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When social meets economic: the case of the European Accessibility Act — remarks from Poland's perspective

Europejski akt o dostępności: społeczny wymiar rynku — kilka uwag z perspektywy Polski

Abstract

During the last decade, a number of EU legal regulations have been adopted in different areas to make the EU space more accessible for persons with disabilities and older persons. European accessibility standards and funding opportunities have been put into place to support their implementation in the environment built and in the information and communication technologies (ICT) and disseminate the Design for All approach. The primary rationale for these steps involves the goals of social cohesion and inclusion, often overshadowing the market arguments relevant to business stakeholders. Their fullest (so far) combination has been adopted in the European Accessibility Act. The analysis, from a Poland's perspective as a Member State, presents how important it is to involve business entities in the processes of planning, creating, implementing and evaluating the transposing legal provisions and tools for increasing the level of accessibility of space, product and service.

Keywords: European Accessibility Act, social market economy, Web Accessibility Directive, CRPD

JEL: K23, K33, K38

Streszczenie

W ostatniej dekadzie przyjęto w Unii Europejskiej wiele regulacji prawnych w różnych obszarach, aby uczynić przestrzeń UE bardziej dostępną dla osób z niepełnosprawnościami i osób starszych. Wprowadzono europejskie standardy dostępności i możliwości finansowania, aby wspierać ich wdrażanie w zbudowanym środowisku i technologiach informacyjno-komunikacyjnych (ICT) oraz rozpowszechniać podejście projektowania uniwersalnego. Podstawowym uzasadnieniem dla tych kroków są cele spójności społecznej i integracji, które często są przesłaniane przez argumenty rynkowe istotne dla interesariuszy biznesowych. Ich najpełniejsze (jak dotąd) połączenie zostało przyjęte w Europejskim akcie o dostępności. Analiza z perspektywy Polski jako państwa członkowskiego pokazuje, jak ważne jest zaangażowanie podmiotów gospodarczych w procesy planowania, tworzenia, wdrażania i oceny transponujących przepisów oraz narzędzi zwiększania poziomu dostępności przestrzeni, produktów i usług.

Słowa kluczowe: Europejski akt o dostępności, społeczna gospodarka rynkowa, dyrektywa w sprawie dostępności cyfrowej, KPON

Introduction

Since the Lisbon Treaty entered into force, the European Union has strengthened its constitutional objectives to achieve a highly competitive social market economy. The social market economy concept, enshrined in Art. 3(3) of the Treaty on the European Union (TEU) as a compromise of the free market and social welfare principles, is to ensure that neither market freedoms nor social policies would dominate the EU operations, or — positively — both forces will drive sustainable development of the EU.

Accessibility of products and services has been one of the areas where the balance remains at the very heart of all interventions. Referring to the broad concept of accessibility (see: Broderick, 2019) taken from the United Nations Convention on the Rights of Persons with Disabilities

(CRPD), accessibility is understood as a set of such features of the environment that enable people with disabilities to use the physical environment, transport, information and communication including technologies and information and communication systems, as well as other devices and services. It obliges the parties to take appropriate measures to provide people with disabilities, on the basis of equality with others, access, *inter alia*, to information and communication technologies and systems, to develop, advertise and monitor and implement minimum standards and guidelines on the accessibility of devices and services that are generally available or generally provided, and to promote the access of people with disabilities to new technologies and information and communication systems, including access to Internet.

The Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services, commonly referred to as the European Accessibility Act (EAA), falls short of the obligations undertaken by the EU under the CRPD, but, juxtaposing market and social objectives in the broad scope, endeavours to challenge the scholarly interpretations of social market economy by providing novel insights on its practical implications. Some authors argue that the EAA signals "an attempt to re-orientation of positive integration in the pursuit of non-economic goals" (Ferri, 2020, 661). However, when implementing the EAA, economic objectives must not be ignored, which, if properly implemented, can also be a driving force in changing the area of accessibility.

The paper considers two questions fundamental for the business sector in the context of the EAA transposition into national law: (1) whether enforcement of the EAA accessibility requirements as a legal rule in business (or the right to accessibility in general) contributes to development of entrepreneurship and increasing the competitiveness of enterprises implementing it; and (2) what factors may strengthen introduction of the EAA market goals.

