

The role of soft law in advancing the rights of persons with disabilities in the EU: A ‘hybridity’ approach to EU disability law

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Abstract

This article discusses the role of soft law in advancing the rights of persons with disabilities in the European Union (EU). In doing so, it revisits the emergence of the standalone, yet cross-cutting, field of ‘EU disability law’ through the lens of the ‘hybridity theory’ advanced *inter alia* by Trubek and Trubek. Being speculative in nature, this article construes EU disability law as a fruitful area for an enquiry into the dynamic relationship between hard and soft law. Until the entry into force of the Treaty of Amsterdam, soft law was crucial to attract disability within the sphere of action of the EU and to embed the social model of disability, displaying a value-setting role. In the post-Amsterdam period, soft law and hard law coexisted, being complementary to one another. Both contributed to a common objective, namely that of advancing equality of opportunities for persons with disabilities. After the conclusion of the UN Convention on the Rights of Persons with Disabilities, the dynamic relationship between hard and soft law has become more complex and akin to what Trubek and Trubek define as ‘transformation’.

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1 | INTRODUCTION

In the past 50 years, the importance and volume of soft law (i.e., instruments having no legally binding force but producing legal and practical effects)¹ have grown exponentially in the European Union (EU) legal system.² Ştefan et al. note that soft law currently accounts for more than 10% of EU law and spans across all the Union's fields of action.³ The recently deployed EFSolaw dataset showcases that soft law 'is now used as much in EU policy as hard law'.⁴ Further, soft law has also supported, and adapted to, the ongoing process of European integration. While its legal effects, desirability and, foremost, its legitimacy are highly questioned,⁵ it has played a vital role in the development of EU law, for example in areas such as social policy⁶ or competition law,⁷ and, as most recently debated, in the application of environmental legislation relating to climate change.⁸

Disability is another field in which soft law has been of key importance. Until the late 1990s, given the lack of any legal basis in the Treaties, the former European Community (EC) had addressed disability primarily through the use of soft law.⁹ With the entry into force of the Treaty of Amsterdam, the then EC acquired the competence to combat discrimination on the ground, *inter alia*, of disability. Further to those constitutional changes, the rights of persons with disabilities started to be addressed by hard law (i.e., codified legislative measures), alongside soft law instruments. In 2009, the conclusion by the EU¹⁰ of the UN Convention on the Rights of Persons with Disabilities (CRPD)¹¹ brought about a major impetus for the development of the EU action on disability. It triggered the adoption of legislation aimed, to varying degrees, at improving access for people with disabilities to a wide range of goods and services,¹² or at protecting disability rights.¹³ In this context, however, soft law has continued to play a vital role. Two major overarching policy strategies, adopted by means of Commission communications—the European Disability Strategy 2010–2020 (EDS),¹⁴ and its successor, the Strategy on the Rights of Persons with Disabilities 2021–2030 (2021 Strategy)¹⁵—have contributed to drawing the contours of current EU disability law.

As yet, an array of academic works has extensively discussed legal developments related to the EU action on disability,¹⁶ and the impact of the CRPD on the EU legal order.¹⁷ Scholars have further engaged with and commented

¹F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 *Modern Law Review*, 19. See, also, G.M. Borchardt and K.C. Wellens, 'Soft Law in European Community Law' (1989) 14 *European Law Review*, 267.

²Opinion AG Bobek in Case C-16/16 P, *Kingdom of Belgium v. European Commission*, ECLI:EU:C:2017:959, paras. 4 and 81 et seq. See also O. Ştefan, 'European Union Soft Law: New Developments Concerning the Divide between Legally Binding Force and Legal Effects' (2012) 75(5) *Modern Law Review*, 279.

³O. Ştefan et al., 'EU Soft Law in the EU Legal Order: A Literature Review' (2019) *King's College London Law School Research Paper Series*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3346629.

⁴B. Cappellina, A. Ausfelder, A. Eick, R. Mespoulet, M. Hartlapp, S. Saurugger and F. Terpan, 'Ever More Soft Law? A Dataset to Compare Binding and Non-binding EU Law across Policy Areas and over Time (2004–2019)' (2022) 23(4) *European Union Politics*, 741.

⁵Among others, D. Petropoulou Ionescu and M. Eliantonio, 'Democratic Legitimacy and Soft Law in the EU Legal Order: A Theoretical Perspective' (2021) 17(1) *Journal of Contemporary European Research*, 43; C. Andone and F. Coman-Kund, 'Persuasive Rather Than 'Binding' EU Soft Law? An Argumentative Perspective on the European Commission's Soft Law Instruments in Times of Crisis' (2022) 10(1) *The Theory and Practice of Legislation*, 22–47.

⁶M. Dawson, 'New Governance and the Displacement of Social Europe: The Case of the European Semester' (2018) 14(1) *European Constitutional Law Review*, 191.

⁷H.A. Cosma and R. Whish, 'Soft Law in the Field of EU Competition Policy' (2003) 14 *European Business Law Review*, 25; O. Ştefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the EU* (Kluwer, 2013); and O. Ştefan, 'Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance' (2014) 21 *Maastricht Journal of European and Comparative Law*, 359, 379.

⁸D. Petropoulou Ionescu and M. Eliantonio, 'Soft Law Behind the Scenes: Transparency, Participation and the European Union's Soft Law Making Process in the Field of Climate Change' (2022) *European Journal of Risk Regulation*, 1.

⁹L. Waddington, *From Rome to Nice in a Wheelchair: The Development of a European Disability Policy* (Europa Law Publishing, 2005).

¹⁰Council Decision 2010/48/EC concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L 23/35.

¹¹Annex I, UN Convention on the Rights of Persons with Disabilities, 13 December 2006, in force 3 May 2008, UN Doc. A/RES/61/106.

¹²For example, Directive (EU) 2019/882 on the accessibility requirements for products and services [2019] OJ L 151/70.

¹³Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, OJ L 94, 28.3.2014, 65–242.

¹⁴Commission, 'European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe', COM (2010) 636 final.

¹⁵Commission, 'Union of Equality: Strategy for the Rights of Persons with Disabilities 2021–2030', COM (2021) 101 final.

¹⁶*Inter alia*, D. Ferri and A. Broderick, *Research Handbook on EU Disability Law* (Edward Elgar, 2020).

¹⁷Among others, see L. Waddington and A. Lawson, 'The Unfinished Story of EU Disability Non-Discrimination Law', in A. Bogg, C. Costello and A.C.L. Davies (eds.), *Research Handbook on EU Labour Law* (Edward Elgar, 2016) 474.

upon the EDS,¹⁸ examining descriptively its key tenets, or assessing it vis-à-vis the CRPD.¹⁹ Limited attention has been paid to the overall role of soft law in advancing the rights of persons with disabilities in the EU. This article, by contrast, focuses on the function of soft law within EU disability law and on the way in which soft law and hard law interact in that field. In doing so, it revisits, reassesses and retraces the emergence of the standalone, yet cross-cutting, field of ‘EU disability law’.²⁰ It does so through the lens of ‘hybridity theory’—i.e., the idea of ‘hybrid constellations’ where hard and soft law operate simultaneously in a complementary fashion or in an integrated way²¹—posited, among others, by Trubek et al.²² This article, therefore, intends to be reconstructive and speculative in nature, and its contribution to scholarship consists in re-reading the evolution of the EU action on disability as a hybrid governance. From this discrete perspective, this article also tallies with the multifaceted and longstanding debate over soft law and on the development of soft governance instruments that deepen EU integration but move away from traditional constitutional processes.²³ In that regard, disability law could be seen as a particularly rich and fruitful area for an enquiry into the dynamic relationship between hard and soft law. While adopting a diachronic approach, this article pays particular attention to the developments that occurred after the ratification of the CRPD.

