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# THE ROLE OF THE EUROPEAN UNION IN ENSURING ACCESSIBILITY OF CULTURAL GOODS AND SERVICES: ALL ABOUT THAT...INTERNAL MARKET?

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## 1. INTRODUCTION

An accessible and inclusive culture is “essential for full participation in society” of persons with disabilities.<sup>1</sup> In 2015, in a public consultation on the then proposal for a European Accessibility Act (EAA)—which was released in 2019<sup>2</sup>—when asked which goods and services should be given priority, respondents ranked culture and/or leisure as key sectors in which accessibility improvements were due.<sup>3</sup> However, as yet, accessibility of cultural goods and services is far from being achieved.<sup>4</sup> A European Blind Union survey shows that people with visual impairments have poor access to culture, and suggests that “[m]ost cultural funding pays little attention to the cultural equality of people with a (visual) disability”.<sup>5</sup> In his paper, provocatively titled “Deaf people do not go to the movies”, Martinez Amador highlights the dearth of accessible movies (i.e. captioned film or movies in sign language) in Spanish cinemas.<sup>6</sup> A recent report on the availability of accessible cultural works (e.g. printed works, audio visuals, sculptural works etc.) subjected to copyright<sup>7</sup> suggests that considerable obstacles to retrieving cultural content in accessible format remain across the European Union (EU).<sup>8</sup> It also shows that “limitations in the availability of accessible formats”, as well as “significant differences between Member States” continue to be a challenge for persons with disabilities.<sup>9</sup> These findings tally with recent qualitative research evidencing that persons with disabilities face notable and multifaceted barriers when it comes to cultural participation.<sup>10</sup>

It is well known that the EU has only supporting competences in the field of culture.<sup>11</sup> In fact, thus far, the EU has relied on art.114 of the Treaty on the Functioning of the European Union (TFEU) as the primary avenue to address accessibility gaps, including with regards to cultural goods and services. In 2010, at the time of the conclusion of the UN Convention on the Rights of Persons with Disabilities (CRPD) or (the Convention),<sup>12</sup> the EU had highlighted its shared, yet general and cross-cutting, competence in the area of accessibility, on foot of art.114 TFEU.<sup>13</sup> The latter was ab initio identified as the chief legal basis to implement the wide-ranging obligations undertaken with the ratification of the CRPD.<sup>14</sup> Annex II of the Decision on the conclusion of the Convention,<sup>15</sup> which provides the Declaration of Competence of the EU<sup>16</sup> listed a number of harmonisation instruments. Among those, it included the

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former Television Without Frontiers (TVWF) Directive<sup>17</sup> (now replaced by the AudioVisual Media Services Directive AVMSD)<sup>18</sup> as well as the InfoSoc Directive,<sup>19</sup> signalling the role of internal market legislation in enhancing accessibility of cultural goods and services. This is certainly unsurprising, as the *longa manus* of the internal market has deeply affected the regulation of cultural goods, services and operators, since the outset of the European integration process.<sup>20</sup> On the one hand, market integration rules did impact upon, or apply to, cultural goods and services.<sup>21</sup> On the other, “the economic rules of the Treaty brought to light the limits placed by [EU] law upon the design and implementation of domestic cultural policies” with “Member States being constrained to abolish or reconsider measures that could impede the creation of a common cultural market”.<sup>22</sup>

At present, in addition to the revised AVMSD and copyright legislation,<sup>23</sup> disability accessibility legislation adopted on the basis of art.114 TFEU, i.e. the Web Accessibility Directive (WAD)<sup>24</sup> and the European Accessibility Act (EAA),<sup>25</sup> does apply to a range of cultural goods and services. Yet, the way in which those pieces of legislation interact and overlay when it comes to the cultural sector is unclear. In the attempt to shine a light on such issue, this article investigates this “jigsaw” of accessibility provisions, their role in promoting access to cultural goods and services, and which gaps remain.

This article purposely and deliberately focuses on such harmonising legislation based on art.114 TFEU —i.e. disability accessibility legislation and harmonisation legislation which specifically relates to cultural goods and services (i.e. copyrighted works and audio-visual) and includes bespoke accessibility provisions. Such focus links to what has been articulated by Charitakis as the physical, information and communication dimensions of accessibility, which will be examined in the following section. Further, this focus allows to contrast the benefits of a harmonised approach to accessibility with the threat posed by an excessive “marketisation” of culture and the inherent progressive erosion of Member States’ competence in the cultural domain. Nonetheless, while adopting a specific scope and approach, this article does recognise that other general disability provisions may impact upon accessibility (broadly conceived) of cultural goods and services. This is the case of the directive that harmonises laws related to radio equipment,<sup>26</sup> which includes references to accessibility of telecommunications terminals for persons with disabilities. This is also the case of consumer law obligations on accessibility of pre-contractual information, discussed in detail by Waddington in various contributions.<sup>27</sup> Further, public procurement directives,<sup>28</sup> which cover cultural services (and allow reserved contracts for them),<sup>29</sup> set out that, in all public tenders, the technical specifications must “be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users”.<sup>30</sup> A range of soft law initiatives might also support the affordability of cultural goods and services for people with disabilities in the EU. For example, the European Disability Card—a system of mutual recognition of disability status and some benefits connected with it (such as free access to cultural institutions)—is notable.<sup>31</sup> This European Disability Card was piloted, between 2016–2018, in eight EU countries, and a Commission proposal to extend the card in all EU Member States is currently under consideration.<sup>32</sup> However, these provisions and initiatives fall outside the remit of the present analysis.

After these introductory remarks, the following section discusses the concept of accessibility for the purpose of the CRPD to set the context of the analysis. The article moves on to recall relevant CRPD provisions and related EU obligations. Then, the WAD, the EAA, the AVMSD, as well as the most recent copyright legislation adopted to implement the Marrakesh Treaty, adopted by the World Intellectual Property Organization (WIPO) in 2013, and concluded by the EU in 2018,<sup>33</sup> are discussed. In that connection, the article explores the extent to which these pieces of legislation promote accessibility of cultural goods and services, complement each other, overlap (or even contradict each other), or leave gaps. In its final part, the article reflects on what balance has been achieved between market integration and the right to access culture of persons with disabilities, building upon the longstanding debate around the

indirect regulation of culture beyond the limited scope of art.167 TFEU.

## 2. LAYING THE FOUNDATIONS: THE “CAPACIOUS” CONCEPTION OF ACCESSIBILITY IN THE CRPD

Before zooming in on how accessibility of cultural goods and services is dealt with in the CRPD, this section examines the concept of accessibility embraced by the CRPD and its legal implications.

Being consistently heralded as a watershed in the advancement of disability rights,<sup>34</sup> the CRPD is said to purport a paradigm shift. This shift is linked to the social-contextual understanding of disability, which, in the Convention, is conceived of as deriving from the interaction between individual impairments and external barriers.<sup>35</sup> In line with this social-contextual model, the CRPD recognises

“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”.<sup>36</sup>

The CRPD includes accessibility among its general principles. However, it does not proffer definitive guidance regarding whether accessibility is a principle or a human right *per se*.<sup>37</sup> Rather, it “firmly anchors accessibility to the realisation of equality”.<sup>38</sup> More broadly, accessibility is articulated as a “precondition” for the enjoyment of all civil, political, economic, social and cultural rights.<sup>39</sup> In that regard, it is also conceived of as key to the realisation of the right to independent living provided in art.19 CRPD.<sup>40</sup>

