

The EU Digital Services Act: An Assessment in Light of the Rights of Persons with Disabilities

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Abstract

The paper tackles the topic of accessibility of services and information for persons with disabilities in the digital domain, with focus on EU law. Its purpose is to assess whether Regulation (EU) 2022/2065 of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) complies effectively with the accessibility obligations set forth in the UN Convention on the Rights of Persons with Disabilities (CRPD), to which the European Union is a party since 2011. It is argued that the Digital Services Act – whose objective is, *inter alia*, to improve consumers' protection and the transparency of platforms – fails to fully protect the rights of persons with disabilities insofar as it makes web accessibility the object of voluntary codes of conduct, rather than of obligations. The paper adopts the doctrinal legal methodology.

Keywords

UN Convention on the Rights of Persons with Disabilities; Web Accessibility; Digital Inclusion; Digital Services Act; Codes of Conduct

1. Introduction

Information and communication technologies (ICTs) – including social media, meant as 'websites and applications that enable users to create and share

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content or to participate in social networking¹ – can be an instrument of social inclusion for persons with disabilities, but they can also be a source of further exclusion if they are not fully accessible. As set forth in the United Nations Convention on the Rights of Persons with Disabilities (CRPD),² accessibility is necessary for persons with disabilities to enjoy their human rights. Accessibility of services and information, including in the digital domain, is the precondition for the full enjoyment of human rights, independent living and social inclusion of persons with disabilities,³ and a human right *per se*.⁴ The proposed contribution will critically evaluate a recent piece of EU secondary legislation on digital services, namely the Digital Services Act (DSA),⁵ in light of the accessibility obligations set forth in the CRPD, to which the European Union is a party since 2011. To this purpose, the paper will first flesh out the content of the accessibility obligations under the CRPD with specific reference to websites and mobile applications. It will then provide a short overview on the status of the CRPD within the EU legal framework and on other EU binding instruments in the field of web accessibility. It is argued that the Digital Services Act – whose objective is, *inter alia*, to improve consumers’ protection and the transparency of platforms – fails to fully protect the rights of persons with disabilities insofar as it makes web accessibility the object of voluntary codes of conduct, rather than of obligations. The paper adopts the doctrinal legal methodology.

2. Obligations stemming from the CRPD in matters of accessibility

The CRPD, adopted by the United Nations General Assembly in 2006 and widely ratified, evidences the general acceptance at the international level of the

1 Silvia Favalli, ‘Disability, Social Media and Human Rights: “What’s the catch?”’ in Maria Caterina Baruffi and Matteo Ortino (eds), *Trending topics in international and EU law: legal and economic perspectives* (Edizioni Scientifiche Italiane 2019) 19.

2 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, opened for signature 30 March 2007, entered into force 3 May 2008) 2515 UNTS 3.

3 CRPD Committee, ‘General comment No. 2 (2014). Article 9: Accessibility’, (22 May 2014) CRPD/C/GC/2, para 1.

4 According to the CRPD Committee, albeit a disability-specific concept, accessibility can be traced back to a general right of access to goods and services enshrined in other human rights treaties, such as the Convention against all forms of Racial Discrimination (*ibid*, para 4). Nonetheless, the literature highlights that accessibility goes well beyond the so-called ‘right to access’ because it entails positive measures and imposes indirect obligations falling upon private parties, and thus amounts to a new human right (Andrea Broderick, ‘Of rights and obligations: the birth of accessibility’, [2020] *The International Journal of Human Rights* 393).

5 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1.

social model of disability, as opposed to the medical model.⁶ While the medical (and traditional) model of disability focuses on the impairment, regarded as an individual, negative situation which deserves charitable interventions, the social model considers disability as a social construction, resulting from the physical and social barriers that may hinder the full and effective participation in society of persons with disabilities.⁷ The CRPD enhances the social model by codifying a human rights model of disability, which takes into account both the individual impairment and the social construction of disability.⁸ This approach is reflected in the open-ended description of ‘persons with disabilities’ enshrined in the Convention.⁹ Based on art 1(2) CRPD, ‘persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’. Hence the CRPD’s focus on accessibility – also implying the removal of barriers – so as to ensure that persons with disabilities have access, on an equal basis with others, ‘to the physical environment, to transportation, to information and communications, *including information and communications technologies and systems*, and to other facilities and services open or provided to the public, both in urban and in rural areas’.¹⁰

The CRPD addresses ICT accessibility at art 9, on the principle of accessibility, and at art 21, on freedom of expression. Art 9 obliges States Parties to take all the appropriate measures to ensure that persons with disabilities have access to digital information and communication systems, including electronic services. In particular, the Convention includes States’ obligation ‘to promote access for persons with disabilities to new information and communications technologies and systems, including the Internet’ (art 9(2)(g)). Importantly for our purposes, based on art 9(2)(b) CRPD, States must ensure that private entities that offer services open or provided to the public take into account all aspects of accessibility for persons with disabilities, including in the digital domain. The United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee), in its General Comment No. 2 on accessibility, confirmed that private parties are bound by accessibility obligations, if they provide public

6 Emily Kakoullis and Yoshikazu Ikehara, ‘Article 1: Purpose’ in Ilias Bantekas, Michael Ashley Stein, Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities. A Commentary* (OUP 2018), 54.