The research method is based on legal dogmatic analysis of the relevant provisions of EU and Polish law and official documents. These analyses will illustrate to what extent the transposition framework designed by the EU legislator may allow for the maximization of benefits for business entities on the example of the legal, socio-economic and political environment in Poland.

Accessibility as a developing EU standard

During the last decade, in different areas of the EU market, a number of EU rules have been adopted to make the EU more accessible for persons with disabilities. Ratifying the CRPD in 2011, the EU along with its all Member States have been bound to fulfil the obligations within the limits of their competence. The adoption of many legislative, standardisation and financial instruments at EU level: the European Accessibility Act covering products and services, the Web Accessibility Directive, the Electronic Communications Code, the Audiovisual Media Services Directive, copyright legislation, a number of legal acts harmonising accessibility requirements for goods and services to contribute to completing the EU internal market and opening up possibilities for economic operators to sell their products throughout the EU, regulations on passenger rights guaranteeing the right to non-discrimination in access to transport and to receive assistance free of charge for passengers with disabilities and reduced mobility travelling by air, rail, maritime means of transport, or bus and coach, or the recent proposal for the review of roaming legislation — have been supported by the European Disability Strategy 2010–2020. EU rules made accessibility requirements compulsory for the Member States also in public procurement (see: Giannoumis, 2015). By 18 April 2016, EU Member States were obliged to transpose the following three directives into national law: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, and Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts. The award criteria provided by them for the most advantageous economic tenders include specific references to accessibility for persons with disabilities and design for all users as part of the quality of a tender. The same requirements become an obligation when drawing up technical specifications for all goods and services intended to be used by the public or staff.

In March 2021, the European Commission adopted the Strategy for the rights of persons with disabilities 2021–2030. To support the implementation of this Strategy and of the CRPD, the EU continues to promote the use of EU funding by the Member States as provided for in the Multiannual financial framework 2021–2027. The Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument and provides the policy framework for, among others, the Cohesion policy funds, including the European Social Fund+ (ESF+), the European Regional Development Fund (ERDF) and the Just Transition Fund (JTF). It sets out that Member States must meet so-called 'enabling conditions' to ensure that the investment environment for EU support is well prepared upfront. One of the enabling conditions requires that a national framework ensures implementation of the CRPD. One of the criteria for its fulfilment relates to having in place arrangements to ensure accessibility.

Further, the European Commission has recommended that within building renovations to improve energy efficiency, accessibility barriers should be removed. Member States are also encouraged to mainstream accessibility funding under the Recovery and Resilience Plans. Under Next-GenerationEU, a €750 billion temporary recovery instrument to help repair the economic and social damage

induced by the coronavirus pandemic, there are new funding opportunities, as well as the Recovery Plan addressing the current crisis lay the foundations for a modern and more sustainable Europe.

EU policies promote an inclusive and accessible digital transformation and digital public services. It is important to mention that in the Commission's Communication of 6 May 2015 on a Digital Single Market Strategy for Europe set out the overall objective of ensuring that the integrated digital single market delivers sustainable economic and social benefits, thus, facilitating trade and promoting employment in the EU. It has been found that all EU consumers — not only underprivileged groups — are still lagging behind in terms of prices and choice and do not reap the full benefits of the single market as cross-border e-transactions are still limited.

The Commission envisages to launch in 2022 plans a European resource centre AccessibleEU. Its objective is "to increase coherence in accessibility policies and facilitate access to relevant knowledge, bringing together national authorities responsible for implementing and enforcing accessibility rules with experts and professionals from all areas of accessibility, to share good practices across sectors, to inspire policy development at national and EU level, as well as to develop tools and standards aiming to facilitate implementation of EU law".

Since the above-mentioned regulations and initiatives are of a harmonising nature, importantly the key purpose of the acts was: first, to ensure that all citizens can access products and services and participate in society, and to promote and facilitate accessible developments; and second, to obtain cohesion in the selected areas of production and services performed in Members States and, thus, to remove possible barriers to their cross-border mobility and trade. For a long time there were no specific binding requirements at the EU level relating to accessibility applied directly to business sector. All such obligations were defined on a per state basis, varying widely from state to state. However, the solid common ground was possible to be established. States that have adopted accessibility requirements tend to adopt requirements that are (i) limited to public sector web sites and (ii) target WCAG 2.0 A and AA conformance. The situation has acquired a new dimension with the adoption of the EAA.

