DIGITALEUROPE

DIGITALEUROPE's Proposal for the European Accessibility Act

Brussels, 23 May 2016

Executive Summary

- A European Accessibility Act should support the ICT industry in its on-going endeavour to act as an enabler of the social, economic and political inclusion of persons with disabilities.
- The alignment of the European Accessibility Act with the New Legislative Framework as suggested in the current proposal would lead to an unenforceable and ineffective Directive, and have negative impacts on consumers and economic operators.
- Accessibility cannot be subject to a generic pass/fail assessment because user requirements vary and usability is subjective.
- DIGITALEUROPE proposes a requirement for the provision of accessible consumer information in order to enable informed purchasing decisions.
- Furthermore, we suggest the introduction of a reporting obligation using a self-assessment approach based on future proofed functional performance statements and in a format that acknowledges that accessibility is not a simple 'pass/fail' assessment.
- Similarly, public procurement should support innovation and competition by adopting international best practice (the use of award criteria and the 'best meets' principle) rather than embedding specific technical requirements.

Introduction

The ICT industry has played a leading role in developing accessibility solutions and is continuously introducing access technologies that promote the social inclusion of persons with disabilities. The importance of ICT in contributing to accessibility stems from its ability to develop and open up a wide range of services, transform existing services and create greater demand for access to information and knowledge, particularly among under-represented groups of the population, such as persons with disabilities.

Mobile devices and services have one of the highest impacts on independent living for persons with disabilities. At the basic level, smartphones provide a means of communication for the user through both SMS and voice calls and, at more complex level, smartphones are able to address the sensorial, cognitive and physical needs of users with disabilities. Web services and content are being made accessible via both computer-based and web-based accessibility features and applications, such as screen readers, speech recognition and video communication. TV

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Transparency register member for the Commission: 64270747023-20

sets are now equipped with a range of functions and features that can be operated by persons with disabilities, enabling the integration of sign language interpretation or audio-description channels in the signals broadcasted.

The ICT industry is working closely with governments, different industry sectors and customers in order to implement and promote innovations in the area of ICT accessibility that will benefit stakeholders in every aspect of their lives. The influence of industry supported accessibility standards and specifications, such as the U.S. Access Board ICT Standards for Section 508 of the Rehabilitation Act, EN 301549 as well as the W3C Web Content Accessibility Guidelines 2.0 (WCAG 2.0 or ISO/IEC 40500) are increasing with every day and the WCAG 2.0 is currently becoming the basis for global web accessibility regulations.

DIGITALEUROPE supports the goal of the UN Convention on the Rights of Persons with Disabilities "to promote access for persons with disabilities to new information and communications technologies and systems, including the Internet" (Article 9) and sees this as an opportunity to act as an enabler of the social, economic and political inclusion of persons with disabilities. We wish to contribute further to the process and try to identify all possible implications of this legislative initiative for economic operators. Building on our first analysis, we outline the following concerns with the legislative proposal of the European Commission and our suggestions.

Our Comments

1. Conformity Assessment Model and New Legislative Framework

In our view, full alignment with the New Legislative Framework (NLF) is inappropriate for the following reasons:

a. Pass/Fail Compliance Approach to Accessibility

The ICT industry develops products and services for all consumers and user groups. However, complete conformity of products and services with accessibility requirements cannot be guaranteed all of the time. Offering the best product by responding to a specific disability, combinations of multiple disabilities, or by taking advantage of the latest technological innovation might not be possible when confronted with a blanket requirement for every product to have all the same accessibility features. In addition, the wording of most accessibility standards (e.g. WCAG 2.0) leaves space for interpretation. For this reason and the fact that how an individual user interacts with specific features influences their accessibility, the tests and measurements that are necessary to be performed for the CE-Marking model cannot be objective.

Article 12 attempts to provide for a certain degree of flexibility within this "pass-fail" approach by introducing an exemption from the accessibility requirements if compliance with such requirements will "impose a disproportionate burden" or "introduce a significant change" to the product. We are, however, of the opinion that these exemptions will not serve their primary purpose, as there are no objective criteria to determine which burden is to be considered "disproportionate" or what change is to be rendered "significant". This means that even after making the assessment, economic operators might not have the necessary legal certainty to say that they comply with the EAA requirements.

b. Enforcement by Market Surveillance Authorities

Articles 5 and 19 of the European Accessibility Act refer to the "risk" associated with accessibility, drawing language from the New Legislative Framework and especially the safety domain. However, it seems inaccurate to refer to the term "risk" in this context as neither human health nor safety is endangered by an ICT product or service - we refer here solely to the categories listed in Article 1.1 (a) (c) (d) and Article 1.2 (a) (b) (e) (f) - that lacks certain accessibility features. It is also impractical to treat all accessibility requirements equally for all users.