Generally, accessibility is said to encompass all principles and processes by which goods and services, the built environment, information and communication technology (ICT) and transportation meet the needs of people with a range of disabilities. However, the CRPD is said to embrace an even more capacious and multifaceted concept of accessibility which accords with a teleological and systematic reading of the Convention.<sup>41</sup> In that connection, Charitakis articulates a conceptualisation of accessibility comprising different distinct dimensions, i.e. “attitudinal accessibility, economic accessibility or affordability, physical accessibility, information accessibility and communication accessibility”.<sup>42</sup> The first dimension of accessibility “refers to the removal of stigma and other negative behaviour that people with disabilities, their families and their caretakers experience throughout their lives”.<sup>43</sup> The second dimension relates to “the idea that facilities, goods and services must be affordable to people with disabilities”, which encompasses the “economic capacity of people with disabilities to afford the costs of using such facilities, goods and services”.<sup>44</sup> The third and physical aspect of accessibility concerns the interrelation with the external environment. This entails that all spaces, facilities, goods and services must “be adjusted so that they are accessible to persons with disabilities, with or without assistance”.<sup>45</sup> Charitakis concedes that physical accessibility is rather complex *per se* because it pertains to the actual availability of accessible goods, services and facilities and to their usability. He also argues that other inherent aspects of physical accessibility are respectively “safety”—whereby “people with disabilities should be able to use goods, services and facilities without being exposed to danger, risk or injury”—and “user-friendliness”.<sup>46</sup> The latter means that goods, services or facilities should be used by persons with disabilities “with ease and in an effective, efficient and satisfying fashion”. Finally, Charitakis suggests that information accessibility requires general information about facilities, goods and services as well about accessibility to be made available to all. This dimension is interlinked with communication accessibility, which concerns making available information in alternative modes and means of communication (e.g. Braille, large print, audio formats etc.).

Arguably the dimensions and sub-dimensions of accessibility identified by Charitakis are somewhat

nuanced, as they entrench and intersect one another. Attitudinal accessibility also partially blends with the recognition dimension of the concept of inclusive equality, articulated by the UN Committee on the Rights of Persons with Disabilities (CRPD Committee), which necessitates the combatting of stigma, stereotyping, prejudice and violence.<sup>47</sup> Further, all these multifaceted dimensions encompass debated terms and concepts, which are used rather differently by scholarship in diverse disciplinary domains.<sup>48</sup> However, undoubtedly, the articulation put forward by Charitakis has the merit to shed a light on the various layers that characterise accessibility obligations within the CRPD. In that connection, such articulation proves useful for the purpose of this analysis and for better carving out the way in which different pieces of EU legislation interact.

### 3. FRAMING THE “JIGSAW”: ACCESSIBILITY OF CULTURAL GOODS AND SERVICES IN THE CRPD AND THE SCOPE OF EU OBLIGATIONS

#### 3.1.ACCESSIBILITY OF CULTURAL GOODS AND SERVICES IN THE CRPD

While, as noted above, accessibility is mentioned in art.3 CRPD among the general principles, broad accessibility obligations are formulated in art.9 CRPD. The latter provision, as Broderick states, is a norm “of transversal application in the Convention”.<sup>49</sup> The obligations laid out in art.9 entail an ex-ante duty. This means that parties to the Convention have the responsibility to ensure that accessibility is provided before an individual request to enter or use a place or service is made.<sup>50</sup> Notably, the CRPD does not distinguish between the public or private proprietorship of buildings, goods, services or technologies and requires parties to ensure that private entities and market operators provide accessible services and facilities. Furthermore, the breadth of the concept of accessibility adopted by the CRPD, as discussed above, has led the CRPD Committee to recognise that accessibility, while being unconditional,<sup>51</sup> is to be realised progressively, and that existing barriers to access “shall be removed gradually in a systematic and, more importantly, continuously monitored manner, with the aim of achieving full accessibility”.<sup>52</sup>

Accessibility obligations feature throughout the CRPD.<sup>53</sup> With regard to the cultural sector, those obligations arise in particular (albeit arguably not exclusively) from art.21 CRPD, on freedom of expression, and art.30 CRPD, on the right to participate in cultural life.<sup>54</sup>

Article 21 CRPD obliges Parties to the CRPD to

“take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice”.

It requires that “information intended for the general public” is furnished to persons with disabilities in accessible formats. It imposes the duty to accept and facilitate “the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions”. Furthermore, this provision obliges parties to the CRPD to urge private entities which offer services to the general public (including cultural services) “to provide information and services in accessible and usable formats for persons with disabilities”. It also includes an explicit reference to accessibility of mass media.

Article 30 CRPD contains a range of obligations that tally with those of arts 9 and 21 CRPD, demanding parties to the CRPD to take all necessary and appropriate measures to ensure that persons with disabilities have access to cultural materials, television programmes, films, theatre and other cultural activities as well

as to places where cultural performances are held or services are provided, and to monuments and sites.<sup>55</sup> Moreover, art.30(3) CRPD obliges parties to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to the access of people with disabilities to cultural materials. The latter provision relates primarily to copyright, which may constitute a barrier that prevents cultural materials from being made available to persons with disabilities in accessible formats.<sup>56</sup> In that regard, the CRPD is supplemented by the Marrakesh Treaty. This Treaty is aimed specifically at ensuring access to printed materials for persons with disabilities. It requires its contracting parties to introduce a set of limitations and exceptions to copyright rules to permit reproduction, distribution and making available of published works in formats that are accessible to persons who are blind, visually impaired or otherwise print-disabled. It further obliges contracting parties to allow the exchange of these accessible works across borders.<sup>57</sup>

### 3.2. THE ROLE OF THE EU IN IMPLEMENTING ACCESSIBILITY OBLIGATIONS RELATED TO CULTURAL GOODS AND SERVICES

For the purpose of EU law, the CRPD is a mixed agreement,<sup>58</sup> and within the EU hierarchy of law, it sits below the Treaties but above secondary law.<sup>59</sup> As noted in the introductory section to this article, upon the conclusion of the CRPD, the EU indicated that it possesses shared competence in the area of accessibility.<sup>60</sup> The Declaration of Competence of the EU listed a number of directives and regulations adopted under art.114 TFEU.

The former European Disability Strategy 2010–2020 (EDS),<sup>61</sup> which set out a loose roadmap to implement the CRPD until 2020, qualified accessibility as a precondition “for participation in society and in the economy”. In recognising that “many goods and services, as well as much of the built environment, are still not accessible enough”, it envisaged legislation and other instruments (such as standardisation) to fulfil the obligations set out in the CRPD.<sup>62</sup> With regard to cultural goods, the EDS only mentioned (quite cursorily) the lack of accessibility of television broadcasters, “which still provide few subtitled and audio-described programmes”,<sup>63</sup> without engaging further. Accessibility of culture was however generally addressed with reference to participation of persons with disabilities in society, whereby the Commission committed itself *inter alia* to

“improve the accessibility of sports, leisure, *cultural and recreational organisations, activities, events, venues, goods and services* including *audio-visual* ones; promote participation in sports events and the organisation of disability-specific ones; ... foster the cross-border transfer of copyright works in accessible format; promote use of the scope for *exceptions provided by the Directive on copyright*”.<sup>64</sup>

The most recent: “Union of equality: strategy for the rights of persons with disabilities 2021–2030” (Strategy 2021–2030)<sup>65</sup> embraces a more rights-oriented language than its predecessor.<sup>66</sup> In that regard, it mentions that accessibility is an “enabler of rights and a prerequisite for the full participation of persons with disabilities on an equal basis with others”. Differently from its predecessor, the Strategy 2021–2030 also expressly addresses the implementation of art.30 CRPD. It states *inter alia* that accessible and inclusive art and culture are vital to ensure full participation of people with disabilities in society, and “increase wellbeing and give everyone, including persons with disabilities, the opportunity to develop and utilise their potential”.<sup>67</sup> It places emphasis on the support of artists with disabilities through EU funding such as the Creative Europe Programme, and the respect of their dignity “in line with the [AVMSD] which requires that commercial communications respect human dignity and do not include any discrimination, including that based on disability”. A general reference is made to availability of printed works for persons with disabilities “taking account of the existing EU law”.

