.*

disabilities.²²⁷ In France, all new stations are fully accessible but the retrofitting of the existing stations is being implemented rather slowly and an estimated 80% of them are not totally or partly accessible.²²⁸ Rolling-stock problems are, also, EU-wide. In Finland, new wagons are usually accessible but restaurant coaches remain inaccessible, and sleeping coaches have toilets and sleeping cabins which are too small.²²⁹ In Denmark, new platforms and new rolling stock meet the accessibility requirements of the Commission's Decision concerning the technical specification of interoperability relating to persons with reduced mobility in the trans-European conventional and high-speed rail system (TSI PRM Decision), which was replaced by the TSI PRM Regulation.²³⁰ Yet there is no measure, legislative or other, which guarantees the accessibility of existing platforms and rolling stock.²³¹ In a study conducted by the European Railway Agency, researchers found that there was some progress with regard to the implementation of the TSI PRM Decision²³², which was repealed by the TSI PRM Regulation. However, progress was still very slow in comparison to the other TSI, such as on RST (rolling stock) and CCS (Control-command and signalling).²³³ Some progress was also made with regard to passenger carriages and their compliance with the TSI PRM Decision.²³⁴

The TSI PRM Regulation amounts to a technical requirement or standard. This requirement could be considered as implementing Article 9 (2) (a) UNCPRD to develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of rail travel.²³⁵ Yet this standard or technical requirement does not fully meet the obligation of Article 9 (2) (a) UNCPRD as it includes certain exceptions on its applicability in the case of existing infrastructure and rolling stock.

Both the EU and the Member States can take the measures needed to fully implement Article 9 (2) (a) UNCPRD, because transport and trans-European networks are areas of shared competence and because the TSI PRM Regulation does not prevent Member States from introducing additional measures to improve accessibility levels.²³⁶

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Ibid.

²³² Commission Decision 2008/164/EC of 21 December 2007 concerning the technical specification of interoperability relating to 'persons with reduced mobility' in the trans-European conventional and high-speed rail system, [2008] OJ L64/72.

²³³ European Railway Agency, 'Progress with Railway Interoperability in the EU', *European Railway Agency* (2011), www.era.europa.eu/Document-Register/Documents/ERA%202016.3138%20Biennial%20Report.pdf, p. 8.

²³⁴ Ibid., p. 9.

²³⁵ Article 9(2) (c) UNCPRD.

²³⁶ Recital 9 of the Preamble to Commission Decision 2008/164/EC of 21 December 2007, concerning the technical specification of interoperability relating to 'persons with reduced mobility' in the trans-European conventional and high-speed rail system, [2008] OJ L64/72.

The final accessibility oriented instrument that I will examine in this part of Chapter VII is the Regulation on Union guidelines for the development of the trans-European transport network.²³⁷ This regulation aims at establishing and developing a complete Trans-European Transport Network (TEN-T), consisting of infrastructure for railways, inland waterways, roads, maritime and air transport, thus, ensuring the efficient functioning of the internal market and the strengthening of economic and social cohesion.²³⁸ With a view to achieving this objective, the Commission concluded that the TEN-T could be best developed through a dual-layer approach, consisting of a comprehensive network and a core network.²³⁹ The comprehensive network constitutes the basic layer of the TEN-T.²⁴⁰ It requires all existing and planned infrastructure to meet the obligations of the Guidelines. The comprehensive network is to be implemented by the 31st of December 2050.²⁴¹ The core network constitutes the backbone of the multi-modal mobility network and focuses on those components of TEN-T with the highest European added value, such as cross border missing links, key bottlenecks and multi-modal nodes. The core network is to be in place by the 31st of December 2030.²⁴²

Article 4 of this regulation states that the development of the TEN-T infrastructure should guarantee accessibility for elderly people, persons with reduced mobility and disabled passengers.²⁴³ In the same spirit as Article 4, Article 10 of this regulation specifies that among the general priorities of the TEN-T comprehensive network are improving or maintaining the quality of infrastructure in terms of, amongst other things, accessibility for all users, including elderly people, persons with reduced mobility and disabled passengers.²⁴⁴ Lastly, Article 37 of this regulation states that the transport

²³⁷ Regulation No. 1315/2013/EU of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU, [2013] OJ L348/1.

²³⁸ Recital 2 of the Preamble to Regulation No. 1315/2013/EU of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No. 661/2010/EU, [2013] OJ L348/1.

²³⁹ Recital 10 of the Preamble of Regulation No. 1315/2013/EU of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No. 661/2010/EU, [2013] OJ L348/1.

²⁴⁰ Recital 11 of the Preamble to Regulation No. 1315/2013/EU of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No. 661/2010/EU, [2013] OJ L348/1.

²⁴¹ Recital 11 of the Preamble to Regulation No. 1315/2013/EU of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No. 661/2010/EU, [2013] OJ L348/1.

²⁴² Recital 13 of the Preamble to Regulation No. 1315/2013/EU of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No. 661/2010/EU, [2013] OJ L348/1.

²⁴³ Article 4 (2) (d) (v) of Regulation No. 1315/2013/EU of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No. 661/2010/EU, [2013] OJ L348/1.

²⁴⁴ Article 10(1) (e) of Regulation No. 1315/2013/EU of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European

infrastructure should allow seamless mobility and accessibility for all users, with an emphasis on elderly people, persons with reduced mobility and disabled passengers.²⁴⁵ These measures can be seen as implementing the UNCRPD's obligation to ensure physical accessibility for people with disabilities. These measures, though, do not fully meet the obligation to ensure physical accessibility for people with disabilities, because these measures refer only to infrastructure and not to vehicles, something which might ultimately undermine the success of this TEN-T.

As seen above, the EU has adopted several measures with regard to different modes of transport with a view to guaranteeing physical accessibility for persons with reduced mobility. These measures relate to the safety of passengers.²⁴⁶ The problem with the safety approach is that it addresses only a small part of physical accessibility. As I analysed in Chapter I²⁴⁷, physical accessibility entails the availability of accessible goods and services and facilities, the ability of a disabled person to reach a good, service or facility and the user-friendliness thereof. Thus, the safety approach to accessibility policy is very limited in its scope when considered from the point of view of the broader goal of full accessibility. Therefore, the safety approach to accessibility might not be the most appropriate way for the EU to fulfil the obligation to ensure physical accessibility in the field of transport.

Instead, the adoption and implementation for transport networks of technical specifications on disability accessibility that include all aspects of physical accessibility in a comprehensive manner might be the most appropriate policy option for the EU to rely upon in implementing the physical aspect of transport accessibility. In that regard, a measure that seems to successfully address the issue of physical accessibility within the EU's legislative framework is the TSI PRM Regulation. This measure requires, with some exceptions, that new infrastructure and rolling stock in the field of rail travel is accessible for persons with reduced mobility. Despite the fact that it is premised on a different legal basis²⁴⁸, the Regulation on rail passengers' rights and obligations made a connection with the TSI PRM Decision, which was repealed by the TSI PRM Regulation, by requiring railway undertakings and station managers to comply therewith.²⁴⁹ In addition, the EU has adopted a

transport network and repealing Decision No. 661/2010/EU, [2013] OJ L348/1.

²⁴⁵ Article 37 of Regulation No. 1315/2013/EU of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No. 661/2010/EU, [2013] OJ L348/1.

²⁴⁶ Directive 2009/45/EC of the European Parliament and of the Council of 6 May 2009 on safety rules and standards for passenger ships (Recast), [2009] OJ L163/1.

²⁴⁷ See Chapter I, Dimensions of accessibility.

²⁴⁸ Article 156 EC (now Article 172 TFEU), instead of the transport legal basis, Article 80 EC (now Article 100 TFEU) and Article 71 EC (now Article 100 TFEU).

²⁴⁹ Article 21 (1) of Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L315/14.

Regulation establishing new guidelines for the TEN-T²⁵⁰, which requires that the development of the TEN-T infrastructure should guarantee accessibility for persons with reduced mobility and for disabled passengers²⁵¹, and that transport infrastructure should allow seamless mobility and accessibility for persons with reduced mobility and disabled passengers.²⁵² This action shows that the EU has prioritised the establishment and development of a TEN-T consisting of infrastructure for railways, inland waterways, roads, maritime and air transport, with a view to ensuring the efficient functioning of the internal market and strengthening economic and social cohesion. It further recognises that disability accessibility²⁵³ is a prerequisite for the development of such a network. Therefore, it seems that in order to achieve the goal of developing the TEN-T, the EU will have to ensure disability accessibility in the areas of air, road and sea travel.

Despite the fact that the Commission's proposal for a Regulation establishing new guidelines for the TEN-T does not refer to the accessibility of vehicles, the TSI PRM does. Thus, the adoption of a TSI PRM Regulation for air, sea, and road travel would be the most appropriate way to achieve a disability accessible TEN-T. Considering that the TSI PRM Regulation is the most comprehensive instrument with regard to physical accessibility in the field of transport, and given that the EU's has decided to develop a disability accessible TEN-T, it can be concluded that the adoption of a TSI PRM Regulation for air, sea, and road travel is the most appropriate policy option with a view to fulfilling the obligations contained in Article 9 UNCRPD. By so doing, this will ensure physical accessibility in the field of transport, so long as the EU ensures the full accessibility of existing infrastructure and vehicles.

It is also important to note, that the TEN-T will also succeed in providing a more holistic and comprehensive approach to accessibility, which is essential for the implementation of Article 9 UNCRPD. Railway stations are an important part of the travel chain, but they are not the only one. Railway stations are connected, for example, with airports and bus terminals. If an airport is not physically accessible to persons with reduced mobility, then the chain is broken and persons with reduced mobility will face great difficulties when they wish to

²⁵⁰ Regulation No. 1315/2013/EU of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No. 661/2010/EU, [2013] OJ L348/1.

²⁵¹ Article 4 (2) (d) (v) of Regulation No. 1315/2013/EU of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No. 661/2010/EU, [2013] OJ L348/1.

²⁵² Article 37 of Regulation No. 1315/2013/EU of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No. 661/2010/EU, [2013] OJ L348/1.

²⁵³ Recital 2 of the Preamble to Regulation No. 1315/2013/EU of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No. 661/2010/EU, [2013] OJ L348/1.

travel. Thus, the development of an accessible TEN-T for persons with reduced mobility will facilitate the mobility of persons with reduced mobility in the EU.

In conclusion, it is fair to say, as I have analysed above, that the implementation of the TSI PRM Regulation has not been a complete success. This is especially the case when it is compared to the passenger rights' Regulations.²⁵⁴ However, it has achieved relative success. Furthermore, the passenger rights regulations relating to travel by air, rail, bus and coach, sea and inland waterway have been rather successfully implemented by the Member States, despite the problems I have analysed in other parts of this chapter. All of the airports examined in the Steer Davies Gleave study implemented the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air, and were providing the required services in some form or another.²⁵⁵ Certainly, this study found examples of incidents of significant service failure, but the study did not identify fundamental problems with service provision at major airports.²⁵⁶ This should be seen against the fact that several airports and airlines stated that the number of disabled persons and persons with reduced mobility requiring assistance has increased significantly since the introduction of the regulation.²⁵⁷ It was only in Greek airports, other than Athens, that the implementation of this regulation failed.²⁵⁸

As far as the Regulation on rail passengers' rights and obligations is concerned, the Steer Davies Gleave study found that the overall results of the implementation of this regulation were fairly positive.²⁵⁹ Most of the requirements had been effectively implemented by most railway undertakings.²⁶⁰ Interestingly enough, there were significantly fewer cases of systematic or deliberate non-compliance with regard to the implementation of this regulation

²⁵⁴ Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L315/14; Regulation No. 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L55/1; Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004/EC, [2010] OJ L334/1; Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

²⁵⁵ Steer Davies Gleave 'Report of the study, Application and enforcement of the regulation concerning the rights of disabled people and persons with reduced mobility when travelling by air', *Steer Davies Gleave* (2010), p. 23.

²⁵⁶ *Ibid.*, p. 27.

²⁵⁷ *Ibid.*, p. 28.

²⁵⁸ *Ibid.*, p. 27.

²⁵⁹ Steer Davies Gleave Report, 'Evaluation of Regulation 1371/2007, on the application and enforcement in the Member States of the Regulation on rail passengers' rights and obligations', *Steer Davies Gleave* (2012), p. 131.

²⁶⁰ *Ibid.*

than with the similar legislation in the air transport sector.²⁶¹ Lastly, this study did not find evidence of systematic or deliberate non-compliance.²⁶²

As far as the Regulation concerning the rights of passengers in bus and coach transport is concerned, the Steer Davies comprehensive study on passenger transport by coach in Europe found that many of the provisions of the regulation had been successfully implemented. For example, all Member States have designated at least one terminal at which assistance is provided to people with disabilities.²⁶³ However, the inaccessibility of the infrastructure and vehicles relevant to bus and coach travel create many barriers to the implementation of this regulation.²⁶⁴

The success of the implementation shows, amongst other things, that the fact that these measures were comprehensive in their approach to guaranteeing the rights of disabled persons and persons with reduced mobility played a role in their successful implementation. This can be contrasted with the implementation of disability measures in the field of goods and services that were analysed in Chapter V. This is because their implementation was less successful from a disability perspective.²⁶⁵ The TSI PRM Regulation is another comprehensive measure that can ensure accessibility. However, the fact that the TSI PRM Regulation does not provide deadlines for the retrofitting of old infrastructure and rolling stock is a challenge to achieving accessibility in the field of the trans-European rail network.

Therefore, it is important for the EU to place deadlines for the implementation of the TSI PRM Regulation in the areas of road, air and sea travel, with a view to effectively implementing these measures and achieving an accessible trans-European network. From the foregoing analysis, it is evident that the EU measures with regard to transport have been rather successful in guaranteeing the rights of people with disabilities. Therefore, it is arguable that the expansion of physical accessibility considerations in the fields of air, bus and coach and sea and inland waterway should be regulated by the EU in a similar way to the TSI PRM Regulation. Furthermore, as I argued above with regard to EU legislation on physical accessibility, in the areas where the EU has already taken action, the Member States seem reluctant to adopt domestic legislation. Moreover, it is logical to assume that the EU will take action in the fields where it has developed a pre-existing framework through the path-dependency process. Thus, it is my view that the EU should take similar action to the TSI PRM in the fields of air, bus and coach and sea and inland waterway in order to comprehensively achieve physical accessibility.

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Steer Davies Gleave, 'Comprehensive Study on Passenger transport by coach in Europe', *Steer Davies Gleave* (2016), p. 122–123.

²⁶⁴ Ibid.

²⁶⁵ See on the implementation of telecommunication services, Technosite et al., 'Annual Report: Monitoring e-accessibility in Europe: 2010', *European Commission* (2010).

IV. CONCLUSION

The EU has established a comprehensive legal framework with a view to facilitating the access of disabled persons and persons with reduced mobility to air, road, sea and inland waterway and rail travel. In general terms, the framework is focused on providing non-discriminatory access to transport, timely and accessible information and immediate and proportionate assistance to people with disabilities. It also requires the accessibility-training of stakeholders who are involved in providing transport services. The data on the implementation of the regulations concerning the rights of disabled persons and persons with reduced mobility when travelling by air and on rail passengers' rights and obligations have been quite positive. Despite some difficulties in the implementation of those regulations²⁶⁶, both legislative instruments have been implemented successfully by the Member States.