7 Silvia Favalli, *Disabilità, diritti umani e diritto internazionale* (Giuffrè 2021), 7-10.

8 *ibid.*, 11-12; Valentina Della Fina, ‘Article 1 [Purpose]’ in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities. A Commentary* (Springer 2017), 98.

9 In fact, the CRPD does not include a definition of ‘disability’ (defined as an evolving concept in the Preamble, para 13). On the negotiation process, which finally excluded a definition, see: Emily Kakoullis and Yoshikazu Ikehara (n 6), 44-48.

10 United Nations Convention on the Rights of Persons with Disabilities, Article 9(1). Emphasis added.

services.¹¹ Likewise, art 21 CRPD, protecting freedom of expression – including also its passive side, that is ‘the right to seek and receive information so that ideas and opinions can be developed’¹² – binds States not only to provide information to the public in accessible formats (art 21(a)), but also to urge ‘private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities’ (art 21(c)) and to encourage ‘the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities’ (art 21(d)).

The above-mentioned States’ obligations laid down at arts 9 and 21 CRPD, which also refer to the accessibility of private services, must be read in light of the general obligations set forth in the Convention. Art 4(1) requires that States take all the appropriate measures to eliminate discrimination on the basis of disability from the part of private entities, such as service providers.¹³ As highlighted by the CRPD Committee in its above-mentioned General Comment on accessibility,

As long as goods, products and services are open or provided to the public, they must be accessible to all, *regardless of whether they are owned and/ or provided by a public authority or a private enterprise*. Persons with disabilities should have equal access to all goods, products and services that are open or provided to the public in a manner that ensures their effective and equal access and respects their dignity. This approach stems from the prohibition against discrimination; denial of access should be considered to constitute a discriminatory act, regardless of whether the perpetrator is a public or private entity.¹⁴

Such prohibition of discrimination also covers information and communication services, as further specified by the CRPD Committee in General Comment No. 6 on equality and non-discrimination.¹⁵ The CRPD ‘indirectly requires ac-

11 CRPD Committee on the Rights of Persons with Disabilities, ‘General comment No. 2’ (n 3), para 13.

12 Rachele Cera, ‘Article 21 [Freedom of Expression and Opinion, and Access to Information]’, in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities. A Commentary* (Springer 2017), 388.

13 According to the CRPD Committee, however, the lack of accessibility amounts to discrimination against persons with disabilities only if the relevant service has been established after accessibility standards are introduced (CRPD Committee, ‘General Comment No. 2’ (n 3), para 31). According to Broderick and Ferri, the relation between accessibility and discrimination has not been sufficiently clarified by the CRPD Committee. See: Andrea Broderick and Delia Ferri, *International and European Disability Law and Policy. Text, Cases and Materials* (CUP 2019), 149.

14 ‘CRPD Committee, ‘General Comment No. 2’ (n 3), para 13. Emphasis added.

15 CRPD Committee, ‘General Comment No. 6 (2018) on equality and non-discrimination’ (26 April 2018) CRPD/C/GC/6, para 40.

tion at the level of the private sector',¹⁶ by placing accessibility requirements also on the private industry.¹⁷ Nonetheless, it is the primary responsibility of the States Parties to the Convention to make sure that the private sector, including digital services providers, make their services accessible for persons with disabilities, by adopting appropriate legislation and minimum mandatory accessibility standards.¹⁸

General accessibility provisions would be moot if not accompanied by applicable standards. Therefore, besides the above-mentioned accessibility obligations, under the CRPD States are bound to develop standards of accessibility in relation to digital technologies. In particular, art 9(2)(a) CRPD affirms States' duty 'to develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public'. In order to fulfil this obligation, States can delegate the development of technical standards to private, specialized entities. This is what often happens in practice, especially in the digital domain. For instance, the main standardization organization pursuing Internet accessibility is the World Wide Web Consortium (W3C), whose member organizations are universities, NGOs and businesses, including big corporations such as Adobe and Google.¹⁹ The Web Content Accessibility Guidelines (WCAG), developed and periodically reviewed by the W3C, are generally considered the main international standard (currently, in its version 2.1).²⁰

While reliance on ICTs and accessibility specialists can be a valuable instrument for States, based on art 9(2)(a) CRPD, States must take the lead in the standard development process, make standards compulsory and effectively monitor compliance.²¹ At the same time, States' duty to ensure accessibility (also by private entities) is frustrated by the fact that standards, such as the WCAG, are not only developed by private entities, but also mostly of voluntary nature when it comes to the private sector.²² In Italy, for instance, the Stanca Act only

16 Andrea Broderick, 'Of rights and obligations: the birth of accessibility' (n 4), 399.

17 Francesco Seatzu, 'Article 9 [Accessibility]', in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities. A Commentary* (Springer 2017), 229.

18 CRPD Committee, 'General Comment No. 2' (n 3), paras 27-33.

19 See the list of member organizations: <<https://www.w3.org/Consortium/Member/List>> accessed 15 February 2023.

20 On such private standard, see: Delia Ferri and Silvia Favalli, 'Web Accessibility for People with Disabilities in the European Union: Paving the Road to Social Inclusion', [2018] *Societies* 1, 4-5. The Guidelines are available at: <<https://www.w3.org/WAI/standards-guidelines/wcag/>> accessed 7 February 2023.