Within the context of the implementation of the CRPD, both the EDS and the Strategy 2021–2030 tread carefully when it comes to access to culture. They do seem to implicitly recognise that physical accessibility of cultural buildings, as other public spaces, has not been achieved and is still patchy across the Member States.<sup>68</sup> They (although limitedly) hint to the lack of cultural products and services in accessible formats. The Strategy 2021–2030 also succinctly highlights that stigma and stereotypes still hamper cultural participation of people with disabilities. Furthermore, barriers faced by people with disabilities have been more overtly articulated within the remit of cultural soft law,<sup>69</sup> even though the Commission has recognised that “access to culture and creativity by people with disabilities (as spectators, and also as artists and creators) ... have not yet been sufficiently addressed in the EU culture policy discussion”.<sup>70</sup> The Open Method of Coordination (OMC) Report from 2012 specifically mentioned physical barriers faced by persons with disabilities, and the need to foster accessible cultural contents (e.g. audio described audio-visual products) by describing a range of best practices across the Member States.<sup>71</sup>

On the whole, disability strategies (the EDS and the Strategy 2021–2030) recognise the multiple barriers faced in cultural contexts by people with disabilities but leave unanswered the question as to whether and to what extent access to culture must be guaranteed and promoted at the EU level. Neither the EDS nor the Strategy 2021–2030 mention the role of the WAD and the EAA in supporting accessibility of digital cultural goods and services. They only cite the AVMSD and copyright legislation. However, this somewhat evasive approach should be embedded in the more general commitment towards increasing accessibility within the EU and overall market-oriented approach adopted.

#### 4. COMPLETING THE “JIGSAW”: MAPPING ACCESSIBILITY OF CULTURAL GOODS AND SERVICES IN EU LEGISLATION

The most recent accessibility specific legislation covers, at least to some extent, cultural goods and services (for the most digital cultural goods and services), and to varying degrees, addresses physical, information and communication accessibility. Arguably, however, such legislation does favour also economic affordability of accessible cultural goods and services, by substantially mandating accessibility within production processes and reducing their price in the internal market.

The WAD and the EAA, taken together do apply to the cultural sector. Recent copyright legislation, namely the so-called “Marrakesh package” approved in 2017, which includes Directive 2017/1564 (Marrakesh Directive),<sup>72</sup> and Regulation 2017/1563 (Marrakesh Regulation),<sup>73</sup> including the decision supporting the conclusion of the Marrakesh Treaty itself,<sup>74</sup> contributes to reproducing printed cultural material in accessible formats, but also making such accessible material more available. The AVMSD covers accessibility of audio-visual products.

With the exception of the Marrakesh Regulation and the Directive, these are minimum harmonisation directives. Thus, they leave room for manoeuvre to the Member States, which could allow to support more stringent accessibility measures when shaping implementing norms that take into account their national cultural specificity. Notably, all those instruments, to a varying extent, cite the CRPD in their preamble. The Marrakesh Directive and Regulation even specify that the EU is a party to the Convention and “should be interpreted and applied in accordance with those rights and principles”.

##### 4.1. CULTURAL GOODS AND SERVICES IN THE WEB ACCESSIBILITY DIRECTIVE

The WAD, adopted in 2016, aims to harmonise “accessibility requirements of the websites and mobile applications of public sector bodies”.<sup>75</sup> The non-binding preamble of the directive includes a general

definition of accessibility according to which

“accessibility should be understood as principles and techniques to be observed when designing, constructing, maintaining, and updating websites and mobile applications in order to make them more accessible to users, in particular persons with disabilities”.

Further, recital 37 of the preamble of the WAD identifies four principles of accessibility

“perceivability, meaning that information and user interface components must be presentable to users in ways they can perceive; operability, meaning that user interface components and navigation must be operable; understandability, meaning that information and the operation of the user interface must be understandable; and robustness, meaning that content must be robust enough to be interpreted reliably by a wide variety of user agents, including assistive technologies”.

From such definitions, it seems clear that the WAD is concerned primarily with the physical and information dimension of accessibility.

In order to comply with art.4 WAD, Member States must ensure that public sector bodies websites and mobile applications are accessible by making them perceivable, operable, understandable and robust. The WAD provides for common mandatory accessibility requirements, introduced by the Harmonised European Standard, initially linked to the WAD by means of the Implementing Decision 2018/2048,<sup>76</sup> further amended in 2021.<sup>77</sup> As mentioned above, being a minimum harmonisation instrument, “Member States may maintain or introduce measures in conformity with Union law which go beyond the minimum requirements” established by the Directive.<sup>78</sup> As further clarified in the recently published report on the implementation of the WAD, a website or mobile application is deemed compliant with the WAD if it fulfils two criteria.<sup>79</sup> First, “it must conform to the accessibility requirements (perceivable, operable, understandable and robust), for which the Harmonised European Standard gives a presumption of conformity”.<sup>80</sup> Secondly, “a website or mobile application must have a detailed, comprehensive and clear accessibility statement”, based on the model provided by the Commission implementing decision.<sup>81</sup>

The WAD requires that accessibility requirements should not impose a “disproportionate burden” upon public sector bodies.<sup>82</sup> As noted in the preamble, this means that, “in justified cases, it might not be reasonably possible for a public sector body to make specific content fully accessible”.<sup>83</sup> In order to assess the extent to which compliance with accessibility requirements imposes a disproportionate burden, the “size, resources and nature of the public sector body concerned” must be considered alongside “the estimated costs and benefits for the public sector body concerned in relation to the estimated benefits for persons with disabilities, taking into account the frequency and duration of use of the specific website or mobile application”. In that regard, public sector bodies must outline which requirements could not be complied with and then provide accessible alternatives. It is worth noting that, as scholars argue,<sup>84</sup> the reference to the limit of “disproportionate burden” diverges from the CRPD approach, according to which accessibility obligations are progressive but unconditional.<sup>85</sup>

The material scope of the WAD encompasses all websites and mobile applications of public sector bodies. Public sector bodies are “the State, regional or local authorities, bodies governed by public law” and

“associations formed by one or more such authorities or one or more such bodies governed by public law, if those associations are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character”.<sup>86</sup>

Such a broad definition of public sector bodies includes public cultural institutions and public agencies. The WAD also makes reference to the list of “central government authorities”, provided in Annex I of Directive 2014/24, and the list of “bodies and categories of bodies governed by public law” included in Annex III of its predecessor Directive 2004/18.<sup>87</sup> It specifies that those lists can be considered illustrative, although the Court of Justice of the European Union (CJEU) has clarified that the inclusion of a body in such an Annex does not create an “irrebuttable presumption” that the body falls within the scope of the directive.<sup>88</sup> On those lists, one can find bodies such as ministries for culture and/or heritage, and other government departments; state agencies in the areas of tourism, heritage, and culture and arts; galleries; libraries; museums; orchestra; theatres; operas; cultural and arts centres; higher education establishments in the area of arts and culture; cultural institutes; and cultural funds/foundations.<sup>89</sup> Public service broadcasters fall outside the scope of the WAD. This exclusion was at the outset justified by the fact that provisions related to the accessibility of audio-visual media services should be developed “in the context of Union sector-specific legislation or legislation focusing on accessibility” applicable to both public and private broadcasters.<sup>90</sup> In fact, at present, accessibility of audio-visual media services is regulated in the AVMSD. However, “services providing access to audio-visual media services” are covered by the EAA, giving rise to different and layered accessibility obligations for broadcasters in relation to their digital services.