The success of these measures can be attributed to several factors. First, the wording of the passenger rights regulations²⁶⁷ is clear and it contains strong obligations. The transport carriers and terminal undertakings are required to ensure that the rights of people with disabilities are respected. Secondly, the regulations have taken a holistic approach to guaranteeing disability accessibility in the field of transport. This means, as I analysed in Chapter III²⁶⁸, that the EU has regulated the area in its entirety. In the case of the passenger rights regulations, the EU conferred the same rights on people with disabilities in all areas of travel. Third, these regulations have a clear aim and the measures that they entail are appropriate for achieving this aim. The aim of these regulations is to protect and assist disabled persons and persons with reduced mobility travelling by air, bus and coach, rail and sea and inland waterways. To achieve this goal, these regulations address non-discrimination, accessible information, the training of stakeholders, assistance and affordability. Thus, the purpose of these regulations was not undermined by the proportionality principle. Fourth, the regulations seemed to be appropriately monitored as well. This

²⁶⁶ Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L315/14; Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

²⁶⁷ Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L315/14; Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L55/1; Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L334/1; Regulation No. 1107/2006/EEC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

²⁶⁸ See Chapter III, The effective implementation of the requirements of the UNCRPD by the EU.

factor is instrumental in contributing to the effective implementation of these regulations.

The EU, with the adoption of a regulation for each type of travel (air, road, sea and inland waterway and rail), seems to have completed a legislative circle and it might attempt to complete another one. The Regulation establishing guidelines for the TEN-T, which requires that the development of the infrastructure of the TEN-T guarantees accessibility for persons with reduced mobility and for disabled passengers, might open the way for the adoption of a TSI PRM Regulation in the areas of air, road, sea and inland waterways and thereby complete the circle that began with the TSI PRM Regulation in the field of rail transport. This will mean that, apart from partially implementing Article 9 UNCRPD so as to ensure affordability and information and communication accessibility, the provision of assistance to persons with disabilities and the training of the stakeholders involved in providing transport services in the areas of air, road, sea and inland waterways and rail travel, the EU might also implement the obligation to ensure physical accessibility in the same areas.

To summarise, the EU has succeeded in providing a minimum level of protection for passengers with disabilities. Now that the passenger rights framework has been adopted, the EU has a great opportunity to take steps in completing the TSI PRM framework and, thus, guaranteeing physical accessibility for people with disabilities with regard to public transport.

CONCLUSION

I. THE PURPOSE OF THE THESIS

This thesis had three main objectives. The first objective was to determine the nature of the obligations resulting from Article 9 UNCRPD with regard to disability accessibility (Part I of the thesis). The second objective was to examine how and to what extent the EU is competent to implement these obligations through legislative or other forms of policy-making (Part II of the thesis). The third objective was to explore the existing EU legislative and non-legislative actions that implement accessibility considerations in the fields of goods and services, the built environment and transport, and to consider whether these actions meet the obligations found in Article 9 UNCRPD (Part III of the thesis).

As far as the first objective is concerned, I analysed the meaning of accessibility in the context of the Convention and I defined accessibility as both a stand-alone principle and in comparison, with reasonable accommodation and Universal Design. I also provided an analysis of the nature of accessibility as a cross-cutting principle of the Convention and the way it applies to the substantive articles of the UNCRPD. Furthermore, I examined the nature of the obligations generated by Article 9 UNCRPD. In particular, I enumerated the main obligations generated by the UNCRPD with regard to accessibility and explored the material scope of these obligations.

With regard to the second objective, I examined the UNCRPD as a mixed agreement under EU law and I identified, in general terms, the EU's competence to implement the UNCRPD with regard to accessibility. Moreover, I analysed the factors that should be taken into account in deciding whether the Member States or the EU should take action to implement the UNCRPD, in the areas where they share the power to act. Lastly, I proposed a mechanism for the coordination of the implementation of the UNCRPD within the EU and for helping to determine whether the Member States or the EU should take action to implement the UNCRPD.

As far as the third objective is concerned, I analysed the existing EU legislative instruments that implement accessibility, I explored the potential for the EU to adopt legislation to implement the UNCRPD with regard to accessibility, I looked at other non-legal measures the EU could adopt to implement Article 9 UNCRPD, such as standardisation, and I considered whether these measures met the obligations contained in Article 9 UNCRPD.

II. GENERAL CONCLUSIONS OF PART I OF THE THESIS (CHAPTER I)

In Chapter I, in an attempt to identify the content of accessibility, I enumerated and analysed its various dimensions. I conceptualise accessibility as being the sum of its parts. I argue that accessibility includes the following dimensions: attitudinal, physical, information, communication and affordability. I also clarified that ‘accessibility of’ is a different concept than ‘access to’. The latter is much broader and it encompasses the former. Nevertheless, both concepts are addressed within the context of the UNCRPD.

My analysis of the concept of ‘reasonable accommodation’ showed that the diverse implementation of this concept throughout the world and the lack of clear guidance in the UNCRPD with regard to issues such as the meaning of the terms ‘reasonable’ and ‘undue or disproportionate burden’, can create challenges for the implementation of the Convention. Furthermore, the examination of this concept indicated that while it shares a common goal with accessibility, namely the elimination of barriers experienced by people with disabilities, it has some fundamental differences with the latter. In particular, accessibility is a proactive duty, while reasonable accommodation is a reactive duty. The scope of accessibility covers people with disabilities as a group whereas reasonable accommodation focuses on a particular individual. The scope of the possible accommodations in the case of reasonable accommodation is much broader than the scope of the potential adjustments in the case of accessibility. Lastly, accessibility is to be progressively realised while reasonable accommodation should be immediately realised, subject to the disproportionate burden exception.

As far as Universal Design is concerned, I concluded that this concept aims to create a physical environment that is accessible to all. It also avoids the (sometimes) segregating effect that Accessible Design entails, by creating disability-specific goods and services. This is because Universal Design creates goods and services that can be used by everyone. Indeed, that is the big difference between the two approaches. Universal Design is fully inclusive, while Accessible Design prioritises and addresses primarily the particular needs of people with disabilities.

With regard to the content of Article 9 UNCRPD, I concluded that accessibility is connected to the principles of independent living and the full participation of people with disabilities in all aspects of life. As a result, without accessibility it is not possible for people with disabilities to enjoy independent living and to fully participate in all aspects of life. Thus, the purpose of accessibility is to enable people with disabilities to live independently and to fully and effectively participate in society.

Moreover, I argue that accessibility is a progressively realisable obligation. Nevertheless, this fact does not exclude the possibility that it will produce several immediate obligations that are essential for the effective implementation of Article 9

UNCRPD and guarantee that a certain level of protection will be provided to people with disabilities. Immediate obligations flowing from Article 9 UNCRPD include the obligation to devise strategies and programmes with regard to accessibility and the obligation to monitor the implementation of Article 9 UNCRPD.

Furthermore, I submitted that the obligation to ensure accessibility requires States Parties to take an array of different measures to implement accessibility, from guaranteeing that the private sector, both at the domestic and international level, does not create barriers to accessibility, to actions to promoting the research and development of assistive technologies or to increasing awareness-raising of accessibility through education.

With regard to my analysis of the terms ‘accessibility of’ and ‘access to’ in the context of the UNCRPD, I stated that, because the title and the context of Article 9 UNCRPD is focused on accessibility and because the drafting history of the article did not include any discussion of the broader term ‘access to’, the true intention of the drafters of this article was to lay down obligations with regard to accessibility. The drafters of the Convention referred to the right of access as a broader goal of the Convention that the implementation of accessibility could contribute to. In that regard, I also found that General Comment No.2 of the CRPD Committee did not clearly and effectively address this issue.

In addition, I analysed the connection between accessibility obligations and equality. I explained that in order for the States Parties to the Convention to ensure accessibility for persons with disabilities on an equal basis with others, they are obliged to take measures that could guarantee equality of opportunity and, in certain instances, equality of result.

Lastly, as far as the scope of application of Article 9 UNCRPD is concerned, I identified that the element that is essential for determining which services and facilities are included in the scope of application of this article is who uses those services and facilities rather than who provides the services or facilities. In addition, I argue that goods or products fall within the scope of application of Article 9 UNCRPD. In that regard, I relied on the General Comment No.2 of the CRPD Committee and the object and purpose of the treaty to support my argument.

III. GENERAL CONCLUSIONS OF PART II OF THE THESIS (CHAPTERS II, III AND IV)

In Chapter II, I concluded that the implementation of the UNCRPD by the EU and the Member States is a very challenging process. I pointed out that the process of the implementation of the Convention by the EU is beset with uncertainty and vagueness. The Council Decision to conclude the Convention and other relevant documents have clarified the areas where the EU has exclusive competence and the areas where it shares competence with the Member

States. Nevertheless, there are many issues that need further exploration and clarification. For example, it is not clear whether the EU or the Member States should act with the view to implementing the Convention in the field of shared competences, and which EU provisions have established uniform rules in the fields covered by the Convention.

In Chapter III, I analysed the distinction between disability-specific legal instruments and disability mainstreaming legal instruments and I pointed out that mainstreaming is a policy approach that the EU is obliged to use in all its fields of competence that are relevant to disability accessibility, as it is prescribed by my reading of Article 9 UNCRPD. Moreover, I showed that the EU has not always been effective in implementing accessibility through mainstreaming. Therefore, I have suggested some criteria that the EU legislator should consider so that the use of mainstreaming will be effective and the requirements of the Convention will be fulfilled.

Furthermore, I presented several factors that should be taken into account in deciding whether the EU or the Member States should take action to implement Article 9 UNCRPD. These factors are the functioning of the internal market, the EU's pursuit of uniformity, business interests in having one set of requirements on accessibility, the technical complexity of accessibility, the financial impact of potential EU measures on the Member States and the impact of such measures on the national practices, the principle of non-discrimination at the EU level and the path-dependency process.

At the same time, I examined the factors that should be considered in determining the most effective way to legislate when proposing EU legislation on disability accessibility. I concluded that the use of a directive as the legal instrument to implement Article 9 UNCRPD would be likely to gather the most political support, as it is most respectful of the Member States' particularities. For the same reason, I argued that the option of minimum harmonisation, rather than full harmonisation, seems to be a more effective option from a political point of view. Nevertheless, I reiterated that the options of adopting a regulation or pursuing full harmonisation cannot be excluded, as they both have been used successfully in the past to address the needs of people with disabilities. Lastly, I presented three issues that the EU should take into account when taking actions to implement Article 9 UNCRPD. These issues are the compatibility of any EU action with the principle of proportionality, the importance of adopting a holistic approach with regard to the regulation of accessibility and the provision of regulatory space to the Member States by the EU with regard to the implementation of disability accessibility.

In Chapter IV, I examined the existing EU coordinating mechanism with regard to the implementation of the Convention. In that regard, I determined that while the mechanism involves many of the EU institutions, it is very fragmented and it does not help to determine the party that will implement

the UNCRPD in the fields where the EU and the Member States share the competence to act. I also pointed out that COHOM might not be an appropriate mechanism to coordinate the implementation of the UNCRPD by the EU and the Member States in combination, as its work is limited to the examination of human rights issues with regard to the EU's external action.

Furthermore, I concluded that the Disability High Level Group could not take on the role of a coordinating mechanism for the implementation of the UNCRPD within the EU, despite its experience with regard to disability issues. This is because it does not have a policy-making capacity and its powers are limited to the provision of advice.

As far as the OMC is concerned, I presented and described the OMC as a soft-law mechanism that is favoured by national governments and which shows respect for their national autonomy. In conclusion, I argued that considering the lack of accountability and transparency of the OMC process and considering that the participation of the Member States in the OMC frameworks is voluntary, and that OMC decisions are not binding on the Member States, the OMC is not the most appropriate mechanism to coordinate the implementation of the UNCRPD within the EU.

Lastly, after examining the Regulations on Bilateral Agreements, I concluded that a similar regulation on the coordination of the implementation of the UNCRPD might be the most appropriate mechanism to address this issue, because it would allow the Member States and the EU to build a disability-specific mechanism that could address all the particularities of the subject. In that regard, I identified the essential elements that such a mechanism should include and an example of how this mechanism could work in practice. My analysis took into account several elements of the OMC and the Disability High Level Group procedures.

IV. GENERAL CONCLUSIONS OF PART III OF THE THESIS (CHAPTERS V, VI AND VII)

The EU has adopted measures that implement disability accessibility in several areas, as I analysed in Chapters V, VI and VII. The main policy approach that the EU uses, in that regard, is mainstreaming. The EU has mainstreamed disability considerations in the fields of the EU customs union, taxation, the internal market, Services of General Economic Interest (henceforth SGEIs), public procurement, Structural and Investment Funds and transport. Furthermore, the EU has adopted disability-related measures in the field of consumer protection. In that area, the EU has used the term 'vulnerable consumers' to address the particular situation of several groups, including people with disabilities.

The EU also has the power to adopt measures to combat discrimination according to Article 19 TFEU. As I mentioned in Chapter VI¹, the EU has adopted the Employment Equality Directive² which protects people with disabilities in the field of employment and occupation from discrimination and ensures their right to receive reasonable accommodation. Furthermore, the EU has proposed a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation³ which, if adopted, will apply in the fields of social protection, health care, education and access to goods and services, including housing that is open to the public. This proposal contains provisions that address disability accessibility. As I argued in Chapter VI, Article 19 TFEU can be used to regulate disability accessibility because the removal of accessibility barriers contributes to the elimination of discrimination that people with disabilities face in their everyday lives. Therefore, accessibility can be interpreted as part of the non-discrimination principle as per Article 19 TFEU.

Article 19 TFEU is the only article in the TFEU that mentions the word disability. This might be why the EU has not adopted many disability-specific instruments to date and instead has developed its disability policy based on mainstreaming considerations. In fact, the EU has adopted three disability-specific legislative instruments: the Regulation on the rights of disabled persons and persons with reduced mobility when travelling by air⁴, the Directive on the accessibility of the websites and mobile applications of public sector bodies⁵ and the TSI PRM Regulation.⁶

The Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air is based on Article 80(2) EC (now 100(2) TFEU). As a disability-specific instrument, this measure regulates the situation of persons with disabilities. It is important to note in that regard, that Article 100 (2) TFEU does not explicitly mention that the EU has a power to regulate disability-accessibility considerations in the context of transport, and that

¹ See, Chapter VI, Obligation to ensure physical accessibility of the built environment, Non-discrimination.

² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16.

³ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 0426 final.

⁴ Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

⁵ Directive 2016/2102/EU of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies, [2016] OJ L327/1.

⁶ Commission Regulation No. 1300/2014/EU of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility, [2014] OJ L356/110.

in general there is no reference to disability in the TFEU chapter on transport policy. The fact that this regulation was enacted on the basis of Article 80(2) EC (now 100(2) TFEU) reveals that the TFEU can be interpreted so as to confer a power on the EU to adopt disability-specific legislation. The same can be said for Article 114 TFEU, which was the legal basis of the Directive on the accessibility of websites and mobile applications of public sector bodies, and Article 172 TFEU, which was the legal basis of the TSI PRM Regulation.