The absence of certain technical features does not immediately render a product "faulty" as not all users tend to use the whole range of features of applications or websites. It is even true that for most complex applications, the consumers do not use the majority of the provided features. The absence of these features prescribed by standards may have no impact on accessibility at all (e.g. non-unique IDs on a web page for controls that are not a direct part of the user interface). Against this framework, we believe that it would be disproportionate to recall such products from the entire market merely on the grounds of absence of some accessibility features. In this case, the risk-based approach to enforcement taken by the NLF is not possible since the market surveillance authorities would not be able to assess different degrees of risk on an objective basis.

In general, DIGITALEUROPE sees potential issues with the enforceability of such complex requirements, which would be difficult to verify and test by Market Surveillance Authorities. It would require substantial investments in a new area of activity for national enforcement authorities, which could ultimately hinder the effectiveness of the Directive. In performing their check-ups, Market Surveillance Authorities are likely to focus only on technical non-compliance leaving out the essential features aimed at functionality and the achievement of accessibility for a particular disability group.

1.3 Scope of the Proposal

In general, the NLF and corresponding CE-Marking approach have previously only been applicable to physical goods and supply chains. However, the current scope of the proposal for the EAA comprises not only physical products but also software and other services. In light of industry's shift to delivering "software as a service" and the dynamic nature of the ICT industry, categorisation of products and services is increasingly difficult. E.g. operating systems (currently included as products) change and get updated on a regular basis, often requiring user action. This makes the concept of CE-Marking and corresponding Declaration of Conformity, representing compliance at a particular point in time, highly impractical for operating systems. DIGITALEUROPE supports the European Commission's decision not to "copy-and-paste" from the NLF for the self-declaration approach in Article 11 and Annex III. However, this "NLF-inspired" approach for services still follows the compliance logic requiring a pass /fail judgement by Market Surveillance Authorities and introduces entirely new concepts such as 'continuous compliance' that may represent disproportionate burdens.

2. Common Technical Specifications

We fully support the use of harmonised standards in the New Legislative Framework and believe that every technical or functional requirement must be backed up by a harmonised standard developed with the participation of the key stakeholders, including technical experts and engineers. The manufacturer or service provider knows their products, services and customers best and they are able to develop products with accessibility features suitable for a particular disability or combination of disabilities. However, article 14 of the European Accessibility Act provides the possibility for the Commission to adopt Common Technical Specifications (CTS) in order to implement accessibility requirements set out in Annex I to the EAA. The development and adoption of such CTS could take place without a consensus based process involving all affected parties, including industry. Without broad consensus any CTS risks being in conflict with other emerging standards and would need to be proven to be implementable in order to support the enforcement of accessibility requirements.

3. Public Procurement

The proposed Directive also addresses public procurement requirements in Article 21. In our view, public procurement policies should promote innovation through competition, furthering progress toward the shared

goal of deploying increasingly accessible technology more quickly and broadly across Europe. There is extensive experience that can for example be drawn from US Section 508. Therefore, we strongly support an approach that embeds accessibility into public procurement by reference to harmonised standards linked to award criteria. Use of harmonised standards allows the adoption of new innovations and progress without depending on the regulatory cycle that delayed updates in the US. Use of award criteria, as opposed to technical specifications, supports flexibility for procurement (e.g. value for money issues and parallel approaches), as well as promoting further competition and innovation on accessibility by vendors.

Our proposal

1. Information and Reporting

DIGITALEUROPE therefore proposes to the EU legislators to re-consider the alignment of the European Accessibility Act to the New Legislative Framework. We think that in order to really achieve the aims of a European Accessibility Act, the European institutions should instead draw inspiration from the best practices in other regions that have successfully promoted accessible solutions.

We note the categories in the current scope are intended to represent consumer facing goods and services. In our proposal, we thus refer to those ICT products and services that involve a purchasing decision by the individual consumer. Its scope would only be geared towards consumers (i.e. only apply to B2C products). Consequently, the definition of "product" or "service" should be supplemented by words explicitly pointing out that it is "intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers" (similar to the definition provided in Article 2 of the General Product Safety Directive).