Even though public cultural institutions and bodies must make their website accessible, the WAD excludes from its scope certain content of websites and mobile applications. This is the case of “reproductions of items in heritage collections”—meaning privately or publicly owned goods presenting an historical, artistic, archaeological, aesthetic, scientific or technical interest and that are part of collections preserved by cultural institutions such as libraries, archives and museums<sup>91</sup>—that cannot be made fully accessible because of either “the incompatibility of accessibility requirements with either the preservation of the item concerned or the authenticity of the reproduction (e.g. contrast)” or

“the unavailability of automated and cost-efficient solutions that would easily extract the text of manuscripts or other items in heritage collections and transform it into content compatible with the accessibility requirements”.<sup>92</sup>

With regard to the first exception, the WAD strikes a balance between accessibility and the protection and preservation of heritage. The latter features among the tasks of the Union, whereby art.167(1) TFEU requires the EU to bring “the common cultural heritage to the fore”. The second exception, by referring to “cost-efficient” solutions, echoes the overall limit of the disproportionate burden included in the directive.

Interestingly, the preamble of the WAD does specify that, even when the item cannot be made accessible, some accessibility requirements for websites or mobile applications should still be complied with as regards to the metadata related to the reproduction of these items.<sup>93</sup> Recital 31 recognises that metadata (which usually include the title associated with the item, description, author and date and are key to support the preservation and management of digital collections)<sup>94</sup> are essential to increase general openness of collections and must be accessible to everyone without discrimination. In fact, it would be important for metadata related to cultural goods to fully address the needs for people with a wide variety of physical, cognitive, and neurological disabilities. For example, as Jones highlights, if metadata describes the object in a way that it could be understood purely by listening to the description,<sup>95</sup> it would greatly support access for people with visual impairments to heritage items.

All in all, the WAD has a great potential to enhance accessibility of cultural institutions that have increasingly moved to the digital space. It is notable that Member State monitoring reports evidence that,



among the categories of public websites, the three most monitored services were: (i) education; (ii) social protection; and (iii) recreation and culture.<sup>96</sup> These reports also signal that, while there is ample room for improvement when it comes to monitored websites and mobile app, an increased accessibility is visible.<sup>97</sup> In spite of its textual limits, it could also contribute to increase accessibility of digital heritage if leveraged and taken into account in digitisation processes.

#### 4.2. CULTURAL GOODS AND SERVICES IN THE EUROPEAN ACCESSIBILITY ACT

The EAA —the WAD sister directive—was adopted by the EU legislators in 2019 with the explicit aim of improving the functioning of the internal market for accessible products and services by removing regulatory barriers across the EU, and to complement the WAD. The EAA primarily pursues economic aims, such as promotion of growth and competitiveness, but its preamble (as the WAD preamble) extensively references the CRPD, reflecting the overarching purpose of the EAA to enhance access to goods and services for persons with disabilities.<sup>98</sup> In this respect, the duality of market and social objectives pursued by the EAA led to conceptualise the EAA as “the embodiment of the constitutional ideal of ‘social market economy’”.<sup>99</sup>

The EAA requires Member States to guarantee accessibility of goods and services falling within its scope. It provides broad requirements for product and services related to information and instructions, user interface and functionality design, support services and packaging that are detailed in Annex I to the directive. The EAA requires products and services to be designed and produced in a way as to “maximise their foreseeable use by persons with disabilities”. Annex II of the EAA also provides for an indicative non-binding list of examples of possible solutions that contribute to meeting the accessibility requirements provided in the directive. Such examples include the use of Braille, audio description but also the use of words in a clear and cogent manner. In that regard, the EAA mostly contributes to enhancing physical, information and communication accessibility, but, in the medium term, is expected to make accessible products more affordable by embedding binding accessibility into manufacturing processes. In December 2021, the Commission formally notified the European standardisation organisations and stakeholder organisations regarding the development of standards and published the final draft standardisation request for harmonised standards in support of the EAA.<sup>100</sup>

The EAA places a range of strong and enforceable obligations on manufacturers, authorised representatives, importers, distributors and service providers,<sup>101</sup> and applies equally to economic operators from the public and private sectors. For example, manufacturers, when placing their products on the market, have to ensure that the products “have been designed and manufactured in accordance with the applicable accessibility requirements of this Directive”.<sup>102</sup> Importers must “place only compliant products on the market”. They also have to carry out a conformity assessment before placing a product on the market.<sup>103</sup> Distributors must “act with due care in relation to the requirements of [the] Directive”, and “ensure that, while a product is under their responsibility, storage or transport conditions do not jeopardise its compliance with the applicable accessibility requirements”.<sup>104</sup> Service providers must “ensure that they design and provide services in accordance with the accessibility requirements” of the EAA.<sup>105</sup>

The material scope of the EAA covers a range of key products and services, such as computers, smartphones, tablets, TV sets, banking ATMs and services, payment terminals, e-books and e-readers, e-commerce websites and mobile applications and ticketing machines and check-in machines.<sup>106</sup> The specific products and services were included in the EAA following the Commission’s impact assessment,<sup>107</sup> which confirmed that the requirements arising from the choice of art.114 TFEU as legal basis were fulfilled.<sup>108</sup> In this respect, the existence of actual or potential market barriers supported the demarcation of the EAA material scope of application. For example, “cultural media content (e.g.

performances, theatres, cinema, concerts)” was excluded from the scope of the directive after it was not found to be among goods that “encounter, or are expected to encounter, barriers in cross-border trade” or in regard to which “market emergence or amelioration is hindered due to a lack of economy of scale”.<sup>109</sup> However, the decision on the scope of the EAA with regard to the cultural sector was not straightforward. The European Parliament’s (EP) Committee on Women’s Rights and Gender Equality considered that the Act could be improved “to cover a more extensive range of goods and services”, including in the areas of tourism and culture.<sup>110</sup> By contrast, the EP Committee on Culture and Education had proposed to remove e-books and audio-visual media services from the scope of the directive, and to incorporate a “culture and media derogation”. In that regard, it pointed to concerns about the competence of the EU in the area of culture.<sup>111</sup>

Ultimately, the range of products and services finally included within the EAA’s material scope is wide. In that regard, Hosking notes that the “primary focus of the EAA is on accessibility in the ICT sector”.<sup>112</sup> Those products and services do encompass specific cultural goods and services, as well as products that are functional to guarantee access to cultural goods and services. Namely, the EAA covers e-books and e-readers. Further, services providing access to audio-visual media are to be made accessible. These can comprise websites and online and mobile applications of TV channels which provide cultural content, as well as of video-on-demand platforms (e.g. Netflix), offering a variety of TV shows, movies or documentaries. Accessibility of other general products encompassed by the EAA, i.e. computers, tablets, smartphones, and smart TVs, is also a precondition to access the cultural digital space. Furthermore, cultural places and institutions, for example cinemas, might have ticketing machines, and again their accessibility is mandated by the EAA. Accessibility of e-commerce services falling within the scope of the EAA is equally crucial for the ability of persons with disabilities to purchase cultural goods and services online, for example, buying a book in an online bookstore.

While the material scope does cover a wider range of digital cultural goods and services than it appears at first sight, a number of limitations to the personal scope of application of the EAA challenge its strength with regard to the cultural sector. Microenterprises providing services are exempt from complying with the accessibility requirements.<sup>113</sup> Further, “for microenterprises dealing with products falling within the scope of this Directive the requirements and obligations of this Directive should be lighter in order to reduce the administrative burden”.<sup>114</sup> A microenterprise is “an enterprise which employs fewer than 10 persons and which has an annual turnover not exceeding EUR 2 million or an annual balance sheet total not exceeding EUR 2 million”.<sup>115</sup> In this regard, data collected by Eurostat shows that the majority of cultural activities, with the exception of broadcasting activities, are provided by microenterprises (and small to medium-sized enterprises (SMEs), i.e. enterprises with fewer than 250 persons employed).<sup>116</sup> Thus, the limited scope of the EAA will not only generally “limit the potential positive effects of this Directive on the lives of persons with disabilities”,<sup>117</sup> but potentially impact on their cultural participation.

