A Disabled Market: Free Movement of Goods and Services in the EU and Disability Accessibility

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A Disabled Market: Free Movement of Goods and Services in the EU and Disability Accessibility

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Abstract: *Individuals with a disability who wish to use goods and services can have a variety of specific needs, ranging from accessible written information to standard products and services which have disability accessibility features built into them. In light thereof, this article focuses on the impact which Community law has had, and could potentially have, on ensuring an EU-wide market in products and services which are accessible to consumers with a disability. The article examines the (possible) impact of a variety of provisions, including the rules relating to the free movement of goods and services (Articles 28 and 49 EC, respectively), the internal market (Articles 94 and 95 EC), non-discrimination (Article 13 EC), EU citizenship provisions, and the work of the European standardisation bodies such as CEN. The central question throughout the article is does EC law allow for, or discourage, the establishment of mandatory disability accessibility standards at the national or EU level, and have the provisions been used to permit or establish such standards to date?*

Introduction

The European Community has progressively and successfully worked towards the establishment of 'an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital'.[1] The internal market should serve to promote economic development and, amongst others, 'the raising of the standard of living and quality of life'.[2] In order to establish the internal market, the European Community has a number of (legal) tools at its disposal. In the context of free movement of goods, Article 28 EC prohibits quantitative restrictions and national 'measures having equivalent effect' thereto, whilst Article 49 EC prohibits restrictions on freedom to provide services, and operates

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[1] Article 3(1)(c) EC.

[2] Article 2 EC.

in a similar manner to Article 28 EC.[3] Meanwhile, Articles 94 and 95 EC allow the Community to establish harmonised standards to secure the free movement of goods and services in an internal market. Moreover, other provisions of the Treaty, such as those relating to EU citizenship and even Article 13 EC, which provides the competence to combat discrimination against individuals on a variety of grounds, arguably can be of relevance in establishing the internal market. Lastly, the work of the European standardisation bodies, such as CEN and Cenelec, make an important contribution to establishing *de facto* harmonised European standards for products which, once complied with, give full access to the internal market. In sum, the combination of these negative and positive approaches to harmonisation has all but removed barriers to the trade of goods and services within the EU.

The question examined in this article is what impact these measures have had, and could potentially have, on ensuring an EU-wide market in products and services which are accessible to disabled consumers, thereby contributing to an improved quality of life for such individuals and their families. Disabled individuals can have a variety of specific needs, ranging from accessible (written) information, which can itself take a variety of forms, to standard products which have disability accessibility features built into them. In the absence of such accessibility features, many disabled people will find goods and services which are in free circulation in the internal market to be impractical or even unsafe to use. The question therefore is, do the myriad of (legal) provisions[4] relating to the internal market which the Community has at its disposal allow for, or discourage, the establishment of mandatory accessibility standards, and have they been used to permit or establish such standards to date?

Disability Accessibility and Goods and Services

The group of disabled people is highly diverse, as are the kind of accessibility needs they have in the context of access to goods and services. Accessing information is a key factor and people with visual, hearing and intellectual impairments often require that information be provided in alternative formats.[5] This may be, respectively, Braille, large print and audio information; sign language and text-based information; and easy to read text and symbols. People with mobility difficulties, including people who use wheelchairs but also, on occasions, people with visual or hearing impairments, have specific access needs with regard to buildings where services are provided, and transport facilities, as well as requiring a means of identifying accessible premises and facilities in advance. Issues relating to disability accessibility also arise in a number of other areas including electronic commerce,[6] digital broadcasting and

[3] In addition, Directive 2006/123/EC on services in the internal market, [2006] OJ L376/36, is also designed to achieve the free movement of services.

[4] Including the possibility to request the European standardisation bodies to develop harmonised technical standards.

[5] Note, eg, Recital 13 of Regulation 1107/2006 of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L204/1 (discussed below), which provides: 'All essential information provided to air passengers should be provided in alternative formats accessible to disabled persons . . . '.

[6] This embraces many elements such as online banking and the purchase of goods or services over the internet.

reception,[7] access to public telephones and the broad area of telecommunications.[8] To give but one example, digital publications available or sold online are sometimes incompatible with screen reader technology[9] meaning that individuals can purchase e-books, and then be unable to 'read' them, and information regarding accessibility is not available prior to purchase.[10] In many cases, accessibility is also linked to questions relating to the safety of disabled consumers and users.[11]

Goods and services, which can be used by disabled people, fall into two categories. First, there are mainstream or barrier-free goods and services which can be used by disabled people, as well as other consumers and users. These are goods and services where, from the design or inception stage, the needs of disabled consumers have been considered and incorporated, and which can be used easily by such individuals, if necessary following minimal modification. The terms 'design for all' or universal design refer to such processes, and the process is linked to the broader approach of disability

[7] Relevant issues concern access symbols for subtitling, audio description, signing, voice input and output and requirements to enable visually impaired users to access interactive services through digital television terminals.

[8] For more information on disability accessibility in this area, see, eg, the brochure *Moving Towards a Fully Inclusive Digital Europe, European Digital Technology and eAccessibility* (EICTA, 2007), available at http://www.eicta.org. See generally Commission Communication European i2010 initiative on e-Inclusion. 'To be part of the information society', COM (2007) 694 final (8 November 2007), which states (at 2.2(5)): 'Lack of e-Accessibility persists in many countries, eg regarding websites, digital television, phone access to emergency services, or public information terminals, and new barriers appear. This is often due to structural market failures and lack of common approaches in the internal market which pose serious barriers for industry. Mass-market technologies and services often continue to ignore inclusive design/design for all. An e-Accessibility business of many billions is left untapped (disabled people are estimated at 15% of the EU population)'. The Communication continues (at 2.3(5)): 'There is a lack of effective legislative frameworks to firmly safeguard rights of users at risk of exclusion in the internal market. This is particularly visible for e-Accessibility: legislation is fragmented across Europe and of a limited impact. Relevant EU provisions are implemented inconsistently or not at all, mainly due to their non-binding nature, and national approaches can diverge significantly. This hinders common e-Accessibility features to the detriment of many users and of the ICT industry, which is confronted with fragmented markets and diversity of requirements'(footnote omitted). More recent Commission publications on e-Accessibility include a 2008 independent study *Accessibility to ICT Products and Services by Disabled and Elderly People*, which includes an evidence-based analysis for a possible coordinated European approach to web accessibility and addresses a framework for further development of EU legislation or other coordination measures on e-Accessibility, available at http://ec.europa.eu/information_society/activities/einclusion/policy/accessibility/com_2008/index_en.htm; and a Commission Communication, Towards an Accessible Information Society COM (2008) 804 final, which makes suggestions for improving web accessibility in particular, and e-accessibility in general, available via the same website.

[9] These are software programs which can read aloud text which is placed on the computer screen.

[10] The incompatibility of digital publications with screen reader or other adapted technology results from the way in which digital rights management systems (DRMs) work. DRMs are designed to prevent unauthorised use of software, including through its modification. However, blind and partially sighted people read electronic material by modifying the way it is presented; eg by transforming the text into audio information. In some cases, DRMs respond to such assistive technology by regarding it as an illicit operation and blocking it. For further information see European Blind Union Response to the European Commission's Consultation on Content Online in Europe's Single Market, available at http://ec.europa.eu/avpolicy/docs/other_actions/contributions/eur_blind_union_col_en.pdf.

[11] In this context it is interesting to note the following statement included in the Commission Communication, A Single Market for 21st Century Europe, COM (2007) 724 final (20 November 2007): 'Empowering consumers, including more vulnerable consumers with special needs or disabilities, setting individual rights and accessibility standards, and protecting them against risks and threats that they cannot tackle as individuals is a central goal of the consumer policy strategy' (para 2.1, box 1(6)).

mainstreaming involving the incorporation of disability-related requirements into general policy and legislation. Examples include websites which meet the Web Accessibility Initiative (WAI) Guidelines;[12] hotels and locations which are physically accessible to people who use wheelchairs; standard computer hardware and software which can be easily adapted to incorporate Braille readers and be used with 'screen reader' technology; (mobile) telephones which provide sufficient opportunities to communicate via text and combine a variety of other accessibility features;[13] and buses and train carriages which are accessible to people with mobility impairments.

Second, goods and services can be designed only to meet the specific needs of people with particular sorts of impairments. Obvious examples include wheelchairs and hearing aids, and specialised transport schemes.