European Accessibility Act — *opus magnum* and a stepping stone

Entering into force on 27 June 2019, the EAA was the first act in EU law with such a broad legal regulation, which is to guarantee that economic entities and public authorities will be obliged to apply common accessibility rules, ensuring greater certainty of economic turnover. The main objectives of this regulation are to improve the functioning of the internal market for specific products and services meeting accessibility requirements, while facilitating the functioning of enterprises and meeting consumer needs, as well as contributing to the implementation of the general strategic social objectives of the EU. By the 28 of June 2022, European member states need to adopt and publish all necessary laws and administrative processes to comply with the EAA.

The economic objective of the EAA is, therefore, to support the relevant mechanisms of the EU internal market, as well as to remove barriers to the free movement of products and services and to prevent the emergence of such barriers that result or could result from divergent national regulations in the field of accessibility. The regulation is intended to help entrepreneurs achieve economies of scale, facilitate cross-border trade and mobility, and help companies focus their resources on innovation, instead of using them for expenditure resulting from the fragmentation of regulations in the European Union. The entry into force of the provisions should therefore improve the competitiveness of economic entities operating within the trade and the provision of services in the single market. Businesses should see a reduction in costs from the standardization of accessibility laws throughout the EU. Furthermore, they will gain access to a large market for their products and services.

At the same time, the EAA pursues the social goal of reducing social exclusion and enabling independent living in society for people with disabilities. The EAA touches on elementary areas of the CRPD, in particular Article 9 (accessibility) and the corresponding requirements of the UN Committee of Experts on the Rights of People with Disabilities in its General Comment No. 2. The scope for action and exceptions contained in the EAA must therefore be designed in the light of the CRPD. This also corresponds to the expectations of the associations regarding the imminent implementation of the European requirements in Poland. The EAA aims to harmonize the requirements for the accessibility of selected products and services in order to ensure a more efficient functioning of the EU internal market by eliminating and preventing barriers to free movement that may result from divergent national regulations. There is a discrepancy between national accessibility requirements related to products and services placed on the market and provided on the EU market, leading to fragmentation of the internal market. The general nature of the CRPD accessibility obligations leads both to differences in their implementation at national level and to further legal divergences in the EU market.

In addition to people with disabilities in the traditional sense, the provisions of the EAA will also benefit other consumer groups, including older persons and those who experience functional limitations temporarily. Disabilities, the needs and possibilities of which constitute a kind of benchmark for meeting the criterion of accessibility by products and services for all. It may be considered a key tool ever developing and changing habits and needs of customers.

The EAA covers products and services that have been identified as being most important for persons with disabilities while being most likely to have diverging accessibility requirements across EU countries: computer hardware with systems, including the operating systems

intended for them (this includes computers, in particular desktop computers, notebooks, smartphones and tablets), as well as payment terminals that are located at a non-virtual point of sale (e.g. a card reader in the supermarket or a parking meter in public areas).

Among other things, the guideline obliges the member states to make all online trade accessible to consumers. Further obligations of the member states for barrier-free design relate to certain aspects of the following services:

- banking services for consumers (ATMs, websites and built environment);
- telecommunications by consumers, including answering emergency calls to 112 and products that are primarily used for electronic communication, such as telephones, but also routers and modems;
- access to audiovisual media for consumers, but not the accessibility of audiovisual media services themselves, because this is regulated in a separate directive (2018/1808);
- passenger transport services — air, rail, bus and sea (ticket and check-in machines, websites and built environment).

