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REPORT

from:	Presidency
to:	Permanent Representatives Committee (Part I) / Council (EPSCO)
No. Cion prop.:	14799/15 SOC 700 MI 770 ANTIDSCRIM 15 AUDIO 34 CODEC 1774 + ADD 1 + ADD 2 + ADD 3 - COM(2015) 615 final
Subject:	Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services - Progress Report

INTRODUCTION

The UN Convention on the Rights of Persons with Disabilities (UNCRPD) contains, inter alia, the obligation to increase the accessibility of goods and services. As most Member States have already ratified the Convention, they need to undertake action to implement it. The Commission expects that the implementation of those parts of the Convention that are related to the accessibility of goods and services, if done by each Member State separately, could lead to divergent legislation. This divergence could affect the internal market and lead to additional costs.

It was against this background that, in December 2015, the Commission submitted its the proposal for a European Accessibility Act (EAA), which includes uniform accessibility criteria for selected goods and services for which the Commission deems the risk of divergence to be highest. The criteria are also meant to provide guidance for the implementation of other Union acts that include the obligation or possibility to improve accessibility.

During the Dutch Presidency, the Working Party on Social Questions met eight times to discuss the proposal and the Commission's Impact Assessment (IA)[1]. Coreper has been informed of the discussions that the Working Party had on the IA. The proposal was also presented to other relevant Working Parties.

Many delegations have welcomed the proposal and its aim. They have also raised a number of questions concerning the scope, the definitions and implementation.

The Danish, Maltese and UK delegations have entered parliamentary scrutiny reservations. A majority of delegations have indicated that they are still examining the proposal.

Within the European Parliament, IMCO (lead committee) and EMPL (associated committee) are the main committees dealing with the proposal; they started their work during the first semester of 2016.

The European Economic and Social Committee adopted its opinion on the proposal during its plenary session on 25/26 May 2016.[2]

1 The proposal and the Impact Assessment can be found in docs. 14799/15 + ADD 4 to 8.
2 SOC/527 - EESC-2016

MAIN ISSUES DISCUSSED DURING THE NETHERLANDS PRESIDENCY

The Social Question Working Party (SQWP) has discussed all the articles of this complex and highly technical proposal, focusing on matters that require clarification; it has not yet concluded its discussions on any of the articles.

Legal basis

The proposed legal basis, Article 114 TFEU, allows the Union to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States having as their objective the establishment and functioning of the internal market. In principle, delegations broadly supported the proposed legal base. Some delegations expressed doubts as to whether it had been established for every sector in the proposal that the possible legislative divergence stemming from the implementation of the UNCRPD would have an obstructive effect on the functioning of the internal market.

At the request of the SQWP, the Council Legal Service submitted a written opinion on the legal basis of the proposal[3].

Definitions of the proposed Directive

In its proposal, the Commission has made use of existing definitions as much as possible. The definition "people with functional limitations" and the reference to older persons gave rise to questions, as they created two additional categories alongside "persons with disabilities," thus widening the personal scope as compared with that of the UNCRPD. Some delegations considered that the scope of the Directive should be similar to the scope of the Convention.

In order to clarify the text, delegations have also suggested adding a number of definitions, including for the following terms: "consumer terminal equipment with advanced computing capability related to telephony services," "passenger transport services," "new product," "new service," "website," "banking services," and "service provider".

[3] Doc. 9007/16

Accessibility requirements of products, services and sectors covered by the proposed Directive

The Commission explained that not all banking or passenger transport services are meant to be covered by the Directive, but only specific elements thereof: websites, self-service terminals and mobile-device based services, and, in the case of transport services, ticketing and check-in machines. The Member States also have *the option* to include the built environment. It should be noted that various questions raised by delegations in this context still need to be addressed.

For products, the format of the proposal is based on the product-directive model known as "the New Legislative Framework". For services, the accessibility requirements and the monitoring measures are inspired by, yet not identical with, what is proposed for goods; the rules for services are simplified and adapted as necessary to service operations. However, delegations still had doubts about using a product-directive model for services. In addition, some delegations wondered whether the functional requirements were not too specific and might therefore hinder future innovation. It has been noted that the text should state more clearly that the obligations only apply to new products and their placement on the market. Delegations have also asked which services would be covered by the Directive, what are the links between a service provided and the products needed for that provision and -- in cases where a service and a product/device or several different service providers are linked -- who would be responsible for ensuring compliance with the accessibility requirements.

Links with other Union legislation and to other proposals

Some delegations have noted that several of the EU legislative instruments referred to in Article 1(3) already include obligations related to accessibility and therefore should not be included in the EAA. The Commission has explained that those laws included only general references to accessibility (for example, in public procurement directives and EU fund regulations, accessibility is included but not defined), while the EAA would give a precise definition of accessibility.

The aim of including these instruments in the EAA is to prevent the fragmentation of the internal market by providing common criteria for accessibility and to harmonise the way in which Member States implement already existing accessibility requirements. The EAA would not increase the number of products and services subject to accessibility obligations under the Union's public procurement or funding rules, whose scope in any case exceeds the list of products and services under Article 1(1-2).