The focus of this article is on mainstream or accessible goods and services, and the impact which Community law can have on stimulating the provision and marketing of such products within the EU. Incorporating disability accessibility requirements can result in extra costs, including costs relating to design, manufacture, licensing and marketing. As a consequence, the unilateral imposition of such requirements by a Member State on suppliers of goods or service providers operating within its territory, and the consequent exclusion of goods and services which do not meet these standards, could affect intra-Community trade. On the other hand, the establishment of harmonised disability accessible standards for particular goods or services by the Community could create a single market in disability accessible products.

Securing the Free Movement of Goods—Article 28 EC[14]

Article 28 EC prohibits quantitative restriction on imports as well as all measures having equivalent effect, and is directed towards achieving the free movement of goods within the Community. The European Court of Justice (ECJ) has defined the concept of measures having equivalent effect to a quantitative restriction very broadly to include 'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade . . . '.[15] The only exceptions to this prohibition are found in Article 30 EC and in the mandatory requirements recognised by the Court. Can domestic disability accessibility requirements be regarded as hindering intra-Community trade and, if so, could they be saved by Article 30 EC or the Court recognised mandatory requirements?

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[12] See the website available at http://www.w3.org/WAI/. According to the Ministerial Declaration on ICT for an Inclusive Society (Riga Declaration) of 11 June 2006, only 3% of public websites comply with the minimum web accessibility standards and guidelines, thereby hindering access to web content and services for people with disabilities (para 3).

[13] Accessibility features to assist people with hearing impairments (and others) include magnetic earpiece speakers in wireless phones which provide better sound quality, inductive loop technology which can communicate via hearing aids, vibrating alerts, SMS, and customised ring tones with varying frequencies. Other accessibility features to assist people with visual impairments (and others) can include specific programmable ring tones to identify incoming calls; speech output capabilities that allow the phone to provide information orally; high contrast displays; and voice recognition.

[14] In addition to Article 28 EC, Article 25 EC (prohibition of customs duties and charges having equivalent effect) and Article 90 EC (prohibition of internal taxation on products from other Member States which is in excess of taxation imposed on comparable domestic products) also play a part in securing the free movement of goods. Since such charges are unlikely to be related to the disability accessibility of products, they are not considered further in this article.

[15] Case 8/74, *Procureur du Roi v Dassonville* [1974] ECR 837 at para 5.

Discriminatory rules, which impose different requirements on domestic products and imported products, are of course caught by the Article 28 EC prohibition. Such rules can include the situation where a Member State requires tenderers to supply products which meet certain national standards, and excludes (non-)national tenders which do not use products that meet those standards.[16] In theory, a comparable situation could arise regarding a public call for tender which required that the delivered products, such as telephones or computers, be disability accessible.[17] If the tender called for products which met a specific domestic disability accessible standard,[18] and no possibility existed for considering whether products which did not conform to this standard nevertheless provided the necessary levels of accessibility, then it is likely that it would fall foul of Community rules. On the other hand, if the question of whether the access needs were met was central and exclusive reliance was not made on a nationally set standard, the tender would be compatible with Community law. Disability accessible products are made in a variety of countries, including the USA, which has far higher standards regarding accessibility than exist in Europe.[19] This means that such a requirement would be unlikely to limit the supply of goods to a particular manufacturer or to products produced in a particular Member State.

However, it is not only measures which openly discriminate against imported products which can fall foul of Article 28 EC. In its well-known *Cassis de Dijon*[20] case, the ECJ interpreted the prohibition contained in Article 28 EC very widely to cover also indistinctly applicable rules in certain circumstance. As a result, even where the same rule applies to imported and domestic products, it is still possible for a measure having equivalent effect to a quantitative restriction to exist, and therefore to be prohibited. In *Cassis de Dijon*, the Court held that a unilateral requirement imposed by the German authorities, which had the effect of excluding a lawfully produced French alcoholic drink from being marketed in Germany, amounted to an obstacle to trade which could not be justified. The judgment embraces the principle of mutual recognition and is

[16] See Case 45/87, *Commission v Ireland* [1988] ECR 4929 concerning a tender in which the authorities required all tenderers to submit bids based on the use of certain water pipes which met a specific Irish standard, and which were only made in Ireland.

[17] In this context, see Standardisation Mandate to CEN, CENELEC and ETSI in support of European Accessibility Requirements for Public Procurement of Products and Services in the ICT domain (M376-EN, 7 December 2005), discussed below.

[18] See Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services, [2004] OJ L134/1, and Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004] OJ L134/114, for the possibility of including disability accessibility standards in technical specifications related to public procurement contracts.

[19] For example, the US Telecommunication Act requires that telecommunication services and equipment be designed and manufactured so as to be accessible. Moreover section 508 of the US Rehabilitation Act obliges federal entities to purchase accessible ICT goods and services, and this has naturally influenced the kind of products service suppliers and manufacturers choose to market. However, in some cases, US accessibility standards in this area are simply different from any existing EU or Member State standards, rather than, necessarily, higher. This applies to technical standards which are related to the particular technical systems which are used in the USA with regard to, eg, text telephones, audio description and hearing aids, where the relevant technical systems differ from those in use in Europe. In these areas, EU manufactures which wish to sell in the US market must comply with the US standards, and cannot market the same goods within the EU. I am grateful to Immaculada Placencia-Porrero of the Disability Unit of the Commission for pointing this out.

[20] Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (*Cassis de Dijon*).

based on the assumption that goods which have been lawfully marketed in one Member State cannot be banned from sale on the territory of another Member State, even if they are produced to technical or quality specifications which are different (lower) than those applied to the products made in the importing state. The only exceptions to this principle can be found in the aforementioned Article 30 EC and the mandatory requirements recognised by the Court.

Since disability accessibility standards which a Member State may wish to impose are likely to be indistinct, in that they will apply to all goods on the market irrespective of origin, it is worth considering whether any of the mandatory requirements recognised by the Court in *Cassis de Dijon* or subsequently can justify their use.[21]

Amongst the mandatory requirements recognised as justifying indistinctly applicable rules which impact on trade is consumer protection, and the Court has placed a great deal of importance on the need to provide adequate labelling to inform consumers of, for example, the contents of a product.[22] However, the Court has also recognised that domestic labelling requirements, which differ from those found in other Member States, can act as a barrier to the marketing of imported goods. This dilemma is reflected in the early judgment of Case 27/80, *Fietje*,[23] in which the Court found that domestic labelling requirements could impede trade between Member States but that, in some circumstances, such requirements could be justified on the grounds of consumer protection.

Nevertheless, the Court has a mixed record when it comes to accepting restrictions on labelling and marketing which are designed to protect 'vulnerable' consumers. In a number of cases regarding such requirements, where it was argued that the labelling of imported products could cause confusion for domestic consumers, the Court has come down on the side of deregulation and found that 'reasonably circumspect'[24] consumers will still be able to make informed choices and not experience confusion.[25] This has led

[21] The exceptions provided for in Art 30 EC, addressing grounds such as public morality and the protection of national treasures, do not seem relevant in this context, and are not discussed further in this article. The only Art 30 EC based exception which could conceivably apply relates to the protection of health and life of humans. This area is considered below in the context of mandatory requirements relating to consumer protection and public health.

[22] See, eg, Case 178/84, *Commission v Germany* [1987] ECR 1227 (the German 'Beer Purity' Case) in which the Court held that adequate labelling could alert German consumers to the content of beer, and to the fact that some (foreign) drinks contained ingredients other than those allowed in the German Beer Purity Laws.

[23] Case 27/80, *Fietje* [1980] ECR 3839. This case concerned a Dutch requirement that certain alcoholic beverages could only be marketed under a description established under domestic law, which differed from the rules in place in the country of origin.

[24] For a reference to this term in the ECJ's case-law, see Case C-470/93, *Verein gegen Unwesen in Handel und Gewerbe Köln eV v Mars GmbH* [1995] ECR I-1923, at para 24. See also S. Weatherill, 'Recent Case Law concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation', (1999) 36 *Common Market Law Review* 51 at 60.

[25] Such was the situation in Case C-315/92, *Verband Sozialer Wettbewerb eV v Clinique Laboratories SNC* [1994] ECR I-317, in which the German authorities prohibited the sale of a line of cosmetics carrying the name Clinique on the grounds that consumers, aware that the similar German term *Klinik* meant hospital, would believe that the products had medicinal properties. The Court rejected the argument that consumers would be confused by the name and struck down the prohibition, but did not seek to deny that some consumers may have been misled. The Court stated: 'The clinical or medical connotations of the word "Clinique" are not sufficient to make the word *so misleading* as to justify the prohibition of its use on products marketed in aforesaid circumstances' (para 23; emphasis added). This suggests that the Court recognised that the name could be misleading to some (insufficient) degree.