The possible impact of the regulation on business and market seems really broad. Only micro-enterprises providing services with fewer than ten employees and no more than an annual turnover or an annual balance sheet total of 2 million euros are not covered by this obligation. In line with paragraph 65 of the Preamble to the EAA, the EAA "should follow the principle of 'think small first' and should take account of the administrative burdens that SMEs are faced with. It should set light rules in terms of conformity assessment and should establish safeguard clauses for economic operators, rather than providing for general exceptions and derogations for those enterprises. Consequently, when setting up the rules for the selection and implementation of the most appropriate conformity assessment procedures, the situation of SMEs should be taken into account and the obligations to assess conformity of accessibility requirements should be limited to the extent that they do not impose a disproportionate burden on SMEs. In addition, market surveillance authorities should operate in a proportionate manner in relation to the size of undertakings and to the small serial or non-serial nature of the production concerned, without creating unnecessary obstacles for SMEs and without compromising the protection of public interest".

Nevertheless, an excessively prudent approach to imposing new obligations on producers and service providers should adequately address the following areas of the EAA, among others, which were identified as relevant:

- The scope of the directive (Art. 2 EAA) is limited to consumer transactions, however, in the context of implementation, the requirements are to be applied to business areas such as computer used for work or the business account at the bank are also covered.
- The requirements for the accessibility of the built environment (Art. 4 EAA) are not stipulated as binding.
- The obligations of economic operators (Art. 7 to 10 EAA) include ensuring that only accessible products are placed on the market. The derogations (Article 14) determine that the accessibility requirements only apply to the extent that compliance with them does not require any significant changes to the product or service and does not lead to a disproportionately high burden on economic actors. In this respect, narrow legal rules should ensure that economic actors can invoke the provided exceptions in clearly defined cases and only to the extent that is absolutely necessary.
- With regard to the conformity assessment procedure, i.e. here the procedure for ensuring the accessibility of products by the companies themselves. A "notified body" can be involved, which accompanies and controls the conformity assessment of manufacturers and service providers externally. In principle, a differentiated approach, for example based on product or services groups, is also conceivable here.
- The market surveillance authorities (Art. 19 to 22 EAA) must ensure the effective application of the legal requirements. Which body will take over the market surveillance in a member state is of great importance. In order to ensure a uniform approach and assessment, a central specialist agency for coordination or a market surveillance authority is absolutely necessary.

In the event of violations of the provisions of the EAA or the transposing act, effective legal enforcement options (Art. 29 EAA) must exist. In addition to individual legal protection in court, this also requires low-threshold complaint options such as arbitration proceedings. Likewise, the possibility of association and model declaratory actions should be created.

This complex matter absolutely requires good implementation support. For example, an independent advisory body could be set up in which experts with disabilities and other groups of people, institutions and entities or their associations particularly affected by the EAA, can participate. The inclusion of accessibility requirements in the compulsory content of various relevant courses, such as computer science or business management, should also be considered, in order to ensure the access to knowledge and skills necessary to understand and apply accessibility.

The shape of the transposition of the area of institutional and procedural provisions, but also indirectly of the regulation of the obligations of economic entities, is also influenced by the amendment to the provisions on market surveillance resulting from a different legislative process. On 25 June 2019, Regulation (EU) 2019/1020 on market surveillance and compliance of products was published (the Market Surveillance Regulation) being part of the "Goods package" which also contained the proposal for a regulation of the European Parliament and of the Council on the mutual recognition of goods lawfully marketed in another member state, adopted in March 2019 (the Mutual Recognition Regulation). Both regulations reflect the EU's objective to reinforce trust in the EU single market by ensuring compliance with, and enforcement of product legislation (through the Market Surveillance Regulation) and at the same time improving and facilitating mutual

recognition for goods (through the Mutual Recognition Regulation).

The Regulations apply to products subject to identified EU harmonisation legislation, unless the legislation contains more specific provisions on market surveillance and enforcement. They do not cover or refer directly to the EAA products, naturally they do not bring any solutions to market surveillance of services, but, what is important in the context of its implementation, national market surveillance systems are already in the process of transformation and some institutions may be at point of reference for the specific EAA market surveillance system. Such an approach could support coherence and rationality of the legal provision sets aimed at business operators.

One of the more technical issue is the reasonable transition period so all businesses have time to adapt. Given the cost and long life-cycle of certain products or elements of services, entrepreneurs should be allowed for lawful use until the end of their economically useful life and shoot be able to obtain support in the form of guideline for the transition.