21 CRPD Committee, 'General Comment No. 2' (n 3), paras 27-33. See also: Francesco Seatzu (n 17), 228.

22 *ibid.*

imposes web accessibility obligations upon the public sector.²³ It thus depends on the sensitivity of private entities to make their websites and applications accessible.²⁴ Even though it is in the interest of businesses to comply with accessibility requirements – for instance, in terms of corporate image,²⁵ but also to reach a higher number of potential clients –, compulsory standards would strengthen the obligation, making it more effective. In this vein, the CRPD Committee has urged States to adopt mandatory standards, implying sanctions for those who do not comply.²⁶ The importance of ‘effective and enforceable minimum accessibility standards’ has also been stressed in the case law of the CRPD Committee.²⁷

Moreover, in light of the participatory approach embedded in the CRPD’s general obligations,²⁸ and of the interpretation of the Convention provided by the Committee on the Rights of Persons with Disabilities, it is important that also persons with disabilities – through their representative organizations – are given the opportunity to take part in the drafting of national laws, regulations and accessibility standards.²⁹ As underlined by the Committee, ‘the active and informed participation of everyone in decisions that affect their lives and rights is consistent with the human rights-based approach in public decision-making processes, and ensures good governance and social accountability’.³⁰ The idea

23 Legge 9 gennaio 2004, n. 4, Disposizioni per favorire e semplificare l’accesso degli utenti e, in particolare, delle persone con disabilità agli strumenti informatici, GU n. 13 del 17 gennaio 2004, art. 3. On public administration and digital accessibility in Italy, see: Vittorio Pampanin, ‘The Role of Public Administration in Promoting the Accessibility of Online Resources: The Italian Legal Framework’, in Carola Ricci (ed), *Building an Inclusive Digital Society for Persons with Disabilities. New Challenges and Future Potentials* (Pavia University Press 2019).

24 Silvia Favalli, ‘Disability, Social Media and Human Rights: ‘What’s the catch?’ (n 1), 26.

25 See eg the results of EU public consultations with small and medium size enterprises in preparation of the European Accessibility Act (Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services [2019] OJ L151/70): <<https://ec.europa.eu/social/BlobServlet?docId=14843&langId=en>> accessed 4 February 2022, 13-14.

26 CRPD Committee, ‘General Comment No. 2’ (n 3), para 28. See also: Andrea Broderick and Delia Ferri (n 13), 144.

27 Anna Lawson, ‘Article 9: Accessibility’ in Ilias Bantekas, Michael Ashley Stein, Dimitris Anastasiou (eds), *The UN Convention* (n 6), 282. See, in particular: CRPD Committee, *N and T v Hungary* (15 April 2013) CRPD/C/9/D/1/2010; *F v Australia* (16 February 2018) CRPD/C/19/D/19/2014.

28 According to art 4(3) CRPD, States must involve persons with disabilities, through their representative organizations, in the development and implementation of legislations and policies to implement the Convention, and on all decision-making related to persons with disabilities.

29 CRPD Committee, ‘General Comment No. 2’ (n 3), para 48.

30 CRPD Committee, ‘General Comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention’ (9 November 2018) CRPD/C/GC/7, para 2.

behind States' obligation to seek the participation of the representative organizations of persons with disabilities, including in the drafting of accessibility regulations and standards, is that successful implementation of the CRPD can take place only through constant dialogue with persons with disabilities,³¹ based on the principle 'nothing about us without us'.³² For this reason, according to the CRPD Committee, States Parties should give priority to the views of organizations of persons with disabilities, rather than to civil society in general, when addressing issues directly related to persons with disabilities,³³ including in relation to ICT accessibility.

3. Legal status of the CRPD within the EU legal framework

According to art 44(1) CRPD, regional integration organizations can become a party to the treaty provided that they declare, in the instrument of ratification or accession, the extent of their competence. After having been an active part in negotiations,³⁴ on 30 March 2007, the EC (now EU) signed the CRPD. With Council Decision 2010/48/EC, formally adopted on 26 November 2009 under the former EC Treaty, the Council of the European Union approved the CRPD, authorizing the deposit of the instrument of ratification.³⁵ It is worth noting that the legal basis for the ratification of the CRPD were arts 13 and 95 TCE (now 19 and 114 TFEU),³⁶ dealing, respectively, with non-discrimination and the internal market. Such double legal basis reflects both the founding principle of the European model of protection of the rights of persons with disabilities – namely, the principle of non-discrimination – and the fact that disability is relevant in many areas of EU law.³⁷

Like its Member States, the European Union thus became a party to the CRPD, accessing a human rights treaty for the first time. As noted by Waddington, 'the EU's accession to the CRPD means that the Convention has become a

31 Andrea Broderick and Delia Ferri (n 13), 86-87.

32 *ibid.*, 87.

33 CRPD Committee, 'General Comment No. 7' (n 29), para 23.

34 Anna Lawson, 'The European Union and CRPD: Complexities, Challenges and Opportunities', in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities. A Commentary* (Springer 2017), 61-66.

35 Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, 2010/48/EC, [2010] OJ L23/55.