Weatherill to note that one may conclude: 'vulnerable consumers are sacrificed to the interests of self-reliant consumers in deregulation, market integration and wider choices'.[26] In contrast, however, is the judgment in Case 382/87, *Buet*[27] in which the Court found that a restriction that was designed to protect individuals who were 'particularly vulnerable'[28] was acceptable.

Labelling and consumer protection are issues which also arise with regard to disability accessibility. For example, national rules requiring that medicine carry labels which include pictures symbolising danger that can be understood by people with a intellectual disability[29] would exclude imported products which did not comply with these requirements from being marketed, and would need to be justified. The Court's case-law suggests that it might be open to accepting such national requirements on the grounds of consumer protection, where labelling requirements in the exporting Member State do not require equivalent accessible information. In the case of pictorial information, it may be appropriate to require importers to use a domestic pictorial system, even where similar images are already being used in accordance with the requirements of another Member State. This is because some people with an intellectual disability may have difficulty recognising the significance of even a similar 'foreign' image. It is undoubtedly true that such consumers would be regarded as particularly 'vulnerable'. However, it is unclear if the Court would be prepared to go further and allow a Member State to require that instruction manuals be made available in disability accessible formats, or that products only be marketed if they contain certain disability accessible features. The Court may not regard the absence of such manuals or features as presenting a (sufficient) risk to consumers and the requirements imposed on manufacturers and importers may be regarded as too burdensome, leading the Court to come down on the side of free movement of inaccessible products.

A further mandatory requirement, which is also referred to in Article 30 EC, relates to the protection of public health.[30] In the context of disability accessibility, it could be argued that certain products which do not incorporate accessibility features, such as public transport vehicles,[31] pose a risk to the health and safety of travellers with certain

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[26] Weatherill, *op cit* n 24 *supra*, at 58.

[27] Case 382/87, *Buet and Educational Business Services v Minstère Public* [1989] ECR 1235. This case concerned a French restriction on door-to-door canvassing and selling of educational material. The Court found that the restriction was justified on the grounds of consumer protection and noted that the law aimed to protect possible purchasers who were 'behind with their education and are seeking to catch up' (para 13). In this respect, Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, [2005] OJ L149/22, is also worth noting. Article 5(3) of the Directive provides: 'Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group'.

[28] *ibid*, para 13.

[29] EC law already requires that medicinal products include information in Braille on the packaging. See below for further details.

[30] See, eg, the aforementioned 'Beer Purity' case, n 22 *supra*.

[31] Note that in fact a number of EC transport instruments do include provisions mandating disability accessibility standards. See, eg, Directive 96/48/EC on the interoperability of the trans-European high-speed rail system, [1996] OJ L235/6; Directive 2001/16/EC on the interoperability of the trans-European conventional rail system, [2001] OJ L110/1 as modified by Directive 2004/49/EC on safety on the Community's railways (Railway Safety Directive), [2004] OJ L164/44; and Directive 2003/24/EC amending Council Directive 98/18/EC on safety rules and standards for passenger ships, [2003] OJ L123/18.

impairments, and that accessibility requirements are therefore justified. On the other hand, the failure to include such accessibility features within public transport vehicles may effectively lead to some disabled people having no choice but to avoid such modes of transport, meaning that no direct risk to health and safety exists, but also to a situation where disabled travellers are excluded, against their will, from services and facilities available to other members of the public.

Even when Community rules do allow Member States to require that disability accessibility be incorporated into the design or packaging of certain goods, as was suggested may potentially be the case with regard to labelling of dangerous products, this will not necessarily remove all impediments to a state adopting such rules. Economically powerful Member States such as Germany, the UK and France may feel free to introduce such standards knowing that producers and importers will probably choose to comply with the disability accessibility standards in order to continue to have access to the large and lucrative markets these states offer. Such standards may even result in producers adapting their manufacturing or labelling process on a Europe-wide level.

On the other hand, smaller Member States are less able to pick and choose and the setting of specific disability requirements by states, such as Luxembourg or Malta, may simply result in producers and importers choosing no longer to market their products in those countries at all. In this context, the only solution would seem to be Community-wide rules requiring disability accessibility.[32]

This article will now consider the role Article 95 EC measures can play in promoting disability accessibility. However, before doing so, a brief examination of the rules concerning the free movement of services will be made.

Securing the Free Movement of Services—Article 49 EC

In many respects, the rules concerning the free movement of services[33] are similar to those relating to the free movement of goods.[34] This has been reinforced in recent years by the Court's tendency to regard all four fundamental freedoms as being based

[32] This reality seems to be reflected in Regulation 1107/2006, n 5 *supra* (discussed below) which concerns the setting of mandatory standards to ensure that people with disabilities are able to access and travel by air throughout the EU. Recital 19 to the Regulation reads: 'Since the objectives of this Regulation, namely to ensure high and equivalent levels of protection and assistance throughout the Member States and to ensure that economic agents operate under harmonised conditions in a single market, cannot sufficiently be achieved by the Member States and can therefore, by reason of the scale or effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty . . . '.

[33] Article 50 EC.

[34] See V. Hatzopoulos and T Uyen Do, 'The Case Law of the ECJ concerning the Free Provision of Services: 2000–2005', (2006) 43 *Common Market Law Review* 923 for, *inter alia*, a discussion of how the rules relating to Internal Market freedoms are converging. However, Peter Oliver and Stefan Enchelmaier also note that where 'less obviously restrictive measures are at stake' noticeable differences between the case-law based on Articles 28 and 49 emerge. Nevertheless, the principles governing justification of restrictions, which are the primary focus here, are essentially the same: P. Oliver and S. Enchelmaier, 'Free Movement of Goods: Recent Developments in the Case Law', (2007) 44 *Common Market Law Review* 649, at 670.

on the same principles[35] and the adoption of Directive 2006/123/EC (the Services Directive).[36]

As with provisions relating to free movement of goods, restrictions which are non-discriminatory in effect can be caught by the Article 49 EC prohibition. Since the requirement to provide services which are disability accessible would probably apply in the same way to domestic and foreign service providers, and equally to impose restrictions on their access to the market, they are likely to be regarded as non-discriminatory. Such restrictions can be justified on the Treaty-based grounds of public policy, security and health,[37] and on a series of grounds which have been developed by the Court using an approach similar to that developed in *Cassis de Dijon*.

Case-law relating to restrictions imposed on free movement of services has frequently considered licensing and authorisation requirements imposed on service providers. In Case C-496/01, *Commission v France*[38] the Court held that it was permissible for the French authorities to require that laboratories, established outside France and which carried out medical analyses, comply with quite detailed French rules and quality criteria in order to obtain authorisation, as long as the French rules were not a mere duplication of equivalent rules which the laboratories were subject to in the Member State of establishment. It was recognised that such requirements could impose a barrier to the free movement of services, but this was justified by the need to ensure a high level of public health protection. The Court was therefore prepared to allow national standards which set quality standards for foreign service providers on the grounds of protecting public health. However, the Court has not had the opportunity to consider whether quality standards leading to disability accessibility of services amount to a (justified) restriction on service providers, leaving this an area of uncertainty.

The problems related to Member States unilaterally setting standards to promote disability accessibility, which were identified with regard to goods, also apply in the area of services. However, a (rare) example of a large state mandating a disability accessible service is the requirement imposed by British authorities on all key broadcasters to provide Audio Description. Audio Description is an additional narrative soundtrack provided on television programmes to assist people who are blind or partially sighted. During gaps in programme dialogue, additional information is provided on the visual plot. Generally, other Member States do not impose such requirements on broadcasters, although broadcasters in countries such as France and Germany do offer some degree of Audio Description.[39]

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[35] Case C-55/94, *Gebhard v Consiglio dell'Ordine degli Avvocate e Procuratori di Milano* [1995] ECR I-4165 and Case C-390/99, *Canal Satélite Digital v Administracíon General del Estado* [2002] ECR I-607, relating to the supply of equipment needed to receive digital television and receiving television broadcasts, in which the Court treated the case-law on goods and services as being the same (see paras 31–43 in particular).

[36] Directive 2006/123/EC, above n 3.

[37] Article 46 EC.

[38] Case C-496/01, *Commission v France* [2004] ECR I-2351.