The Commission has also proposed another disability-specific instrument that is based on Article 114 TFEU: the European Accessibility Act.⁷ All these examples show that the TFEU confers the power on the EU to regulate disability accessibility through disability-specific instruments, and that the EU has a general competence to address disability considerations.

EU policy did not gradually develop through the adoption of disability-specific instruments, but through the adoption of mainstreaming instruments. As I stated in Chapter III⁸, mainstreaming can be used as a policy tool at the EU level in the context of any legal basis. The EU has been extensively relied on mainstreaming to implement disability accessibility requirements in several fields of EU law. The mainstreaming approach with regard to accessibility has not always been effective in ensuring the implementation of accessibility. In Chapter V, VI and VII, I identified four major challenges to the effective implementation of accessibility by EU mainstreaming legislative instruments.

First, and many occasions, EU measures that mainstream disability accessibility do not provide for a strong obligation to guarantee the implementation of accessibility in the related policy field. For example, the Universal Service Directive⁹ obliges the Member States to guarantee that national regulatory authorities are able to force undertakings that provide public electronic communications networks and/or publicly available electronic communications services to publish comparable, adequate and up-to-date information on both the quality of their services and the measures they have adopted to ensure equivalence in access for disabled end-users.¹⁰ In this example, the national regulatory authorities have discretion as to whether to force undertakings to publish data on measures related to access by people with

⁷ 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 the accessibility requirements for products and services, COM(2015) 0615 final.

⁸ See Chapter III, Alternative ways the EU can address disability issues.

⁹ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, as amended by the Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

¹⁰ Article 22(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, as amended by the Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

disabilities to their services. This provision cannot guarantee that information on the undertakings' measures on access to their service by people with disabilities will be published, because national regulatory authorities are not obliged to force the undertakings to publish this information.

Another example of this weakness in the context of EU accessibility mainstreaming is Article 7 of the Audio-Visual Media Services Directive. This article provides that Member States should encourage media service providers to guarantee that their services are gradually made accessible to people with visual or hearing impairments.¹¹ In this example, the media service providers have discretion as to whether to implement accessibility.

Second, EU mainstreaming measures do not usually take a holistic approach to ensuring accessibility. In that regard, it is important to note that the holistic approach to accessibility should be applied within the field of application of the EU measure at hand. The holistic approach implies, as I analysed in Chapter III¹², that accessibility works as a chain. If one of the links of the chain is missing, the chain will consequently fall apart. For example, to ensure accessibility in the field of audio-visual media services, the devices, the software and the networks related to the audio-visual media services should be accessible. Most EU measures are focused only on a very specific link of the chain and they do not regulate the other links of the chain. For example, the Regulation concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor¹³ does not regulate the accessibility of all the vehicles covered by the regulation. The Commission's Regulation on TSI PRM¹⁴ does not, for example, require the retrofitting of all rail infrastructure and vehicles.

Third, many of the disability accessibility mainstreaming measures do not address all the dimensions of accessibility. In that regard, it is important to note that accessibility, as I analysed in Chapter I of my thesis¹⁵, has many dimensions, namely, attitudinal accessibility, economic accessibility or affordability, physical accessibility, information accessibility and communication accessibility. When a legislative instrument regulates accessibility, it is important to address as many of these dimensions as possible. Most of the EU legislative

¹¹ Article 7 of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), [2010] OJ L95/1.

¹² See Chapter III, The effective implementation of the requirements of the UNCRPD by the EU.

¹³ Regulation No. 661/2009/EU of the European Parliament and of the Council of 13 July 2009 concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor, [2009] OJ L200/1.

¹⁴ Commission Regulation No. 1300/2014/EU of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility, [2014] OJ L356/110.

¹⁵ See, Chapter I, Dimensions of Accessibility.

instruments that mainstream accessibility do not regulate more than one dimension of accessibility¹⁶ and they are not particularly detailed either.

Fourth, the implementation of the EU's disability accessibility mainstreaming instruments is not appropriately monitored. Because of the lack of detail that these legislative instruments have with regard to accessibility provisions, the reporting on the implementation of these legislative instruments in their entirety does not even examine the implementation of the accessibility measures that are contained therein. For example, the provision related to accessibility in the Public Sector Directive in the field of public procurement was not examined in the report on the implementation of that directive.¹⁷ The same applies to the provision related to accessibility in the VAT Directive.¹⁸ Other times an accessibility mainstreaming measure might contain strong obligations with regard to accessibility, but the implementation of the provision is not appropriate. For example, the previous General Regulation on the ESI Funds contained an obligation to guarantee accessibility throughout the implementation of the operational programmes.¹⁹ Nevertheless, the implementation of accessibility in the context of the previous ESI Funds was very low.²⁰ The same can be said about the Universal Service Directive. This directive obliges the Member States to ensure the accessibility of emergency services.²¹ A Technosite report on e-accessibility showed that only 47% of the Member States provided direct access

¹⁶ See, Regulation No. 661/2009/EC of the European Parliament and of the Council of 13 July 2009 concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor, [2009] OJ L200/1; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004] OJ L134/114; Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC, [1995] OJ L153/62.

¹⁷ See European Commission, 'Annual Public Procurement Implementation Review of the old Public Procurement Directives', *European Commission* (2018), https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en (accessed 17 January 2018).

¹⁸ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the future of VAT, Towards a simpler, more robust and efficient VAT system tailored to the single market, COM(2011) 851 final.

¹⁹ Article 16 of Council Regulation No. 1083/2006/EC of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No. 1260/1999, [2006] OJ L210/25.

²⁰ European Commission, 'Study on the Translation of Article 16 of Regulation EC 1083/2006 for Cohesion policy programmes 2007–2013 co-financed by the ERDF and the Cohesion Fund (Public Policy and Management Institute (PPMI, Lithuania) in partnership with Net Effect (Finland) and Racine (France)', *European Commission* (2009), http://ec.europa.eu/regional_policy/en/information/publications/evaluations/2009/study-on-the-translation-of-article-16-of-regulation-ec-n10832006-on-the-promotion-of-gender-equality-non-discrimination-and-accessibility-for-disabled-persons-into-cohesion-policy-programmes-2007-2013-co-financed-by-the-erdf-and-the-cohesion-fund, p. 12.

²¹ Articles 27a (2) and Article 22(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic

to emergency services via text telephony and only 38% provided direct access to emergency services via a video phone device.²²

The EU instruments that are the most effective in overcoming these problems are the passenger rights regulations.²³ In this category of instruments, I include the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air, which is a disability-specific legislative instrument. This regulation succeeded in overcoming the problems that I analysed above. These regulations, most of which are mainstreaming measures, have been the most successful EU measures with regard to achieving accessibility because they set out clear, precise and strong obligations and, in addition, they adopt a holistic approach by regulating all kinds of transport (air, rail, bus and coach and sea and inland waterway). Furthermore, they encompass all the necessary measures to achieve their purpose, which is to protect and assist disabled persons and persons with reduced mobility when travelling by air, bus and coach, rail and sea and inland waterway. Indeed, and in order to achieve their purpose, the instruments include provisions on non-discrimination, accessible information, the training of stakeholders, assistance and affordability. Lastly, from the reports on the implementation of these regulations²⁴, it is evident that the regulations were successfully implemented and, from the data contained in the reports, it is clear that they were carefully and effectively monitored. Thus, these regulations show the EU the most effective way to regulate accessibility. In that regard, the EU should use these regulations as the template for other EU measures in the field of accessibility.

communications networks and services, as amended by the Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51.

²² Technosite et al., 'Study on assessing and promoting e-accessibility', *European Commission* (2013).

²³ Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L315/14; Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, [2011] OJ L55/1; Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, [2010] OJ L334/1; Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1.

²⁴ Steer Davies Gleave 'Report of the study, Application and enforcement of the regulation concerning the rights of disabled people and persons with reduced mobility when travelling by air' *Steer Davies Gleave* (2010); Steer Davies Gleave, 'Report of the study, Evaluation of Regulation 1371/2007, on the application and enforcement in the Member States of the Regulation on rail passengers' rights and obligations', *Steer Davies Gleave* (2012). Steer Davies Gleave, 'Report of the comprehensive study, Passenger transport by coach in Europe', *Steer Davies Gleave* (2016), p. 118; Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No. 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004, COM(2016) 274 final, 24 May 2016.

Another issue that arose in my analysis of EU disability policy was the approach that the EU has adopted with regard to physical accessibility. The EU, when regulating accessibility, usually establishes an obligation to ensure physical accessibility and it connects that obligation with a particular standard or technical specification. Examples of such an approach are found in the Regulation concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor²⁵, the Directive on lifts²⁶ and the Public Procurement Directive.²⁷ Nevertheless, the EU has also used the health and safety approach to guarantee the rights of people with disabilities. Examples of such an approach are found in the Directive on safety rules and standards for passenger ships²⁸ and the proposed Regulation on consumer product safety.²⁹

In that regard, it is important to note that while safety is an important part of physical accessibility, it is not the only important dimension of accessibility. As I explained in the first chapter of my thesis³⁰, physical accessibility includes the availability of accessible goods and services and facilities, the ability of a disabled person to reach a good, service or facility and the user-friendliness of a good, service or facility. Thus, the approach of using safety to guarantee physical accessibility is rather limited. EU disability policy should not put an emphasis on the implementation of this approach. Instead, it should focus on developing standards on physical accessibility and adopting legislation that will connect the obligation to ensure physical accessibility with the relevant standard.

Moreover, it is interesting to point out that, since the conclusion of the UNCRPD by the EU, the Union has exhibited a great eagerness to implement the Convention. The EU's desire to take action to implement the UNCRPD is evidenced by the number of references to disability in EU legislation that has been proposed and adopted between December 2010 – when the EU concluded the UNCRPD – and October 2017. For example, during this time period the new ESI Funds Regulations³¹, which constitutes a great improvement compared to

²⁵ Regulation No. 661/2009/EC of the European Parliament and of the Council of 13 July 2009 concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor, [2009] OJ L200/1.

²⁶ Directive 2014/33/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to lifts and safety components for lifts, [2014] OJ L96/251.

²⁷ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65.

²⁸ Directive 2009/45/EC of the European Parliament and of the Council of 6 May 2009 on safety rules and standards for passenger ships (Recast), [2009] OJ L163/1.

²⁹ Proposal for a Regulation of the European Parliament and the Council on consumer product safety and repealing Council Directive 87/357/EEC and Directive 2001/95/EC, COM(2013) 78 final.

³⁰ See Chapter I, Dimensions of accessibility.

³¹ Regulation No. 1303/2013/EU of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social

the previous ones with regard to the disability accessibility, were proposed and adopted. The influence of the UNCRPD on these regulations is evident from the references to the Convention in the Annex of the General Regulation.³² Indeed, administrative capacity to implement the UNCRPD is one of the *ex ante* conditionalities, which are essential for the proper implementation of the funds.

Further instruments that were proposed and adopted during this period were the new Public Procurement Directives.³³ Like the ESI Funds Regulations, these directives constitute a considerable improvement over the previous ones with regard to disability accessibility. In addition, the directives refer to the Convention in their Preamble.³⁴ The third instrument that was proposed during this time period was the Regulation on consumer product safety.³⁵ This regulation will also provide more protection to people with disabilities against unsafe products than is currently provided for under EU law. Nevertheless, people with disabilities are protected as part of the broader group of vulnerable consumers under EU consumer protection law.

To summarise, it seems that the EU is currently interested in taking action to implement the UNCRPD. Since the conclusion of the Convention by the EU,

Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, [2013] OJ L347/320; Regulation No. 1301/2013/EU of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No. 1080/2006, [2013] OJ L347/289; Regulation No. 1301/2013 of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No 1080/2006, [2013] OJ L347/289.

³² Regulation No. 1303/2013/EU of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, [2013] OJ L347/320, Annex XI.

³³ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, [2014] OJ L94/243.

³⁴ Recitals 3 and 96 of the Preamble to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L94/65; Recitals 5 and 101 of the Preamble to Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, [2014] OJ L94/243.

³⁵ Proposal for a Regulation of the European Parliament and the Council on consumer product safety and repealing Council Directive 87/357/EEC and Directive 2001/95/EC, COM(2013) 78 final.

the Union has taken measures that improve pre-existing legislative frameworks with a view to raising the level of disability accessibility within the EU. Thus, the significance and the influence of the UNCRPD on EU law and policies should not be underestimated.

Lastly, the effectiveness of EU disability policy has been rather mixed. There are areas, such as transport and the internal market, where EU measures that are relevant to accessibility were relatively successful. This applies to EU instruments that address accessibility in areas such as public procurement and the Structural and Investment Funds, where the recently adopted measures seem very promising. However, there are also instruments that address areas such as consumer protection and SGEIs, whereby the measures adopted by the EU on accessibility have not been particularly effective in ensuring the implementation of accessibility in the EU.

In terms of the effectiveness of the EU disability policy as a whole, it is important to point out two general drawbacks with regard to the policy. First, the EU's overreliance on mainstreaming instruments that implement accessibility considerations has discouraged the EU from adopting disability-specific instruments that would more comprehensively address issues related to accessibility. Nevertheless, the adoption of the proposed European Accessibility Act might turn the tide in this respect. Second, the strong emphasis that the EU has placed on the adoption of disability mainstreaming instruments has created an EU disability policy that is very fragmented. The fact that EU disability policy consists of several provisions which are scattered over a large number of policy fields causes problems with regard to the codification of this legislation and the monitoring of these provisions by the EU's mechanism for the implementation of the UNCRPD. Furthermore, the fragmented nature of EU disability legislation is certainly impeding the ability of the EU citizens with disabilities to familiarise themselves with the rights that have been conferred on them by EU actions.

MAIN RECOMMENDATIONS

As I have analysed throughout my thesis, the policy tool of mainstreaming has been the main tool that the EU has used to regulate disability accessibility considerations in its laws and policies. Yet, as I showed in Chapters V, VI and VII, mainstreaming has not always been successful in ensuring accessibility in practice. For that reason, I propose several ideas that the EU should consider when drafting mainstreaming legislation, and some ideas that the EU should always bear in mind when legislating in the field of accessibility.

As far as the mainstreaming of accessibility considerations is concerned, first, accessibility should be applied at all stages of the policy or the legislative process, and it should be considered at an early stage of this process. Second, the participation of representatives of people with disabilities in the formulation of laws and policies is essential for successful mainstreaming.¹ Third, the EU should invest human and financial resources so as to guarantee the effective implementation of these measures.² Fourth, all the people who will be involved in the implementation of a measure that mainstreams accessibility should receive disability-related training.³ Fifth, regular monitoring and data collection is important for the successful implementation of such measures.⁴

With regard to the issues that the EU should consider when drafting legislation in the field of accessibility, it is important that the wording of EU measures on accessibility is clear and that the legislation contains strong obligations. The legislation should take a holistic approach to ensuring accessibility. Lastly, the legislation should have a clear aim and the obligations which it sets out should be appropriate for achieving that aim.

Apart from my general recommendations on how to improve the effectiveness of the legislative and mainstreaming policy options of the EU with regard to accessibility, I also wish to propose some specific legislative actions with regard to accessibility that the EU should prioritise.