Further to these introductory remarks, the remainder of the article proceeds as follows. Section 2 recalls the concept of soft law and presents the theory of ‘hybridity’ in the EU context. Section 3 examines the role of soft law in the timespan preceding the conclusion of the CRPD, revisiting the surge in EU disability law. It discusses how soft law was initially a value-setting and coordination tool, and posits that, with the advent of the Treaty of Amsterdam, it became complementary to hard law. Section 4 explores the period following the conclusion of the CRPD and pays particular attention to the EDS. In that regard, it argues that the conclusion of the CRPD has provoked a progressive ‘hardening’ of soft law and ‘hybridisation’ of EU disability law. This section refers to the general obligations of the CRPD but, deliberately, does not engage in any great depth with the Convention itself. Section 5 focuses on future developments following the release of the 2021 Strategy. Section 6 presents some concluding remarks, and characterises current EU disability law as a ‘hybrid’ field, in which soft law, new soft participatory structures and hard law are integrated into a single system.

2 | A THEORETICAL FRAMEWORK: EU SOFT LAW AND HYBRIDITY

With the aim of conceptualising and understanding the development of EU disability law and the key role played by soft law, this section expounds the notion of soft law adopted for the purpose of this analysis, and the core tenets of ‘hybridity’ as theoretical framework.

2.1 | EU soft law and its overlapping functions

In spite of the conceptual fuzziness surrounding soft law²⁴ and its difficult location ‘in the classic hierarchy of sources’,²⁵ EU law scholars concur in highlighting that soft law entails ‘rules of conduct which, in principle, have no

¹⁸D.L. Hosking, ‘Staying the Course: The European Disability Strategy 2010–2020’, in L. Waddington, G. Quinn and E. Flynn (eds.), *European Yearbook of Disability Law* (Intersentia, 2013) 73–98.

¹⁹L. Waddington and A. Broderick, ‘The Post-2020 European Disability Strategy’ (July 2020) Directorate-General for Internal Policies, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/656398/IPOL_STU\(2020\)656398_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/656398/IPOL_STU(2020)656398_EN.pdf).

²⁰D. Ferri and A. Broderick, ‘Introduction’, in D. Ferri and A. Broderick, *Research Handbook on EU Disability Law* (Edward Elgar, 2020).

²¹D.M. Trubek and L. Trubek, ‘New Governance and Legal Regulation: Complementarity, Rivalry, and Transformation’ (2006) 13(3) *Columbia Journal of European Law*, 539.

²²D.M. Trubek, M.P. Cottrell and M. Nance, ‘“Soft Law”, “Hard Law”, and European Integration: Toward a Theory of Hybridity’, *University of Wisconsin Legal Studies Research Paper No. 1002* (November 2005), available at: <https://doi.org/10.2139/ssrn.855447>.

²³G. De Búrca and J. Scott, *Law and New Governance in the EU and the US* (Hart, 2006).

²⁴F. Terpan, ‘Soft Law in the European Union—The Changing Nature of EU Law’ (2015) 21 *European Law Journal*, 68.

²⁵G. Martinico, ‘Comparative Law Reflections on the Use of Soft Law in the Belt and Road Initiative’ *Sant’Anna Legal Studies Research Paper* (April 2020), available at: <https://ssrn.com/abstract=3565992>. See, also, B. Pastore, ‘“Soft law”, gradi di normatività, teoria delle fonti’ (2003) *Lavoro e diritto*, 5.

legally binding force but which nevertheless may have practical effects', or even legal effects.²⁶ Boschetti and Poli suggest that 'soft law works as a descriptive legal category that encompasses the multi-faceted complexity of an increasingly important normativity essential to the effectiveness and resilience of contemporary legal systems and their institutional apparatus'.²⁷ Snyder's definition, included in a milestone article published in 1993, remains the most cited one, and the one this piece embraces, conceiving of soft law as an array of formally non-binding norms that remain at the bottom of the legal sources hierarchy, but which do have legal relevance.²⁸ Martinico speaks of the 'Hegelian residual character' of soft law, which includes everything that cannot be included in the traditional categories of law.²⁹

Within the section on the legal acts of the Union, Article 288 of the Treaty on the Functioning of the European Union (TFEU) refers to two instruments that are non-binding (i.e., soft law): recommendations and opinions. Recommendations may be an aid to the interpretation of EU and national provisions, and national courts must take them into consideration.³⁰ However, scholarship is also quite consistent in highlighting that EU soft law measures may take the form of acts that are not explicitly mentioned in Article 288 TFEU: communications, notices, action plans or guidelines or indeed other *sui generis* types of documents.³¹

Trying to make sense of EU soft law, EU law academics have extensively discussed the types, functions and effects it encompasses,³² with this debate being revamped during the COVID-19 emergency.³³ Terpan identifies a taxonomy of soft law on the basis of 'different types of obligation/enforcement combination[s]',³⁴ thereby placing emphasis on different levels of (still very limited) enforceability. Other scholars have suggested different classifications on the basis of the functions of soft law.³⁵ This article refers to that propounded by Chalmers et al. who identify six broad categories of soft law: (i) instruments including commitments about the conduct of an institution; (ii) soft law providing for the respect of certain values; (iii) those programming legislation (e.g., action plans for European policies); (iv) regulatory communications (e.g., soft law including indications from the Commission as to the behaviour of undertakings in certain sectors and the possible sanctions they might incur in case of infractions); (v) soft law interpreting legislation; and (vi) model law-making (i.e., norm-setting soft law).³⁶ Even when soft law does not achieve a norm-setting value, it can have a 'coordinating' function. It might be a way to enthuse coordinated approaches of the Member States without a specific obligation, creating a consensus around certain behaviours in line with EU goals.³⁷ In general, all those functions of soft law tend to overlap and co-exist.

In spite of the wealth of contributions on the legal effects that soft law displays, those remain fraught by uncertainty. Snyder suggests that soft law binds the enacting institution, and can give concrete shape to the general duty of institutional cooperation.³⁸ Soft law has also been considered capable of orientating overall EU policies. In that regard, on the basis of institutionalist theories, Slominski and Trauner connect soft law to policy

²⁶F. Snyder, above, n. 1, 32.

²⁷B. Boschetti and M.D. Poli, 'A Comparative Study on Soft Law: Lessons from the COVID-19 Pandemic' (2021) 23 *Cambridge Yearbook of European Legal Studies*, 20.

²⁸L. Senden, *Soft Law in European Community Law* (Hart, 2004).

²⁹G. Martinico, 'Il soft law nel diritto comparato della pandemia: alcuni spunti critici?' (2022) *La Rivista "Gruppo di Pisa"*.

³⁰Case C-322/88, *Salvatore Grimaldi v. Fonds des maladies professionnelles*, ECLI:EU:C:1989:646.

³¹Ştefan et al., above, n. 3. Contra B. De Witte, 'The Place of the OMC in the System of EU Competences and Sources of Law' (2018) *European papers*. De Witte warns against the extension of the term soft law to a 'broader category of documents published by the various EU institutions (strategies, agendas, high level reports, green and white papers, work programmes, and so on) that all share the characteristic of being policy documents rather than normative instruments seeking to guide behaviour', as those documents 'do not display any legal characteristics, whether hard or soft' but only announce or foreshadow legal developments.