[39] Note that the Audiovisual Media Services (Television without Frontiers) Directive (Directive 2007/65/EC on the coordination of certain provisions laid down by law, regulation or administrative action in the Member States concerning the pursuit of television broadcasting activities, [2007] OJ L332/45) provides in Chapter IIa, Article 3c: 'Member States shall encourage media service providers under their jurisdiction to ensure that their services are gradually made accessible to people with a visual or hearing disability'. This clearly stops short of mandating the use of Audio Description, but is an explicit recognition of the particular needs of some people with disabilities.

Internal Market Legislation—Articles 94 and 95 EC

Articles 94 and 95 EC provide the Community with the competence to adopt harmonising measures which have as their object the establishment and functioning of the common or internal market. Article 95(3) EC further obliges the Commission to take, as a base, a high level of protection when proposing measures concerning, *inter alia*, health, safety and consumer protection.

The potential clearly exists to include disability accessibility requirements when establishing harmonisation measures on the basis of Article 94 and 95 EC. Indeed, in recognition of the need to take account of the disability dimension when formulating internal market legislation, Declaration 22 was attached to the Amsterdam Treaty. This reads:

> Declaration regarding persons with a disability
>
> The Conference agrees that, in drawing up measures under Article 100a (now Article 95) of the Treaty establishing the European Community, the institutions of the Community shall take account of the needs of persons with disabilities.

Given that the internal market is an extremely broad notion which encompasses the removal of all kinds of barriers to trade, it is not surprising to find that Article 95 EC has provided the legal basis for instruments addressing many different areas. In a few cases, these mainstream instruments have recognised a specific disability dimension, although this has not been explicitly linked to Declaration 22. For example, Directive 2001/85[40] on vehicles carrying more than eight passengers requires the mandatory fitting of certain accessibility features for persons with reduced mobility and visually impaired persons; Directive 95/16/EC[41] on lifts refers to the need to ensure accessibility for disabled persons; Directives 2004/17[42] and 2004/18[43] on public procurement provide that, whenever possible, technical specifications relating to public procurement contracts should take into account accessibility for disabled people and design for all requirements;[44] Directive 1999/5[45] on radio and telecommunication terminal equipment provides that the Commission may decide that apparatus shall support features to facilitate their use by disabled persons; Directive 2002/21[46] on electronic communications networks and services requires national regulatory authorities to address the

[40] Directive 2001/85/EC relating to special provisions for vehicles used for the carriage of passengers comprising more than eight seats in addition to the driver's seat, and amending Directives 70/156/EEC and 97/27/EC, [2002] OJ L43/1.

[41] Directive 95/16/EC on the approximation of the laws of the Member States relating to lifts, [1995] OJ L213/1 as amended.

[42] Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, [2004] OJ L134/1.

[43] Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004] OJ L134/114.

[44] In this context, see Build for All, *Promoting Accessibility for All to the Built Environment and Public Infrastructure* (Luxembourg, 2006). The Build for All Reference Manual aims to provide assistance for the inclusion of accessibility criteria in public calls for tenders under the Public Procurement Directive. See also the website available at http://www.build-for-all.net/.

[45] Directive 1999/5/EC on radio and telecommunications terminal equipment and the mutual recognition of their conformity, [1999] OJ L91/10.

[46] Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive), [2002] OJ L108/35.

needs of disabled users in a variety of ways; and Directive 2002/22[47] on universal services and 'users' rights relating to electronic communication networks and services requires Member States to ensure that covered services are affordable for disabled users and that they have the same conditions of access as others. In light of the earlier discussion concerning the possibility of adopting mandatory standards relating to the inclusion of accessible information on packaging of products, Directive 2004/27/EC[48] is of particular interest. This Directive, which amends Directive 2001/83/EC[49] on the Community code relating to medicinal products for human use, requires that the name of medicinal products must be expressed in Braille on the packaging, and that the marketing authorisation holder must ensure that the package information leaflet is made available, on request from patients' organisations, in formats appropriate for blind and partially sighted people.[50] All of these instruments have, as their legal basis, Article 95 EC,[51] and therefore recognise the disability dimension to securing the internal market.

In order to understand how such references to disability can be included within legal instruments based on Article 95 EC, it is worth studying the (non-binding) preambles to some of the measures. For example, the Preamble to Directive 2001/85, on vehicles used for the carriage of more than eight passengers, specifies that technical requirements relating to vehicles can differ from one Member State to another, and that such differences prevent vehicles being sold in the Community market. For that reason, the Directive sets out harmonised requirements to facilitate the proper functioning of the internal market. Whilst the principal aim of the Directive is to guarantee the safety of passengers,[52] the Directive recognises that it is also necessary to provide technical

[47] Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), [2002] OJ L108/51.

[48] Directive 2004/27/EC amending Directive 2000/83/EC on the Community code relating to medicinal products for human use, [2004] OJ L136/35. I am grateful to Nicola Bedlington and the staff at the European Patients' Forum for helping me track down this instrument.

[49] 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, [2001] OJ L311/67.

[50] Article 1(42), which amends Art 56a of Directive 2001/83/EC, *ibid.*

[51] In the case of Directive 2004/17 and 2004/18 on public procurement, Arts 47(2) EC and 55 EC are also legal bases in addition to Art 95 EC.

[52] As stated in Recital 11 of the Preamble to the Directive. In some respects it is remarkable that guaranteeing the safety of passengers is regarded as the principal aim of a directive based on Art 95 EC. That Article, after all, relates to the 'establishment and functioning of the internal market', and not health and safety. In this perspective, it is recalled that, in Case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union* [2000] ECR I-8419 ('*Tobacco Advertising*' case), the Court annulled a directive, which was based, *inter alia*, on Art 100a EC (now Art 95 EC), which sought to establish an EU-wide ban on the advertising and sponsorship of tobacco products. The Court found that the outright ban could not be justified by the need to eliminate obstacles to the free movement of advertising media or the freedom to provide services, and that the directive did not ensure the free movement of products which were in conformity with its provisions. Nor was the directive apt to eliminate appreciable distortions of competition. In light thereof, the Court found Art 100a *et al* could not provide the legal basis for the instrument, as the directive went beyond the scope of the competence to act provided by those Treaty Articles. However, in Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health* [2005] ECR I-6451, the Court also stated 'provided that the conditions for the recourse to Article 95 EC as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made' (para 30). One can conclude that, whilst the concern to protect the safety of passengers is the main driver behind Directive 2001/85/EC, the use of Art 95 EC as a legal basis is nevertheless permitted and appropriate because the directive also seeks to contribute to the establishment and functioning of the internal market.

prescriptions to allow accessibility for persons with reduced mobility in accordance with Community transport and social policies. The aim of this Directive was therefore to create harmonised design standards to ensure a single market for such vehicles, and, at the same time, to ensure that these standards contributed to the safe transport of passengers. With regard to the latter, the legislators recognised that certain travellers with a disability required specific safety measures, and included appropriate and additional standards within the Directive.

Nevertheless, there are many examples of Article 95 EC based instruments which could have potentially included disability specific clauses, but which do not. For example, Directive 2001/95 on general product safety,[53] which aims to ensure that consumer products placed on the market are safe, makes no reference to the specific safety requirements of disabled users, and this is true of many other Article 95 EC Directives addressing safety, such as those concerning toys.[54]

Therefore, whilst Article 95 EC has clearly been used in a number of instances to include disability accessibility requirements within internal market legislation relating to both goods and services, it seems that there are also many instances where such requirements have been overlooked, thereby making it more difficult for Member States to establish national disability accessible standards.

Standardisation Bodies and Accessible Goods and Services

Given the difficulties involved in developing technical harmonisation standards in EC legislation, the Community has, since the mid-1980s, favoured the use of so-called 'New Approach directives' to promote the recognition of common standards.[55] Under this approach, legislative harmonisation is limited to setting essential requirements that products placed on the Community market must meet. Technical specifications, which elaborate how a product can meet the set essential requirements, are established through (non-binding) harmonised European-wide standards. However, these are not developed by the Community itself, but by (private) European standardisation bodies, CEN,[56] Cenelec[57] and ETSI[58].[59] These European standards are then adopted or 'transposed' by national standardisation bodies in each Member State. Whilst compliance with these common technical standards by manufacturers and suppliers remains voluntary, there is a strong incentive to do so, since this will lead to a presumption of conformity with the legislatively established essential requirements and, therefore,

This is stated in, *inter alia*, Recital 4 of the Preamble to the Directive which states 'The adoption of harmonised requirements by all of the Member States in place of their national regulations should facilitate the proper functioning of the internal market for these vehicles'. In light of the judgment in the *Tobacco Advertising* case, such an internal market dimension is essential for the directive to be validly based on Art 95. I am grateful to an anonymous reviewer of this article for making this point.