In the field of the EU customs union and of taxation, the EU should focus its policy efforts on achieving the affordability of goods and services. In that regard, I propose that the EU takes action to relieve goods and services that are designed specifically for use by people with disabilities from customs duty. In

¹ Strategy & Evaluation Services, 'Non-discrimination mainstreaming – instruments case studies and way forwards', *Strategy & Evaluation Services* (2007), http://edz.bib.uni-mannheim.de/daten/edz-ath/gdem/07/mainstr07_en.pdf, p. 4.

² Ibid.

³ Ibid.

⁴ Ibid.

the field of taxation, I suggest that the EU revises the current VAT Directive, and to include a provision that will provide the Member States with the option to impose reduced VAT rates on goods and services that are specifically designed for use by people with disabilities.

In the field of the internal market, it is of great importance that the EU adopts the proposed EAA. The EAA will undoubtedly improve accessibility within the EU. It will also implement Article 9 UNCRPD. While the EAA has many positive elements, it is far from perfect. Therefore, the EU legislators should take action to improve the EAA. I believe that it is within the EU's competence to expand the scope of the EAA, so as to include all websites and hospitality services. It is also essential that the physical environment relevant to the services covered by the EAA is accessible. Moreover, the EU should oblige the Member States to establish national funds that will help economic operators that are not able to implement the requirements of the EAA to do so. Lastly, the EU legislators should consider the possibility of developing an accessibility label, instead of using the CE-marking, so as to indicate the conformity of goods placed on the market with the EAA's requirements.

In the field of SGEIs, when the EU uses the Article 14 TFEU legal basis to adopt legislation to determine the principles governing SGEIs, it is important that accessibility is included as one of those principles. The inclusion of accessibility among the principles governing SGEIs will guarantee that accessibility will become an essential element of the implementation of SGEIs, both at the EU and Member State level. Nevertheless, even if the EU does not interpret Article 14 TFEU as providing the EU with that competence, the EU can still mainstream accessibility considerations when it proposes regulations to enumerate the principles governing SGEIs.

In the field of consumer protection, I recommend that the EU adopts a disability-specific legislative instrument which will guarantee that people with disabilities enjoy the rights found in the existing EU legal framework on consumer protection on an equal basis with others. Such an instrument should also address their particular needs. In that regard, the instrument should primarily focus on the information and communication dimensions of accessibility. In other words, the instrument should ensure that people with disabilities can, on an equal basis with others, seek, receive and impart information, including information on the accessibility of goods and services in the field of consumer protection, and that this information is offered in accessible formats.

Lastly, in the field of transport, I think it is essential that the EU takes action to expand the standards of the TSI PRM Regulation in the areas of air, bus and coach, sea and inland waterway travel and to complete the circle that started with the TSI PRM Regulation in the field of rail transport. If the EU endeavours to take such action, it will ensure the implementation of physical accessibility in the fields of air, bus and coach, sea and inland waterway travel, which is the arguably the most important flaw in the otherwise successful implementation of accessibility in the field of transport.

VALORISATION ADDENDUM

I was part of an EU Marie Curie Initial Training Network, entitled “Disability Rights Expanding Accessible Markets (DREAM).” The aim of the DREAM network was to develop professionally and educate the next generation of disability policy researchers. Within this network, I worked with other researchers to provide advice to the EU and its Member States with regard to the implementation of the UNCRPD at the national and EU levels. Therefore, the purpose of the research undertaken for this book, within the DREAM project, moved beyond the creation of theoretical frameworks for academic debates, with a view to informing and facilitating legal and policy makers in their pursuit of legal and policy reforms that promote the rights of persons with disabilities.

The findings of this book are directed to multiple target groups. Firstly, this book will be of interest to scholars in the area of international human rights law, because it entails an analysis of the newly introduced human rights principle of accessibility and its corresponding obligations under the UNCRPD. Secondly, the book provides a rich source of information and analysis on the subject of the implementation of a human rights treaty by the EU, for EU scholars. In particular, the book’s exploration of the consequences of the conclusion of the first human rights mixed agreement by the EU and the challenges inherent to the delimitation of competences between the EU and the Member States in implementation of the UNCRPD will be appealing to EU constitutional law and external action experts. In addition, EU law scholars will be interested in the book’s analysis of the inclusion of non-economic values in EU laws and policies.

Thirdly, this book undoubtedly has relevance to EU legal and policy makers, particularly the European Commission. The text of this book contains the first comprehensive legal interpretation of Article 9 UNCRPD on accessibility and related articles. To that end, the research provides a detailed understanding of the obligations by which the EU and its Member States are bound. It also provides a critical analysis of current EU actions in the field of accessibility and proposes legal and policy actions that the EU can take to implement the requirements of the UNCRPD. The book also proposes a mechanism that could be used to coordinate the implementation of the UNCRPD by the EU and the Member States and decide which of the two should take action to implement the obligations of the Convention.

Fourthly, persons with disabilities and their representative organisations can potentially use this book to educate themselves on their rights awarded to them

by the UNCRPD, particularly with regard to accessibility, and to campaign for those rights. This book is especially relevant to EU residents with disabilities and their representative organisations at the EU level.

Lastly, the research outcomes emerging from this book are of particular interest to the CRPD Committee (the Committee in charge of monitoring compliance with the Convention in the various States Parties to the Convention). The Committee might be willing to consider some aspects of the book's interpretation of Article 9 UNCRPD in its work on the rights of persons with disabilities, particularly, in its case law and concluding observations of States Parties' reports. In addition, the book's examination of the competence of the EU to implement the requirements of the UNCRPD, the exploration of the existing EU actions relevant to disability and the proposed recommendations with regard to potential actions the EU can adopt to implement the UNCRPD, could be a useful guidance to the CRPD Committee in its evaluation of EU compliance with the Convention.

ABOUT THE AUTHOR

Stelios Charitakis obtained his LL.B at the National and Kapodistrian University of Athens (2009) and his LL.M (cum laude) in international human rights and criminal justice at Utrecht University (2011). Stelios was engaged as a practicing lawyer in a Law Firm specialising in labour law. Stelios is currently an EU law advisor for TIPIK. He has previously worked as a lecturer at Leiden and Maastricht University teaching European Union Law. The author has also worked for the European Economic and Social Committee and the European Disability Forum on several projects with regard to the implementation of disability rights at the EU level.

BIBLIOGRAPHY

I. EUROPEAN UNION LAW SOURCES

A. REGULATIONS

- Commission Implementing Regulation No. 2016/1821/EU of 6 October 2016 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, [2016] OJ L294/1
- Commission Regulation No. 800/2008/EC of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), [2008] OJ L 214/3
- Commission Regulation No. 1300/2014/EU of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility, [2014] OJ L356/110
- Council Regulation No. 2658/87/EEC of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, [1987] OJ L256/1
- Council Regulation No. 343/2003/EC of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L50/1
- Council Regulation (EC) No. 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No. 1260/1999, [2006] OJ L210/25
- Council Regulation No. 664/2009/EC of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations, [2009] OJ L200/46
- Council Regulation No. 1186/2009/EC of 16 November 2009 setting up a Community system of reliefs from customs duty, [2009] OJ L324/23
- Regulation No. 261/2004/EC of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, [2004] OJ L 46/1
- Regulation No. 460/2004/EC of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency, [2004] OJ L 77/1

- Regulation No. 847/2004/EC of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries, [2004] OJ L195/3
- Regulation No. 1080/2006/EC of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No. 1783/1999, [2006] OJ L210/1
- Regulation No. 1107/2006/EC of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L 204/1
- Regulation No. 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L 315/14
- Regulation No. 765/2008/EC of the European Parliament and the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, [2008] OJ L218/30
- Regulation No. 661/2009 of the European Parliament and of the Council of 13 July 2009 concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor, [2009] OJ L 200/1
- Regulation No. 662/2009/EC of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations, [2009] OJ L200/25
- Regulation No. 1177/2010/EU of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004, [2010] OJ L 334/1
- Regulation No. 181/2011/EU of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004, [2011] OJ L 55/1
- Regulation No. 305/2011/EU of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, [2011] OJ L88/5
- Regulation No. 1025/2012/EU of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No. 1673/2006/EC of the European Parliament and of the Council, [2012] OJ L316/12
- Regulation No. 1301/2013/EU of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No. 1080/2006, [2013] OJ L347/289
- Regulation No. 1303/2013/EU of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund

for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, [2013] OJ L347/320

Regulation No. 1304/2013/EU of the European Parliament and of the Council of 17 December 2013 on the European Social Fund and repealing Council Regulation (EC) No. 1081/2006, [2013] OJ L347/470

Regulation No. 1315/2013/EU of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU, [2013] OJ L348/1

B. DIRECTIVES

Council Directive 73/404/EEC of 22 November 1973 on the approximation of the laws of the Member States relating to detergents, [1973] OJ L347/51

Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, [2001] OJ L82/16

Council Directive 85/210/EEC of 20 March 1985 on the approximation of the laws of the Member States concerning the lead content of petrol, [1985] OJ L96/25

Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, [1989] OJ L298/23

Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, [1993] OJ L199/51

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 L 180/22

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16

Council Directive 2009/47/EC of 5 May 2009, amending Directive 2006/112/EC as regards reduced rates of value added tax, [2009] OJ L 116/18

Council Directive 2010/88/EU of 7 December 2010 amending Directive 2006/112/EC on the common system of value added tax, with regard to the duration of the obligation to respect a minimum standard rate, [2010] OJ L326/1

Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, as amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, and Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, [1998] OJ L15/14

- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] OJ L 167/10
- Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use as amended by Directive 2002/98/EC of 27 January 2003, [2001] OJ L311/67
- Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, [2001] OJ L272/32
- Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, [2002] OJ L11/4
- Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), [2002] OJ L 108/33
- Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, [2002] OJ L108/21
- Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, as amended by the Directive 2009/136/EC of 25 November 2009 (Universal Service Directive), [2002] OJ L108/51
- Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, [2004] OJ L134/1
- Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004] OJ L 134/11
- Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, [2004] OJ L 136/34
- Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), [2005] OJ L149/22
- Directive 2006/95/EC of the European Parliament and of the Council of 12 December 2006 on the harmonisation of the laws of Member States relating to electrical equipment designed for use within certain voltage limits, [2006] OJ L374/10
- Directive 2006/112/EC of the European Parliament and of the Council of 28 November 2006, on the common system of value added tax, [2006] OJ L347/1
- Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, [2006] OJ L376/21
- Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, [2006] OJ L376/36

- Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive), [2007] OJ L263/1
- Directive 2007/65/EC of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, [2007] OJ L332/27
- Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, [2008] OJ L52/3
- Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC of 12 July 2002, concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No. 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, [2002] OJ L 108/51
- Directive 2009/45/EC of the European Parliament and of the Council of 6 May 2009 on safety rules and standards for passenger ships (Recast), [2009] OJ L163/1
- Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), [2010] OJ L 95/1
- Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, [2011] OJ L88/45
- Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, [2011] OJ L 304/64
- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L 94/65
- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, [2014] OJ L94/243
- Directive 2014/33/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to lifts and safety components for lifts, [2014] OJ L96/251
- Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC, [2014] OJ L153/62
- Directive 2016/2102/EU of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies, [2016] OJ L 327/1

C. DECISIONS

- Council Decision 7407/07EC on the signing, on behalf of the European Community, of the United Nations' Convention on the Rights of Persons with Disabilities, 20 March 2007
- Commission Decision 2008/164/EC of 21 December 2007 concerning the technical specification of interoperability relating to 'persons with reduced mobility' in the trans-European conventional and high-speed rail system, [2008] OJ L64/72
- Council Decision 2010/48/EC of 24 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35
- Council Decision 2010/707/EU of 21 October 2010 on guidelines for the employment policies of the Member States, [2010] OJ L 308/46

D. PROTOCOLS

- Protocol (No. 30) on the application of the principles of subsidiarity and proportionality, [1997] OJ C321/308
- Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, [2008] OJ C115/206
- Protocol (No. 25) on the exercise of shared competence, [2008] OJ C115/307
- Protocol (No. 26) on Services of General Interest, [2008] OJ C115/308

II. EUROPEAN UNION SOFT-LAW INSTRUMENTS

A. COMMUNICATIONS

- Commission interpretative communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, COM(2001) 274 final
- Commission interpretative communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM(2001) 566 final
- Commission Report to the European Council, Better Law-making, COM(1999) 562 final
- Communication from the Commission to the Council and the European Parliament, Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities, COM(2003) 16 final
- Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Commission's Green Paper on EU Consumer protection, COM(2001) 531 final
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, accompanying the Communication on 'e-accessibility', COM(2005) 425 final

- Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of Regions, Progress report on the single European electronic communications market, COM(2008) 153 final
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, EU Consumer Policy Strategy 2007–2013: Empowering Consumers, Enhancing their welfare, effectively protecting them, COM(2007) 99 final
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe, 15 November 2010, COM(2010) 636 final
- Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the future of VAT, Towards a simpler, more robust and efficient VAT system tailored to the single market, COM(2011) 851 final
- Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of Regions, A Quality Framework for Services of General Interest in Europe, COM(2011) 900 final
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A European Consumer Agenda – Boosting confidence and growth, COM(2012) 225 final
- Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee, Report on the application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), COM(2013) 139 final
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A European Action Plan 2004–2006, COM(2003) 650 final
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A European Action Plan 2006–2007, COM(2005) 604 final
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A European Action Plan 2008–2009, COM(2007) 738 final
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, accompanying the Communication, A single market for 21st century Europe – Services of general interest, including social services of general interest: a new European commitment, COM(2007) 725 final

- Communication from the Commission, European governance – A White Paper, COM(2001) 428 final
- Communication from the Commission, Public procurement: regional and social aspects, COM(89) 400 final
- Communication of the Commission on equality of opportunity for people with disabilities – A New European Community Strategy, COM(1996) 406 final
- Communication on a Commission initiative for the special European Council of Lisbon, 23 and 24 March 2000 – eEurope – An information society for all, COM(1999) 687 final
- First Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2010/13/EU, COM(2012) 203 final
- Opinion of the European Economic and Social Committee on the ‘Communication from the Commission to the Council and the European Parliament – Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities’ (COM(2003) 16), [2003] OJ C 133/50
- Proposal for a Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, COM (2008) 530/2 final
- Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 0426 final
- Proposal for a Directive of the European Parliament and of the Council on the accessibility of public sector bodies’ websites, COM(2012) 721 final
- Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast), COM(2016) 0590 final
- Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), COM(2003) 356 final
- 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 the accessibility requirements for products and services, COM(2015) 0615 final
- Proposal for a Directive of the European Parliament and the Council on the Application of Patient’s Rights in Cross-Border Health Care, COM(2008) 414 final
- Proposal for a Directive of the European Parliament and the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM(2016) 287 final
- Proposal for a Directive of the European Parliament and the Council amending Directive 2009/45/EC on safety rules and standards for passenger ships, COM(2016) 369 final
- Proposal for a Regulation of the European Parliament and the Council on consumer product safety and repealing Council Directive 87/357/EEC and Directive 2001/95/EC, COM(2013) 078 final

- Report from the Commission to the European Parliament and the Council on the functioning and effects of Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, COM(2011) 166 final
- Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No. 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, COM(2016) 274 final
- White Paper from the Commission to the Council, Completing the internal market, COM(1985) 310 final
- White Paper submitted by the Commission, European transport policy for 2010: time to decide, COM(2001) 370 final