36 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326.

37 Silvia Favalli, *Disabilità, diritti umani e diritto internazionale* (n 7), 75.

part of EU law, and must be complied with by the EU institutions and legislature'.³⁸ The European Union is not yet a party of the Optional Protocol to the Convention allowing individual petitions to be brought before the Committee on the Rights of Persons with Disabilities, despite the Committee having urged the Union to take such a step.³⁹

Art 216 TFEU establishes that the international agreements that the EU stipulates with other international organizations or third States in its areas of competence are binding upon both the EU and its Member States and form an integral part of EU law. The CRPD amounts to a 'mixed agreement' under EU law, meaning that, in the area of shared competence with Member States – also identified in the EU Declaration annexed to the instrument of ratification⁴⁰ –, the EU has exclusive competence where the Convention affects existing EU provisions that establish common rules, from which the Member States cannot deviate; in contrast, if EU legislation only sets out minimum standards, States remain free to grant stronger protection to persons with disabilities.⁴¹ Also in the latter case, however, the EU can adopt new common rules, if the founding treaties permit it.⁴²

With respect to the rank of the CRPD within the EU legal system, the Convention, like any treaty concluded by the European Union,⁴³ enjoys a lower rank than the primary sources of EU law, but higher with respect to EU secondary legislation.⁴⁴ From the higher rank of the CRPD with respect to EU's secondary legislation, however, it does not follow automatically that the Court of Justice of the European Union (CJEU) can invalidate secondary legislation because in contrast with the Convention. According to the case law of the CJEU, secondary legislation can be reviewed by the Court on the basis of international agreements concluded by the Union only if the treaty provision in question 'contains a clear and precise obligation which is not subject, as regards its implementation or effects, to the adoption of any subsequent measure'.⁴⁵

38 Lisa Waddington, 'The European Union' in Lisa Waddington and Anna Lawson (eds), *The UN Convention on the Rights of Persons with Disabilities in Practice. A Comparative Analysis of the Role of Courts* (OUP 2018), 131.

39 CRPD Committee, 'Concluding observations on the initial report of the European Union' (2 October 2015) CRPD/C/EU/CO/1, paras 6-7.

40 <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en#EndDec> accessed 9 February 2023.

41 Lisa Waddington, 'The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences' [2011] *Maastricht Journal of European and Comparative Law* 431, 445-446.

42 *Ibid.*

43 See: Luigi Daniele, *Diritto dell'Unione europea* (6th edn, Giuffrè 2018) and the case law mentioned therein.

44 Lisa Waddington, 'The European Union' (n 38), 138.

45 Case C-93/02 P *Biret International SA v Council of the European Union* [2003] ECR I-10497 para 60. See also, eg: Case C-213/03 *Pêcheurs de l'étang de Berre* [2004] ECR I-07357, para 39.

This is not, however, the case of the CRPD. In a case concerning surrogacy birth and maternity leave, the CJEU clarified that the Convention has no direct effect on EU law, precisely because its provisions ‘are not, as regards their content, provisions that are unconditional and sufficiently precise’.⁴⁶ According to the Court, it is apparent from art 4(1) of the CRPD, concerning general obligations, ‘that it is [...] for the States Parties to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in that Convention’.⁴⁷

Still, as affirmed in the case law of the Court of Justice of the European Union, the primacy of the international treaties to which the Union is a party over EU secondary legislation implies that the latter must be interpreted in a manner which is as far as possible consistent with those international agreements.⁴⁸ Therefore, EU secondary legislation must be interpreted in a manner which is, as far as possible, consistent with the provisions of the CRPD.⁴⁹

Assessing EU’s secondary legislation based on the obligations enshrined in the CRPD, to which the European Union is bound as concerns its areas of competence, is very important from a reform perspective. Therefore, the next two paragraphs will be dedicated to the analysis of EU legislative instruments dealing with the accessibility of ICTs, which were adopted by the European Union following ratification of the CRPD.

4. Binding EU instruments on accessibility: the Web Accessibility Directive and the European Accessibility Act

Few Member States of the European Union had adopted binding accessibility requirements for both the public and the private sector before the EU introduced accessibility obligations in its areas of competence.⁵⁰ The two main

46 Case C-363/12 *Z v A Government department, The Board of management of a community school* [2014] ECR 159, para 90.

47 *ibid*, para 87.

48 See eg: Case C-61/94 *Commission v Federal Republic of Germany* [1996] ECR I-03989, para 52; Joined Cases C-288/09 and C-289/09 *British Sky Broadcasting Group* [2011] ECR I-02851, para 83; Joined Cases C-320/11, C-330/11, C-382/11 and C-383/11 *Digitalnet* [2012] ECR 745, para 39; Case T-527/14 *Rosenich v EUIPO* [2012] ECR 487, para 54.

49 See eg: Joined Cases C-335/11 and C-337/11 *Ring and Werge* [2013] ECR 222, para 32; Case C-824/19 *TC and UB* [2021], para 59. On the interpretation of the EU secondary legislation in line with the CRPD, see: Lisa Waddington, ‘The European Union’ (n 38), 143-150.