Moreover, the EAA provides for exceptions to the application of its accessibility requirements.<sup>118</sup> Similarly to the WAD, art.14 EAA establishes that accessibility requirements do not apply where they would impose a disproportionate burden on the economic operators concerned. This provision includes an additional limit. Namely, accessibility does not apply when it would imply a significant change in a product or service that results in the fundamental alteration of its basic nature. For example, the Council Presidency noted in one of the progress reports during the process of negotiating the EAA that “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”.<sup>119</sup> The reason cited for these exceptions is proportionality,<sup>120</sup> and the safeguard clauses apply to all types of businesses. However, SMEs might be more likely to invoke the limit of “disproportionate burden” and their obligations in terms of conformity assessment are lighter.<sup>121</sup> As mentioned above, since SMEs “tend to dominate the vast majority of cultural

activities” in the EU,<sup>122</sup> these safeguard clauses also might undesirably impact on the accessibility of cultural goods and services.

On the whole, the EAA has the potential to increase accessibility of a range of digital cultural goods and to facilitate access to audio-visual content. Nonetheless, the range of limitations to its personal scope and derogations to the obligations might impact more significantly on the cultural sector than on other sectors because of its particular market characteristics, hindering the benefits of the EAA.

#### 4.3. ACCESSIBILITY OF AUDIOVISUAL MEDIA SERVICES IN THE REVISED AUDIOVISUAL MEDIA SERVICES DIRECTIVE

The AVMSD is “the main media and cultural policy tool by which the European regulators draw a legal framework over a convergent [European audio-visual] landscape”.<sup>123</sup> The AVMSD, differently from the WAD and EAA, is not accessibility specific legislation, but it explicitly addresses accessibility of audio-visual media services, which are “as much cultural services as they are economic services”.<sup>124</sup>

The AVMSD<sup>125</sup> updated and revised the former TVWF Directive,<sup>126</sup> which had established “a single market in television broadcasting across the European Union”.<sup>127</sup> The original AVMSD constituted a (contested) milestone in the building of audio-visual cultural policy.<sup>128</sup> It was meant to “achieve a balance between the free circulation of TV broadcast and new audio-visual media and the preservation of values of cultural identity and diversity”.<sup>129</sup> It applied to audio-visual media services including television broadcasting or on-demand services “which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public”,<sup>130</sup> in their function to inform, entertain and educate the general public.<sup>131</sup> Originally, the AVMSD applied to “any content service of commercial nature”,<sup>132</sup> it did not cover activities non-economic in nature,<sup>133</sup>

“such as private websites and services consisting of the provision or distribution of audio-visual content generated by private users for the purposes of sharing and exchange within communities of interest”.<sup>134</sup>

For the purposes of the original AVMSD, the term “audio-visual” referred to “moving images with or without sound, thus including silent films but not covering audio transmission or radio services”.<sup>135</sup>

The original text of the AVMSD contained, in art.7, a provision on accessibility of audio-visual media services. This provision was the result of an intervention by the European Parliament, arguing that accessibility of the media was necessary to ensure the participation of EU citizens, including persons with disabilities, in social and cultural life.<sup>136</sup> However, that provision only encouraged but did not oblige Member States to impose accessibility requirements on providers of audio-visual media services,<sup>137</sup> adopting a “soft approach to media accessibility”.<sup>138</sup> While “the number of audio-visual media services accessible to people with visual or hearing disabilities [increased] in the recent years [...] almost all Member States [introduced] statutory rules requiring service providers to adopt measures to facilitate the accessibility of audio-visual media services”, divergences across Member States remained.<sup>139</sup>

In 2018 a new directive amending the AVMSD was passed with the explicit purpose of updating the regulatory framework to “changing market realities”.<sup>140</sup> The amendment of the AVMSD coupled with the revision of the copyright directives was part of the broader EU Digital Strategy.<sup>141</sup> In fact, one of the key novelties introduced by the amended AVMSD is the extension of the overall material scope to video-sharing platforms.<sup>142</sup> Other main changes include reinforcing the rules on the protection of minors, and combating hate speech; clarifying the country of origin principle; increasing the obligations on promoting the production and distribution of European works, in particular in relation to on-demand services; and

increasing the flexibility in relation to advertising.<sup>143</sup> The provisions on accessibility were also revised. Initially, the Commission proposed to delete art.7 on accessibility, as access to audio-visual media services could be dealt with in the EAA.<sup>144</sup> However, the opposite approach was in fact adopted. As noted above, the EAA refers to accessibility requirements to services providing access to audio-visual media services, that is

“websites, online applications, set-top box-based applications, downloadable applications, mobile device-based services including mobile applications and related media players as well as connected television services”.<sup>145</sup>

The current text of the AVMSD contains “strengthened” obligations in relation to accessibility of audio-visual media services.<sup>146</sup> It removes some of the “arguably weak language” contained in the original version.<sup>147</sup> It also links the provision of accessible audio-visual media services to the CRPD, and specifically to the right of persons with disabilities to participate in culture.<sup>148</sup> These accessibility obligations apply to television broadcasts and video-on-demand services, but not to content shared through video-sharing platforms. This means that content included on platforms such as YouTube and TikTok, increasingly of “greater importance as sources of knowledge, information and creative content”,<sup>149</sup> might not be accessible to persons with disabilities.

Article 7(1) of the revised AVMSD stipulates that

“Member States shall ensure, without undue delay, that services provided by media service providers under their jurisdiction are made continuously and progressively more accessible to persons with disabilities through proportionate measures”.

The four main access services that the directive envisions are sign language, subtitling for the deaf and hard of hearing, spoken subtitles, and audio description,<sup>150</sup> and reflect the focus of the directive on people with visual or hearing impairments.<sup>151</sup> The implementation of art.7(1) is further supported by specific obligations on the Member States, which must: ensure reporting by the media service providers to their national regulatory bodies, and, in turn, by the Member States to the Commission, on the implementation of the accessibility provision;<sup>152</sup> encourage media service providers to develop accessibility action plans;<sup>153</sup> and designate an online point of contact for providing information, as well as receiving complaints on accessibility issues.<sup>154</sup>

As already noted by the European Disability Forum (EDF),<sup>155</sup> while the revised AVMSD certainly strengthens the obligations on Member States, it does not provide quantitative and qualitative targets. The EDF also argues that its efficiency is dependent on the implementation in national legislation. Further, the strength of the AVMSD obligations is dependent on the interpretation of concepts of continuous and progressive improvements in accessibility, as well as of what constitutes a proportionate measure.<sup>156</sup> Thus, the AVMSD while important in ensuring greater accessibility of audio-visual media risks to remain a blunt weapon if Member States will not ensure implementing efforts.

#### 4.4. ACCESSIBILITY OF PRINTED MATERIAL AND COPYRIGHT LEGISLATION

One of the most important pieces of legislation in the bulk of EU copyright law is the InfoSoc Directive, most recently amended by the Digital Single Market (DSM) Directive, which harmonises certain aspects of copyright and related rights. The InfoSoc included in the original text of its art.5(3)(b) a “disability exception” to copyright rules. That provision, while recognising the intersection between the rights of persons with disabilities and copyright,<sup>157</sup> allowed (but did not compel) Member States to provide for

exceptions or limitations for “uses for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability”. As Sganga noted, being loosely drafted and optional, it was transposed by Member States in a patchy way.<sup>158</sup> Whilst many EU Member States had included some forms of exceptions to copyright for the benefit of individuals with disabilities, the implementation of art.5(3) was inconsistent both with regard to the types of disabilities covered and the scope of the exception.<sup>159</sup>

The Marrakesh Directive, which “aims to further harmonise Union law applicable to copyright and related rights in the framework of the internal market”,<sup>160</sup> introduces a mandatory exception to the harmonised rights of creators and authors, empowering persons who are blind or have a visual impairment or are otherwise print disabled (beneficiaries) and authorised entities to undertake the necessary steps to transform a work into an accessible format for their own benefit. In line with the Marrakesh Treaty, authorised entities are those

“authorised or recognised by a Member State to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a public institution or non-profit organisation that provides the same services to beneficiary persons as one of its primary activities, institutional obligations or as part of its public-interest missions”.<sup>161</sup>

The Marrakesh copyright exception relates to the reproduction right; the right of communication to the public; and the right of making available to the public (as required by the Marrakesh Treaty). It also encompasses the distribution right.