B. STAFF WORKING DOCUMENTS

- Commission Staff Working Document, Annual European standardisation work programme 2012, SWD(2012) 0301 final
- Commission Staff Working Document, Annual Public Procurement Implementation Review, SWD(2012) 21 final
- Commission Staff Working Document, Ex-post REFIT evaluation of the Audiovisual Media Services Directive 2010/13/EU Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, SWD(2016) 170 final
- Commission Staff Working Document, Guidance on the implementation/ application of Directive 2005/29/EC on Unfair Commercial Practices, SWD(2016) 163 final
- Commission Staff Working Document, Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, SWD(2013) 53 final
- Commission Staff Working Document, 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, SWD(2015) 634 final
- Commission Staff Working Document, 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, SWD(2015) 264 final
- Commission Staff Working Document, Impact assessment accompanying the document, Proposal for a Directive of the European Parliament and of the Council on the accessibility of public sector bodies' websites, SWD(2012) 401 final

- Commission Staff Working Document, 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, SWD(2015) 0278 final
- Commission Staff Working Document, Initial plan to implement the European Disability Strategy 2010–2020, List of Actions 2010–2015, SEC(2010) 1324 final
- Commission Staff Working Document, Interpretative Guidelines on the application of Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, SWD(2012) 171 final
- Commission Staff Working Document, Progress Report on the implementation of the European Disability Strategy (2010 – 2020), SWD(2017) 29 final
- Commission Staff Working Document, Report on the implementation of the UN Convention on the Rights of Persons with Disabilities by the European Union, 5 June 2014, SWD(2014) 182 final

C. RESOLUTIONS

- Resolution of the Council and of the representatives of the governments of Member States meeting within the Council on equality of opportunity for people with disabilities, [1996] OJ C12/1
- European Parliament legislative Resolution on 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, P6_TA(2009)0211
- European Parliament Resolution on the future of European standardisation (2010/2051(INI)), 21 October 2010

D. OTHER EUROPEAN UNION SOFT-LAW INSTRUMENTS

- 3rd Disability High Level Group Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities, March 2010
- 4th Disability High Level Group Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities, May 2011
- 6th Disability High Level Group Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities, September 2013
- 7th Disability High Level Group Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities, July 2015
- 8th Disability High Level Group Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities, September 2016
- European Commission, ‘Annual Public Procurement Implementation Review of the old Public Procurement Directives’, *European Commission* (2018), https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en

- European Commission, 'Available Budget 2014–2020', *European Commission* (2018), http://ec.europa.eu/regional_policy/en/funding/available-budget/
- European Commission, 'Cohesion Policy 2014–2020 – Investing in Growth and Jobs', *European Commission* (2011), http://ec.europa.eu/regional_policy/sources/docoffic/official/regulation/pdf/2014/proposals/regulation2014_leaflet.pdf
- European Commission, 'Study on the Translation of Article 16 of Regulation EC 1083/2006 for Cohesion policy programmes 2007–2013 co-financed by the ERDF and the Cohesion Fund (Public Policy and Management Institute (PPMI, Lithuania) in partnership with Net Effect (Finland) and Racine (France), September 2009', *European Commission* (2009), http://ec.europa.eu/regional_policy/en/information/publications/evaluations/2009/study-on-the-translation-of-article-16-of-regulation-ec-n10832006-on-the-promotion-of-gender-equality-non-discrimination-and-accessibility-for-disabled-persons-into-cohesion-policy-programmes-2007-2013-co-financed-by-the-erdf-and-the-cohesion-fund
- European Commission, 'Toolkit for using Structural and Cohesion Funds, Ensuring accessibility and non-discrimination of people with disabilities', *European Commission* (2009), <http://ec.europa.eu/social/BlobServlet?docID=2740&langId=en>
- Declaration No. 22 regarding persons with a disability, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related Acts, 10 November 1997
- Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C 340/11
- Flash Eurobarometer 345, Accessibility, December 2012
- European Commission Consultation document, Citizens' summary entitled, Modernising public procurement in the EU-consultation stage, *European Commission* (2011), http://ec.europa.eu/internal_market/consultations/docs/2011/public_procurement/citizen_summary_en.pdf
- European Commission Press Release, Consumers: New Rules crackdown on misleading advertising and aggressive sales practices, IP/07/1915, 12 December 2007
- European Parliament Committee on the Internal Market and Consumer Protection, Rapporteur: Maria Irigoyen Pérez, Report on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI) A7–0155/2012) (2012)
- European Parliament Committee on the Internal Market and Consumer Protection, Report on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI) A7–0155/2012), (2012)
- European Parliament, 'Report on the 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 the accessibility requirements for products and services, (A8–0188/2017)', *European Parliament* (2017), www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2017-0188&language=EN
- European Parliament, 'Report, EU Implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD): European Implementation Assessment',

- European Parliament (2016), www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA%282016%29536347
- European Railway Agency, 'Progress with Railway Interoperability in the EU', European Railway Agency (2011), www.era.europa.eu/Document-Register/Documents/ERA%202016.3138%20Biennial%20Report.pdf
- Explanatory notes to the combined nomenclature of the European Union, (2015), OJ C76/1
- Fundamental Rights Agency, '(FRA) Report, The right to political participation of persons with mental health problems and persons with intellectual disabilities', Fundamental Rights Agency (2010), <http://fra.europa.eu/en/publication/2010/right-political-participation-persons-mental-health-problems-and-persons>
- Recommendation of the European Parliament and the Council on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry, 20 December 2006
- Roadmap, European Accessibility Act: legislative initiative to improve accessibility of goods and services in the Internal Market
- Standardisation Mandate M/273, to CEN, CENELEC and ETSI on ICT for disabled and elderly people, 29 September, 1998.
- Standardisation Mandate M/283, to CEN, CENELEC and ETSI on safety and usability of products by people with special needs, 24 June 1999.
- Standardisation Mandate M/370 to CEN in the field of services, 19 July 2005
- Standardisation Mandate M/420 to CEN CENELEC and ETSI in support of European accessibility requirements for public procurement in the built environment, 21 December 2007
- Standardisation Mandate M/466 to CEN, in the field of the structural Eurocodes, 19 May 2010
- Standardisation Mandate M/473 to CEN, CENELEC and ETSI to include 'Design for All' in relevant standardization initiatives, 1 September 2010
- Standardisation Mandate M/515 to CEN for amending existing Eurocodes and extending the scope of structural Eurocodes, 12 December 2012

E. COURT OF JUSTICE OF THE EUROPEAN UNION CASE LAW

- Case 6/64 *Flaminio Costa v. ENEL*, EU:C:1964:66
- Case 7/68 *Commission v. Italy*, EU:C:1968:51
- Case 181/73 *Haegeman v. Belguim*, EU:C:1974:41
- Case 41/76 *Donckerwolcke*, EU:C:1976:182
- Case 804/79 *Commission v. UK*, EU:C:1981:93
- Case 66/82 *Fromançais v. Forma*, EU:C:1983:42
- Case 12/86 *Demirel v. Stadt Schwabisch Gmund*, EU:C:1987:400
- Case 47/86 *Roquette Freres v. ONIC*, EU:C:1987:316
- Case C-31/87 *Beenjes v. The Netherlands*, EU:C:1988:422
- Case 215/88 *Casa Fleischhandel v. Balm*, EU:C:1989:331

- Case C-358/88 *Oberhausener Kraftfutterwerk Wilhelm Hopernmann GmbH v. Bundesanstalt für landwirtschaftliche Marktordnung*, EU:C:1990:173
- Case C-179/90 *Merci convenzionali porto di Genova*, EU:C:1991:464
- Case C-350/92 *Spain v. Council*, EU:C:1995:237
- Case C-25/94 *Commission v. Council*, EU:C:1996:114
- Case C-61/94 *Commission v. Germany*, EU:C:1996:313
- Case C-125/94 *Aprile Srl v. Amministrazione dello Stato*, EU:C:1995:309
- Case C-120/95 *Decker*, EU:C:1998:167
- Case C-242/95 *GT-Link A/S*, EU:C:1997:376
- Case C-53/96 *Hermes International v. FHT Marketing*, EU:C:1998:292
- Case C-158/96 *Kohll*, EU:C:1998:171
- Case C-162/96 *Racke v. Hauptzollamt Mainz*, EU:C:1998:400
- Case C-266/96 *Corsica Ferries France SA*, EU:C:1998:306
- Joined Cases C-164/97 and C-165/97 *Parliament v. Council*, EU:C:1999:99
- Joined Cases C-300/98 and C-392/98 *Christian Dior and Assco Geruste*, EU:C:2000:688
- Case C-376/98 *Germany v. Parliament and Council*, EU:C:2000:544
- Case C-377/98 *Netherlands v. Parliament and Council*, EU:C:2001:523
- Case C-466/98 *Commission v. United Kingdom*, EU:C:2002:624
- Case C-467/98 *Commission v. Denmark*, EU:C:2002:625
- Case C-468/98 *Commission v. Sweden*, EU:C:2002:626
- Case C-469/98 *Commission v. Finland*, EU:C:2002:627
- Case C-471/98 *Commission v. Belgium*, EULCL2002:679
- Case C-472/98 *Commission v. Luxembourg*, EU:C:2002:670
- Case C-475/98 *Commission v. Austria*, EU:C:2002:630
- Case C-476/98 *Commission v. Germany*, EU:C:2002:631
- Case C-481/98 *Commission v. France*, EU:C:2001:237
- Case C-83/99 *Commission v. Spain*, EU:C:2001:31
- Case C-89/99 *Schieving-Nijstad v. Groeneveld*, EU:C:2001:438
- Case C-157/99 *Geraets-Smits and Peerbooms*, EU:C:2001:404
- Case C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v. Helsingin kaupunki and HKL-Bussiliikenne*, EU:C:2002:495
- Case C-13/00 *Commission v. Ireland (Berne Convention)*, EU:C:2002:184
- Case C-336/00 *Huber*, EU:C:2002:509
- Case C-211/01 *Commission v. Council*, EU:C:2003:452
- Case C-281/01 *Commission v. Council*, EU:C:2002:761
- Case C-338/01 *Commission v. Council*, EU:C:2004:253
- Case C-384/01 *Commission v. France*, EU:C:2003:264
- Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, EU:C:2002:741
- C-109/02 *Commission v. Germany*, EU:C:2004:586
- Case C-396/02 *DFDS*, EU:C:2004:536
- Case C-434/02 *Arnold André GmbH & Co. KG v Landrat des Kreises Herford*, EU:C:2004:800
- Case C-106/03 *OHIM*, EU:C:2003:264
- Case C-178/03 *Commission of the European Communities v. European Parliament and Council of the European Union*, EU:C:2006:4

- Case C-210/03 R (on the application of *Swedish Match AB and Swedish Match UK Ltd*) v *Secretary of State for Health (Swedish Match)*, EU:C:2004:802
- Case C-239/03 *Commission of the European Communities v. French Republic*, EU:C:2004:98
- Case C-459/03 *Commission v. Ireland*, EU:C:2006:345
- Case C-495/03 *Intermodal Transports*, EU:C:2005:552
- Joined Cases C-154/04 and C-155/04 *The Queen, on the application of Alliance for Natural Health and Others v. Secretary of State for Health and National Assembly for Wales*, EU:C:2005:449
- Case C-217/04 *UK v. European Parliament and Council*, EU:C:2006:27
- Case C-344/04 *IATA v. Department for Transport*, EU:C:2006:10
- Case C-13/05 *Chacón Navas v. Eurest Colectividades SA*, EU:C:2006:456
- Case C-250/05 *Turbon International*, EU:C:2006:681
- Case C-251/05 *Talacre Beach Caravan Sales*, EU:C:2006:451
- Joined cases C-402/05 and C-415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, EU:C:2008:461
- Case C-183/06 *RUMA*, EU:C:2007:110
- Case C-454/06 *pressetext*, EU:C:2008:351
- Case C-246/07 *Commission v. Sweden (PFOS)*, EU:C:2010:203
- Case C-58/08 *Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform*, EU:C:2010:321
- Case C-282/08 *Commission v. Luxembourg*, EU:C:2009:55
- Case C-321/08 *Commission v. Spain*, EU:C:2009:265
- Case C-370/08 *DataI/O*, EU:C:2010:284
- Case C-273/09 *Premis Medical BV v. Inspecteur van de Belastingdienst/Douane Rotterdam, Kantoor Laan op Zuid*, EU:C:2010:809
- Case C-12/10 *Lecson Elektromobile GmbH v. Hauptzollamt Dortmund*, EU:C:2010:823.
- Case C-122/10 *Konsumentombudsmanned v. Ving Sverige*, EU:C:2011:299
- C-312/11 *Commission v. Italy*, EU:C:2013:446
- Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, EU:C:2013:222
- Case C-360/11 *European Commission v. Kingdom of Spain*, EU:C:2013:17
- C-356/12 *Wolfgang Glatzel v. Freistaat Bayern*, EU:C:2014:350
- Case C-363/12 *Z. v. A Government department, The Board of management of a community school*, EU:C:2014:159
- Case C-354/13 *FOA v. Kommunernes Landsforening (KL) (Kaltoft)*, EU:C:2014:2463
- Case C-678/13 *European Commission v. Republic of Poland*, EU:C:2015:358
- Case C-198/15 *Invamed Group Ltd, Invacare UK Ltd, Days Healthcare Ltd, Electric Mobility Euro Ltd, Medicare Technology Ltd, Sunrise Medical Ltd, Invacare International SARL v. Commissioners for Her Majesty's Revenue & Customs*, EU:C:2016:362
- Case C-198/15 *Invamed Group Ltd, Invacare UK Ltd, Days Healthcare Ltd, Electric Mobility Euro Ltd, Medicare Technology Ltd., Sunrise Medical Ltd, Invacare International SARL v. Commissioners for Her Majesty's Revenue & Customs*, EU:C:2016:362.

- Case C-395/15 *Mohamed Daouidi v. Bootes Plus SL and Others*, EU:C:2016:917
 Case C-406/15 *Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control*, EU:C:2017:198
 Case C-573/15 *État belge v. Oxycure Belgium SA*, EU:C:2017:189
 Opinion 1/75 of the Court of 11 November 1975 1/75, EU:C:1975:145
 Opinion 1/94 of the Court of 15 November 1994, EU:C:1994:384
 Opinion 2/00 of the Court of 6 December 2001, EU:C:2001:664
 Opinion 1/03 of the Court of 7 February 2006, EU:C:2006:81.

