

# Accessibility Outside Employment

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1. This paper concerns accessibility outside employment.
2. There is no universal definition of accessibility. At its most simple, it means literally being able to access transport, a service etc. (transport will not be covered in this paper, as it is being dealt with by another speaker).
3. The interaction between “accessibility” and “reasonable accommodation” is a complex one. In the UK, for example, “reasonable adjustments”, as they are known, form part of a range of measures to afford “accessibility” to disabled people. Thus “accessibility” can include the duty to make reasonable accommodation.
4. Often, however, accessibility is seen as the legislative and policy framework which ensures that infrastructure such as buildings, transport systems and the internet are made accessible to the vast majority of disabled people. It implies not a reactive, individualist approach to access, but is, rather, concerned with tackling barriers in advance of individual disabled people experiencing difficulty with them.

## The UN Convention

5. There are obligations contained in the UN Convention on the Rights of Persons with Disabilities (“UNCRPD”) relating to accessibility.
6. Not only does the Convention address specifically the rights of disabled people in the context of social and economic, as well as civil and political rights, but it has been signed by the EC. It is the first Convention in which the EU participated as a negotiating body, and it is also the first Convention that has been signed by the EU. This,

particularly when it comes to considering the competence of the EU, will be critical.

7. The Convention preamble states:

*Recognizing the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms,*

8. The definition provisions in Article 2 state, so far as is relevant, as follows:

*“Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;*

*“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;*

*“Universal design” means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. “Universal design” shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.*

9. The general principles of the Convention, at Article 3, include full and effective participation in society and accessibility.

10. Article 9 deals in depth with accessibility issues.

## **Article 9**

### **Accessibility**

*1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:*

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

*2. States Parties shall also take appropriate measures:*

- (a) To develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;*
- (b) To ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;*
- (c) To provide training for stakeholders on accessibility issues facing persons with disabilities;*
- (d) To provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;*
- (e) To provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;*
- (f) To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;*
- (g) To promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;*

*(h) To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.*

11. Those member states who have signed up to the Convention will need to consider the measures that they have in place for accessibility and ensure that they are sufficient to meet the provisions of the Convention.

### **European provisions**

12. There is no specific Directive or Regulation dealing with accessibility outside employment. There is a proposed Directive, more detail on which is given below.

13. Out of the vast number of EC Directives and Regulations, some may have some implications for accessibility in the broadest sense - for example, EC No.960/2008 concerning communication statistics on the Information Society - but there are relatively few which do actually reference disability.

14. Of those that do, the scope of existing protection is unclear in the sense that such legislation as does exist has not had time to start producing interpretive case law. The Draft Goods and Services directive (see below) is a comprehensive piece of legislation which, if passed, will deal with all aspects of service related accessibility.

15. In Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (Decision 2010/48/EC), the Council of Europe noted Community provisions with relevance to the UN Convention. These are set out in the appendix to this paper - and there are a considerable number of them.

16. Those that have particular relevance in the context of disability and to accessibility in general are set out below.

### Telecommunications

17. The two directives which address disability in the area of telecommunications are *Directive 2002/22/EC on universal service and users' rights relating to electronic communications and networks and services* ("Universal Services Directive"); and *Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services* (Framework Directive").

18. The Universal Services Directive was amended in 2009 by *Directive 2009/136 EC*. As a result the Universal Services Directive addresses disability in the following ways:

- (a) Article 1 makes specific reference to disabled people, stating that the Directive "*also includes provisions concerning certain aspects of terminal equipment, including provisions intended to facilitate access for disabled end-users.*"
- (b) Article 6 provides that "*national regulatory authorities may impose obligations on undertakings in order to ensure that public pay telephones or other public voice telephony access points are provided to meet the reasonable needs of end-users in terms of the geographical coverage, the number of telephones or other access points, accessibility to disabled end-users and the quality of services*".
- (c) Article 7 specifically addresses what is entitled "measures for disabled end users" and provides that:

*1. Unless requirements have been specified under chapter IV which achieve the equivalent effect, Member States shall take specific measures to ensure that access to, and affordability of, the services identified in Article 4(3) and Article 5 for disabled*