The Marrakesh Directive incorporates the reference to the three-steps test by explicating that the exception

“shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the right-holder”.<sup>162</sup>

However, it does not allow Member States to impose additional requirements for the application of the exception, such as the prior verification of the commercial availability of works in accessible formats. In the attempt to strike a balance between the rights of beneficiaries and copyright holders, this Directive also requires authorised entities to actively discourage copyright violations in the form of “unauthorised reproduction, distribution, communication to the public or making available to the public of accessible format copies”, and to demonstrate “due care” in handling accessible format copies.<sup>163</sup>

The Marrakesh Directive contributes to solidify and expand the “disability exception” of the InfoSoc Directive also by introducing an amendment to art.5(3)(b). The consolidated provision still affirms that Member States “*may* provide” for exceptions or limitations to the rights of reproduction and communication to the public for the “uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability” without prejudice to the obligations of Member States under the Marrakesh Directive. This means that Member States still *may* (but are not required to) provide for a copyright exception or limitation in cases which do not fall under the scope of the Marrakesh Directive.<sup>164</sup>

The Marrakesh Regulation, which is complementary to the Marrakesh Directive, provides for a copyright exception allowing for the cross-border exchange of accessible format copies of certain works protected by copyright between EU Member States and non-EU Member States which are party to the Marrakesh Treaty.

The Marrakesh package is essential to support access to printed material, to contrast what has been defined as the “book famine”.<sup>165</sup> However, its personal scope is (almost inevitably) limited, as it focuses on specific groups of persons with disabilities, while the EAA and other instruments align overtly or implicitly to the broader conceptualisation of disability of the CRPD, which embeds the social-contextual model. Moreover, its material scope is constrained, and taken alone would not be sufficient to substantially increase the number of books in accessible formats.<sup>166</sup>

## 5. ACCESSIBILITY OF CULTURAL GOODS AND SERVICES IN EU LEGISLATION: AN INCOMPLETE JIGSAW?

The WAD, the EAA, the AVMSD and copyright legislation are aimed at overcoming the regulatory fragmentation for a range of products and services, and enhancing their cross-border circulation. Generally, all those pieces of legislation, to varying degrees, can be seen contributing to the shaping of a more accessible internal market. In particular, disability accessibility measures such as the WAD and the EAA intend to support the creation of an EU market for accessible goods and services. The increased competition for the manufacturing of accessible (digital) products is also meant to make those products more affordable and reduce their overall manufacturing cost in the medium term. While the effects of the EAA at this early stage are difficult to gauge, the WAD has been deemed successful in increasing the number of actors specialising in accessibility within the EU market, and the expected continuous increase in demand will in turn support increased supply of accessibility tools. In fact, the review on the implementation of the WAD highlighted “the spread of knowledge about accessibility solutions across businesses” and an “increase in demand for accessibility tools”.<sup>167</sup>

When it comes to accessibility of cultural goods and services in the internal market, the contribution of the WAD, the EAA, the AVMSD and copyright legislation can be considered significant. However, this is so only in so far as they are conceived of as pieces of a jigsaw. In other words, accessibility of cultural goods and services is achieved by the mutually supportive and complementary nature of these acts. For example, copyright legislation is essential to ensure access to a range of existing printed material, because it allows, without prior authorisation of the copyright holder, for conversion of existing printed material in accessible formats (e.g. the creation of an audiobook) and the reproduction of accessible format copies (making additional copies of a book in Braille).<sup>168</sup> However, the EAA will oblige publishers to produce their digital publications in an accessible format from the beginning, increasing the actual availability of born accessible printed material. It will also ensure accessibility of e-readers. The WAD regulates the accessibility of the websites and mobile applications of public sector bodies. While this includes the websites of a number of public cultural institutions and public agencies, it does not cover private sector websites. However, private sector websites and mobile applications as elements of services that fall within the scope of EAA are covered by the EAA.<sup>169</sup> Most notably, the EAA “includes obligations to ensure that e-commerce websites are accessible”,<sup>170</sup> and this includes private economic operators, for example book sellers. Websites and mobile applications that fall within the scope of the WAD *and* the EAA should comply with accessibility requirements of both directives “in order to ensure that the online sale of products and services is accessible for persons with disabilities irrespective whether the seller is a public or private economic operator”.<sup>171</sup> As noted, the WAD has the potential to enhance accessibility of websites of public cultural institutions as well as to their cultural content in the digital space. The EAA will apply to private cultural operators. The AVMSD and the EAA also jointly support access to audio-visual content. In fact, as noted above, websites and mobile applications of audio-visual service providers—both public and private TV broadcasters, as well as video-on-demand—remain covered in the finally adopted version of the EAA.<sup>172</sup> In this regard, the following words of the EDF ring true:

“It is important to see these two EU regulatory frameworks as complementing each other with the aim of

ensuring the rights of persons with disabilities to information, cultural, educational and other content.”<sup>173</sup>

Kearns, in a collection published almost nineteen years ago, claimed that “it was always unlikely that EU law’s regulation of culture would be holistic” and this continues to be the case. In fact, “[w]hen the wheel of EU law turns, it takes with it, in each of its relevant separate segments, a particular dimension of culture”.<sup>174</sup> This seems to particularly be the case when it comes to accessibility of cultural goods and services.

Yet, this is an incomplete jigsaw, and even the combination of those acts does not cover all facets of the cultural sector and existing cultural goods and services. The limited scope of the copyright exception is one of the flaws already highlighted.<sup>175</sup> The Marrakesh package only covers printed material, and, as Ramalho noted, “[t]here is considerable normative and legal latitude ... to expand the scope of the current disability exceptions”.<sup>176</sup> However, a recent report presents evidence suggesting that an enlargement of the exception will be too onerous for copyright holders (and hence unnecessary).<sup>177</sup> Similarly, the WAD, the AVMSD, and to a large extent also the EAA, are focused on the accessibility of the digital space, but gaps remain and are exacerbated by a certain disconnection between accessibility legislation and EU cultural digitisation actions. As yet, EU heritage digitisation policies have not addressed disability accessibility specifically. The 2011 Commission recommendation on the digitisation and online accessibility of cultural material and digital preservation is the key policy document that addresses the digital lifecycle of cultural heritage items, including the planning, monitoring and funding of digitisation, and supports the online access and re-use.<sup>178</sup> It also reinforces the cooperation among Member States and the exchange of best practices, but without tackling the needs of persons with disabilities. Even though access for persons with disabilities has been addressed in the remit of some dedicated projects, accessibility is dealt with in very general terms. This recommendation de facto eschews to further promote access to culture for people with disabilities.

Additionally, access to culture in the “real world” remains outside the scope of accessibility legislation. Although a public consultation on the EAA indicated that accessibility of cultural media content (e.g. performances, theatres, cinema, concerts), as well as of buildings open to the public, including libraries, theatres, monuments, and cultural heritage, was important for the inclusion of persons with disabilities,<sup>179</sup> these goods and services were not included within the scope of the EAA. The EAA leaves to Member States’ discretion whether to implement accessibility requirements in relation to the built environment used by clients of services covered by the EAA.<sup>180</sup> It does not seem a coincidence that the CRPD Committee in advance of the joint second and third report of the EU, released a list of issues<sup>181</sup> and asked the EU to give account of

“planned legislation and other measures, if any, that would extend accessibility rights of persons with disabilities to those areas that the European Accessibility Act does not cover sufficiently, such as accessibility of *‘historical sites and buildings’*”.<sup>182</sup>

Notably, the CRPD Committee also required information on Member States implementation of the Marrakesh Treaty. It asked whether and to what extent services for persons with disabilities under the revised AVMSD “will be provided with the necessary quality and to the appropriate extent and within a reasonable time period”.<sup>183</sup> It further sought information on measures aimed to facilitate the availability of “accessible languages, formats and technologies appropriate to different kinds of impairments, including sign languages, Braille, augmentative and alternative communication”, as well as instruments that ensure “equal access to video-sharing, social media platforms and news websites”.<sup>184</sup> The queries of the CRPD Committee are likely to further unveil that, almost inevitably, taken alone or together, these legislative pieces fall short of the obligations included in the CRPD in various respects.