³²See, *inter alia*, F. Snyder, 'Interinstitutional Agreements: Forms and Constitutional Limitations', in G. Winter (ed.), *Sources and Categories of European Union Law: A Comparative and Reform Perspective* (Nomos, 1996) 463; Senden, above, n. 28; Ştefan, above, n. 2.

³³O. Ştefan, 'The Future of EU Soft Law: A Research and Policy Agenda for the Aftermath of Covid-19' (2020) 7 *Journal of International and Comparative Law*, 329–349. For a comparative perspective, Boschetti and Poli, above, n. 27.

³⁴Terpan, above, n. 24, 77.

³⁵L. Senden, 'Soft Law and Its Implications for Institutional Balance in the EC' (2005) 1(2) *Utrecht Law Review*, 79.

³⁶D. Chalmers, G. Davies and G. Monti, *European Union Law* (Cambridge University Press, 2014) 114–115.

³⁷K. Jacobsson, 'Soft Regulation and the Subtle Transformation of States: The Case of EU Employment Policy' (2004) 14(4) *Journal of European Social Policy*, 359.

³⁸Snyder, above, n. 1.

change.³⁹ Štefan et al. recall that the practical effects of soft law ‘include the transformations that soft law may generate’ in the behaviour and practices of both the EU institutions and the Member States.⁴⁰ In this respect, to sum up the blurred effects of soft law, Advocate General (AG) Bobek, in his opinion on the case *Belgium v. Commission*, states:

the various soft law instruments share the same key feature: they are not *binding* in the traditional sense. They are a type of *imperfect* norm: on the one hand, they clearly have the normative ambition of inducing compliance on the part of their addressees. On the other hand, no instruments of direct coercion are attached to them. Usually adopted in the wake of a process of consultation with the different stakeholders (a bottom-up approach), they may contain ‘mild obligations’ or ‘robust exhortations’ that are coined in terms of ‘invitation’.⁴¹

2.2 | The interplay between soft law, soft governance and hard law: ‘hybridity’

Zooming out from the desirability of soft law and the interplay between soft law and hard law, Trubek et al. identify in the international law literature ‘general (and related) explanatory themes’ that support the use of soft law (instead of hard law).⁴² EU scholars posit that in a system such as the EU, governed by the principle of conferral, a major advantage of soft law is that it may engage with any policy field, including areas in which the EU does not have legislative competences or where harmonisation is not permitted by the Treaty.⁴³

Soft law is considered ‘a fluid normativity that originates and operates in a composite and highly flexible web of international, supranational, domestic, and sub-state players, both public and private’.⁴⁴ In the EU legal system, soft law also interacts in various ways with soft governance processes and practices, which simultaneously involve EU institutions, Member States and civil society actors. Those soft processes, which occur outside the standard democratic procedures circuit, may allow the achievement of a certain degree of coordination among Member States or the enhancement of participatory democracy, albeit they often lack transparency and full legitimacy. In general, soft law sets up, shapes or guides those processes, or constitutes (one of) their output. The most debated (and criticised)⁴⁵ of those soft processes in the EU is the Open Method of Coordination (OMC).⁴⁶ While the OMC *per se* remains beyond the scope of this article, it is worth recalling that this ‘form of intergovernmental policy-making’⁴⁷ was set up by the Lisbon European Council in 2000. It has never been regulated, nor been mentioned in the Treaties and, as De Witte notes, ‘is still situated in a constitutional no man’s land’.⁴⁸ The OMC ‘does not result in binding EU legislative measures and it does not require EU

³⁹P. Słominski and F. Trauner, ‘Reforming Me Softly—How Soft Law Has Changed EU Return Policy Since the Migration Crisis’ (2021) 44 *West European Politics*, 93.

⁴⁰O. Štefan et al., above, n. 3.

⁴¹AG Bobek, Case C-16/16 P, *Kingdom of Belgium v. European Commission*, ECLI:EU:C:2017:959, para. 86. In its opinion on the case *Italian Republic and Comune di Milano v. Council* (AG Bobek, Joined Cases C-59/18 and C-182/18 and Case C-743/19, *Italian Republic and Comune di Milano v. Council of the European Union - Parliament v. Council*, ECLI:EU:C:2021:812), AG Bobek reiterates that ‘the EU legal order and the Court’s case-law allow various actors, including EU institutions, to issue various non-binding (soft law) measures in order to exhort and to persuade, distinct from the power to adopt acts having binding force’ (para. 174).

⁴²Trubek et al., above, n. 22.

⁴³M. Dawson, ‘Integration through Soft Law: No Competence Needed? Juridical and Bio-Power in the Realm of Soft Law’, in S. Garben and I. Govaere (eds.), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart, 2017) 235.

⁴⁴Boschetti and Poli, above, n. 27.

⁴⁵V. Hatzopoulos, ‘Why the Open Method of Coordination Is Bad for You: A Letter to the EU’ (2007) 13(3) *European Law Journal*, 309–342.

⁴⁶K. Armstrong, ‘The Open Method of Coordination—Obstinate or Obsolete?’, *University of Cambridge Faculty of Law Research Paper No. 45/2016* (September 2016).

⁴⁷M. Prpic ‘The Open Method of Coordination’ (2014) *European Parliamentary Research Service*, available at: <https://www.europarl.europa.eu/EPRS/EPRS-AaG-542142-Open-Method-of-Coordination-FINAL.pdf>.

⁴⁸De Witte, above, n. 31.

countries to introduce or amend their laws',⁴⁹ and cannot be considered itself a form of soft law, but may produce soft law measures such as recommendations.⁵⁰

The relationship between soft law, soft governance and hard law can rarely be seen as alternative. Trubek et al. contend that 'the question is not necessarily one of hard versus soft law: there is also the issue of the possible interaction between these two approaches to governance and thus of "hybrid" constellations in which both hard and soft processes operate in the same domain'.⁵¹ They suggest that hybridity 'may be the result of conscious design or it may come about because the same objective is being pursued through two routes, one of which leads to hard measures and the other to soft ones'.⁵² Elsewhere, Trubek and Trubek discuss three types of 'coexistence' between hard and soft law and soft governance, which allude to diverse interactions: complementarity, rivalry and transformation.⁵³ The first occurs when soft law and hard law operate simultaneously 'contributing to a common objective'.⁵⁴ The second takes place '[w]hen the newer forms of governance are designed to perform the same tasks as legal regulation and are thought to do it better, or otherwise there seems to be a necessary choice between systems'.⁵⁵ The third type of coexisting form of soft and hard law, referred to as 'transformation' by Trubek and Trubek, describes 'configurations in which new governance and traditional law are not only complementary; they also are *integrated* into a single system and the functioning of each element is necessary for the successful operation of the other'.⁵⁶ Trubek and Trubek, somewhat differently from Sabel and Simon (and De Búrca and Scott) who contrast 'hybridity' and 'transformation',⁵⁷ characterise transformation as the best embodiment of hybridity, i.e. as a 'long-term phenomenon and not simply a passing stage' in which hard law and soft law are mutually inter-dependent.⁵⁸

On the whole, hybridity theories, which have been further elaborated by other scholars, in their different nuances, mostly posit that hard law and soft law (and new governance) are interrelated and somewhat entrenched in one another. In that regard, they seem helpful in further developing existing analyses on EU disability law and forging a new understanding of the role of soft law in protecting and promoting the rights of persons with disabilities.