F. ADVOCATE GENERAL'S OPINION

- Opinion of Advocate General Mengozzi in Case C-573/15 *État belge v. Oxycure Belgium SA*, EU:C:2016:792

III. INTERNATIONAL LAW SOURCES

A. GENERAL COMMENTS/GENERAL RECOMMENDATIONS/DECISIONS OF CORE HUMAN RIGHTS TREATY BODIES

Committee on Civil and Political Rights

- Committee on Civil and Political Rights, General Comment No. 28, The Equality of Rights between Men and Women, 2000

Committee on Economic, Social and Cultural Rights

- Committee on Economic, Social and Cultural Rights, Concluding observations Russia E/1998/22
 Committee on Economic, Social and Cultural Rights, Concluding observations Iraq E/1998/22
 Committee on Economic, Social and Cultural Rights, Concluding observations Nigeria E/1999/22
 Committee on Economic, Social and Cultural Rights, Concluding observations Colombia E/1996/22
 Committee on Economic, Social and Cultural Rights, Concluding observations Korea E/C.
 Committee on Economic, Social and Cultural Rights, Concluding observations Sri Lanka E/1999/2212/1/Add.59.
 Committee on Economic, Social and Cultural Rights, Concluding observations Dominican Republic E/1997/22
 Committee on Economic, Social and Cultural Rights, Concluding observations Zimbabwe E/1998/22
 Committee on Economic, Social and Cultural Rights, Concluding observations, Mexico E/2000/22

- Committee on Economic, Social and Cultural Rights, Concluding observations Morocco E/2001/22
- Committee on Economic, Social and Cultural Rights, Concluding observations El Salvador E/1997/22
- Committee on Economic, Social and Cultural Rights, Concluding observations Argentina E/2000/22
- Committee on Economic, Social and Cultural Rights, Concluding observations Iceland E/2000/22
- Committee on Economic, Social and Cultural Rights, Concluding observations Germany E/1999/22
- Committee on Economic, Social and Cultural Rights, Concluding observations Australia E/2001/22
- Committee on Economic, Social and Cultural Rights, General Comment No. 13, The right to education, 1999
- Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health, 2000
- Committee on Economic, Social and Cultural Rights, General Comment No. 1, Reporting by States parties, 1981
- Committee on Economic, Social and Cultural Rights, General Comment No. 4, The right to adequate housing, 1991,
- Committee on Economic, Social and Cultural Rights, General Comment No. 5, Persons with Disabilities, 1994
- Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of States Parties' Obligations, 1990
- Committee on Economic, Social and Cultural Rights, General Comment No. 19, The right to social security, 2007

Committee on the Rights of Persons with Disabilities

- Committee on the Rights of Persons with Disabilities Decision, F. v. Austria (Communication No. 21/2014, CRPD/C/14/D/21/2014), 21 September 2015
- Committee on the Rights of Persons with Disabilities Decision, Mr. X. v. Argentina (Communication No. 8/2012, CRPD/C/11/D/8/2012), 18 June 2014
- Committee on the Rights of Persons with Disabilities Decision, S.C. v. Brazil (Communication No. 10/2013, CRPD/C/12/D/10/2013), 2 October 2014
- Committee on the Rights of Persons with Disabilities Decision, Szilvia Nyusti and Péter Takács v. Hungary (Communication No. 1/2010, CRPD/C/9/D/1/2010), 21 June 2013
- Committee on the Rights of Persons with Disabilities, 'Guidelines on treaty-specific document to be submitted by states parties under article 35, paragraph 1, of the Convention on the Rights of Persons with Disabilities, CRPD/C/2/3', CRPD (2009), www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD7102010.aspx
- Committee on the Rights of Persons with Disabilities, Concluding observations EU CRPD/C/EU/CO/1/2015
- Committee on the Rights of Persons with Disabilities, Concluding observations Bosnia and Herzegovina CRPD/C/BIH/CO/1/2017
- Committee on the Rights of Persons with Disabilities, Concluding observations EU CRPD/C/EU/CO/1/2015

- Committee on the Rights of Persons with Disabilities, Concluding observations, EU CRPD/C/EU/CO/1/2015
- Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, 2014
- Committee on the Rights of Persons with Disabilities, Initial Report, EU CRPD/C/EU/1/2014
- Report on the concluding observations of the UN Committee on the Rights of Persons with Disabilities on the initial report of the European Union (CRPD/C/EU/CO/1/Add.1) (2017)

Human Rights Committee

- Human Rights Committee, Concluding comments Sudan CCPR/79/Add. 85

B. OTHER CORE HUMAN RIGHTS TREATY BODIES' SOFT-LAW INSTRUMENTS

- Ad Hoc Committee on the Disability Convention, Daily Summaries, Sixth Session, Morning Session, 5 August 2005
- Ad Hoc Committee on the Disability Convention, Daily Summaries, Seventh Session, Morning Session, 17 January 2006
- Ad Hoc Committee on the Disability Convention, Daily Summaries, Third Session, Afternoon Session, 1 June 2004
- Bangkok recommendations on the elaboration of a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities
- OHCHR, 'What is Disability', OHCHR www.ohchr.org/Documents/.../Disability/.../Module1_WhatDisability.ppt
- OHCHR, 'Written comments by the Mental Disability Advocacy Centre, submitted to the Committee on the Rights of Persons with Disabilities, on its day of General Discussion on Article 9, the right to accessibility of the Convention on the Rights of Persons with Disabilities', OHCHR (2010), www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD7102010.aspx
- Report of the Secretary General, 'Issues and Emerging Trends related to Advancement of Persons with Disabilities, Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities', United Nations (2003), www.un.org/esa/socdev/enable/rights/a_ac265_2003_1e.htm
- UN General Assembly Resolution 37/52, World Programme of Action concerning Disabled Persons, of 3 December 1982
- UN General Assembly Resolution 48/96, Standard Rules on the Equalization of Opportunities for Persons with Disabilities, of 20 December 1993

C. EUROPEAN COURT ON HUMAN RIGHTS CASE LAW

ECtHR, *Golder v. United Kingdom*, Application No. 4451/70, Judgment of 21 February 1975

ECtHR, *Tyler v. the United Kingdom*, Application No. 5856/72, Judgment of 25 April 1978

ECtHR, *Louizidou v. Turkey* (Preliminary Objections), (1995) 20 EHRR 99

D. INTERNATIONAL COURT OF JUSTICE CASE LAW

ICJ, Case concerning Nuclear Tests (*New Zealand v. France*), 1973 ICJ Reports, p. 457 (Dec. 20)

ICJ, Case concerning the Corfu Channel (*the United Kingdom v. Albania*), 1949, ICJ Reports, p. 4 (Apr. 9)

ICJ, Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (*Canada. v. U.S.A.*), 1984 ICJ Reports (Nov. 25)

ICJ, Case concerning the Territorial Dispute (*Libya v. Chad*), 1994 ICJ Reports, p. 7 (Feb. 3)

ICJ, Case concerning the application of the Convention on the prevention and punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), 2007, ICJ Reports, p. 43, (Feb. 26)

IV. NATIONAL LAW SOURCES

Brazil, Federal Law, 8666/93

South Africa, Preferential Procurement Policy Framework Act No 5, 2000

UK, Disability Discrimination Act 1995

V. SECONDARY ACADEMIC SOURCES

A. BOOKS

Ahmed T., *The impact of EU law on Minority Rights* (Hart Publishing, 2011)

Armstrong K.A., *Governing Social Inclusion, Europeanization through Policy* (Oxford University Press, 2010)

Arnardottir O.M. and Quinn G., *The UN Convention on the Rights of Persons with Disabilities* (Martinus Nijhoff, 2009)

Aust A., *Modern Treaty Law and Practice* (2nd edition, Cambridge University Press, 2007)

Barnard C., *The substantive law of the EU: The four freedoms* (Oxford University Press, 2007)

Bell M., *Anti-discrimination law and the European Union* (Oxford University Press, 2002)

Boerefijn I., *The Reporting procedure under the Covenant on Civil and Political Rights: practice and procedure of the Human Rights Committee* (Intersentia, 1999)

- Bredimas A., *Methods of Interpretation and Community Law* (North Holland, 1978)
- Broderick A., *The long and winding road to equality and inclusion for persons with disabilities: the United Nations convention on the rights of persons with disabilities* (Intersentia, 2015)
- Burri S. and Prechal S., *EU Gender Equality Law* (Office for Official Publications of the European Communities, 2008)
- Chalmers D., Davies G. and Monti G., *European Union Law* (Cambridge University Press, 2010)
- Chopin I. and Niessen J., *Proposals for Legislative Measures to Combat Racism and to Promote Equal Rights in the European Union* (Commission for Racial Equality, 1998)
- Craig P. and Búrca G., *EU Law: Text, Cases, and Materials* (Oxford University Press, 2011)
- Craig P., *EU Administrative Law* (Oxford University Press, 2006)
- Dahm G., Debruck J. and Wolfrum R., *Volkerrecht* (Berlin Walter de Gruyter, 1989)
- De la Feria R., *The EU VAT System and the Internal Market* (IBFD, 2006)
- Della Finna V., Cera R. and Palmisano G., *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer, 2017)
- Donnelly J., *Universal Human Rights in Theory and Practice* (Cornell University Press, 2003)
- Dworkin R., *Justice in Robes* (Harvard University Press, 2006)
- Eeckhout P., *External relations of the European Union-Legal and constitutional foundations* (Oxford University Press, 2004)
- Estella A., *The Principle of Subsidiarity and its Critique* (Oxford University Press, 2002)
- Evans A., *The Structural Funds* (Oxford University Press, 2004)
- Fredman D., *Civil Liberties and Human Rights in England and Wales* (2nd edition, Oxford University Press, 2002)
- Frid R., *The relations Between the EC and International Organizations: Legal theory and Practice* (Kluwer Law International, 1995)
- Hales G., *Beyond Disability, Towards an Enabling Society* (Sage Publications, 1996)
- Hathaway J., *The Rights of Refugees Under International Law* (Cambridge University Press, 2005)
- Hillion C. and Koutrakos P., *Mixed Agreements Revisited* (Hart Publishing, 2010)
- Holdgaard R., *External relations Law of the European Community* (Kluwer Law International, 2008)
- Howard E., *The EU race directive: developing the protection against racial discrimination within the EU* (Routledge, 2009)
- Kaeding M., *Better Regulation in the European Union: Better Regulation or Full Steam Ahead? The transposition of EU transport directives across the Member States* (Leiden University Press, 2007)
- Kalin W. and Kunzli J., *The law of Interantional Human Rights Protection* (Oxford University Press, 2009)
- Keirsbilck B., *The New European Law of Unfair Commercial Practices and Competition Law* (Hart Publishing, 2011)
- Klamert M., *The Principle of Loyalty in EU Law* (Oxford University Press, 2014).
- Konstandinides T., *Division of Powers in the European Union: The Delimitation of the Internal Competence between the EU and the Member States* (Kluwer Law International, 2009)

- Koutrakos P., *EU international relations law* (Hart Publishing, 2006)
- Lasok K. and Millet T., *Judicial Control in the EU* (Richmond Law and Tax Ltd., 2004)
- Lenaerts K. and Van Nuffel P., *Constitutional law of the European Union* (Thomson: Sweet and Maxwell, 2004)
- Lock T., *The European Court of Justice and International Courts* (Oxford University Press, 2015)
- McCrudden C., *Buying Social Justice: Equality, Government of Procurement & Legal Change* (Oxford University Press, 2007)
- McLeod I., Henry I.D. and Hyett D., *The external relations of the European Communities* (Oxford University Press, 1996)
- McNair A., *The Law of the Treaties* (Clarendon Press, 1961)
- Mendez M., *The Legal Effects of EU Agreements* (Oxford University Press, 2013).
- Middleton L., *Disabled Children: Challenging Social Exclusion* (Blackwell Science, 1999)
- Mueller J.L. and Mace R.L., *The Universal design file: Designing for People of all ages and abilities*, (The Centre for Universal Design, 1998)
- Nowak M., U.N. *Covenant on Civil and Political Rights. CCPR Commentary* (2nd edition, N.P. Engel, 2005)
- Nussbaum M., *Frontiers of justice* (Harvard University Press, 2006)
- Obradovic D. and Lavranos N., *Interference between EU Law and National Law* (Europa Law Publishing, 2007)
- Oliver M., *The Politics of Disablement* (Macmillan 1990);
- Oliver M., *Understanding Disability: From Theory to Practice* (MacMillan 1996)
- Piris J., *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press, 2010)
- Radeideh M., *The Principle of fair Trading in EC law* (Europa Law Publishing, 2005)
- Rausching D., *The Vienna Convention on the Law of the Treaties, Travaux Préparatoires* (Metzner, 1978)
- Schricker G. and F. Henning-Bodewig, *Elemente einer Harmonisierung des Rechts des unlauteren Wettbewerbs in der Europäischen Union* (WRP, 2001)
- Schutze R., *From Dual to Cooperative Federalism: The changing Structure of European Law* (Oxford University Press, 2009)
- Sen A., *Inequality re-examined* (Russell Sage Foundation, 1999)
- Sepulveda M., *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, 2003)
- Shur L., Kruse D. and Blanck P., *People with Disabilities: Side-lined or Mainstreamed?* (Cambridge University Press, 2013)
- Sinclair I., *Vienna Convention on the Law of Treaties* (2nd edition, Manchester University Press, 1984)
- Smail R., Broos L. and Kuijpers E., *Managing Structural Funds: A step by step Practical Handbook* (EIPA, 2008)
- Torres Pérez A., *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press, 2009)
- Verwey D., *The European Community, the European Union and the International Law of Treaties* (T.M.C. Asser Press, 2004)
- Welsh P., *Strategies for Teaching Universal design* (Adaptive Environments, 1995)

B. BOOK CHAPTERS

- Allen R., 'Article 13 – EC, evolution and current contexts', in Meenan H. (ed.), *Equality law in an enlarged European Union: understanding the Article 13 Directives* (Cambridge University Press, 2007)
- Arrowsmith S. and Kunslik P., 'Public procurement and horizontal policies in EC law: general principles', in Arrowsmith S. and Kunslik P. (eds.), *Social and Environmental Policies in EC Procurement Law: New Directions and New Directives* (Cambridge University Press, 2009)
- Bell M., 'The new article 13 EC Treaty: a platform for a European policy against racism?', Moon G. (ed.), *Race discrimination developing and using a new legal framework* (Hart Publishing, 2000)
- Boeger N., 'Minimum harmonisation, free movement and proportionality', in Syrpis P. (ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press, 2012)
- Bossuyt M., 'The Concept and Practice of Affirmative Action', in Boerefijn I. et al. (eds.), *Temporary Special Measures: Accelerating de facto Equality of Women under Article 4 (1) UN Convention on the Elimination of All Forms of Discrimination against Women* (Intersentia, 2003)
- Bradley K., 'Powers and procedures in the EU constitution: legal bases and the court', in Craig P. and De Burca G. (eds.), *The evolution of EU law* (Oxford University Press, 2011)
- Bull H., 'Mixity Seen from the Outside of the EU but inside the Internal Market', in Hillion C. and Koutrakos P. (eds.), *Mixed Agreements Revisited* (Hart Publishing, 2010)
- Burri S., 'EU Anti-Discrimination law: Historical Development and Main Concepts', in Li Y. and Goldschmidt J. (eds.), *Taking Employment Discrimination Seriously: Chinese and European Perspectives* (Martinus Nijhoff Publishers, 2009)
- Cali B., 'Specialised Rules of Treaty Interpretation: Human Rights', in Hollis D.B. (ed.), *Oxford Guide to Treaties* (Oxford University Press, 2012)
- Caranta R., 'Sustainable Public Procurement in the EU', in Caranta R. and Trybus M. (eds.), *The Law of Green and Social Procurement in Europe* (Djoef Publishing, 2010)
- Christoffersen J., 'Impact on General Principles of Treaty Interpretation', in Kamminga M. and Scheinin M. (eds.), *The Impact of General human Rights Law on General International Law* (Oxford University Press, 2009)
- Comba M.E., 'Green and Social Considerations in Public Procurement Contracts: A Comparative Approach', in Caranta R. and Trybus M. (eds.), *The Law of Green and Social Procurement in Europe* (Djoef Publishing, 2010)
- Coomans F., 'In search of the core content of the right to education', in Brand D. and Russell S. (eds.), *Exploring the core content of socio-economic rights: South Africa and international perspectives* (Intersentia, 2001)
- Corker M. and Davis J.M., 'Disabled Children: (Still) Invisible Under the Law', in Cooper J. (ed.), *Law, Rights & Disability* (Jessica Kingsley Publishing, 2000)
- Cremona M., 'External Relations and External Competence: The Emergence of an Integrated Policy', in Craig P. and De Búrca G. (eds.), *The Evolution of EU Law* (Oxford University Press, 2011)