[53] Directive 2001/95/EC on general product safety, [2002] OJ L11/4.

[54] Directive 88/378/EEC on the approximation of the laws of the Member States concerning the safety of toys, [1988] OJ L187/1 as amended.

[55] See Council resolution on a new approach to technical harmonisation and standards, [1985] OJ C136/1.

[56] European Committee for Standardisation.

[57] European Committee for Electrotechnical Standardisation.

[58] European Telecommunications Standards Institute.

[59] These three bodies are listed as European Standardisation Bodies in Annex I to Directive 98/34/EC of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, [1998] OJ L2004/37.

access to the internal market. The Commission, under Directive 98/43/EC,[60] has the authority to request the standardisation bodies to develop standards to complement legislatively established essential requirements.[61] In practice, the Commission does this by issuing 'mandates' to the standardisation bodies. These have been described as 'part contract—fixing target dates, arranging financial modalities and so forth, and part technical elaboration of the essential requirements'.[62] Mandates can also be given even when no 'New Approach' directive exists. In these cases, the mandates replace the essential requirements and are the only legal requirement set on the standards.[63] One can conclude that '[s]tandardisation is an integral part of the Council's and Commission's policies . . . to remove barriers to trade . . . '[64] and that the 'New Approach' has given a tremendous boost to its work in this area. CEN, for example, has produced over 13,000 publications over its lifetime.[65]

Clearly, an approach to standardisation which incorporates disability accessibility standards could help to facilitate the free movement of accessible goods. The Commission has recognised this in its 2004 Communication on the role of European standardisation in the framework of European policies and legislation. It acknowledges that standards are an 'important instrument for making society and economy more inclusive' and 'there is a growing market for goods and services that satisfy the requirements of disabled and/or elderly people'. The Commission therefore concludes: 'Standardisation has the potential to respond to this challenge and to pave the way for the introduction of innovative state of the art technologies that ensure accessibility for all. However, this requires strong commitment from all stakeholders involved in this process'.[66]

One can expect that the involvement of consumer organisations and, in particular, organisations representing people with disabilities in the standard setting process would be likely to lead to more account being taken of the need to ensure disability accessibility. However, full membership of the standard-setting bodies is reserved to national standardisation authorities, and only these full members can vote and agree on the standards to be set.[67] The Commission has pressed for greater involvement of other interested parties in the process and, as a result, CEN reluctantly agreed to establish the status of associated member in 1992.[68] Amongst the associated members is ANEC, the European Association for the Coordination of Consumer Representation in Standardisation. ANEC has good contacts with the umbrella organisation representing the interests of disabled people in Europe, the European Disability Forum, and is supportive of their work to achieve greater recognition of disability

[60] *ibid.*

[61] Although there is no obligation on the standardisation bodies to actually do so.

[62] H Schepel, *The Constitution of Private Governance* (Hart, 2005), at 240.

[63] *ibid*, at 240.

[64] Communication from the Commission to the European Parliament and the Council on the role of European standardisation in the framework of European policies and legislation, COM (2004) 674 final (18 October 2004), at 2.

[65] Information published on CEN homepage, available at http://www.cen.eu/cenorm/standards_drafts/index.asp.

[66] Commission Communication, *op cit* n 64 *supra*, at 7 (original emphasis removed).

[67] For a brief description of the process whereby standards are developed and adopted within CEN, see Schepel, *op cit* n 62 *supra*, at 101–107.

[68] *ibid*, at 103 and 244–246.

accessibility needs in terms of standardisation.[69] Nevertheless, their voice is restricted within CEN and Cenelec.[70]

One means by which the Community can stimulate the standardisation bodies to take more account of disability accessibility is to include such matters within the mandates which they issue to the standardisation bodies, and the legislatively established essential requirements which need to be met before products can go into free circulation. 'New Approach' directives which set out the essential requirements are based on Article 95 EC, and include the aforementioned Directive 95/16/EC on lifts,[71] which does address disability accessibility. However, as noted above, most Article 95 EC directives do not pay specific attention to the needs of consumers with a disability. Nevertheless, the impact on technical standards of European legislation referring to disability accessibility is evidenced by a search of the CEN catalogue of published standards, which revealed only four references to 'disability', three of which related to the aforementioned Lifts Directive.[72]

The Commission can also encourage the development of disability accessibility standards by issuing the standardisation bodies with mandates, even in the absence of 'New Approach' directives which set essential requirements. The Commission has done this in the context of public procurement, where it has issued standardisation mandates in support of European accessibility requirements for public procurement of products and services in the information and communication technology (ICT) domain[73] and in support of European accessibility requirements for public procurement in the built environment.[74] The standardisation bodies have established an advisory group on assistive technologies,[75] which involves both ANEC and EDF, as well as representatives from industry, academics and the standardisation bodies, and much of their work relates to the first of the aforementioned mandates concerning ICT. However, work has not yet been completed on the relevant standards.[76] Nevertheless, once again, the issuing of these mandates reveals the potential that the Commission has to prompt the development of disability accessibility standards by the European standardisation bodies.[77]

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[69] See, eg, the Joint ANEC-EDF position on web and eAccessibility legislation (ANEC-DFA-2008-G-030, July 2008), available at http://www.anec.org/attachments/ANEC-DFA-2008-G-030final.pdf.

[70] See Schepel, *op cit* n 62 *supra*, at 244–246, who argues that '[t]he integration of European wide interest groups in European standardisation conflicts with the cardinal organisation principle of national delegations. Associated members are thus formally excluded from voting and have mere "observer" status' (at 245).

[71] *op cit* n 41 *supra*.

[72] The fourth reference was to CEN/TC 293 on assistive products for persons with disability. Search carried out on 18 August 2008 via CEN search engine on the CEN homepage, available at http://www.cen.eu/esearch/. A search using the term 'disab*' revealed a slightly higher 13 hits, in the areas of lifts, escalators, and moving walks (3); fixed fire-fighting systems (1); aircraft ground support equipment (1); assistive products for persons with disability (5); and syringes (2). However, not all of these instruments necessarily promote disability accessibility.

[73] Standardisation Mandate to CEN, CENELEC and ETSI, *op cit* n 17 *supra*.

[74] Standardisation Mandate to CEN, CENELEC and ETSI in support of European Accessibility Requirements for Public Procurement in the Built Environment (M420-EN, 21 December 2007).

[75] The Design for All and Assistive Technology Standardisation Coordination Group.

[76] Status as of August 2008.

[77] I am grateful to Janina Arsenjeva of the European Disability Forum for providing me with information about these two mandates and the work being carried out in this area by CEN, CENELEC and ETSI.

Non-Discrimination and Accessible Goods and Services—Article 13 EC

Whilst the focus of this article thus far has been on how Community rules relating to free movement of goods and services and the internal market can contribute to, or hinder, the development of mandatory accessibility standards, one should also recognise that Community provisions relating to combating discrimination may also be of relevance. Article 13 EC provides the Community with the competence to take action to combat discrimination on a variety of grounds, including disability. The Article has provided the legal basis for Directive 2000/78 establishing a general framework for equal treatment in employment and occupation,[78] which prohibits employment-related discrimination on the grounds of, *inter alia*, disability. Whilst Article 13 EC has not, thus far, been used to prohibit disability discrimination with regard to goods and services, it has provided the legal basis for two directives that do address such discrimination on the grounds of ethnic and racial origin,[79] and gender.[80] Moreover, in 2008, the Commission proposed a further Article 13 EC Directive to implement the principle of equal treatment outside employment, which does address disability.[81] The proposed directive seeks, *inter alia*, to prohibit (disability) discrimination 'as regards both the public and private sectors . . . in relation to . . . access to and supply of goods and other services which are available to the public, including housing'.[82] The proposal goes on to state:

> The measures necessary to enable persons with disabilities to have effective non-discriminatory 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. Such measures should not impose a disproportionate burden, nor require fundamental alteration of the . . . goods and services in question or require the provision of alternatives thereto.[83]

Lastly, in this context, the proposal states that 'This Directive shall be without prejudice to the provisions of Community law or national rules covering the accessibility of particular goods or services'.[84]

To what extent could such a directive result in mandatory accessibility standards for goods and services?