3 | THE ROLE OF SOFT LAW UNTIL THE ADVENT OF THE CRPD AND THE SURGE IN EU DISABILITY LAW

As noted above, Chalmers et al. identify broad categories of soft law, which are particularly useful as a lens for re-reading the evolution of EU disability law. On the basis of that classification, this section qualifies the main functions of soft law instruments related to disability, highlighting the extent to which they set forth commitments about the conduct of an institution, the respect of certain values or display coordinating functions (albeit not achieving a norm-setting role). In a chronological fashion, and in light of Trubek and Trubek's approach to hybridity, this section also appraises the developing interaction and coexistence between soft and hard law in the field of disability.

⁴⁹Prpic, above, n. 47.

⁵⁰K.A. Armstrong, 'New Governance and the European Union: an Empirical and Conceptual Critique', in G. de Búrca, C. Kilpatrick and J. Scott (eds.), *Critical Legal Perspectives on Global Governance: Liber Amicorum David M. Trubek* (Hart, 2013).

⁵¹Trubek et al., above, n. 22.

⁵²Ibid.

⁵³D.M. Trubek and L. Trubek, 'New Governance and Legal Regulation: Complementarity, Rivalry or Transformation' (2006) 13 *Columbia Journal of European Law*, 539, 543.

⁵⁴Ibid.

⁵⁵Ibid.

⁵⁶Ibid. (emphasis added).

⁵⁷C.F. Sabel and W.H. Simon, 'Epilogue: Accountability without Sovereignty', in G. De Búrca and J. Scott (eds.), *Law and New Governance in the EU and the US* (Hart, 2006); G De Búrca and J Scott, 'Introduction: New Governance, Law and Constitutionalism', in G. De Búrca and J. Scott (eds.), *Law and New Governance in the EU and the US* (Hart, 2006).

⁵⁸Trubek and Trubek, above, n. 53. Other authors have used the word transformation in a similar vein but in a more general fashion. For example, Dawson has argued that modes of new governance denote a transformation of legal categories and argues that, in such new governance, soft norms and hard law institutions begin to cohabit and interact (M. Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (Cambridge University Press, 2011) *passim*, especially 110 et seq.).

3.1 | The 'soft' origin of EU disability law: soft law as a value-setting and coordination tool

As consistently highlighted by scholars,⁵⁹ until the late 1990s, even if some Community Action Programmes were set up by means of (binding) Council decisions to facilitate exchange of information and best practices across Member States,⁶⁰ the European action on disability was primarily characterised by the use of soft law, given the absence of a legal basis within the Treaty.

O'Mahony and Quinlivan⁶¹ argue that a recommendation adopted by the Council in 1986⁶² and focusing on the area of employment can be considered an initial wide-ranging initiative on disability.⁶³ Other Council resolutions were adopted in the same period to foster Member States' cooperation in specific fields, such as education,⁶⁴ while European Parliament resolutions contributed to shed light on the rights of persons with disabilities.⁶⁵ The first European disability policy plan was released in 1996, by means of a Commission Communication on a European Community Disability Strategy (1996 Strategy).⁶⁶ The 1996 Strategy, while recognising that 'responses to the objective of equal opportunities will vary with the national, regional or local context', displayed two main functions. First, it provided for the respect of certain values. Namely, being inspired by the 1993 UN Standard Rules for the Equalization on Opportunities for Persons with Disabilities⁶⁷ (Standard Rules),⁶⁸ it revolved around a substantive conception of equality and a social model-oriented⁶⁹ understanding of disability,⁷⁰ i.e., the view that disability stems from the interaction between the individual's sensory, intellectual, psychosocial or physical impairment and external barriers. By placing emphasis 'on identifying and removing the various barriers to equal opportunities and full participation in all aspects of life',⁷¹ the 1996 Strategy provided for the alignment of EC policies with the social model and 'charted the movement toward the rights-based' approach to disability 'both in the Member States and at the level of the Community'.⁷² Secondly, the 1996 Strategy included some (loosely drafted) commitments about the conduct of the Commission. Those concerned either the preparation of reports, the monitoring of the use of structural funds, and an array of actions to stimulate political dialogue and coordination among Member States. The 1996 Strategy also entrusted the Commission with the task of 'consolidat[ing] the valuable cooperation' among Member States developed on the basis of Community Action Programmes. The 1996 Strategy displayed a specific normative role in setting out intra-institutional collaborative processes (in particular within the Commission). Further, the 1996 Strategy, in conjunction with a Resolution of the Council and the Representatives of the Member States, set up an inter-institutional mechanism (i.e., High Level Group of Member States' Representatives on Disability) for the exchange of information.⁷³ In laying the foundation for soft collaborative procedures to identify key priorities for the EU action

⁵⁹Waddington, above, n. 9. See, also, C. O'Mahony and S. Quinlivan, 'The EU Disability Strategy and the Future of EU Disability Policy', in D. Ferri and A. Broderick (eds.), *Research Handbook on EU Disability Law* (Edward Elgar, 2020); Waddington and Broderick, above, n. 19.

⁶⁰HELIOS I Community Action Programme for Disabled People (1988–1991) [1988] OJ L 104/38.

⁶¹O'Mahony and Quinlivan, above, n. 59.

⁶²Council Recommendation (EEC) 86/379 on the employment of disabled people in the Community [1986] OJ L 225/43.

⁶³M. Priestley, 'In Search of European Disability Policy: Between National and Global' (2007) 1(1) *ALTER: European Journal of Disability Research*, 61–74.

⁶⁴Resolution of the Council and the Ministers for Education meeting with the Council of 31 May 1990 concerning integration of children and young people with disabilities into ordinary systems of education, OJ C 162, 03.07.1990.

⁶⁵For example, Resolution of 14 December 1995 on the human rights of disabled people, OJ C 17, 22.1.1996, 196.

⁶⁶Commission Communication of 30 July 1996, Equality of Opportunity for People with Disabilities: A New European Community Disability Strategy, COM (96) 406 final.

⁶⁷Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 20 December 1993, UN Doc. A/RES/48/96.

⁶⁸G. Quinn and E. Flynn, 'Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability' (2012) 60(1) *American Journal of Comparative Law*, 23–48.

⁶⁹In the mid-1970s, the British Union of the Physically Impaired Against Segregation (UPIAS) argued that society disables people with impairments and distinguished the 'impairment' itself from the social 'situation' of people with impairments, the latter giving rise to a 'disability'. On the basis of the UPIAS manifesto, Michael Oliver further elaborated a conception of disability as a societal construction and expounded the 'social model of disability' (inter alia, M. Oliver, *The Politics of Disablement* (Macmillan Education, 1990)).

⁷⁰D.L. Hosking, 'Promoting Accessibility for Disabled People Using EU Standardisation Policy' (2017) 42 *European Law Review*, 145–165.

⁷¹COM (96) 406 final, para. 3.

⁷²*Ibid.*, para. 59.