Accessibility in transposition in Poland

The transposing act prepared by the Polish government will respond to the indicated problems and implement the objectives of the EAA in the area of Polish law. At the same time, it must tak into account the national socio-economic context.

The Constitution of the Republic of Poland of 1997 stipulates that no one may be discriminated against in political, social or economic life for any reason (Art. 32(2) Constitution), also regardless of differences resulting from disability or permanent or temporary restrictions in mobility and perception. The postulate of equality was also formulated as an important premise for organizing a social order based on solidarity, in which any form of social exclusion is rejected.

The transposing act will be also in line with the assumptions of the government program Accessibility Plus established by the resolution of the Council of Ministers of 17 July 2018 on the establishment of the Government Program Accessibility Plus, the main goal of which is to improve the quality of life and ensure independence of citizens who, due to their health, whether disabilities face limitations in mobility and perception in everyday life. The Accessibility Plus program improves the accessibility of public space as well as products and services in terms of architecture, information and communication. Its specific objectives were defined around three pillars concerning the creation of the legal and institutional framework for the implementation of accessibility, improvement of physical and digital accessibility and services, and the use of the accessibility of products and services to increase the competitive advantage of Polish enterprises, including on international markets.

According to the results of the 2011 National Census of Population and Housing, the number of people with disabilities in Poland at the end of March 2011 was almost 4.7 million (exactly 4,697.0 thousand). Thus, the number of people with disabilities at that time constituted 12.2% of the country's population. This number can be increased by some older people who, although they do not have a sense of belonging to the group of people with disabilities and do not identify themselves with this group, face the same challenges as people with disabilities, especially when performing activities related to the use of the eye or motor . It must be admitted that although not every disability causes barriers or difficulties in accessing information and services presented electronically, it can be estimated that in Poland there is probably a group of approx. 2–3 million people who may have difficulties, and in some cases find in a situation of complete helplessness, in the face of the increasingly common requirement to exchange information and access services by electronic means.

Due to the fact that there is no homogeneous group of people with disabilities and, more broadly, people with functional limitations who have the same needs and possibilities, the approach to accessibility seems to be appropriate, allowing for the highest degree of individualisation of the way of using products and services. It should be noted that some people with disabilities use specialized supporting tools for this, e.g. screen readers, programs that magnify or change the colour of the screen, some people need specialized devices, e.g. special keyboards or mice activated by shifting their heads, while some of them need to the information presented on the screen of a computer or a mobile device was written in a language that could be understood or that they would have enough time in each situation to take action, without having to perform them in a too short time. These indications are part of the indications addressed to economic entities under the new regulation. A functional approach to accessibility enables flexible design of accessibility in products and services and the use of innovative solutions that are adequate to the constantly changing consumer conditions and information and communication technologies.

So far, these issues have not been comprehensively regulated in Polish law. Selected areas of accessibility are subject to regulation, among others in the Construction Law, the Act on ensuring accessibility for people with special needs, the Act on digital accessibility of websites, the Public Procurement Law, the Act on rail transport, the Act on road transport, the Act on collective transport, the Telecommunications Law, the Act on radio broadcasting and television. These regulations remain scattered and do not create a set of standards ensuring an adequate level of product and service accessibility. Especially private economic entities are not covered by a consistent and complete legal regulation in this regard.

Recent changes to Polish law in this respect were directed to public entities. On 20 September 2019, the Act of 19 July 2019 on providing accessibility to people with special needs entered into force. The Act specifies measures to ensure architectural, digital, information and communication accessibility to people with special needs. Such persons,

within the meaning of the Act, are persons who, due to their external or internal characteristics, or due to the circumstances in which they are take additional measures to overcome the barrier to participate in different spheres of life on an equal basis with others. The obligation to ensure the indicated accessibility applies to public entities and is to be implemented through the use of universal design or rational improvement within the meaning of the CRPD. Moreover, the Accessibility Fund was established as a state earmarked fund for the implementation of tasks consisting in supporting activities in the field of ensuring accessibility to people with special needs.

The Act also introduced appropriate changes to other acts, including banking legislation or the Act of 7 July 1994 — Construction Law, in which the obligation to specify in the content of the construction design, depending on the purpose of the designed object, the necessary conditions for the use of the object by persons with special needs.