50 ANED, ‘National accessibility requirements and standards for products and services in the European single market: overview and examples Compiled by Mark Priestley on behalf of the Academic Network of European Disability experts (ANED)’ (January 2013) <<https://ec.europa.eu/social/BlobServlet?docId=14840&langId=en>> accessed 9 February 2023.

legislative instruments adopted by the Union, dealing specifically with ICTs accessibility, are the Web Accessibility Directive⁵¹ and the European Accessibility Act.⁵² The objective of EU accessibility legislation is not only to ensure respect of the CRPD, but also to expand the single market by making more products accessible and to promote interoperability among Member States, making cross-border trading easier.⁵³ The market-oriented nature of this legislation is clear from its legal basis, which is art 114(1) TFEU, concerning the internal market.

With the 2016 Directive on web accessibility the EU set out minimum harmonization requirements for public sector bodies. All Member States have adopted the necessary domestic legislation,⁵⁴ but problems in the accessibility of websites and mobile applications of public bodies still remain.⁵⁵ The Directive also encourages States to extend accessibility standards to private entities which offer services to the public,⁵⁶ but does not impose binding obligations upon private entities. A further limitation is that the Directive excludes from its scope of application the websites and applications of public broadcasters and to the websites and applications of NGOs which are deemed not to provide essential services for the public.⁵⁷ The 2016 Directive has thus a limited scope of application.⁵⁸

Following the recommendation of the CRPD Committee to adopt a comprehensive accessibility act,⁵⁹ binding obligations upon private entities were introduced with the 2019 EU Accessibility Act. Differently from the 2016 Web Accessibility Directive, the European Accessibility Act regulates both the public and private sector, imposing obligations upon the providers of certain services that are considered of major importance for people with disabilities, such as computers and operating systems, smartphones, e-books, banking services,

51 Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies [2016] OJ L327/1.

52 Directive (EU) 2019/882 (n 25).

53 See, eg, the presentation of EU accessibility legislation on the website of the EU Commission: <<https://ec.europa.eu/social/main.jsp?catId=1202>> accessed 15 February 2023.

54 For instance, in Italy the Web Accessibility Directive has been implemented by means of d.lgs. 10 agosto 2018 n. 106, GU 211 dell'11 settembre 2018, amending the aforementioned *Legge Stanca* and the so-called codice dell'amministrazione digitale, namely d.lgs. 7 marzo 2005, n. 82, GU n. 112 del 16 maggio 2005.

55 See, eg, the Study supporting the review of the application of the Web Accessibility Directive, commissioned by the EU Commission: <<https://digital-strategy.ec.europa.eu/en/library/study-supporting-review-web-accessibility-directive>> accessed 15 February 2023.

56 Directive (EU) 2016/2102 (n 51), recital n 34.

57 *ibid*, art 1(3).

58 For critical remarks, see: Delia Ferri and Silvia Favalli (n 20), 11.

59 CRPD Committee, 'Concluding observations on the initial report of the European Union' (n 39), paras 28-29.

ticketing and ticket machines, e-commerce, transport related services, emergency communications.⁶⁰ The Directive sets forth obligations for a wide range of private entities, including manufacturers, representatives, importers and distributors. Like the Web Accessibility Directive, the European Accessibility Act aims not only to comply with the accessibility obligations enshrined in the CRPD,⁶¹ but to improve the functioning of the internal market by removing barriers created by divergent rules in Member States.⁶² Member States had to adopt the laws, regulations and administrative provisions necessary to comply with this Directive by June 2022. To date, nine States failed to report on the measures adopted.⁶³ Private companies shall conform to those new national regulations from 28 June 2025.⁶⁴

The European Accessibility Act presents a number of shortcomings. Firstly, microenterprises are excluded from its scope of application,⁶⁵ which implies that enterprises with less than ten employees do not need to make their services accessible. Secondly, the obligations enshrined in the European Accessibility Act are to be complied with by private enterprises only if there is no excessive financial burden.⁶⁶ This provision can be criticized on the ground that considerations of burden proportionality are entailed by the concept of reasonable accommodation, but are not proper to the principle of accessibility, which must be realized to the maximum extent.⁶⁷ Moreover, the assessment of what represents a financial burden is primarily left to the self-assessment of the industry,⁶⁸ even if national surveillance authority must review companies' assessments,⁶⁹ based on specific criteria set out in an annex to the European Accessibility Act.⁷⁰ However, despite its above-mentioned shortcomings and market-oriented nature, the European Accessibility Act can be regarded as a positive example of legislation that implements the duties enshrined in the CRPD through the imposition of binding web accessibility obligations upon the private sector.

60 Directive (EU) 2019/882 (n 25), art 2.

61 *ibid*, recitals n 15-16.

62 *ibid*, recital n 1.

63 <<https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32019L0882>> accessed 9 February 2023.

64 Directive (EU) 2019/882 (n 25), art 2.

65 *ibid*, recital n 70.

66 *ibid*, art 14 and recitals n 66-67.

67 Andrea Broderick, 'The European Accessibility Act: A Paradigm of Inclusive Digital Equality for Persons with Disabilities?', in Carola Ricci (ed), *Building an Inclusive Digital Society for Persons with Disabilities. New Challenges and Future Potentials* (Pavia University Press 2019), 30.