First, it is clear that such a directive would address 'standard' discrimination-related issues that arise with regard to access to goods and services. These can be as basic as a directly discriminatory refusal to allow a disabled person to enter premises, such as a restaurant or a nightclub, because they present the 'wrong image', or a refusal to serve a disabled person. However, the kind of accessibility-related issues discussed in this article have not, thus far, been addressed via Article 13 EC non-discrimination directives, simply because they are unique to people with disabilities and do not arise in the

[78] Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16.

[79] Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L180/22 (Racial Equality Directive).

[80] Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] OJ L373/37 (Gender Goods and Services Directive).

[81] 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) 426 final.

[82] Article 3(1)(d).

[83] Article 4 (1)(a).

[84] Article 4(3).

context of the Racial Equality or Gender Goods and Services Directives. Nevertheless, a strong argument can be made that the provision of inaccessible goods and services should be regarded as a form of disability discrimination.[85] However, even accepting this position, the proposed directive, and indeed any directive based on Article 13 EC, would be unlikely to lead to the free movement of accessible goods and services for at least two reasons.

First, Article 13 EC addresses discrimination. Measures adopted on the basis of this Article cannot have the (primary) goal of contributing to the achievement of the internal market. Indeed, since Article 13 is 'without prejudice to the other provisions of [the] Treaty', this competence remains reserved to Articles 94 and 95 EC.[86] Second, as has already been seen with some of the directives that have been based on Article 95 EC, and which have set common disability accessibility standards, the establishment of such standards is a complex and technical matter. Such complexity is a consequence of the need to set Community-wide standards which are sufficiently clear and precise. Whilst an Article 13 EC Directive could include a generic obligation to provide accessible goods and services, it could not set out what accessibility standards were required in each area, thereby leaving Member States free to set differing standards. In contrast, harmonisation can (only) be achieved through Articles 94 and 95 EC.[87] Moreover, the generic obligation to provide accessible goods and services found in the current proposal is severely limited, in that there is no requirement to provide accessibility where the action needed would result in a disproportionate burden, require fundamental alteration of the goods or services, or require the provision of alternatives thereto. Arguably, the disproportionate burden limitation would have been sufficient to protect manufacturers and suppliers from being obliged to make unreasonable or impossible adaptations to ensure accessibility.

Lastly, it is also worth noting that the Community's competence to address (disability) discrimination on the basis of Article 13 EC is limited to the fields which fall within 'the powers conferred by [the Treaty] upon the Community'.[88] These limits are, in some respects, still undefined and obscure and, for example, whilst the Racial Equality Directive does address discrimination with regard to education, there is no authoritative statement identifying where Community competence to address discrimination with regard to education ends, and where the exclusive competence of Member States to regulate such discrimination begins. Similarly, the Community can only address disability discrimination with regard to access to and supply of goods and services (and other areas) in as far as this field falls within the scope of the Treaty. To the extent that

[85] Support for this position arguably is found in Regulation 1107/2006, n 5 *supra*, which states, in Art 1(1) that 'This regulation establishes rules for the protection of and provision of assistance to disabled persons . . . both to protect them against discrimination and to ensure that they receive assistance'. The Regulation is discussed in more detail below. Support can also be found in Standardisation Mandate to CEN, CENELEC and ETSI, *op cit* n 17 *supra*, which states: 'Lack of equal access to ICT products and services can be seen as a form of discrimination' (section 2.2(3)).

[86] This position seems to have been endorsed by Daniela Bankier, Head of the Equality and Action against Discrimination: Legal Questions Unit, at a public hearing held at the European Parliament, Brussels, on 'Future anti-discrimination legislation: what are the specificities of the "disability ground" ', which took place on 14 May 2008. Ms Bankier stated that, in adopting any new Art 13 EC Directive, the EC would have to legislate within its competences. This implied that no concrete rules could be established relating to product design, as this area fell outside the scope of Art 13 EC.

[87] Including, on occasions, through using the 'New Approach' discussed above.

[88] Article 13(1) EC.

this is not yet clarified, by legislation or ECJ case-law, the limits of the competence of the Community to regulate this field also remain uncertain.

EU Citizenship and Accessible Goods and Services—Article 17 EC

Since the establishment of EU citizenship in the Maastricht Treaty, it has become increasingly obvious that nationals of EU Member States have acquired a package of additional rights through Article 17 EC et al.[89] The Court, in particular, has played a leading role in interpreting and establishing such rights in the context of citizens who have exercised their right to move freely within the Union.[90] The question arises whether citizenship-based rights, and in particular the notion of intra-Community solidarity between citizens, can also contribute to the development of a legal system which promotes access by those citizens to goods and services which are disability accessible.

Writing in a national context, Marshall has argued that citizenship involves full membership of the community and is based on a package of civil, political and social rights. Social citizenship in turn entails 'the right to a modicum of economic welfare and security and the right to share to the full the social heritage and to live the life of a civilised being according to the standards prevailing in society'.[91] Arguably, citizenship is also based on the principle of solidarity,[92] whereby wealthier and stronger members of the community are obliged, through a process of 'involuntary subsidisation',[93] to provide funds to support their fellow citizens who are less privileged.

Based on this brief overview, one could argue that the social rights associated with citizenship[94] could include the right to access goods and services which are disability accessible, and that the principle of solidarity, whereby all citizens accept a slightly higher price for goods and services, thereby sharing the cost of accessibility amongst all users, could justify imposing mandatory standards.

Does EC legislation and case-law in the field of EU citizenship give any hope that such an argument could find a legal basis?

The principle of solidarity has a vital 'Community component'[95] and has undoubtedly played an important role in the way that the Court's case-law with regard to EU

[89] The relevant provisions are contained in Arts 17–22 EC.

[90] See, in particular, the seminal cases of Case C-85/96, *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691, Case C-184/99, *Grzelczyk v CPAS* [2001] ECR I-6193 and Case C-413/99, *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

[91] T.H. Marshall, *Citizenship and Social Class* (Cambridge University Press, 1950) and *Social Policy* (Hutchinson Education, 1975) at 11, quoted in S. O'Leary, 'Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union', in G. de Búrca, *EU Law and the Welfare State, In Search of Solidarity* (Oxford University Press, 2005), at 54.

[92] For a discussion of solidarity and social rights in the context of national and EU citizenship, see M Ferrera, 'Towards an "Open" Social Citizenship? The New Boundaries of Welfare in the European Union', in Búrca, *ibid*, 11, at 19–24.

[93] This term is taken from the Opinion of Advocate General Fennelly in Case C-70/95, *Sodemare v Regione Lombardia* [1997] ECR I-3395 at para 29: social solidarity 'envisages the inherently uncommercial act of involuntary subsidisation of one social group by another'; cited by M. Dougan and E. Spaventa, ' "Wish You Weren't Here . . . ", New Models of Social Solidarity in the European Union', in M. Dougan and E. Spaventa (eds), *Social Welfare and EU Law* (Hart, 2005), 181, at 184.

[94] The reference to 'citizenship' in this sentence should be seen as generic and not a specific reference to EU citizenship.

[95] Dougan and Spaventa, ' "Wish You Weren't Here . . . " ', *op cit* n 93 *supra*, at 181.

citizenship has developed. Barnard has noted that the Court has applied the principle of solidarity in two separate ways in cases addressing the rights of citizens.[96] First, it has used the principle of solidarity negatively to protect national social welfare policies and ensure that they are not undermined by deregulatory single market rules. Therefore, in cases such as *Poucet and Pistre*[97] and *Sodemare*,[98,99] the Court found that where the challenged activities involved a sufficient degree of national solidarity, this justified a finding that the activities were not 'economic', and therefore fell outside the scope of Community law. As a consequence, EC competition law[100] and rules relating to freedom to establish[101] did not apply.

The Court has also used the solidarity principle in a positive way to impose obligations on Member States requiring them to allow migrant EU citizens to claim benefits under domestic social or welfare systems under the same terms as nationals. Barnard argues that the Court has applied the solidarity principle in such cases in a sensitive way, providing for greater access to social and welfare benefits for those migrants who have established the highest degree of assimilation with the society of the host state, generally through a prolonged period of residence.[102] However, Barnard distinguishes the Court's sensitive use of the solidarity principle in these citizenship cases from its approach in cases which it regards as involving the single market, such as cases relating to access to education or healthcare by migrants.[103] Such cases are seen as falling within Article 49 EC, and the facilities in question are regarded as economic services provided in return for a fee. Barnard argues that here the Court fails to take account of the principle of solidarity, even though solidarity can also play a role in the provision of such services.[104]

What does this imply for the issue of disability accessibility?