- De Witte B., 'A competence to protect: The pursuit of non-market aims through internal market legislation', in Syrpis P. (ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press, 2012)
- De Witte B., *Non-Market values in the internal market legislation*, in Shuibne N.N. (ed.), *Regulating the Internal Market* (Edward Elgar, 2006)
- Degener T., 'A New Human Rights Model of Disability', in Della Finna V., Cera R., Palmisano G. (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer, 2017)
- Dehousse R., 'The legacy of Maastricht: Emerging Institutional Issues', in Cremona M., De Witte B. and Francioni F. (eds.), *Collected Courses of the Academy of European Law* (Nijhoff, 1992)
- Della Finna V., 'Article 3 [General Principles]', in Della Finna V., Cera R., Palmisano G. (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer, 2017)
- Ferri D., 'The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EU/EC: A Constitutional Perspective', in Waddington L. and Quinn G. (eds.), *European Yearbook of Disability Law* (Volume II, Intersentia, 2010)
- Fredman S., 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights', in Boerefijn I. et al. (eds.), *Temporary Special Measures: Accelerating de facto Equality of Women under Article 4 (1) UN Convention on the Elimination of All Forms of Discrimination against Women* (Intersentia, 2003)
- Harnacke C. and Graumann S., 'Core Principles of the UN Convention on the Rights of Persons with Disabilities: An Overview', in Anderson J. and Philips J. (eds.), *Disability and Universal Human Rights, Legal, Ethical, and Conceptual Implications of the Convention on the Rights of Persons with Disabilities* (SIM Special 35, 2012)
- Hillion C., 'Mixity and Coherence in EU External Relations: The Significance of the "Duty of Cooperation"', in Hillion C. and Koutrakos P. (eds.), *Mixed Agreements Revisited* (Hart Publishing, 2010)
- Jones M. and Basser L.A., 'Law and people with disabilities', in Smesler N. and Baltes P. (eds.), *International encyclopaedia of social and behavioural sciences* (Elsevier, 2001)
- Jones M., 'Inclusion, Social Inclusion and Participation', in Rioux M.H., Basser L.A. and Jones M. (eds.), *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff Publishers, 2011)
- Keirsbilck B., 'The Implementation of the Unfair Commercial Practices Directive in the United Kingdom, Germany and the Netherlands', in Straetmans G., Stuyck J. and Terryn E. (eds.), *De Wet Handelspraktijken anno 2008* (Kluwer, 2008)
- Kersh J., 'Attitudes about people with intellectual disabilities: Current status and new directions', in Hodapp R.M. (ed.), *International Review of Research in Developmental Disabilities* (Oxford Academic Press, 2011)
- Lord J.E. and Brown R., 'The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities', in Rioux M.H., Basser L.A. and Jones M. (eds.), *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff, 2011)
- Mackenzie-Stuart L., 'Subsidiarity: A Busted Flush', in Curtin D. and O'Keefe D. (eds.), *Constitutional adjudication in European community and national law* (Butterworth, 1992)

- Martinsen D.S. and Falkner G., 'Social Policy: problem solving gaps, partial exits and court-decision traps', in Falkner G. (ed.), *The EU's decision traps: comparing policies* (Oxford University Press, 2011)
- Martinsen D.S., 'Welfare States and Social Europe', in Van de Gronden W. et al., (eds.), *Legal Issues of Services of General Interest* (T.M.C. Asser Press, 2013)
- Micklitz H-W., 'Universal Services: Nucleus for a Social European Private Law', in Cremona M. (ed.), *Market Intergration and Public Services in the European Union* (Oxford University Press, 2011)
- Morettini S., 'Public Procurement and Secondary Policies in the EU and global Administrative law', in Chiti E. and Mattarella B.G. (eds.), *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison* (Springer, 2011)
- Peters B., 'Aspects of Human Rights Interpretation by the UN Treaty Bodies', in Keller H. and Ulfstein G. (eds.), *UN Human Rights Treaty Bodies, Law and Legitimacy* (Cambridge University Press, 2012)
- Priestley M., 'Disability Policies and the Open Method of Coordination', in Waddington L., Quinn G. and Flynn E. (eds.), *European Yearbook of Disability Law: Volume 3* (Intersentia, 2012)
- Rodrigues S., 'Towards a General EC Framework Instrument related to SGEI? Political Considerations and Legal Constrains', in Krajewski M., Van de Gronden J. and Neergaard U. (eds.), *The Changing Legal Framework for Services of General Interest in Europe* (T.M.C. Asser Press, 2009)
- Russell S., 'Minimum state obligations: International dimensions', in Brand D. and Russell S. (eds.), *Exploring the core content of socio-economic rights: South Africa and international perspectives* (Intersentia, 2001)
- Schlutter B., 'Aspects of human rights interpretation by the UN treaty bodies', in Keller H. and Ulfstein G. (eds.), *UN Human Rights Treaty Bodies, Law and Legitimacy* (Cambridge University Press, 2012)
- Seatzu F., 'Article 9 [Accessibility]', in Della Finna V., Cera R., Palmisano G. (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer, 2017)
- Smyth I., 'A view from Foreign and Commonwealth Office', in Hillion C. and Koutrakos P. (eds.), *Mixed Agreements Revisited* (Hart Publishing, 2010)
- Stuyck V., 'The Notion of the Empowered and Informed Consumer in Consumer Policy and How to Protect the Vulnerable under Such a Regime', in Howells G. et al. (eds.), *The Yearbook of Consumer Law* (Ashgate, 2007)
- Tietje C., 'The status of international law in the European legal order: The case of International Treaties and non-binding international instruments', in Wooters J., Nollkaemper A. and De Wet E. (eds.), *The Europeanization of International Law: The Status of International Law in the EU and its Member States* (T.M.C Asser Press, 2008)
- Timmermans C.W.A., 'Organising joint participation of EC and Member States', in Dashwood A. and Hillion C. (eds.), *The General Law of EC External Relations* (Sweet & Maxwell, 2000)
- Tridimas T., 'The Rule of Reason and its Relation to Proportionality and Subsidiarity', in Schrauwen A. (ed.), *Rule of Reason: Rethinking another Classic of European legal Doctrine* (Europa Law Publishing, 2005)

- Trindade C., 'La Interpretation de Tratados en El Derecho Internacional y La Especificidad de los Tratados de Derechos Humanos', in De Clement Z.D. (ed.), *Estudios de Derecho Internacional en Homenaje al Profesor Ernesto J. Rey Caro* (Drnas, Lerner, 2004) 19–60
- Trubek D.M., Cottrell P. and Nance M., "Soft Law", "Hard Law" and EU Integration', in De Burca G. and Scott J. (eds.), *Law and new governance in the EU and the US* (Hart Publishing, 2006)
- Waddington L., 'Reasonable Accommodation', in Schiek D., Waddington L. and Bell M. (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Ius Commune Casebooks for the Common Law of Europe, Hart Publishing, 2007)
- Weatherill S., 'Maximum versus Minimum Harmonisation: Choosing Between: Unity and Diversity in the Search for the Soul of the Internal Market', in Shuibhne N.N. and Gormley L.W. (eds.), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford University Press, 2012)
- Westerholm R. et al., 'Stigma', in Albrecht G. et al. (eds.), *Encyclopedia of disability* (Sage, 2006)
- Williams A., 'An Introduction to the Austrian Federal Disability Equality Act', in Quinn G. and Waddington L. (eds.), *European Yearbook on Disability Law* (Intersentia, October 2009)

C. JOURNAL ARTICLES

- Arnould J., 'Secondary policies in public Procurement: Innovations in the new directives', 13 *Public Procurement Law Review* (2004) 187–197
- Arrowsmith J., Sisson K. and Marginson P., 'What can "benchmarking" offer open method of coordination', 11 *Journal of European Public Policy* (2004) 311–328
- Arrowsmith S., 'The EC procurement directives, national procurement policies and better governance: the case for a new approach', 27 *European Law Review* (2000) 3–24
- Barnes C., 'Understanding Disability and the importance of Design for All', 1 *Journal of Accessibility and Design for All* (2011) 55–80
- Beinz A., 'Accountable multi-level governance by the open method of coordination?', 13 *European Law Journal* (2007) 505–522
- Bell M., 'The new article 13 EC Treaty: A sound basis for European anti-discrimination law?', 6 *Maastricht Journal of European and Comparative Law* (1999) 5–23
- Bickenbach J.E. and Cieza A., 'The Prospects for Universal Disability Law and Social Policy', 1 *Journal of Accessibility and Design for All* (2014) 23–37
- Borras S. and Greve R., 'Preface', 11 *Journal of European Public Policy* (2004) 181–184
- Bryan I., 'Equality and Freedom from Discrimination: Article 13 EU Treaty', 24 *Journal of Social Welfare and Family Law* (2002) 223–238
- Cameron J. and Gray K.R., 'Principles of International Law in The WTO Dispute Settlement Body', 50 *International and Comparative Law Quarterly* (2001) 248–298
- Capoccia G. and Kelemen R.D., 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism', 59 *World Political Science Review* (2007) 341–369

- Carozza P.G., 'Subsidiarity as a Structural Principle of International Human Rights Law', 97 *American Journal of International Law* (2003) 38–79
- Charitakis S., 'An Introduction to the Disability Strategy 2010–2020, with a focus on Accessibility', *Ars Aequi* (2013) 28–35
- Charitakis S., 'Austerity Measures in Greece and the Rights of Persons with Disabilities', 2 *Cyprus Human Rights Law Review* (2013) 258–271
- Cremona M., 'C-246/07 Case Law', 48 *Common Market Review* (2011) 1639–1666
- Dashwood A., 'The Limits of European Community Powers', 21 *European Law Review* (1996) 113–128
- Davies J. and Davies W., 'Reconciling Risk and the Employment of disabled Persons in a Reformed Welfare State', 29 *Industrial Law Journal* (2000) 347–377
- De Burca G., 'The EU in the Negotiations of the UN Disability Convention', 35 *European Law Review* (2010) 174–196
- De Campos Velho Martel L., 'Reasonable accommodation: The New Concept from an Inclusive Constitutional Perspective', 8 *International Journal on Human Rights* (2011) 85–112
- De la Porte C. and Nanz P., 'The OMC-A Deliberative-Democratic Mode of Governance? The cases of Employment and Pensions', 11 *Journal of European Public Policy* (2004) 267–288
- Devroe W., 'Limits of differentiation in European Economic Law: Ne bis in idem and minimum versus maximum harmonisation', 16 *Maastricht Journal of European and Comparative Law* (2009) 141–148
- Eckardt M., 'The open method of coordination on pension reforms', 15 *Journal of European Social Policy* (2005) 247–267
- Fitzmaurice F., 'Dynamic (Evolutive) Interpretation of Treaties, Part I', XXI *Hague Yearbook of International Law* (2008) 101–153
- Fredman S., 'Breaking the Mold: Equality as a Proactive Duty', 60 *The American Journal of Comparative Law* (2012) 265–288
- Gossett A. et al., 'Beyond Access: A case study on the inter between, accessibility, sustainability and universal design', 4 *Assistive Technology* (2009) 439–450
- Hodson D. and Maher I., 'The open Method as a New Mode of Governance: The Case of Soft Economic Policy Coordination', 39 *Journal of Common Market Studies* (2001) 719–746
- Imrie R., 'Ableist Geographies, Disablist Spaces, Towards a Reconstruction of Gollidge's "Geographies of the Disabled"', 21 *Transactions of the Institute of British Geographers* (1996) 397–403
- Incardano R. and Poncibo C., 'The average consumer, the unfair commercial practices directive, and the cognitive revolution', 30 *Journal of Consumer Protection* (2007) 21–38
- Kanter A.S., 'The promise and the challenge of the United Nations Convention on the Rights of Persons with Disabilities', 34 *Syracuse Journal of International Law and Commerce* (2007) 287–321
- Kavess R. and French P., 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities', 8 *Human Rights Law Review* (2008) 1–34
- Lawson A., 'Disability, equality, reasonable accommodation and the avoidance of ill-treatment in places of detention: the role of supranational monitoring and inspection bodies', 16 *The International Journal of Human Rights* (2012) 845–864

- Lawson A., 'People with Psychosocial Impairments or Conditions, Reasonable Accommodation and the Convention on the Rights of Persons with Disabilities', 26 *Law in Context* (2008) 62–84
- Lawson A., 'The EU Rights Based Approach to Disability Some Strategies for Shaping an Inclusive Society', 6 *International Journal of Discrimination and the Law* (2005) 269–288
- Levesque J., Harris M. and Russell G., 'Patient-centred access to health care: conceptualising access at the interface of health systems and populations', 12 *International Journal for Equity in Health* (2013) 1–9
- Linos K., 'Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union', 35 *Yale Journal of International Law* (2010) 115–169
- Mace R., 'Universal Design in Housing', 10 *Assistive Technology* (1998) 21–28
- Mechlem K., 'Treaty Bodies and the Interpretation of Human Rights', 42 *Vanderbilt Journal of Transnational Law* (2009) 905–947
- Megret F., 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?', 30 *Human Rights Quarterly* (2008) 494–516
- Melish T., 'The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify', 14 *Human Rights Brief* (2007) 43–47
- Miller A., 'Limitations to and Derogations from Economic Social, and Cultural Rights', 9 *Human Rights Law Review* (2009) 113–157
- Page S.E., 'Path Dependence', 1 *Quarterly Journal of Political Science* (2006) 87–115
- Peat M., 'Attitudes and access: advancing the rights of people with disabilities', 156 *Canadian Medical Association Journal* (1997) 657–659
- Pelkmans J., 'The New Approach to Technical Harmonisation and Standardisation', 25 *Journal of Common Market Studies* (1987) 249–269
- Pulzl H. and Lazdinis M., 'May the Open Method of Coordination be a new instrument for forest policy deliberations in the European Union', 13 *Forest Policy and Economics* (2011) 411–418
- Quinn G. and Doyle S., 'Taking the UN Convention on the Rights of Persons with Disabilities Seriously: The Past and Future of the EU Structural Funds as a Tool to Achieve Community Living', 9 *The Equal Rights Review* (2012) 69–94
- Reiss J.W., 'Innovative Governance in a Federal Europe: Implementing the Convention on the Rights of Persons with Disabilities', 20 *European Law Journal* (2014) 107–125
- Schwab S.J. and Willborn S.L., 'Reasonable Accommodation of Workplace disabilities', 44 *William and Mary Law Review* (2003) 1197–1284
- Scior K., 'Public awareness, attitudes and beliefs regarding intellectual disability: A systematic review', 32 *Research in Developmental Disabilities* (2011) 2164–2182
- Senyonjo M., 'Reflections on the state obligations with respect to economic, social and cultural rights in international human rights law', 16 *The International Journal of Human Rights* (2011) 969–1012
- Sluijs J.P., 'Network neutrality and the internal market fragmentation', 49 *Common Market Law Review* (2012) 1647–1674
- Smits J., 'Full Harmonisation of Consumer Law? A Critique of the Draft Directive on Consumer rights', 18 *European Review of Private Law* (2009) 573–581