68 This was a critical element already in the Draft European Accessibility Act, as highlighted by the NGO Inclusion Europe, a representative organization of persons with disabilities: <https://inclusion-europe.eu/wp-content/uploads/2015/03/IE_policypaper_EAA_final.pdf> accessed 15 February 2023, 6. See also Delia Ferri and Silvia Favalli (n 20), 13.

69 Directive (EU) 2019/882 (n 25), art 19.

70 *ibid*, Annex VI.

With respect to standards of accessibility, following the adoption of the 2016 Web Accessibility Directive, the EU Commission adopted an implementing decision requesting European standardization organizations⁷¹ – composed by one member association per Member State, often amounting to partnerships between the private and the public sectors – to set a technical standard in accordance with the Directive.⁷² This standard has recently been updated to be in line with the more recent WCAG (WCAG 2.1).⁷³ As of today, however, this standard is compulsory only for public sector bodies, as it is linked to the Web Accessibility Directive, but not to the European Accessibility Act. The latter only sets out functional requirements of accessibility, without specifying how they are to be implemented from a technical point of view.⁷⁴ According to commentators, including the European Disability Forum – an umbrella organization representing persons with disabilities –, this is a positive aspect because it leaves a certain flexibility to the private sector, possibly fostering technological innovations.⁷⁵

With respect to the participatory model which, according to the general obligation enshrined in art 4(3) CRPD, State Parties must adopt when designing regulations and policies which affect persons with disabilities, the Commission opened consultations with the public in general, including persons with disabilities and their representative organizations, before and after the adoption of e-accessibility legislation. A recent example is the public consultation on the 2016 Web Accessibility Directive, aimed at evaluating the impact of the legislation and at identifying its possible gaps and weaknesses.⁷⁶ Another example is the public consultation opened before the adoption of the European Accessibility Act.⁷⁷ In this case, however, besides a general consultation, a specific one was opened with respect to small and medium enterprises, rather than with the organizations representing persons with disabilities, which makes even

71 CEN, CENELEC and ETSI.

72 Commission Implementing Decision C(2017)2585 of 27 April 2017 on a standardisation request to the European standardisation organisations in support of Directive (EU) 2016/2102 on the accessibility of the websites and mobile applications of public sector bodies [2017] OJ L327/84.

73 Commission Implementing Decision (EU) 2021/1339 of 11 August 2021 amending Implementing Decision (EU) 2018/2048 as regards the harmonised standard for websites and mobile applications [2021] OJ 289/53.

74 Directive (EU) 2019/882 (n 25), Annex I.

75 Delia Ferri and Silvia Favalli (n 20), 13.

76 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12537-Accessible-web-&-digital-content-for-people-with-disabilities-review-of-EU-rules/public-consultation_en> accessed 15 February 2023.

77 Deloitte, ‘Study on the socio-economic impact of new measures to improve accessibility of goods and services for people with disabilities. Public Consultation Analysis’ <<https://ec.europa.eu/social/BlobServlet?docId=14842&langId=en>> accessed 9 February 2023.

more apparent the market-oriented nature of the legislation.⁷⁸ As to monitoring, persons with disabilities are involved, through the participation of their representative organizations, in the working group which monitors and facilitates compliance with the European Accessibility Act.⁷⁹ The action of the Union with respect to the involvement of persons with disabilities into the design and review of legislation on ICT accessibility can thus be positively evaluated, even though it could be further improved by granting more targeted participation of persons with disabilities.

5. The EU Digital Services Act: a critical assessment

Always at the level of EU secondary legislation, the Union recently adopted the Digital Services Act. The Regulation entered into force twenty days after its publication on the official journal and will apply from 17 February 2024. The Digital Services Act regulates digital platforms which offer intermediary services (including search engines), complementing the Digital Markets Act. The Digital Services Act focuses on the removal of illegal content online, also by allowing users to signal illegal content (art 16). It also establishes due diligence obligations for a transparent and safe online environment, including, for instance, transparent terms and conditions related to the policies for content moderation and redress mechanisms (art 14), and transparency reporting obligations, for instance on the removed content (art 15).

As apparent, differently from the Web Accessibility Directive and the European Accessibility Act, the Digital Services Act does not deal specifically with digital accessibility. It does contain, however, relevant provisions on e-accessibility, which have been so far neglected by commentators, except by organizations representing persons with disabilities.⁸⁰ The present section will thus discuss the DSA and its legislative history precisely in the light of the rights of persons with disabilities.

In its first reading of the Commission's proposal for the Digital Services Act, the European Parliament had voted in favour of an amendment introducing an accessibility obligation for online platforms. In particular, art 19(a) of the

⁷⁸ Deloitte, 'Analysis of the results of the SME Panel consultation on the socio-economic impact of new measures to improve the accessibility of goods and services for people with disabilities' <<https://ec.europa.eu/social/BlobServlet?docId=14843&langId=en>> accessed 9 February 2023.

⁷⁹ Directive (EU) 2019/882 (n 25), art 28. On the participative dimension of the European Accessibility Act, see: Andrea Broderick, 'The European Accessibility Act' (n 67), 32-33.