In principle, a case concerning accessibility would impact on EU citizens who have not exercised the right to free movement, but who would benefit from having access to a certain kind of good or service, whether that be provided in their own Member State, or imported from within or outside the EU. In this sense, the factual situation bears more resemblance to the first set of cases described by Barnard, which affect the rights of non-mobile EU citizens. However, the Court applies the principle of solidarity in a negative way in such cases—ie to protect a nationally established scheme which is based on solidarity, rather than to require that Member States establish a scheme which is based on solidarity. As has been seen, Member States rarely provide for mandatory disability accessibility standards, meaning the question of whether such provisions are compatible with EC law, and whether they can be justified on the grounds of solidarity, are unlikely to come before the Court.

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[96] C. Barnard, 'EU Citizenship and the Principle of Solidarity', in Dougan and Spaventa, *op cit* n 93 *supra*, 157, at 158–161.

[97] Joined Cases C-159/91 and C-160/91, *Poucet and Pistre v AGF and Cancava* [1993] ECR I-637.

[98] Case C-70/95, *Sodemare v Regione Lombardia* [1997] ECR I-3305.

[99] These two cases concerned, respectively, the organisation of a non-contributory and non-profit-making sickness fund and a redistributive pension scheme, and the requirement that operators of residential care homes, which received public subsidies, be non-profit making.

[100] In *Poucet and Pistre*, n 97 *supra*.

[101] In *Sodemare*, n 98 *supra*.

[102] Barnard, *op cit* n 96 *supra*, at 165–175.

[103] *ibid*, at 175–179.

[104] *ibid*, at 177–179.

Second, Barnard has noted the sharp distinction between citizenship case-law, where solidarity plays an important part in the Court's considerations, and internal market case-law, where solidarity is ignored or overlooked. The former can involve questions related to entitlement of a migrant to, for example, a social security benefit, whilst the latter can involve questions related to the access of a migrant to, for example, a university education. Similarly, this article is considering the scope for establishing disability accessibility standards with regard to commercially provided goods and services. It is likely that the Court will regard such questions as falling squarely within the field of the internal market, and as not raising citizenship issues, therefore leaving little scope for consideration of issues such as solidarity.

Lastly, the solidarity that is at the heart of the Court's case-law on citizenship exists between, on the one hand, citizens of a specific Member State or members of a national social security scheme (in the case where the principle is used to justify the non-application of EC law, thereby leaving the challenged scheme or organisation in tact) and, on the other, between EU citizens (in the case where the principle is used to justify (no) entitlement of a migrant to a (social security) benefit provided by a host Member State).[105] The solidarity that could support a system promoting disability accessible goods and services would exist between disabled and non-disabled EU citizens and residents, which is of a completely different nature. Whilst such solidarity is relevant in the context of national citizenship, with tax premiums paid by all being used to fund, *inter alia*, disability-related benefits for the minority, there is no evidence of such solidarity playing a role in the ECJ's case-law on citizenship.

However, one should note a recently adopted EC Regulation which seems to adopt exactly this sort of approach and makes a direct link between citizenship, solidarity and the need to provide access for disabled citizens to services, *in casu*, services provided by airports and airlines. Regulation 1107/2006[106] concerning the rights of disabled persons and persons with reduced mobility when travelling by air requires that disabled persons should be given equal access to air travel. Consequently, airline companies and airports are required to provide additional assistance to meet the needs of disabled travellers, and to employ the staff and equipment needed to do this. Notably, 'in the interests of social inclusion, the persons concerned should receive this assistance without additional charge',[107] and '[a]ssistance should be financed in such a way as to spread the burden equitably among all passengers using an airport . . . '.[108] Such a requirement seems to meet exactly the definition of social solidarity elaborated by AG Fennelly in the *Sodemare* case. Moreover, the Preamble to the Regulation makes a direct link between citizenship and the right to access services:

> The single market for air services should benefit citizens in general. Consequently, disabled persons . . . should have opportunities for air travel comparable to those of other citizens. Disabled persons . . . have the same right as all other citizens to free movement, freedom of choice and non-discrimination. This applies to air travel as to other areas of life.[109]

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[105] See Case C-184/99, *Grzelczyk v CPAS*, n 90 *supra*, in which the ECJ held that EC law 'thus accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary' (para 46).

[106] Regulation 1107/2006, *op cit* n 5 *supra*.

[107] Recital 4.

[108] Recital 8.

[109] Recital 1.

It is naturally too early to know whether this heralds a new approach to citizenship in the context of disability rights,[110] or indeed, whether this Regulation will set a precedent to be followed by further EC legislation providing for accessible goods and services. The Regulation finds its legal basis in Article 80(2) EC, which deals specifically with transport; nevertheless, the logic used to justify the adoption of the legislation could equally apply to many other areas. However, as noted elsewhere,[111] the Community legislator has shown particular sensitivity to disability-related issues in the field of transport, but this has not generally been reflected in (legislative) developments in other areas. For the time being at least, the Regulation is a rare example of disability-specific EC legislation providing for an accessible service and which recognises the relevance of EU citizenship and, implicitly, solidarity between consumers.

An International Dimension—the New UN Convention on the Rights of Persons with Disabilities, and Accessibility Requirements[112]

On 13 December 2006, after almost six years of work by an Ad Hoc Committee, the United Nations General Assembly adopted a Convention on the Rights of Persons with Disabilities. The Convention is ground breaking for a number of reasons including, from a European perspective, the fact that it is the first human rights convention which the European Community negotiated and signed, and it will be the first such convention which the Community will conclude. The Communities' competence to undertake such action resulted primarily from the aforementioned Article 13 EC, which contains the only specific reference to disability in the main body of the Treaty, and which confers powers to take action to combat discrimination on a number of grounds, including disability.

The Convention covers a broad range of rights including, significantly, accessibility. Article 9 requires state parties to '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 . . . '. These measures include the 'identification and elimination of obstacles and barriers to accessibility'.[113]

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[110] Arguably, the different uses made of the concept of social solidarity in EC law noted in this section reinforce the argument made by Dougan and Spaventa that the EU lacks any clear organising concept of social solidarity, and that social solidarity 'trickles through different Treaty provisions in different forms and in different ways—creating a veritable kaleidoscope of welfare rights and principles': Dougan and Spaventa, ' "Wish You Weren't Here . . . " ', *op cit* n 93 *supra*, at 182.

[111] See L. Waddington, *From Rome to Nice in a Wheelchair, The Development of a European Disability Policy* (Europa Law Publishing, 2005), at 32–33.

[112] United Nations Convention on the Rights of Persons with Disabilities (G.A. Res. 61/106, art. 1, 61st Sess., U.N. Doc. A/RES/61/106, 24 January 2007). The text of the Convention is available at http://www.un.org/esa/socdev/enable/. For an academic commentary on the Convention see: A. Lawson, 'The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?', (2007) 34 *Syracuse Journal of International Law and Commerce* 563.

[113] Some commentators have been critical of Art 9 of the Convention. See T. R. Justesen and T. R. Justesen, 'Perspectives on the UN Convention on the Rights of Persons with Disabilities: An Analysis of the Development and Adoption of the United Nations Convention Recognizing the Rights of Individuals with Disabilities: Why the United States Refuses to Sign this UN Convention', (2007) 14 *Human Rights Brief* 36. Justesen and Justesen state: ' . . . Article 9 suggests that member-states [sic] must independently create architectural design and construction standards for facilities to meet the accessibility requirements

More specifically, Article 9(1) requires state parties to identify and eliminate obstacles and barriers to accessibility with regard to, *inter alia*, buildings, roads, transportation and other indoor and outdoor facilities, and information, communication and other services. Moreover, Article 9(2)(a) requires state parties 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. Article 30, meanwhile, requires state parties to take appropriate measures to ensure that persons with disabilities have access to cultural materials, television programmes, films, theatre and other cultural activities in accessible formats and that they are able to enjoy access to places for 'cultural performances or services', such as museums, cinemas and tourism services.[114]

Following EC conclusion of the Convention, which is expected to occur in 2009 or 2010, the Community will clearly be bound by these obligations in as far as they fall within its competence.[115] It is interesting to note in this respect that the Council Decision[116] conferring competence on the Commission to sign the Convention on behalf of the Community had, as its legal basis, not only Article 13 EC but also Article 95 EC.[117] Therefore it seems to have been recognised that the new Convention will impose obligations on the Community in the context of the internal market, and indeed this is appropriate given the already demonstrated use of Article 95 EC to ensure disability accessibility in a limited number of areas.