⁷³Resolution of the Council and of the representatives of the governments of the Member States meeting within the Council 20 December 1996 on equality of opportunity for people with disabilities, OJ C 12, 13.1.97.

on disability, the 1996 Strategy acknowledged the importance of including the perspective of persons with disabilities in the development of disability policy, and as a foundational stone of equality of opportunities.⁷⁴

The 1996 Strategy was followed by a Resolution of the Council that reiterated the commitment of the EU institutions towards the social model, and called upon Member States to evaluate whether their policies were adequate in ‘empowering people with disabilities for participation in society, including the severely disabled, while paying due attention to the needs and interests of their families and carers’, and ‘to promote the involvement of representatives of people with disabilities in the implementation and follow-up of relevant policies’.⁷⁵ Other resolutions of the Council addressed the right to work of persons with disabilities,⁷⁶ tallying with general soft law instruments focusing on employment such as the 1999 Council Resolution on employment guidelines.⁷⁷

Overall, in this first phase, soft law proved vital in bringing disability within the sphere of action of the then EC.⁷⁸ Echoing the words of Láncoš, soft law measures (in particular the 1996 Strategy) were mostly ‘employed to bridge the divide between the lack of formal legislative competences’ and the policy ambitions of the Commission.⁷⁹ As argued by Waddington, ‘[i]n spite of their restricted legal status, the Commission Communication and Council Resolution [...] paved the way for subsequent policy developments, and created the framework within which the Community institutions could respond to the new possibilities opened up by the Amsterdam Treaty in 1999’.⁸⁰ Soft law created an initial value framework to address disability at the EU level, epitomising a shift in the narrative of disability by EU institutions, from one which concerned individual impairment and rehabilitation to one which focused on external barriers. As will be discussed below, with the evolution of the EU constitutional framework, soft law kept its value-setting role, but became complementary to hard law.

3.2 | From Amsterdam to Lisbon: the ‘complementarity’ of soft law

As mentioned in the introduction to this article, the Treaty of Amsterdam, by virtue of Article 13 of the Treaty on the European Community (TEC) (now Article 19 TFEU), conferred upon the then EC the competence to combat discrimination on the ground, *inter alia*, of disability.⁸¹ Further, it provided a Declaration requiring EU institutions to take account of the needs of persons with disabilities in creating harmonisation measures under the former Article 95 EC (now Article 114 TFEU). Notably, in 2000, the proclamation of the (then non-binding) Charter of Fundamental Rights (CFR) placed further emphasis on the role of the EU in protecting disability rights. On the basis of Article 13 TEC, Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive)⁸² was adopted. It represented the first legislative intervention aimed at addressing disability discrimination. Article 13 TEC also supported the adoption of a Council decision to designate 2003 as the ‘European Year of People with Disabilities’.⁸³ As Waddington has highlighted in several of her most influential works,⁸⁴ disability issues also started to be mainstreamed across various strands of EU

⁷⁴COM (96) 406 final, para. 38 *et seq.*

⁷⁵Resolution of the Council, above, n. 73, 1.

⁷⁶Council Resolution of 17 June 1999 on equal employment opportunities for people with disabilities (1999/C 186/02).

⁷⁷Council Resolution of 22 February 1999 on the 1999 Employment Guidelines (1999/C 69/02) OJ C 69, 12.3.1999, 2.

⁷⁸Waddington, above, n. 9.

⁷⁹P.L. Láncoš, ‘A Hard Core Under the Soft Shell: How Binding Is Union Soft Law for Member States?’ (2018) 24(4) *European Public Law*, 755–784.

⁸⁰Waddington, above, n. 9.

⁸¹On the development of EU non-discrimination law, see M. Bell, *Anti-Discrimination Law and the European Union* (Oxford University Press, 2002); M. Bell, ‘EU Anti-Discrimination Law: Navigating Sameness and Difference’, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press, 2021) 651.

⁸²Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

⁸³Council Decision 2001/903/EC of 3 December 2001 on the European Year of People with Disabilities 2003.

⁸⁴Among others, L. Waddington, ‘A Disabled Market: Free Movement of Goods and Services in the EU and Disability Accessibility’ (2009) 15(5) *European Law Journal: Review of European Law in Context*, 575–598.

legislation, mostly internal market legislation.⁸⁵ In this context, hard law and soft law (in particular Commission communications,⁸⁶ as well as Council resolutions⁸⁷) started operating together.

Further to the Commission Communication of May 2000 'Towards a barrier-free Europe for people with disabilities', which along the lines of the 1996 Strategy, focused on 'the environmental, technical and legal obstacles to the effective participation of people with disabilities', a major policy plan—the EU Disability Action Plan (EU DAP)—was released in 2003. This aimed to carry forward the 1996 Strategy.⁸⁸ Similar to that Strategy, the EU DAP had a clear value-setting role. Even more overtly than its predecessor, it made explicit the alignment of the EU political institutions with the social model of disability:

The EU also sees disability as a social construct. The EU social model of disability stresses the environmental barriers in society which prevent the full participation of people with disabilities in society. These barriers must be removed [...].⁸⁹

Another major function of the EU DAP was that of outlining 'forward-looking EU initiatives aimed at the further inclusion of people with disabilities in an enlarged EU economy and society',⁹⁰ and setting out the Commission's commitments, including commitments related to overseeing and reporting on the overall situation of people with disabilities in the EU. While not proposing the adoption of new legislation, it traced the contours of the Commission's action on disability in a more stringent way than its predecessor. It laid out distinct obligations in monitoring the implementation of existing hard law (such as the Structural Funds legislation) and enhancing policy coordination through soft law (such as the European Employment Strategy, EES). In that vein, the EU DAP did place emphasis on the use of existing soft governance tools, such as the OMC, to advance equality of opportunity. It also constituted a method for defining the disability agenda at the EU level. Along the lines traced by the 1996 Strategy, the EU DAP also aimed to ripen the role of intra-institutional mechanisms. In particular, it tasked the Commission Disability Inter-Services Group 'with pushing forward the Action Plan process and monitoring the mainstreaming activities of the various Commission departments'.⁹¹ It placed further emphasis on the High Level Group on Disability (HLGD), which was entrusted with supporting 'the development of synergies among disability policies at EU level'. It also referred to general 'voluntary cooperation methods which provide for adequate participation of all stakeholders: Member States, social partners, civil society, etc.'. These references to cooperation methods, however, remained rather vague.

The EU DAP cannot be conceived as a norm-setting soft law, or a 'directive-like' type of communication, as it did not include mandatory formulations and detailed actions to be undertaken by Member States.⁹² However, it did include goals for the Member States and was also complemented by biennial action plans, which set out more specific targets for Member States, including that of developing national action plans on social inclusion of persons with disabilities.⁹³ In this way, the EU DAP aimed to induce (without coercing) Member States to enact policies aligning with the social model, to stimulate coordinated approaches of the Member States in the absence of binding

⁸⁵See, e.g., Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (InfoSoc Directive).

⁸⁶See, e.g., Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions—Towards a barrier free Europe for people with disabilities COM (2000) 0284 final.

⁸⁷Council Resolution of 15 July 2003 on promoting the employment and social integration of people with disabilities, OJ C 175, 24/07/2003, 1; Council Resolution of 6 February 2003 on 'eAccessibility'—improving the access of people with disabilities to the knowledge-based society, OJ C 39, 18.2.2003, 5; Council Resolution of 5 May 2003 on equal opportunities for pupils and students with disabilities in education and training, OJ C 134, 7.6.2003, 6.

⁸⁸Commission Communication of 30 October 2003, Equal Opportunities for People with Disabilities: A European Action Plan, COM (2003) 650 final.

⁸⁹Ibid.

⁹⁰Ibid.

⁹¹Ibid., para. 4.1.1, 24.