Rather than implementing the NLF approach for accessibility, we suggest that the European Accessibility Act introduces the obligation to make accessibility information available to consumers. A similar approach has been introduced by the U.S. Twenty-First Century Communications and Video Accessibility Act (CVAA) under which manufacturers make accessibility information available on their websites. We suggest that the format and manner of making the information available would be decided by the economic operator. This way, the manufacturer or service provider would provide all relevant users with the necessary accessible information in order to enable them to make an informed buying choice and to be able to use the products and services without an impediment.

In addition, we propose that manufacturers and service providers would be obliged to report on the presence of the accessibility features of their products and services, including compatibility with existing assistive devices and technologies if applicable. They would provide detailed information on the features that fulfil the functional performance criteria, describing how and to what degree their products and services meet accessibility criteria and are able to provide explanations when they are not applicable. An example is the method that has already been used by industry specifically to address the market surveillance requirements of Section 508[1]. At the moment, current data about the level of accessibility of products and services in the European market is lacking. By using a machine-readable format, the European Commission and member states will easily monitor and assess the market situation.

1 The Voluntary Product Accessibility Template (VPAT): https://www.itic.org/policy/accessibility/

Our proposal means that manufacturers and service providers will on the one hand be encouraged to take the needs of persons with disabilities into account when developing their products and on the other hand be obliged to thoroughly consider their decision if they choose not to integrate certain accessibility features into their products and services. The reporting approach will leave more space and incentives for innovation and competition through increased transparency in the market which will, in the end, benefit the consumer.

2. Focus on Functionality

As mentioned, the format of this reporting method needs to be based on functional performance criteria. We appreciate the Commission's effort to define accessibility requirements only at the functional level. However, we fear this is not achieved in the current draft, which contains both technical and functional requirements. It is also because of this mix that for some elements in Annex I it is not clear what obligation they would put on the economic operator and how compliance can be achieved. For example, the requirements for the accessibility of packaging in a legal sense are not sufficiently clear, and should be removed. They do not provide enough clarity on how the packaging should be accessible, to what degree and at which stage.

In order to achieve an actual set of functional requirements, we propose their replacement with functional performance statements, such as those provided by section 4 of EN 301 549. These functional performance requirements address the key requirements of the Commission's proposal, provide additional functionality for users beyond the current Annex I language and are harmonised with the U.S. Access Board's proposed ICT Standards for Section 508. They will allow for innovation in the accessibility of products and services as well as create the needed flexibility for a truly future-proof legislation.

Example: Functional performance statements related to vision[2]

4.2.1 Usage without vision

Some users need ICT to provide at least one mode of operation that does not require vision.

4.2.2 Usage with limited vision

Where ICT provides visual modes of operation, some users will need the ICT to provide features that enable users to make better use of their limited vision.

4.2.3 Usage without perception of colour

Where ICT provides visual modes of operation, some users will need the ICT to provide a visual mode of operation that does not require user perception of colour.

Any attempt to define requirements for specific ICT product and service types in legislation is almost certain to be ineffective because of the rapid development and evolution in this sector. It is not possible to predict what products and services are likely to be available even in 2022 when the rules will come into effect. For example, as the definitions for telephony services (Directive 2002/21) and audiovisual media services (Directive 2010/13/EU) in article 2 are under revision, the related terminal equipment could change as well. Functional statements are future-proof and will allow the legislation to be effective while enabling innovation. In addition, a

2 EN 301 549 http://www.etsi.org/deliver/etsi_en/301500_301599/301549/01.00.00_20/en_301549v010000c.pdf

reporting and information obligation will also be easily monitored and enforceable by Market Surveillance Authorities, making it a practical piece of legislation that will lead to real changes in the market.

Conclusions

With this proposal, DIGITALEUROPE's members hope to advance the development of a truly successful European Accessibility Act that achieves its goal of widening participation in society through accessible products and services. Introducing an obligation to provide consumer information, as well as a self-reporting obligation based on functional performance criteria, will help the European Commission and the member states in fulfilling the provisions set out for them by the UN Convention on the Rights of Persons with Disabilities. It will be the chance to create a truly future-proof legislation that combines best practices in accessibility legislation and create a real change in the lives of consumers. Furthermore, legislation alone is certainly never enough. DIGITALEUROPE thus welcomes all initiatives that bring together the different parts of the supply chain as well as user groups in order to promote accessibility throughout the entire eco-system.

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ABOUT DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies.

DIGITALEUROPE ensures industry participation in the development and implementation of EU policies. DIGITALEUROPE's members include 61 corporate members and 37 national trade associations from across Europe. Our website provides further information on our recent news and activities: http://www.digitaleurope.org

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