It is submitted that the Convention provisions concerning accessibility are likely to impact on Community provisions relating to the free movement of goods and services in two ways. First, there seems a clear link, in terms of the standardisation requirement, between the establishment of harmonised standards to serve the internal market under Article 95 EC, and the requirements of Article 9(2)(a) of the Convention, which relates to minimum standards to ensure accessibility of facilities and services provided to the

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of the Convention. The article provides no additional support or technical assistance specifying which building elements and features must be accessible, or how and by when member-states should meet such standards. Likewise, there is no reasonable means for measuring a member-state's progress or lack thereof in this regard' (footnotes omitted). Justesen and Justesen also argue that US law provides stronger protection for disabled individuals, including technical accessibility standards.

[114] It is worth noting that the Convention does not specifically include a generic obligation to provide goods which are accessible to people with disabilities, although it does frequently refer to accessible services, and accessibility remains one of the general principles of the Convention set out in Art 3. In addition, the Convention does define, at Art 2, 'Universal Design', for the purposes of 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' (emphasis added).

[115] In 2008 the Commission published a 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 final/2. For a discussion of the implications of the UN Convention on the Rights of Persons with Disabilities for the European Community, see L. Waddington, 'Breaking New Ground—The Implications of Ratification of the UN Convention on the Rights of Persons with Disabilities for the European Community', in O. M. Arnardóttir and G. Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers, 2009).

[116] Council Decision on the signing, on behalf of the European Community, of the United Nations' Convention on the Rights of Persons with Disabilities (2407/07, 20 March 2007).

[117] A third legal basis was Art 300(2) EC. This addresses the procedure to be followed when the Community makes agreements with international organisations. The proposal for a Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, n 115 *supra*, referred to a number of Treaty Articles as its legal basis. In addition to Arts 13 EC and 95 EC, the mentioned Articles were Arts 26, 47(2), 55, 71(1), 80(2), 89, 93 and 285 EC, as well as Arts 300(2) and 300(3).

public for persons with disabilities. Article 95 EC, with its internal market aim, cannot provide the legal basis for instruments which have the sole aim of ensuring disability accessibility, and which have only a tenuous link to the internal market.[118] However, where the requirements of the internal market necessitate the development of harmonised standards, as was the case with Directive 2001/85 on the construction of vehicles carrying more than eight passengers, it seems that the Convention will require that disability accessibility standards are incorporated within any Community rules. Therefore, whilst the Convention may not require the Community to adopt accessibility standards with regard to all aspects of the physical environment, information and communication, and access to facilities and services open to the public, it does oblige the Community to establish such accessibility standards where the demands of the internal market require that the Community intervenes in one of these areas. Thus far, this commitment only seems to have been pursued half-heartedly at best.

Second, the Convention requirements are likely to impact on free movement provisions in a further way. It has been seen that whilst mutual recognition is the guiding principle behind the internal market, Member States are still allowed to establish barriers to trade where these are recognised as necessary to meet mandatory or objective requirements. Amongst the mandatory requirements which the Court has recognised as justifying restriction is the protection of fundamental rights. Such was the situation in Case C-112/00, *Schmidberger v Austria*,[119] where a road haulage company sought to have declared the decision of the Austrian authorities to allow an environmental demonstration on a major motorway to be a breach of Article 28 EC. As a result of the demonstration, the motorway had been closed for almost 30 hours, making the transport of goods by the companies' lorries impossible along that route. Having found that the decision to allow the demonstration did fall within the scope of Article 28 EC, the Court had to decide whether it could be justified. The Austrian authorities argued that they were obliged to grant permission for the demonstration to occur as they had to respect the demonstrators' rights to freedom of expression and freedom of assembly under Articles 10 and 11 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The Court accepted this claim and stated: '. . . since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods'.[120]

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[118] See the *Tobacco Advertising* case, n 52 *supra*, on this point.

[119] Case C-112/00, *Schmidberger v Austria* [2003] ECR I-5659.

[120] Paragraph 74. See also Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, in which the ECJ held that 'Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services'(para 35). Relying on this principle, the Court held that the German authorities were entitled to prohibit the commercial exploitation of a 'laser game', which had been lawfully developed and marketed in another Member State, and which involved the simulated killing of people, on the grounds that it infringed the fundamental value of human dignity, which was enshrined in the German constitution. See also J. Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution', (2006) 12 *European Law Journal* 15.

The Court stressed that Article 28 EC could never be relied upon to justify the breach of fundamental rights. However, the Court also stressed that only those human rights which are recognised as part of Community law are protected and can justify a restriction to freedom of movement.[121]

Nevertheless, the Court has a rather poor record of deriving rights from United Nations based texts,[122] as opposed to the ECHR, which it has referred to on many occasions. This might suggest that it is unlikely to give much weight to the argument that restrictions on the free movement of goods or services are needed in order to ensure disability accessibility and thereby comply with the obligations under the United Nations Convention on the Rights of Persons with Disabilities. However, this latest UN human rights treaty will enjoy a much greater status and recognition within the EC than its predecessors, given that the Community has already signed, and is expected to conclude, the Treaty, thereby bringing it within the scope of Community law and, arguably, allowing its requirements to be used to justify restrictions to free movement of goods and services within the EU.

As a consequence, Member States can seek to justify domestic disability accessibility requirements, which could pose a barrier to free movement, on the additional ground that these requirements are needed to meet their obligations under international law and respect fundamental rights, and specifically meet their obligations under the UN Convention. It is submitted that this argument, should it be raised, will be given great weight by both the Commission and Court when they consider the permissibility of such restrictions, and mean that it is more likely that such requirements are likely to be regarded as compatible with Community law. Furthermore, this, in turn, may prompt the Community legislator to conclude that Community-wide harmonisation measures are needed, and to have recourse to Article 95 EC.

Conclusion

This article has revealed that, whilst the European Court of Justice has not, thus far, been called upon to decide on the compatibility with Articles 28 and 49 EC of domestic disability accessibility requirements, which impose restrictions—and indeed a complete barrier—to the free movement of non-accessible goods and services originating from other Member States, there does seem to be some potential for regarding such requirements as compatible with Community law. However, the Court's room for manoeuvre in this area should not be over-estimated, and market integration remains the driving force behind its case-law. In contrast, Article 95 EC has already been used—although only to a limited extent—to establish mandatory Community-wide disability accessibility requirements, thereby helping to promote a single market in accessible products

[121] Paragraph 73 and Oliver and Enchelmaier, *op cit* n 34 *supra*, at 697.

[122] Only infrequent references to UN human rights treaties can be found in ECJ case-law. Rikki Holtmaat and Christa Tobler refer to Case 158/91, *Levy* [1993] ECR I-3287 as being the only case in which the ECJ has referred to the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): 'CEDAW and the European Union's Policy in the Field of Combating Gender Discrimination', (2005) 12(4) *Maastricht Journal of European and Comparative Law* 399. The Court has occasionally made reference to other human rights instruments. For example, in Case C-249/96, *Grant v South West Trains Ltd* [1998] ECR I-621, the Court referred to the International Covenant on Civil and Political Rights. However, the Covenant did not impact on its decision as the Court declined to follow the opinion of the Human Rights Committee established under the Covenant.

and services in areas covered, and encourage the development of technical standards by the European standardisation bodies which include disability accessibility provisions.

However, even faced with a willing court, barriers still exist to the development of unilateral disability accessibility standards by Member States. Only a minority of (large) Member States will be able to set such standards in the knowledge that manufacturers and importers will not respond by restricting the supply of goods or services. Instead, to achieve a true common market in disability accessible goods and services requires Community-level intervention. The setting of such standards will not only convince sceptical manufacturers and service providers of the need to embrace disability accessibility, but may also result in a European market which is large enough to bring with it economies of scale for those adaptations which prove to be more time consuming or expensive to develop.

The expected conclusion by the EC of the United Nations Convention on the Rights of Persons with Disabilities brings a new dimension into the equation. This may breath new life into Article 95 EC, thereby requiring a much more vigorous consideration of the need to incorporate disability accessibility standards in internal market harmonisation legislation. Moreover, a perception of EU citizenship that encourages solidarity between disabled and non-disabled citizens could also stimulate the inclusion of disability accessibility provisions in EC legislation. Whilst domestic accessibility requirements, which are regarded as justified restrictions to free movement, may result in benefits for disabled residents in the Member States in question, a true single market for disabled citizens and residents can only be obtained by Community-level action.

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