⁹²P.L. Láncoš, 'The Phenomenon of "Directive-like Recommendations" and their Implementation: Lessons from Hungarian Legislative Practice', in P. Popelier et al. (eds), *Lawmaking in Multi-level Settings: Legislative Challenges in Federal Systems and the European Union* (Hart, 2019) 199–218.

⁹³Commission Communication of 26 November 2007 entitled 'Situation of disabled people in the European Union: the European Action Plan 2008–2009', COM (2007) 0738.

harmonising measures, also in 'sensitive' areas such as social security and legal capacity. Yet its actual effects remain rather difficult to gauge.

In the post-Amsterdam period, soft law confirmed its seminal value-setting role. In this phase, its role as a coordination tool capable of fostering coordinated responses on the part of Member States was also bolstered, by means of more detailed formulations setting out targets to be achieved. Soft law was also used to support and monitor the implementation of the Employment Equality Directive. Furthermore, the field of EU disability law began to take shape as a hybrid constellation in which hard law (such as the Employment Equality Directive or the Council Decision on the European Year of People with Disabilities, but also more general instruments such as Regulation (EEC) No 883/2004 on social security schemes) and soft law remained complementary in the meaning put forward by Trubek and Trubek as a first type of hybrid coexistence. In fact, in this period, hard and soft law can be seen as simultaneously yet separately contributing to a common objective, i.e., that of equality of opportunities. In the last 10 years such coexistence has evolved into a more complex form of hybridity which will be discussed below.

4 | THE CONCLUSION OF THE CRPD AND THE CONSOLIDATION OF EU DISABILITY LAW BETWEEN 2010 AND 2020: HYBRIDITY AS TRANSFORMATION

The Treaty of Lisbon, which entered into force in December 2009, has not brought about significant constitutional innovations in relation to disability. Article 19 TFEU remains the main legal basis for the adoption of equality legislation. However, the Treaty of Lisbon has placed an emphasis on the protection of human rights, and has notably conferred constitutional value to the Charter of Fundamental Rights. Social considerations have also gained further prominence. By virtue of Article 3(3), the EU has constitutionally defined itself as a 'highly competitive *social* market economy',⁹⁴ and included among its own objectives those of combating social exclusion and discrimination, and promoting social justice.⁹⁵ Article 3(3) TEU supports two cross-cutting clauses that allow the EU to mainstream social considerations (broadly conceived) in its internal market legislation.⁹⁶ In particular, Article 10 TFEU requires that, 'in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on [inter alia] disability', allowing the EU to integrate the equality considerations into all EU actions. However, the Treaty of Lisbon has not enhanced the Union's competence on disability.

In this slightly changed constitutional framework, but in the context of a more complex integration which has seen the expansion of the EU governance tools,⁹⁷ EU disability has evolved into a hybrid configuration in which soft law, soft governance and traditional legislative tools are 'integrated'.

4.1 | The conclusion of the CRPD

Given the seemingly limited impact of the Treaty of Lisbon on disability-related competences, the conclusion of the CRPD is commonly acknowledged to be the major driver for the development of EU disability law.⁹⁸ Without engaging with the complexities of the CRPD, it is essential to point out that the CRPD is underpinned by the human rights model of disability. While recasting disability as a social construct, and stating that persons with disabilities 'include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various

⁹⁴Emphasis added.

⁹⁵Articles 2 and 3 TEU.

⁹⁶Article 9 TFEU.

⁹⁷Dawson, above, n. 58.

⁹⁸D. Ferri, 'The Unorthodox Relationship between the EU Charter of Fundamental Rights, the UN Convention on the Rights of Persons with Disabilities and Secondary Rights in the Court of Justice Case Law on Disability Discrimination' (2020) 16(2) *European Constitutional Law Review*, 275–305.

barriers may hinder their full and effective participation in society on an equal basis with others', it embraces a social-contextual conception of disability.⁹⁹ Furthermore, it considers disability as one layer of identity.¹⁰⁰ By qualifying people with disabilities as holders of rights,¹⁰¹ it places a strong emphasis on their inherent dignity.

The CRPD also recognises that, in order to ensure the effective realisation of disability rights, implementation and monitoring are essential. It requires State Parties to 'adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention'. The CRPD does not use the wording soft law, but this is certainly encompassed by the expression 'other measures'. Under Article 4 CRPD, State Parties also have the obligation to review domestic law, regulations and practices in order to align them with the CRPD. Article 4 CRPD further encompasses a wide series of obligations which suggest the use of soft law. Among those, it requires State Parties to 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities'. From the text of this provision, it is clear that anti-discrimination legislation should be accompanied by soft law measures that provide guidance on discriminatory practices and contribute to their elimination. Article 4(1)(c) CRPD also includes a mainstreaming clause, which obliges State Parties to 'take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes'.¹⁰² In this regard, the UN Committee on the Rights of Persons with Disabilities (CRPD Committee), the treaty body set up by the CRPD, has frequently stated that policy plans 'are an excellent method of bringing laws, policies and practices in line with the Convention'.¹⁰³ The CRPD also mandates the participation of persons with disabilities, and lays out specific obligations with regard to implementation and monitoring in Articles 4 and 33(3). Furthermore, Article 33(1) CRPD requires parties to set forth one or more focal points to implement the CRPD and give due consideration to the establishment of a mechanism to coordinate the implementation process. Article 33(2) CRPD obliges Parties to put in place a structure to protect, promote and monitor the implementation of the Convention. The emphasis on participatory features and governance structures in the implementation and monitoring has led scholars to speak about a notably 'experimentalist' character of the CRPD.¹⁰⁴ On the whole, the CRPD traces a complex implementing architecture in which participatory governance mechanisms are complemented by hard law and a range of soft tools to buttress and strengthen disability rights.

Further to its conclusion by the EU, the CRPD has become an integral part of EU law and acquired sub-constitutional status.¹⁰⁵ It has become a legal benchmark within Court of Justice of the European Union (CJEU) case-law, generating a considerable change in the Luxembourg Court's approach to disability and its (formal) alignment to the social-contextual understanding of disability.¹⁰⁶ To support the implementation of the CRPD, the Commission adopted the, already mentioned, EDS,¹⁰⁷ which included a comprehensive 10-year policy framework and envisaged a portfolio of diverse legislative and other instruments to promote the rights of persons with disabilities. Hence, the conclusion of the CRPD has not only boosted the flourishing of EU disability law as a distinct field, but it has also prompted the hardening of soft law and the renewal of its functions, giving rise to a new type of hybrid coexistence between hard and soft law. Both those themes will be discussed in the subsections below.

⁹⁹Oliver's initial articulation of the 'social model of disability' has generated a wide debate, and the term social-contextual model has been used to refer to refined versions of the social model which focus on the interaction between the individual's impairment and external barriers. A. Broderick and D. Ferri, *International and European Disability Law and Policy: Text, Cases and Materials* (Cambridge University Press, 2019).

¹⁰⁰CRPD Committee, General Comment No. 6 (2018).

¹⁰¹T. Degener, 'Disability in a Human Rights Context' (2016) 5(3) *Laws*, 35.

¹⁰²The CRPD uses the wording 'policies and programmes' in a general fashion, and they seem to encompass soft law as well as hard law.

¹⁰³For example, CRPD Committee, Concluding Observations on the initial report of Austria, CRPD/C/AUT/CO/1, October 8, 2012, para. 4.