- Thirlway H., 'The Law and procedure of the International court of Justice 1960–1989', 80 *British Yearbook of International Law* (2009) 10–216
- Varney E., 'Social Regulation in the Air Transport Industry – An Examination of Regulation 1107/2006 concerning the Rights of Disabled Persons and Persons with Reduced Mobility when travelling by Air', 28 *Comparative Socio-Legal Research* (2007) 191–201
- Waddington L. and Bell M., 'Exploring the boundaries of positive action under EU law: A search for conceptual clarity', 48 *Common Market Review* (2011) 1503–1526
- Waddington L., 'A Disabled Market: Free Movement of Goods and Services in the EU and Disability Accessibility', 15 *European Law Journal* (2009) 575–598
- Waddington L., 'Future Prospects for EU Equality Law: Lessons to be Learnt from the Proposed Equal Treatment Directive', 36 *European Law Review* (2011) 163–184
- Waddington L., 'Saying all the right things and still getting it wrong: The Court of Justice's definition of disability and non-discrimination law', 22 *Maastricht Journal of European and Comparative Law* (2015) 576–591
- Waddington L., 'Testing the limits of the EC treaty article on non-discrimination', 28 *Industrial Law Journal* (1999) 133–152
- Waddington L., 'The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences', 18 *Maastricht Journal of European and Comparative Law* (2011) 431–453
- Waddington L., 'Vulnerable and confused: the protection of "vulnerable" consumers under EU law', 38 *European Law Review* (2013) 757–782
- Waddington L., 'When it is reasonable for Europeans to be confused: understanding when disability accommodation is "reasonable" from a comparative perspective', 29 *Comparative Labour Law and Policy Journal* (2008) 101–124

D. MISCELLANEOUS SOURCES (REPORTS AND OTHER)

- ANEC position paper, 'How to protect vulnerable consumers', ANEC (2011), <https://www.anec.eu/publications/position-papers/240-anec-position-paper-how-to-protect-vulnerable-consumers-december-2011>
- ANEC, 'Annual Report 2010', ANEC (2010), <https://www.scribd.com/document/61671109/ANEC-Annual-Report-2010>
- ANED, 'Annotated review of European Union law and policy with reference to disability, January 2017', ANED (2017), <https://www.disability-europe.net/theme/eu-law-and-policy>
- ANED, 'Annotated review of European Union law and policy with reference to disability', ANED (2009), <https://www.disability-europe.net/theme/eu-law-and-policy>
- Bianchini T. and Guidi V., 'The Comparative Survey on the National Public Procurement Systems Across the PPN', PPN (2010), www.forum-vergabe.de/fileadmin/user_upload/Weiterf%C3%BChrende_Informationen/Comparative_survey_on_PP_systems_across_PPN.pdf.
- CEN ESO Phase One – Final Technical Report, SA/CEN/ENTR/420/2009/07 (2009)
- CEN, 'Protocol on accessibility following a Design for All approach in standardization', CEN (2018), http://ftp.cencenelec.eu/EN/EuropeanStandardization/Fields/Accessibility/DfA/protocol/Doc_1TheProtocol.pdf

- CEN, M/ 473 Deliverable 1.2, Analysis of main areas of Standardisation & Prioritisation of work in standardisation in relation to the needs of people with disabilities and older persons, 26 May 2015
- CEN/CENELEC Guide 6, Guidelines for standards developers to address the needs of older persons and persons with disabilities, January 2002
- CEN-CENELEC working programme of 2015, European Standardisation and related activities, 15 December 2014
- CEN-CENELEC, 'Working programme of 2017, European Standardisation and related activities', *CEN-CENELEC* (2016), https://www.cencenelec.eu/News/Publications/Publications/cen-cenelec-wp2017_en.pdf
- CENELEC GUIDE 28, Accessibility in Interfaces in Low Voltage Electrical Installations A Guide for Standard Writers, March 2006
- CENELEC, 'Built Environment', *CENELEC* (2018), <https://www.cencenelec.eu/standards/Sectors/Accessibility/BuiltEnvironment/Pages/default.aspx>
- Centre for Strategy & Evaluation Services, 'Report, Non-discrimination mainstreaming – instruments, case studies and way forwards', *Centre for Strategy & Evaluation Services* (2007), http://edz.bib.uni-mannheim.de/daten/edz-ath/gdem/07/mainstr07_en.pdf
- Centre for Universal Design: The New Principles of Universal Design. Centre for Universal Design, College of Design, North Carolina State University, 2011
- Claes A. and Vergote W., 'Report prepared for the Commission, Econometric study on parcel list prices', *European Commission* (2016), <https://ec.europa.eu/docsroom/documents/14647/attachments/1/translations/en/...pdf>.
- Community of European Railway and Infrastructure Companies, A European overview of the implementation of Regulation (EC) No 1371/2007: The Rail Sector Report, October 2012
- Conclusions of the Madrid European Council 1995 (Bulletin of the EU, 12–1995)
- Coomans F., *The international protection of the right to education* (PhD thesis, Maastricht University, 1992)
- Copenhagen Economics, 'Study on reduced VAT applied to goods and services in the Member States of the European Union', *European Commission* (2007), https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/rates/study_reduced_vat.pdf
- Cremona M., 'External relations and External Competence of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law', *EUI Working Papers Law* No. 2006/22 (2006), <http://cadmus.eui.eu/handle/1814/6249>.
- Degener T. and Quinn G., 'Human Rights and Disability: The Current use and Future Potential of United Nations Instruments in the Context of Disability', *United Nations* (2002), www.ohchr.org/Documents/Publications/HRDisabilityen.pdf
- Dion B. and Waddell C., *Technical Paper on Accessibility and the United Nations Convention on the Rights of Persons with Disabilities, For an Inclusive and accessible society for all*, prepared for the United Nations as background documentation for the United Nations Expert Group Meeting on Accessibility: Innovative and cost-effective approaches for inclusive and accessible development, Washington D.C, 28–30 June 2010, 7 October 2010

- Dong H., 'Global Perspectives and Reflections', in the Delta Centre (ed.), *Trends in Universal Design: An anthology with global perspectives, theoretical aspects and real world examples* (Norwegian Directorate for Children Youth and Family affairs, 2013), https://www.bufdir.no/Global/nbbf/universell_utforming/Trends_in_Universal_Design.PDF
- E. Steinfeld, Position paper, The future of Universal Design, IDEA Centre, University of Buffalo, 2006
- E.1.2.1.2 EN 81-40 Stair lifts and inclined lifting platforms intended for persons with impaired mobility
- EDF Contribution to the day of general discussion on accessibility, Committee on the Rights of Persons with Disabilities, Geneva, 7 October 2010
- EDF, 'Alternative Report to the UN Committee on the Rights of Persons with Disabilities', *EDF* (2015), www.edf-feph.org/newsroom/news/edf-launches-its-alternative-report-rights-persons-disabilities
- EDF, 'EDF Response to the Public Consultation with a View to a European Accessibility Act, March 2012', *EDF* (2012), www.edf-feph.org/search/node/EDF%20Response%20to%20the%20Public%20Consultation%20with%20a%20View%20to%20a%20European%20Accessibility%20Act
- EDF, 'Initial response to the proposal for a European Accessibility Act', *EDF* (2016), p. 9. www.edf-feph.org/sites/default/files/edf_initial_response_european_accessibility_act_feb_2016_-_final_1.pdf
- EDF, 'Opinion on the European Parliament's opinion on the proposed European Accessibility Act', *EDF* (2017), www.edf-feph.org/newsroom/news/accessibility-act-business-over-people
- EDF, 'Response to Steer and Davies Gleave's questionnaire on review of Regulation 1371/2007 on rail passengers' rights and obligations', *EDF* (2012), www.edf-feph.org/rail-passengers-rights-obligations
- EDF, 'Statement on the Proposal for a Directive amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities (COM(2016)287)', *EDF* (2016), www.edf-feph.org/sites/default/files/final_edf_position_avmsd_revision.pdf
- EN 1990:2002 E, Euro-code – Basis of Structural Design, CEN, 29 November 2001
- European Coalition of Community Living, 'Wasted Time, Wasted Money, Wasted Lives... a Wasted opportunity?', *European Coalition of Community Living* (2010), <http://community-living.info/documents/ECCL-StructuralFundsReport-final-WEB.pdf>
- European Equality Law Network, Austria – Country report, non-discrimination 2017, by Dieter Schindlauer, *European Equality Law Network* (2017), <https://www.equalitylaw.eu/downloads/4459-austria-country-report-non-discrimination-2017-pdf-1-57-mb>
- European Foundation Centre Report, 'Study on the challenges and good practices in the implementation of the UN Convention on the Rights of Persons with Disabilities', *EFCR* (2010), www.efc.be/publication/study-on-challenges-and-good-practices-in-the-implementation-of-the-un-convention-on-the-rights-of-persons-with-disabilities-executive-summary/, p. 31

- Homeyer I., 'The role and performance of the OMC in EU environmental policy', *Bertelsmann Foundation* (2005)
- Jiménez A. and Huete A., *Estudio sobre el agravio comparativo económico que origina la discapacidad*. (Ministry of Health and Social Policy, 2010)
- Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1986, No. 17
- Lord J.E., 'Accessibility and Human Rights fusion in the CRPD: Assessing the scope and the content of the accessibility principle and duty under CRPD', *Harvard School of Law and DARE Presentation for the General Day of Discussion on Accessibility* (2010), www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD7102010.aspx
- Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997
- Minkowitz T., 'Accessibility as a right of users and survivors of psychiatry with psychological disabilities', *Submission of the World Network of Users and Survivors of Psychiatry (WNUSP) to the Committee on the Rights of Persons with Disabilities for its day of General discussion on CRPD Article 9* (2010), www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD7102010.aspx
- Muller A.P.M., 'A critical study of Brazilian procurement law', *George Washington University* (1998), www.gwu.edu/~ibi/minerva/Fall1998/Andre.Mueller.html
- Newfield J., 'Ways Disability Insurance Companies Use to Deny Claims', *Disabled World* (2011), www.disabled-world.com/disability/insurance/claims/denying.php#sthash.3hJN2rID.dpuf-last
- Open Society Foundation, 'The European Union and the Right to Community Living Structural Funds and the European Union's Obligations under the Convention on the Rights of Persons with Disabilities', *Open Society Foundation* (2012), <https://www.opensocietyfoundations.org/sites/default/files/europe-community-living-20120507.pdf>
- Parckar G., 'Disability Poverty in the UK', *Leonard Cheshire Disability* (2008), www.lcdisability.org/?lid=6386
- Priestley M., 'National accessibility requirements and standards for products and services in the European single market: overview and examples', *ANED* (2013)
- Quinn G., *The interaction of Non-discrimination with article 9*, unpublished paper (on file with author)
- Recommendation of the Committee of Ministers, REC (2006)5, The Council of Europe Action Plan to Promote the Rights and full Participation of People with Disabilities in Society: Improving the Quality of Life of People with Disabilities in Europe 2006–2015, 5 April 2006
- Recommendation of the Committee of Ministers, REC (2015)2, Human rights: a reality for all – Council of Europe Disability Strategy 2017–2023, 25 June 2015
- Regent S., 'The Open Method of Coordination: a supranational form of governance?', *International Institute for Labour studies, Decent Work Research Programme, Discussion Paper DP/137/2002* (2002)
- Ruptash S., 'How to promote Universal Design through Passion, Knowledge and Regulations', in The Delta Centre (ed.) *Trends in Universal Design: An anthology with global perspectives, theoretical aspects and real world examples* (Norwegian Directorate for Children Youth and Family affairs, 2013)

- Sabel C. and Zeitlin J., 'Active Welfare, Experimental Governance, and pragmatic Constitutionalism: The New Transformation of Europe', unpublished paper prepared for the International Conference of the Hellenic Presidency of the European Union, *The Modernization of the European Social Model and EU Policies and Instruments*, Ioannina, Greece, May 21–22 2003, p. 24
- Schulze M., 'Understanding the UN Convention on the Rights of Persons with Disabilities: A handbook on the Human Rights of Persons with Disabilities, Handicap International', *Handicap International* (2010), www.hiproweb.org/uploads/tx_hidrtdocs/HICRPDManual2010.pdf
- Sen A., 'Social exclusion: Concept, application and scrutiny', *No. 1. Social Development Papers* (2000), <https://www.adb.org/sites/default/files/publication/29778/social-exclusion.pdf>
- Sen A., *Disability and justice, Disability and Inclusive Development*, Conference-Keynote, Washington
- Social Platform, 'Report: Ensuring access to services of general interest: A mapping of existing European Commission's processes which guarantee universal access to basic services with a particular focus on access of groups facing exclusion and/or discrimination', *Social Platform* (2010)
- Steer Davies Gleave 'Report of the study, Application and enforcement of the regulation concerning the rights of disabled people and persons with reduced mobility when travelling by air', *Steer Davies Gleave* (2010), https://ec.europa.eu/transport/sites/transport/files/themes/passengers/studies/doc/2010_06_evaluation_regulation_1107-2006.pdf
- Steer Davies Gleave, 'Comprehensive Study on Passenger transport by coach in Europe', *Steer Davies Gleave* (2016), <https://ec.europa.eu/transport/sites/transport/files/modes/road/studies/doc/2016-04-passenger-transport-by-coach-in-europe.pdf>,
- Steer Davies Gleave, 'Report of the study, Evaluation of Regulation 1371/2007, on the application and enforcement in the Member States of the Regulation on rail passengers' rights and obligations', *Steer Davies Gleave* (2012), <https://ec.europa.eu/transport/sites/transport/files/themes/passengers/studies/doc/2012-07-evaluation-regulation-1371-2007.pdf>
- Strategy & Evaluation Services, 'Non-discrimination mainstreaming – instruments case studies and way forwards', *Strategy & Evaluation Services* (2007), http://edz.bib.uni-mannheim.de/daten/edz-ath/gdem/07/mainstr07_en.pdf
- Technosite et al., 'Annual Report: Monitoring e-accessibility in Europe: 2010', *European Commission* (2010)
- Technosite et al., 'Study on assessing and promoting e-accessibility', *European Commission* (2013), <https://ec.europa.eu/digital-single-market/en/news/study-assessing-and-promoting-e-accessibility>
- Zero Project Report, 'International Study on the Implementation of the UN Convention on the Rights of Persons with Disabilities', *Zero Project Report* (2011)