⁸⁰ See, eg, the position of the European Disability Forum: EDF, 'Digital Services Act fails to ensure accessibility for persons with disabilities. EDF calls the EU to rectify this political agreement' (10 May 2022) <<https://www.edf-feph.org/digital-services-act-fails-to-ensure-accessibility-for-persons-with-disabilities-edf-calls-the-eu-to-rectify-this-political-agreement/>> accessed 14 March 2023.

amended regulation obliged platforms which offer services in the Union to ensure that they design and provide services in accordance with the accessibility requirements set out in the European Accessibility Act.⁸¹ With this amendment, the DSA would have extended the list of private entities bound to comply with a mandatory accessibility standard for ICTs under EU legislation, thus complementing and strengthening the protection of the rights of persons with disabilities enshrined in the European Accessibility Act, and ensuring better compliance with the CRPD. Unfortunately, however, such provision was not included in the final text of the Digital Services Act negotiated with the Council, raising the protests of the associations representing persons with disabilities, which had lobbied in favour of mandatory accessibility requirements for digital platforms.⁸² This result might be due also to the fact that a general consultation was launched with regard to the Digital Services Act, but with no specific focus on persons with disabilities.⁸³

The Digital Services Act in its final version does not provide for an obligation for online platforms to ensure accessibility for persons with disabilities, but makes accessibility a matter of voluntary codes of conduct to be adopted by providers. Based on art 47 of the Digital Services Act, and as reflected in recital n 105 of the Preamble, the European Commission shall encourage and facilitate the drawing up of codes of conduct on accessibility for persons with disabilities, with the participation of providers of online platforms and other relevant service providers, as well as of organisations representing persons with disabilities and civil society organisations or relevant authorities.⁸⁴ The Commission ‘shall aim to ensure that the codes of conduct pursue the objective of ensuring that those services are accessible in compliance with Union and national law, in order to maximise their foreseeable use by persons with disabilities’, by making services perceivable, operable, understandable and robust – as prescribed by the aforementioned WCAG standard –, and by making information on how they meet the accessibility requirements accessible and easy to find for persons with disabilities.⁸⁵ The codes of conduct shall be developed by 18 February 2025 and applied by 18 August 2025.⁸⁶

81 Amendments adopted by the European Parliament on 20 January 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM(2020)0825), P9_TA(2022)0014, Amendment 255: <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0014_EN.html> accessed 15 March 2023.

82 EDF, ‘Digital Services Act’ (n 80).

83 Summary Report on the open public consultation on the Digital Services Act Package (15 December 2020) <<https://digital-strategy.ec.europa.eu/en/library/summary-report-open-public-consultation-digital-services-act-package>> accessed 9 February 2023.

84 Regulation (EU) 2022/2065 (n 5), art 47(1).

85 *ibid*, art 47(2).

86 *ibid*, art 47(3).

The compromise solution reached by the European Parliament and the Council has been harshly criticized by the associations representing persons with disabilities. According to the European Disability Forum, by leaving accessibility measures to the goodwill of service providers, the Council and Parliament ‘instead of owning up to their commitments under the CRPD and ensuring a rights-based approach to disability inclusion, [...] opted for a charity-based approach’.⁸⁷ In the Forum’s view, the Digital Services Act leaves persons with disabilities in a position of vulnerability, because, besides not being able to fully access online services, they will not enjoy as a matter of rights the protection granted by the Digital Services Act, for instance in terms of data protection.⁸⁸ The underlying idea is that human rights, including the rights of persons with disabilities, are fully respected, protected and realized only through binding rules associated with appropriate enforcement mechanisms. Albeit founded, this criticism must be contextualized in the light of both States’ obligations enshrined in the CRPD in matters of accessibility, and the functions pursued by codes of conduct.

Codes of conduct can be defined as ‘regulatory instruments consisting of written sets of rules which can deal with very specific or more general areas of regulatory concern, but always focus on a certain desirable conduct of the addressee’.⁸⁹ A typical feature of codes of conduct is that they are non-binding, although they might reflect (or specify) binding rules.⁹⁰ They can be classified based on source and addressee,⁹¹ ranging from guidelines developed at the international level and addressed to States, to the self-regulatory codes of conduct adopted by private entities.⁹² At the European Union level, codes of practices developed by and for private entities have been regarded as useful initiatives at least since 2003, as reflected in the inter-institutional agreement on better law-making adopted by the European Parliament, the Council and

87 EDF, ‘Digital Services Act’ (n 80).

88 *ibid.* On data protection and privacy concerns with a focus on persons with disabilities, see: Silvia Favalli, ‘Disability, Social Media and Human Rights: “What’s the catch?”’ (n 1), 30-34.

89 Jürgen Friedrich, ‘Codes of Conduct’ in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (vol II, OUP 2012), 264.

90 *ibid.*, 265.

91 See the categorizations made in Jürgen Friedrich (n 89) and Fabrizio Marrella, ‘Regolazione internazionale e responsabilità globale delle imprese transnazionali’, [2009] *Diritti umani e diritto internazionale* 229, 242-254.