On 23 May 2019, the Act of 4 April 2019 on digital accessibility of websites and mobile applications of public entities entered into force implementing the Web Accessibility Directive. The act concerns the digital accessibility of websites and mobile applications of public entities. Introduces the obligation to place a declaration of accessibility on websites. Describes the procedure in the event of non-compliance with digital accessibility. Digital accessibility means compliance with the requirements of WCAG 2.1. AA specified in the table attached to the Act being in line with clauses 9, 10 and 11 of the European Standard EN 301 549 V2.1.2.

The legal and economic conditions resulting, inter alia, from the operation of the Accessibility Fund and the high level of allocation and use of funds from the European Union structural funds by Poland, provide for a solid basis for the EAA transposition and implementation process to place equal emphasis on the social and market goals of the new directive. It is indispensable for the effective and maximum implementation of the assumptions of coherent and even social and economic development in the national and EU dimensions.

Conclusions

It seems that the EU legislator managed to avoid the danger of overregulation that would threaten the freedoms of the internal market or distort the existing division of powers between the EU and the Member States in the social field. What should be positively assessed, the EAA uses functional accessibility criteria instead of prescriptive requirements. This should guarantee for the future-proofing of the provisions. Standards covering detailed requirements should be developed in cooperation with all the relevant stakeholders, including industry and groups representing the disabled. Currently, under the provisions of in the EAA, a direct mandate for the European standardisation body to draft a harmonised standard is being issued. Such an approach leaves space for self-regulations of sectors, which has already taken place in the area of accessibility, for example in the banking sector in Poland.

The increasing demand for barrier-free products and services, ready to be used in a flexibly functional way, is undeniable, inter alia due to the aging population. The supply in the internal market of available products and services is currently not satisfying this demand. An environment with more accessible products and services enables an inclusive society and makes it easier for people with disabilities to live independently. The implementation of the EAA can have a positive impact on a significant section of market and will, thus, play a crucial role both at the level of the European Union and at the level of the Member States. In the context of the adoption and implementation of the EAA, it is important to take into account that the implementation of accessibility requirements is emphasized by mandatory and optional instruments of international law that oblige countries to create an appropriate legal basis for future implementation and development of the EAA.

The introduction of accessibility requirements as legal obligations of enterprises should be implemented in a manner adequate to market conditions. It seems obvious that any changes in law are preceded by a regulatory impact assessment that takes into account the impact of changes in the legal status or obligations of economic entities on entrepreneurship and competitiveness. Companies placing products and services on the EU market should take steps to understand and prepare for the impact of the regulation on their operations and how they will be impacted by the authorities' increased surveillance and control powers. Such powers are not unlimited and actions towards market actors must remain within the limits established by the applicable legislation and general principles of EU law.

However, especially in the case of regulations that simultaneously pursue economic and social goals, a very important indication is the inclusion in the implementation process of ministries and offices with knowledge and competence in the field of performing tasks for the development of entrepreneurship and in the area of market supervision. It is not only about taking into account the demands of representatives of economic entities, but also including their development of legal solutions themselves, as well as methods of their implementation.

We cannot create the illusion that accessibility is effortless or comes without cost. Implementing solutions that meet the accessibility requirements provided for in the EAA will often require modifications in the design and implementation of products and services, which can be prepared and implemented only after spending on human — employment of experts and testers, training of staff, etc. — or financial resources — acquisition of know-how, licenses, equipment or materials, etc. The necessary effort in each case will be the time needed for reviews of products and services, verification of their accessibility through an internal procedure and with the support of external consultants. Such involvement of

resources on the part of economic entities cannot be ignored within discussions on the shape of the regulations, and the preparation of entrepreneurs for the implementation of the new regulation in the first place must not be complete without actions increasing the awareness of the very concept of accessibility, its implementation conditions and methods of assessment.

The need to raise awareness on accessibility requirements applies, of course, to consumers and market surveillance authorities, which should also build their capacity in terms of accessibility in order to be a supportive and equal partner for consumers and entrepreneurs in the implementation of the principles of accessibility. However, this issue should contribute to further discussion.

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