¹⁰⁴G. de Búrca, 'Experimentalism and the Limits of Uploading the EU and the UN Disability Convention', in J. Zeitlin (ed.), *Extending Experimentalist Governance? The European Union and Transnational Regulation* (Oxford University Press, 2015).

¹⁰⁵Joined Cases C-335/11 and C-337/11, *HK Danmark*, ECLI:EU:C:2013:222; Case C-363/12, *Z. v. A Government Department and The Board of management of a community school*, ECLI:EU:C:2014:159.

¹⁰⁶L. Waddington, 'The Influence of the UN Convention on the Rights of Persons with Disabilities on EU Anti-Discrimination Law', in U. Belavusau and K. Henrard (eds.), *About EU Anti-Discrimination Law beyond Gender* (Hart, 2018) 339.

¹⁰⁷Commission, 'European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe', COM (2010) 636 final.

4.2 | The ‘hardening’ of soft law after the conclusion of the CRPD: the European Disability Strategy 2010–2020

The EDS was the primary soft law measure adopted in the aftermath of the conclusion of the CRPD to support the realisation of disability rights. In line with previous policy plans, the EDS was released in the form of a communication from the Commission.¹⁰⁸ In a similar vein to the 1996 Strategy and the EU DAP, it had a value-setting role.¹⁰⁹ However, the EDS took a step further than its predecessors. It did not just refer to the social model of disability, but embedded a social-contextual understanding of disability from a prescriptive standpoint: it was the first instrument to cite expressly Article 1(2) CRPD, long before the paradigm shift occurred in CJEU case-law with *HK Danmark*.¹¹⁰ It also embraced (albeit far less overtly than its successor, the 2021 Strategy) the human rights model of disability, embedded into the CRPD.¹¹¹ Thanks to its ‘CRPD-derived prescriptiveness’, the EDS had a spillover effect, in that other soft law documents, with broader focus, have progressively ingrained the human rights model of disability. For example, the European Pillar of Social Rights (Pillar), which was solemnly proclaimed in 2017 with the aim of acting ‘as a guide towards efficient employment and social outcomes’,¹¹² contains a principle on inclusion of people with disabilities (Principle 17). The Pillar is said to reflect ‘the comprehensive human rights-based approach to disability enshrined in the [CRPD]’,¹¹³ and has been deemed to have ‘a high degree of coherence with the [EDS]’.¹¹⁴ The EDS orientated the overall EU policies and stimulated further ‘layering’, nudging all EU institutions towards a more overt focus on the human rights of persons with disabilities.¹¹⁵ The 2021 Strategy has further pushed such process of ‘layering’ by adopting an even more ostensible rights-based approach to disability, placing an emphasis on how disability represents an integral part of human diversity and promoting an intersectional perspective, with the aim of addressing ‘specific barriers faced by persons with disabilities who are at the intersection of identities (gender, racial, ethnic, sexual, religious), or in a difficult socioeconomic or other vulnerable situation’.

Along the lines of its forebearers, the EDS also provided for commitments about the conduct of the Commission in relation to disability. As overtly stated in the EDS Evaluation, ‘the Strategy was issued in the form of a communication, so that its content, although *binding for the Commission*, did not directly commit other EU policy makers or the Member States’.¹¹⁶ Compared to its predecessors, the EDS is written in more rigorous terms and is complemented by an implementation plan that includes a detailed list of actions.¹¹⁷ Commitments laid out in most stringent terms are those linked to the Commission’s role of monitoring the implementation of EU Directives in force, such as the Employment Equality Directive,¹¹⁸ while others remained more broad. However, notwithstanding the level of detail engaged with, the ‘hardening’ of the EDS in this respect is noticeable. The commitments cannot be considered judicially enforceable, as is indeed the case for soft law measures,¹¹⁹ and have never been challenged. The EDS did, nevertheless, limit the Commission’s institutional discretion and created a legitimate expectation that the Commission

¹⁰⁸Hosking, above, n. 18, 80.

¹⁰⁹Ibid.

¹¹⁰Joined Cases C-335/11 and C-337/11, *HK Danmark*, ECLI:EU:C:2013:222.

¹¹¹Waddington and Broderick, above, n. 19, 8.

¹¹²European Pillar of Social Rights, para. 12.

¹¹³Commission Staff Working Document accompanying the document communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee monitoring the implementation of the European Pillar of Social Rights, SWD (2018) 67 final, 76.

¹¹⁴Commission Staff Working Document Evaluation of the European Disability Strategy 2010–2020, SWD (2020) 291 final, 48.

¹¹⁵See, e.g., Council Conclusions on the Economy of Wellbeing 2019 (2019), Conclusions on Access to sport for persons with disabilities (2019), and Conclusions on sport as a platform for social inclusion through volunteering (2017).

¹¹⁶SWD (2020) 291 final 10.

¹¹⁷Commission Staff Working Document accompanying the Communication from the Commission on the European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe—Initial plan to implement the European Disability Strategy 2010–2020 List of Actions 2010–2015, COM (2010) 636 final SEC (2010) 1323 final.

¹¹⁸Ibid., 6.

¹¹⁹Gentile has noted that soft law is ‘subject to an “incomplete judicial scrutiny” by the EU judiciary’ and the CJEU has been ‘reluctant to directly review EU soft law through actions for annulment’ (G. Gentile, ‘Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment Before the EU Courts: A Plea for a Liberal-Constitutional Approach’ (2020) 16(3) *European Constitutional Law Review*, 466). Eliantonio and Ștefan highlight that ‘the approach of EU courts is largely dictated by the policy area and the particular features of the soft law employed’ (M. Eliantonio and O. Ștefan, ‘Soft Law before the European Courts: Discovering a ‘Common Pattern’?’ (2018) 37 *Yearbook of European Law*, 457–469, 459).

would comply with the commitments it laid down. It therefore made the Commission legally and politically accountable. Compliance with those commitments was in fact subject to parliamentary control (as well as to the external scrutiny of the CRPD Committee). For example, read jointly with its implementation plan and list of actions, the EDS required the Commission to consider ‘whether to propose a “European Accessibility Act” by 2012’.¹²⁰ The Commission did miss that ‘deadline’. It put forward a proposal for the ‘European Accessibility Act (EAA)’ far later than expected, in December 2015.¹²¹ While this delay was not formally challenged in front of the CJEU as the timing put in the EDS remained within the discretionary remit of the Commission, it was reproached by the European Parliament (and by the CRPD Committee).¹²² Further, the European Parliament had on numerous occasions—and in a general fashion—called on the Commission to respect its own pledges.¹²³ It also built on issues highlighted in the EDS to urge the Commission to undertake specific actions promised in the EDS.¹²⁴ The most notable instance is perhaps the Parliament’s Resolution on mobility and inclusion of people with disabilities, in which the European Parliament recalled the Commission’s findings in the EDS in regard to the low availability of subtitles and audio description on television to appeal the Commission to provide funding for public broadcasters to break down this barrier.¹²⁵ The European Parliament also often took the opportunity to pinpoint gaps in the EDS. This is the case with intersectionality, in relation to which the Parliament expressed regret that the EDS failed to include ‘an integrated gender perspective or a separate chapter on gender-specific disability policies’.¹²⁶ On the whole, it is evident that the more stringent approach to the drafting of the Commission’s commitments, under the influence of the CRPD, as well as the parliamentary control, contributed to their fulfilment. The final evaluation of the EDS found that, out of 150 measures included on the ‘list of actions’ necessary to implement the EDS across the core thematic areas, 101 have been fully implemented and 40 have been partially implemented.¹²⁷

Furthermore, in comparison to its predecessors, the EDS fulfilled an important all-encompassing function, i.e., that of ‘programming’ new legislation and other measures to accomplish the CRPD obligations. This function is immediately evident from the text of the EDS itself, which claimed to provide ‘a framework for action at European level’ and identified eight main areas for EU action, which cover different EU competences (including merely supporting competences): accessibility, participation, equality, employment, education and training, social protection, health and external action.¹²⁸

The evaluation of the EDS released in November 2020¹²⁹ and Waddington and Broderick’s study¹³⁰ have extensively discussed the effects displayed in practice by the EDS and its overall impact, achievements and shortcomings. Namely, Waddington and Broderick, while highlighting gaps and pitfalls, posit that the EDS backed the mainstreaming of disability issues at EU institutional level, and ‘has contributed to the taking of many important initiatives’.¹³¹ Despite being formally devoid of binding force, the EDS shaped the overall EU action on disability.