## 6. CONCLUDING REMARKS: ACCESSIBILITY OF CULTURAL GOODS AND SERVICES AT THE INTERSECTION OF DISABILITY RIGHTS, MARKET INTEGRATION AND “MARKETISATION” OF CULTURE

Culture has fallen within the spectrum of EU competences since the Treaty of Maastricht.<sup>185</sup> However, as Psychogiopoulou puts it, art.167 TFEU “depicts a carefully demarcated cultural mandate for the European Union, revealing that responsibilities for cultural matters essentially remain with the Member States”, allowing the EU to adopt only incentive measures, “excluding any harmonisation of the laws and regulations of the Member States”.<sup>186</sup> Crucially, incentive measures adopted on the basis of art.167 TFEU entail cultural programmes that provide support to the development of a range of cultural services and activities, such as Creative Europe.<sup>187</sup> The Creative Europe Programme 2014–2020 included only a cursory reference to the “balance between the increasing accessibility of cultural and creative works, fair remuneration of artists and creators”,<sup>188</sup> albeit it comprised among its objectives that of reaching

“new and enlarged audiences and improve access to cultural and creative works in the Union and beyond, with a particular focus on children, young people, *people with disabilities* and under-represented groups”.<sup>189</sup>

In a similar vein, the Creative Europe Programme 2021–2027,<sup>190</sup> while aiming to increasing “cultural participation across the Union, in particular with regard to people with disabilities”,<sup>191</sup> arguably does not focus on accessibility. In fact, as mentioned in the introductory section, the EU has, since the conclusion of the CRPD, linked accessibility and the implementation of relevant CRPD provisions to creation of a “deeper and fairer” internal market. Cultural accessibility makes no exception in this respect.

Article 114 TFEU as a primary avenue for accessibility, including that of cultural goods and services, signals that “market goals have become more and more intertwined with social objectives”.<sup>192</sup> The EAA, the WAD, the Marrakesh package and accessibility provisions in the AVMSD represent a balancing exercise between disability rights and market-based objectives. The incomplete jigsaw that they create advances accessibility yet presents notable gaps. In furtherance, zooming in on the legal impact of these instruments on national cultural policies, it is evident that they contribute to the further erosion of Member States’ competences. Most certainly, this is not a new phenomenon. The progressive restraint of Member States’ cultural action and the corresponding broadening of the reach of EU law has been longstanding. It has also been supported by the so-called cultural mainstreaming clause included in art.167(4) TFEU, that entrust the EU to give consideration to cultural issues across the overall EU action. Thus, the quest for accessibility of cultural goods and services is just the latest, and probably not the last, factor that pushes towards the “marketisation” of culture. This approach goes hand in hand with a more and more pronounced “economic and technological” emphasis of current EU cultural policies,<sup>193</sup> and with the framing of culture into the competitiveness agenda.<sup>194</sup> It is further reinforced by the ambitious EU Digital Policy, which falls within the creation of the EU digital single market.<sup>195</sup> This policy further intertwines accessibility of digital goods for persons with disabilities with the creation of a vibrant and broad digitalised market. It suffices to recall Europe’s Media in the Digital Decade: An Action Plan to Support Recovery and Transformation plan, which states that initiatives to support audio-visual and media companies must be

“implemented encouraging equal access to opportunities and resources for people who might otherwise be excluded or marginalised, for example including *access to content by people with disabilities*”.<sup>196</sup>

Of course, doubts can also be cast on the (implicit) acknowledgement that cultural goods and services are



primarily economic in their nature. Questions can be raised about whether or not such progressive “marketisation” of culture really serves the purpose of enhancing access to culture for people with disabilities. While, as noted above the legislation considered falls short of the CRPD obligations, the answer to this question should probably be in the affirmative. Indeed, while the effects of the EAA will be seen in the long run, EU legislation might be deemed to already display some impact. The report on the availability of cultural works mentioned above<sup>197</sup> suggests that accessible audio-visual works, audiobooks and printed works are more available than other cultural goods and services. The report on the WAD also signals positive effects displayed by this legislation.<sup>198</sup> However, questions should also be asked as to whether this approach supports the flourishing of culture and is suitable to respect cultural diversity, which is one of the objectives of the Treaty. The answer here is less clear cut. Ultimately, finding the right balance between enhancing cultural content diversification, preserving Member States’ competences and regulating a more accessible frontier-less cultural market will probably always be uneasy.

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### Footnotes

- 1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Union of Equality: Strategy for the Rights of Persons with Disabilities 2021–2030” COM(2021) 101 final.
- 2 Directive 2019/882 on the accessibility requirements for products and services [2019] OJ L151/70.
- 3 *M. Lecerf, “Understanding EU Policies for Persons with Disabilities” (2021) EPRS.eu, <https://epthinktank.eu/2021/11/25/understanding-eu-policies-for-persons-with-disabilities/>.*
- 4 For the purpose of this analysis, cultural goods and services are defined as goods and services that embody artistic, aesthetic, symbolic and spiritual values and “differ from other products because their system of valorisation, which includes a characteristic irreproducible, is linked to its appreciation or pleasure”. See UNESCO, “The 2009 UNESCO Framework for Cultural Statistics (FCS)” (Montreal UNESCO Institute for Statistics, 2009), <https://unstats.un.org/unsd/statcom/doc10/BG-FCS-E.pdf>.
- 5 *EBU Access to Culture Survey 2012, Mapping Current Levels of Accessibility to Cultural Venues and Activities in Europe (2012)*, [http://www.kulttuuriakaikille.fi/doc/research\\_and\\_reports/SUMMARY-REPORT-OF-THE-EBU-Access-to-Culture-Survey-2012-and-EBU-call-for-action.pdf](http://www.kulttuuriakaikille.fi/doc/research_and_reports/SUMMARY-REPORT-OF-THE-EBU-Access-to-Culture-Survey-2012-and-EBU-call-for-action.pdf).
- 6 E. Martinez Amador, “Los sordos no van al cine: la accesibilidad de las personas con discapacidad auditiva en las salas de cine españolas” (2016) 12 Fonseca Journal of Communication 130.
- 7 These include both “born accessible” goods (i.e. works initially produced in a way that allows persons with disabilities to access it), and “accessible format copies” (i.e. copies of a work made subsequently accessible to persons with disabilities).
- 8 *Report on the availability of certain copyright protected works for persons with disabilities within the internal market* SWD(2022) 109 final, p.9.
- 9 *Report on the availability of certain copyright protected works for persons with disabilities within the internal market*, p.8.
- 10 D. Ferri et al., “Implementing the Right of People with Disabilities to Participate in Cultural Life across

Five European Countries: Narratives and Counternarratives” (2022) 14 *Journal of Human Rights Practice* 859–878.