In certain cases, the inclusion of a sector and/or linkages to other Union legislation covering that sector should, according to some delegations, be further considered and better explained in the preamble of the Directive (this applies in particular to the audiovisual sector, passenger transport, e-commerce and radio equipment). Other delegations have noted that it should be checked whether it would be better to include the accessibility requirements of different service sectors in specific directives covering them. In particular, some delegations considered that audiovisual media services (Article 1(2)(b)) and transport services (Article 1(2)(c)) should be covered in sector specific regulation such as the Audiovisual Media Services Directive[4] or the passenger rights regulations.

It has also been noted that the IA had been completed before the adoption of a number of EU legislative acts included in Article 1(3) and that Member States were still transposing some directives referred to in the EAA; therefore, delegations could not yet evaluate the impact of the EAA on the implementation of those directives.

[4] Directive 2010/13/EU, the proposal for a recast published on 25 May 2016 (9479/16).

The proposed horizontal Equal Treatment Directive[5] and the EAA proposal have different but complementary objectives: based on Article 19 TFEU, the former combats discrimination, including discrimination based on disability, while the EAA proposal aims to remove and prevent barriers to the free movement of selected accessible products and services. Their links to the UNCRPD are also different: the Equal Treatment Directive mainly aims to fulfil the obligations set out in Article 5 of the UNCRPD, while the EAA proposal mainly deals with the obligations set out in Article 9. While the EAA would only cover a selection of key new products and services, the scope of the horizontal directive would be much broader covering both accessibility and reasonable accommodation for a wide range of products and services.

Safeguard clauses (Articles 12 and 22)

The accessibility requirements should, according to the Commission, be implemented to the extent that they do not impose a disproportionate burden on manufacturers, service providers or other economic operators, or, where relevant, public authorities. These actors should provide documentation, including a self-assessment, to the market surveillance authorities -- and where relevant to the Commission -- when they invoke a disproportionate burden. Micro-enterprises are exempted from the obligation to notify market surveillance authorities on such an assessment.

Also, the Directive would not require any modification which would result in the fundamental alteration of a product or a service. For example, the obligation to ensure the accessibility of an e-book did not imply it should be turned into a paper Braille book, as that would fundamentally change the nature of the product.

[5] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. The latest progress report can be found in 9336/16.

During the discussions, explanations have been requested by the delegations as to what exactly could constitute a disproportionate burden, how this burden could be proven (cf. broad exemptions in Articles 12 and 22) and how such a burden might be compensated (Article 12(4)). In particular, the sector-specificity of accessibility requirements was stressed and, for example, the audio-visual sector -- which includes many small broadcasting channels -- might find it burdensome to render services accessible (sign language, subtitling) or might struggle to prove that the burden was indeed disproportionate.

Some delegations found the notification procedure set out in Article 12(6) administratively burdensome. The Commission stressed that an assessment of a disproportionate burden would be self assessed by the economic operator or authority concerned. Related questions by the delegations have included the following: Would the *partial* fulfilment of accessibility requirements be in line with the EAA (e.g. replacing only *some* ticketing machines with accessible ones or not providing accessibility in remote parts of the transport network)? What would happen if different economic operators came up with very different results in their assessments on what constituted a disproportionate burden?

Concerns related to the administrative burden

Fearing that the Directive's requirements could be burdensome for SMEs, some delegations considered that SMEs and microenterprises should be exempted from it. However, the Commission has argued that SMEs would be most severely affected by any fragmentation of the internal market and that, conversely, SMEs wishing to export to or operate in other EU countries would benefit most from common accessibility rules, as they would not need to adjust to different rules in different Member States. Delegations have also wished to know how the national authorities would be expected to cooperate in cases of cross-border services (e.g. banking services) as there was already a banking supervision system in place. The Commission explained that the proposal was flexible, leaving it to the Member States on how to organise such cooperation.

MAIN ISSUES STILL TO BE DISCUSSED

The Council discussions have concentrated on clarifications as regards the proposed legal basis, the scope, and the definitions, as well as the practical meaning of the proposal. The Commission has provided various examples and clarifications. Questions that need to be further discussed include the following:

- Definitions of persons covered: Is it desirable to include people with functional limitations and elderly persons as separate categories?
- Material scope: What is the difference between accessible products and services? What should be the material scope (including the question as to which sectors should fall under the Directive)? In this context, there is a need for further assessment of the internal market justification of the sectors included. How should the inclusion of these products, services and sectors be reflected in the preamble?
- Links to other Union acts: How to define clearly the links between the EAA and other Union legal acts and how to rule out overlap with other Union Acts?
- Functional accessibility requirements: Do they provide guarantees on accessibility and at the same time leave room for innovation?
- Disproportionate burden: How to offer the possibility to exempt products or services from the accessibility requirements without creating an excessive administrative burden on companies and other actors seeking to justify such an exemption?

NEXT STEPS

It is expected that detailed discussions by the SQWP during the Netherlands Presidency, including the clarifications provided by the Commission representatives, will allow the Council's preparatory bodies to begin the drafting of the Council's position on the proposal. The Slovak Presidency will continue the work in this direction.

The Council will follow with interest the EP's work on the file.