*end users is equivalent to the level enjoyed by other end-users. Member States may oblige national regulatory authorities to assess the general need and the specific requirements, including the extent and concrete form of such specific measures for disabled end users. [ the services in 4(3) and 5 are the requirement for member states to ensure that all reasonable request for the provision of a publically available telephone service over the network connection referred to in paragraph 1 (at a fixed location) that allows for originating and receiving national and international calls are met by at least one undertaking; and directly enquiry services and directories]*

*2 Member states may take specific measures in the light of national conditions to ensure that disabled end-users can also take advantage of the choice of undertakings and services providers available to the majority of end-users.*

- (d) There is also a requirement in Article 21 that member states shall ensure that national regulatory authorities are able to oblige undertakings providing public electronic communications networks and/or publically available electronic communications services to inter alia regularly inform disabled subscribers of details of products and services designed for them.

19. The remainder of the Directive addresses issues regarding access and affordability for all where appropriate, as well as special tariffs.

20. The amendment of Article 7, in particular, is very significant: whilst it appears that the bulk of this Directive is empowering, but not obliging, member states to apply specific provisions, Article 7 requires states to take measures to ensure access to services - albeit to fixed telephone services and directory enquiries only.

21. The Framework Directive (which together with 2002/20/EC, 2002/19/EC, 2002/22/EC and 97/66/EC comprise the regulatory framework for all transmission networks and services) provides that national regulatory authorities

*“shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by, inter alia:*

- *ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality; and addressing the needs of specific social groups, in particular disabled users.*

22. This is not a particularly strong provision, however - referring as it does simply to promotion.

23. Amendments were made to the Framework Directive by the "Citizens' Rights" Directive – 2007/0248 Directive. Thus the Framework Directive now states that in order to promote the free flow of information, media pluralism and cultural diversity, Member States shall encourage, in accordance with the provisions of Article 17(2), inter alia, providers of digital TV services and equipment to cooperate in the provision of interoperable TV services for disabled end-users.

24. In addition, the Directive provides that the Commission may, taking the utmost account of the opinion of the Authority, if any, issue a recommendation or a decision on the harmonised application of the provisions in this Directive and the Specific Directives in order to further the achievement of the objectives set out in Article 8. The objectives in Article 8 include ensuring that users, including disabled users, derive maximum benefit in terms of choice, price, and quality;

25. Further, Member States shall ensure that national regulatory authorities take the utmost account of those recommendations in carrying out their tasks. Where a national regulatory authority chooses not to follow a recommendation, it shall inform the Commission, giving the reasoning for its position.

26. The Directive goes on to state that Measures adopted pursuant to paragraph 1 may include the identification of a harmonised or coordinated approach for dealing with the following issues: Consumer

issues, including accessibility to electronic communications services and equipment by disabled end-users.

## **Radio and Telecommunications Terminal Equipment (R & TTE) Directive**

27. *Directive 1995/5 of the European Parliament of the Council of March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity* (the R & TTE Directive) refers to disability in its preamble, stating as follows:

*Whereas telecommunications are important to the well-being and employment of people with disabilities who represent a substantial and growing proportion of the population of Europe; whereas radio equipment and telecommunications terminal equipment should therefore in appropriate cases be designed in such a way that disabled people may use it without or with only minimal adaptation”* (paragraph 15).

28. At paragraph 19, the R&TTE Directive states

*“Whereas it should therefore be possible to identify and add specific essential requirements on user privacy, features for users with a disability, features for emergency services and/or features for avoidance of fraud”.*

29. Article 3.3 of the Directive states that the Commission can, once it has submitted its proposals to the relevant comitology process (TCAM) and/or the Council “*may decide that apparatus within certain equipment classes or apparatus of certain types shall be so constructed that ...(f) it supports certain features in order to facilitate its use by users with a disability*”.

30. Thus the Commission has powers in relation to the introduction of accessibility requirements for telecommunications equipment, if deemed necessary.