92 The two opposite sides of the spectrum might, however, influence each other. On the interrelation between international soft law and the self-regulatory standards developed by private entities, with a focus on food law, see: Carola Ricci, ‘Circolazione di standard internazionali di sicurezza alimentare: quando regolatore pubblico e privato si confondono’, in Elisabetta Colombo (ed), *Le istituzioni e le idee. Studi indisciplinary offerti a Fabio Rugge per il suo settantesimo compleanno* (Giuffrè 2022).

the Commission that year.⁹³ Codes of conduct, whose development is often foreseen by EU secondary legislation (as in the case of the Digital Services Act), have become veritable co-regulatory instruments voluntarily adopted by the private sector, but with the facilitation of the European Commission (and possibly, also of other EU and national institutions). Relevant examples include, for instance, codes of conduct under the General Data Protection Regulation (GDPR),⁹⁴ and the EU code of conduct on responsible food business and marketing practices.⁹⁵ The same Digital Services Act delegates to codes of conduct the regulation not only of digital accessibility, but also of online advertising.⁹⁶

Despite their non-binding character, and as evinced by their widespread adoption at international and national level, codes of conduct addressed to private entities are not necessarily ‘the enemy’ of human rights. Codes of conduct and guidelines adopted at the inter-State level serve the useful function to regulate, at least in a non-binding form, the conduct of enterprises in absence of agreement among States.⁹⁷ Likewise, at the European Union level codes of conduct developed by private parties through dialogue with EU institutions have been used, in absence of appropriate legal basis for EU legislation or in case of disagreement among Member States, to convince private actors to grant higher standards of conduct than those embedded in binding national or EU legislation.⁹⁸ Although effectiveness overall remains a matter of discussion,⁹⁹ codes of conduct enjoy a high compliance rate when they are elaborated directly by the addressed economic sector, or in close coordination with it.¹⁰⁰ In fact, private entities follow codes of conduct in order to be labelled as respecting a certain ethics and/or quality standard: therefore, for their own economic

93 Interinstitutional agreement on better law-making of 16 December 2003, 2003/C 321/01 [2003] OJ C321/1. Codes of conduct for the private sector must be distinguished from the self-regulatory codes adopted by EU institutions. On the subject, see: Paola Mori, ‘La codificazione del diritto dell’Unione europea e i suoi strumenti’, [2019] *Il diritto dell’Unione europea* 109, 132-133.

94 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation or GDPR) [2016] OJ L119/1, art 40.

95 EU Code of Conduct on Responsible Food Business and Marketing Practices (June 2021) <https://food.ec.europa.eu/horizontal-topics/farm-fork-strategy/sustainable-food-processing/code-conduct_en> accessed 4 April 2023.

96 Regulation (EU) 2022/2065 (n 5), art 46.

97 Francesco Salerno, ‘Natura giuridica ed effetti dei codici di condotta internazionali per le imprese multinazionali’ [2005] *Lavoro e diritto* 655, 657.

98 Oreste Pollicino, ‘I codici di condotta tra *self-regulation* e *hard law*: esiste davvero una terza via per la regolazione digitale? Il caso della strategia europea contro la disinformazione online’ [2022] *Rivista trimestrale di diritto pubblico* 1051, 1058.

99 Jürgen Friedrich (n 89), 269.

100 Fabrizio Marrella (n 91), 248.

interest.¹⁰¹ Moreover, codes of conduct might act as catalyst for the adoption of binding rules.¹⁰²

Codes of conduct regulating digital accessibility for persons with disabilities like those foreseen by art 47 of the Digital Services Act, ie developed directly by the service providers with the facilitation of the EU Commission, might thus help improving accessibility for persons with disabilities, especially if service providers think that they might get economic advantages by extending their user base. Leaving accessibility regulation only to codes of conduct, however, does not fully comply with States' obligation to 'ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities', laid down in art 9(2)(b) CRPD. While private standards can be very useful to promote digital accessibility – as the WCAG standard demonstrates –, based on the CRPD's provisions on accessibility and the interpretation provided by the Committee,¹⁰³ States must set out at least minimum accessibility obligations for private service providers. Such obligations could then be better specified, if needed, in codes of conduct, which cannot, however, be the only source of regulation on accessibility. We thus agree with the European Disability Forum's criticism whereby the Digital Services Act is a missed opportunity which, instead of building on the European Accessibility Act, 'takes Union accessibility policy a step back'.¹⁰⁴

6. Conclusive remarks

The European Union has taken significant – albeit limited – steps to ensure digital accessibility for persons with disabilities with the adoption of the Web Accessibility Directive and, three years later, of the European Accessibility Act. Unfortunately, the regulation of accessibility through voluntary codes of conduct set forth in the Digital Services Act is not sufficient to ensure full compliance with EU's international obligations under the CRPD, nor does it realise the promise of a truly inclusive digital environment in the Union. Hopefully, the rights of persons with disabilities will be better mainstreamed in future EU legislation and policy through the systematic involvement of persons with disabilities and their representative organizations. The newly established European Disability Platform, a flagship initiative of the EU Disability Strategy 2021-2030, might be an opportunity in this respect.¹⁰⁵

101 In this sense, see eg: Francesco Galgano and Fabrizio Marrella, *Diritto del commercio internazionale* (3rd edn, CEDAM 2011), 926-927.

102 Jürgen Friedrich (n 89), 270.

103 CRPD Committee, 'General comment No. 2' (n 3), para 13.

104 EDF, 'Digital Services Act' (n 80).

105 European Commission, 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', 3 March 2021, COM(2021) 101 final.