- 11 Article 6 TFEU.
- 12 Decision 2010/48 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L23/35.
- 13 L. Waddington, “A Disabled Market: Free Movement of Goods and Services in the EU and Disability Accessibility” (2009) 15 *E.L.J.* 575.
- 14 In line with the CRPD, this article uses person-first language placing “the person” before a disabling identifier, to acknowledge individual abilities and to constitute disability as part of “human diversity”. For a recent critical account on the debate on the language of disability see K.L. Best et al., “Language Matters! The Long-standing Debate between Identity-first Language and Person First Language” (2022) 34 *Assistive Technology* 127.
- 15 Decision 2010/48 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L23/35.
- 16 This Declaration aimed at signalling to third parties the competences attributed to the EU in the areas covered by the CRPD.
- 17 Directive 2007/65 amending Council Directive 89/552 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L332/27.
- 18 Directive 2018/1808 amending Directive 2010/13 on the coordination of certain provisions laid down by law, regulation or administration action in Member States concerning the provision of audio-visual media services in view of changing market realities [2018] OJ L303/62.
- 19 Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.
- 20 Among others see *B. De Witte, “The Cultural Dimension of Community Law” in Collected Courses of the Academy of European Law (Leiden: Martinus Nijhoff Publishers, 1993), pp.241–245, 271–287; E. Psychogiopoulou, The Integration of Cultural Considerations in EU Law and Policies (Leiden: Martinus Nijhoff Publishers, 2008).*
- 21 *Psychogiopoulou, The Integration of Cultural Considerations in EU Law and Policies (2008).*
- 22 E. Psychogiopoulou, “The Cultural Mainstreaming Clause of Article 151(4) EC: Protection and Promotion of Cultural Diversity or Hidden Cultural Agenda?” (2006) 12 *E.L.J.* 575.
- 23 Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10; Directive 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9 and 2001/29 [2019] OJ L130/92; Directive 2017/1564 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society [2017] OJ L242/6; Regulation 2017/1563 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled [2017] OJ L242/1.
- 24 Directive 2016/2102 on the accessibility of the websites and mobile applications of public sector bodies [2016] OJ L327/1.
- 25 Directive 2019/882 on the accessibility requirements for products and services [2019] OJ L151/70.

- 26 Directive 2014/53 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5 [2014] OJ L153/62.
- 27 L. Waddington, “Reading a Duty to Provide Accessible Pre-contractual Information for Consumers with Disabilities into EU Consumer Protection Law” (2022) 45 *Journal of Consumer Policy* 307–329. See also L. Waddington, “Exploring Vulnerability in EU Law: An Analysis of ‘Vulnerability’ in EU Criminal Law and Consumer Protection Law” (2020) 45 *E.L. Rev.* 779–801.
- 28 Directive 2014/24 on public procurement and repealing Directive 2004/18 (the Classical Directive) [2014] OJ L94/65; Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17 (the Utilities Directive) [2014] OJ L94/243; and Directive 2014/23 on the award of concession contracts [2014] OJ L94/1.
- 29 Article 74 of Directive 2014/24.
- 30 See e.g. art.42 of Directive 2014/24.
- 31 See European Disability Card, <https://ec.europa.eu/social/main.jsp?catId=1139>.
- 32 After having published an impact assessment study in 2021 (Commission, Study assessing the implementation of the pilot action on the EU Disability Card and associated benefits (2021), <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8407&furtherPubs=yes>) at the time of revising this article, the Commission launched a public consultation on the European Disability Card due to close on 5 May 2023, see fn.31 above.
- 33 WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh, 27 June 2013). The Treaty has been ratified by the EU by means of Decision of 14 April 2014 on the signing, on behalf of the European Union, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled [2014] OJ L115/1.
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- 35 *A. Broderick and D. Ferri, International and European Disability Law and Policy. Text, Cases and Materials (Cambridge: Cambridge University Press, 2019)*.
- 36 CRPD Preamble (v) (emphasis added).
- 37 A. Broderick, “Of Rights and Obligations: The Birth of Accessibility” (2019) 24 *International Journal of Human Rights* 393.
- 38 D. Ferri, “The European Accessibility Act and the Shadow of the ‘Social Market Economy’” (2020) 45 *E.L. Rev.* 660–680.
- 39 *CRPD Committee, General Comment No. 2 on Article 9 of the Convention (2014), para.13*.
- 40 *CRPD Committee, General comment No. 5 on living independently and being included in the community (2017), para.16(b)*.
- 41 *A. Lawson, “Article 9: Accessibility” in I. Bantekas, M.A. Stein and D. Anastasiou (eds), The UN Convention on the Rights of Persons with Disabilities: A Commentary (Oxford: Oxford University Press, 2018)*.
- 42 *S. Charitakis, Access Denied: The Role of the European Union in Ensuring Accessibility under the United Nations Convention on the Rights of Persons with Disabilities (Antwerp: Intersentia Press, 2018), p.25*.
- 43 *Charitakis, Access Denied (2018), p.25*.

- 44 *Charitakis, Access Denied (2018), p.26.*
- 45 *Charitakis, Access Denied (2018), p.28.*
- 46 *Charitakis, Access Denied (2018), p.29.*
- 47 *UN Committee on the Rights of Persons with Disabilities, General Comment No 6 on equality and non-discrimination (2018), para.11.* Inclusive equality is said to embrace: a fair redistributive dimension, which requires that socio-economic disadvantages are addressed; a recognition dimension which necessitates the combatting of stigma, stereotyping, prejudice and violence, and the recognition of the dignity of human beings and their intersectionality; a participative dimension which aims to reaffirm the social nature of people with disabilities as members of the society; and an accommodating dimension, which entails making “space for difference as a matter of human dignity”.
- 48 For example, usability is sometimes considered to be an umbrella term (rather than a dimension of accessibility), with accessibility being a subset of usability, or a different term. Among many others see S. Iwarsson and A. Ståhl, “Accessibility, Usability and Universal Design—Positioning and Definition of Concepts describing Person-Environment Relationships” (2003) 25 *Disability and Rehabilitation* 57.
- 49 Broderick, “Of Rights and Obligations: The Birth of Accessibility” (2019) 24 *International Journal of Human Rights* 393.
- 50 *CRPD Committee, General Comment No. 2 on Article 9 of the Convention (2014), para.25.*
- 51 This means that the entity or provider required to ensure accessibility may not invoke the excessive burden of providing access for persons with disabilities. See *CRPD Committee, General Comment No. 2 on Article 9 of the Convention (2014), para.25.*
- 52 *CRPD Committee, General Comment No. 2 on Article 9 of the Convention (2014), para.14.*
- 53 *F. Seatzu, “Article 9: Accessibility” in V. Della Fina, R. Cera and G. Palmisano (eds), The United Nations Convention on the Rights of Persons with Disabilities: A Commentary (Cham.: Springer, 2017), pp.225–242, 227.*
- 54 Article 24 CRPD also includes an explicit reference to the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication, sign language and their use in educational settings, as well as the promotion of the linguistic identity of the deaf community.
- 55 *L. Manca, “Article 30 Participation in Cultural Life, Recreation, Leisure and Sport” in Della Fina, Cera and Palmisano (eds), The United Nations Convention on the Rights of Persons with Disabilities: A Commentary (2017), p.541.*
- 56 C. Sganga, “Disability, Right to Culture and Copyright: which Regulatory Option?” (2015) 29 *International Review of Law, Computers & Technology* 88.
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- 63 Communication on European Disability Strategy 2010–2020.
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- 72 Directive 2017/1564 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society [2017] OJ L242/6.
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82 Article 5 and recital 39 WAD.

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84 D. Ferri and S. Favalli, "Web Accessibility for People with Disabilities in the European Union: Paving the Road to Social Inclusion" (2018) 8 *Societies* 40.

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87 Directive 2014/24 replaced Directive 2004/18, but its personal scope remained unaltered (Directive 2014/24 recital 10).

88 *Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik v AOK Rheinland/Hamburg (C-300/07) EU:C:2009:358* at [42]–[43].

89 These lists also often include public broadcasters, but these are, pursuant to art.1(3)(a), excluded from the scope of the WAD.

90 Recital 23 WAD.

91 Article 3 point 7 WAD.

92 Article 1(4)(f)(ii) WAD.

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- 108 On the requirements arising from art.114 TFEU, see *Charitakis, "Accessibility of Goods and Services" in Ferri and Broderick (eds), Research Handbook on EU Disability Law (2020), p.233.*
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