31. These powers have not yet been invoked. They would be limited in any event to telecommunications manufacturers.



32. As the November 2008 report states, the proposal for a Regulation of the European Parliament and of the Council of 13 November 2007 establishing the European Electronic Communications Market Authority - COM (2007) 699 - would have provided that the proposed Market Authority would have monitored and reported on interoperability and accessibility in Europe with the ability to issue recommendations on measures to be taken at national level to better meet, in particular, the needs of disabled or elderly citizens. In addition, it would have been required, at the request of the commission, to advise the commission and member states on improving the interoperability of, access to, and use of electronic communications services and terminal equipment and in particular cross border interoperability issues.

33. However, the final directive - *Regulation establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office – 2007/0249 (COD)* - which establishes BEREC - makes no mention at all of the needs of disabled people. In addition, the directive gives considerably less power to the regulatory body than the original proposal by the commission. It is clear that the degree of regulation in this area - still limited as it was in relation to disability - was unacceptable.

## TV Services

34. The *Audiovisual Media Services Directive* (ref AVMSD) amended the *Television with Frontiers Directive*. This includes accessibility within its scope.

35. At paragraph 64 of the pre-ambles, it is recognised that “*the right of persons with a disability and the elderly to participate and be integrated in the social and cultural life of the Community is inextricably linked to the provision of accessible audiovisual media services. The means to achieve accessibility should include, but need not be limited to, sign language, subtitling, audio-description and easily understandable menu navigation*”.

36. Article 3c of the Directive states that 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.

37. These provisions apply to both providers of traditional broadcast TV services and on demand audiovisual media services.

38. Again, however, these provisions are empowering rather than obligatory.

### **Copyright**

39. *Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society* (the copyright directive) provides that Member States can make exceptions to copyright rules and protections in order to facilitate accessibility for disabled people. Member states are “given the option” of providing for exceptions or limitations (see paragraph 34 of the preamble).

40. Following the publication of its Green Paper on “Copyright in the Knowledge Economy”, which addressed provisions for eAccessibility in the copyright directive and consider the adopting of exemptions for disability access by Member States, the Commission has issued a Communication - Communication on Copyright in the Knowledge Economy on 19<sup>th</sup> October 2009.

41. This Communication sets out the results of Commission consultation with organisations, including those of disabled people, and sets out next steps for action. Disability access to information, it states, is a priority. The steps to be taken in relation to this are set out in the document, as follows:

***Next steps** The immediate goal is to encourage publishers to make more works in accessible formats available to disabled persons. TPM should not prevent the conversion of legally acquired works into accessible formats. Contractual licensing should respect statutory exceptions for persons with disabilities including visually impaired persons.<sup>14</sup> The consultation has revealed a range of existing collaborative efforts for visually impaired persons or persons with visual or print disabilities across the EU. Such efforts should be accelerated and applied across the EU. As a first step the Commission will organise a stakeholder forum concerning the needs of disabled persons, in particular visually impaired persons by the end of 2009. The forum would consider the range of issues facing persons with disabilities and possible policy responses. The UN Convention on the Rights of Persons with Disabilities should serve as a benchmark against which to measure progress in this area.*

*The forum should also look at possible ways to encourage the unencumbered export of a converted work to another Member State while ensuring that right-holders are adequately remunerated for the use of their work. It should look closely at the mutual recognition and free movement of information, publications, and educational and cultural material that is accessible for persons with disabilities and reflect upon online content accessibility issues.*

*On the basis of the results of the forum the Commission will assess whether any further initiatives are justified.*

42. Although disability stakeholders had advocated mandatory measures, the Commission were clearly reluctant to choose this route forward.

## **General accessibility of services and products**

### **- Public Procurement**

43. There are a number of public procurement directives. Most recently, the revised Directives of 2004 (*Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; and Directive 2004/17/EC of 31 March 2004 co-ordinating the procurement procedures of entities operating in the water energy transport and postal services sectors*) have included clauses encouraging accessibility and design for all requirements to be included in public procurements.

44. The preambles of both directives (paragraph 29 of Directive 2004/18/EC and paragraph 42 of Directive 2004/17/EC) state that: *“Contracting authorities should wherever possible lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users”*.

45. The Directives themselves set out, in the specific articles on technical specifications (Article 23, Paragraph 1 of Directive 2004/18/EC and Article 34, Paragraph 1 of Directive 2004/17/EC). These state that *“whenever possible [these] technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users”*. Practical examples of how accessibility criteria could be addressed in practice were provided in the Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement - for example, at 1.2 it states:

*“In the above-mentioned Communication, the Commission states that the provisions of the public procurement directives on technical specifications apply without prejudice to legally binding national technical rules that are compatible with Community law [21]. These national rules can include, among others, requirements concerning product safety, public health and hygiene or access for the disabled to certain buildings or public transport (for example, accessibility standards on the width of corridors and doors, adapted toilets, access ramps), or access to certain products or services (for example, in the field of information technology.”*

46. However, whilst the language of these procurement provisions appears mandatory, the provisions are qualified by the phrase **“whenever possible”**.

47. Although the provisions are qualified, “whenever possible” can be seen as a strong requirement, meaning that it is only where impossibility prevents the obligation being carried out that the person addressed by it is not subject to it.

48. The words appear therefore simply to deal with the situation in which it becomes apparent during the attempt to draft the specification that it is not possible to take into account accessibility criteria. Such situations would appear to be extremely rare.

49. In determining the actions that can be required by this formula the European Court of Justice (ECJ) would have to consider the social purpose of the Directive. In addition in formulating policy or action based on it the EU will have to take Art 10 of TFEU into account.

50. However, this Directive imposes obligations in relation to bodies tendering for public contracts: it does not afford individual rights to what might be termed “end users” i.e. disabled people. In addition, it seems clear from the wealth of information available that the Directives have yet to have the desired - and potentially lawfully required - effect upon accessibility.

### **Discrimination and accessibility**

51. Article 13 E provides the Community with the competence to address discrimination on a variety of grounds. It has led to the introduction of *Directive 2000/78/EC* which prohibits discrimination in employment and occupation on a number of grounds, including disability. This has been addressed by Lisa Waddington in her presentation.

52. There is also a proposed Directive on goods and services. The proposed Directive will prohibit discrimination in relation to goods and services on a number of grounds, including disability. The proposal not only provides that failure to make reasonable accommodation in relation to an individual amounts to discrimination, but it also imposes an anticipatory duty to make adjustments upon services providers. It states that:

*“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 shall not impose a disproportionate burden nor require fundamental alteration of the ...goods and services in question or require the provision of alternatives therefore [check current wording]. The proposal also 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”.*

53. An anticipatory duty should lead to changes in the way that has far more scope for addressing accessibility issues, it will not provide consistency across member states, as clearly by their nature Directives leave the means of implementation to member states.
54. There are some other measures that address disability in the context of transport and eAccessibility - for example, the Commission Decision of 21 December 2007 concerning the technical specification of interoperability relating to "persons with reduced mobility" in the trans-European conventional and high-speed rail system (2008/164/EC). This sets out standards for accessibility, including audio announcements.
55. There are measures other than legislative ones by which accessibility is being addressed.
56. The Commission has the power to encourage the development of disability accessibility standards through the standardisation bodies (European Committee for Standardisation, CEN, European Committee for Electrotechnical Standardisation - Cenelec - and European Telecommunications Standards Institute - ETSI). These bodies have established an advisory group on assistive technologies (The Design for All and Assistive Technology Standardisation Coordination Group). Much of their work relates to ICT, but work has not yet been completed on their standards.

## Accessibility in the UK

57. The Equality Act 2010, which has in effect merged all the anti-discrimination legislation in the UK into one Act, places an anticipatory duty to make reasonable adjustments on service providers, public authorities, private clubs and further and higher education establishments.

58. As well as the duty to make adjustments, there are building regulations governing new buildings and those undergoing refurbishment, which require access for disabled people to be made.

59. There is also an obligation upon public authorities and those undertaking functions of a public nature to have due regard to, inter alia, disability equality when carrying out their functions.

60. The provisions tend to complement each other, with little overlap. A breach of some provisions, however, such as building regulations, does not result in an individual remedy for a disabled person, though it may form the basis of a challenge by means of judicial review to the public authority.

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