¹²⁰European Disability Strategy 2010–2020, at 5. Emphasis added.

¹²¹Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services, COM (2015) 615 final.

¹²²CRPD Committee, Concluding Observations on the initial report of the European Union, CRPD/C/EU/CO/1.

¹²³See, e.g., European Parliament Resolution of 25 October 2011 on mobility and inclusion of people with disabilities and the European Disability Strategy 2010–2020, 2010/2272(INI) OJ C 131, 08.05.2013, para. 4; European Parliament Resolution of 8 September 2015 on the situation of fundamental rights in the EU (2013–2014), 2014/2254(INI) OJ C 316, 22.09.2017, para. 93; European Parliament Resolution of 29 March 2012 on the EU Citizenship Report 2010: Dismantling the obstacles to EU citizens’ rights, 2011/2182(INI), 2013/C 257 E/10, para. 17.

¹²⁴See, e.g., European Parliament Resolution on mobility and inclusion of people with disabilities and the EDS, paras. 56, 90; European Parliament Resolution of 7 July 2016 on the implementation of the UN Convention on the Rights of Persons with Disabilities, with special regard to the Concluding Observations of the UN CRPD Committee 2015/2258(INI), 2018/C 101/13, para. 74; European Parliament Resolution of 29 March 2012 on the EU Citizenship Report 2010: Dismantling the obstacles to EU citizens’ rights, para. 17.

¹²⁵European Parliament Resolution on mobility and inclusion of people with disabilities, para. 56.

¹²⁶European Parliament Resolution of 29 November 2018 on the situation of women with disabilities, 2018/2685(RSP) OJ C 363, 28.10.2020, para.

2, R. See, similarly, European Parliament Resolution of 9 June 2015 on the EU Strategy for equality between women and men post 2015, 2014/2152(INI), para. 3.

¹²⁷SWD (2020) 291 final, 13.

¹²⁸Commission, ‘European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe’, COM (2010) 636 final.

¹²⁹SWD (2020) 291 final.

¹³⁰Waddington and Broderick, above, n. 19, 79.

¹³¹Ibid.

Notably, EU-level stakeholders, especially umbrella organisations representing persons with disabilities, consider that the EDS ‘has helped placing the disability agenda higher among the EU policy priorities’.¹³² By contrast, the role as a coordination tool and the related effects of the EDS on national disability policies, remained limited,¹³³ although the array of references to disability in other non-binding documents such as the Pillar, or equality strategies and action plans, have contributed to stimulate certain coordination.¹³⁴ The European Semester (a framework for the coordination of economic policies across the EU), which is connected to the Pillar, for example through the social scoreboard (a mechanism for monitoring the performance of the Member States in relation to the Pillar),¹³⁵ has ‘allowed to further increase the visibility of disability policy at EU level and to issue specific disability-related recommendations in the context of the European Semester, thus creating stronger coordination between EU and Member States on disability policy’.¹³⁶

On the whole, since 2009, soft law (namely the EDS) has acquired indirect prescriptiveness that derives from the CRPD. While it lacks mandatory effects, its normative character rests on the CRPD. Its value-setting also links back to the human rights model of disability provided in the CRPD. It has also been key to laying down the Commission's commitments in relation to the Convention, and in developing a programme for its implementation. In that connection, soft law has become more closely related to disability-specific legislation, disability provisions included in other legislative instruments and indeed other measures, including standardisation (as a form of private regulatory mechanism). In particular, as will be discussed in the subsection below, the EDS did design EU disability law as a ‘hybrid’ field of EU action, in which each hard or soft law instrument performs a specific role in ensuring the enjoyment of the rights of persons with disabilities.

4.3 | The coexistence of hard law, soft law and soft governance: the hybridity of EU disability law as ‘transformation’

Further to the conclusion of the CRPD, and with the launch of the EDS, EU disability law has emerged as a stand-alone field characterised by the coexistence of soft and hard law as well as soft governance tools aimed at enhancing the participation of persons with disabilities in EU policy-making. Each of these components is functional to the implementation of the Convention, in line with the general obligations included in Article 4 CRPD, and is mutually interdependent and ‘necessary for the successful operation of the other’.¹³⁷ In that regard, the type of hybridity that characterises EU disability law is, as mentioned above, what Trubek and Trubek define as ‘transformation’.

First, the EDS traces a system in which soft law and hard law are mutually inter-dependent. When ‘programming’ legislation and measures to implement the CRPD, non-binding policy instruments, guidelines and indicators are coupled with more traditional legislation. Accessibility, for example, is the field in which the EDS provided for the adoption of disability-specific legislation¹³⁸—the Web Accessibility Directive (WAD)¹³⁹ and the EAA¹⁴⁰—but referred to existing soft law measures such as the Digital Agenda and Innovation Union flagships, as well as the use of other

¹³²SWD (2020) 291 final, 21.

¹³³Ibid., 53. The evaluation of the EDS pointed out that ‘the most influential policy framework for Member States’ disability policy is the [CRPD]’ and that ‘the overall coherence between Member States’ policies and the Strategy is due to their adherence to the principles of the [CRPD]’.

¹³⁴European Commission, ‘Union of Equality: the first year of actions and achievements’ (22 December 2020), available at: https://ec.europa.eu/commission/commissioners/2019-2024/dalli/announcements/union-equality-first-year-actions-and-achievements_en.

¹³⁵European Commission, ‘Social Scoreboard—Supporting the European Pillar of Social Rights’ (9 June 2022), available at: <https://composite-indicators.jrc.ec.europa.eu/social-scoreboard/>.

¹³⁶SWD (2020) 291 final, 39.

¹³⁷Ibid. (emphasis added).

¹³⁸Commission Staff Working Document, European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe Initial plan to implement the European Disability Strategy 2010–2020 List of Actions 2010–2015.

¹³⁹Directive (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 L 327/1, 2.12.2016.

¹⁴⁰Directive (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 L 151/70, 7.06.2019.

instruments such as standardisation. With regard to employment, soft law is pragmatically combined with hard law, to stimulate coordinated approaches among the Member States. In a similar vein, the instruments to enhance participation of persons with disabilities in society highlighted by the EDS encompass Structural Funds regulations and soft instruments such as the European model of disability parking card rooted in a Council Recommendation of 1998.¹⁴¹

Secondly, the consolidation of EU disability law as a 'hybrid' field has also been favoured by a range of soft-governance participatory tools aimed at involving persons with disabilities and their representative organisations in the planning, design and deployment of both soft and hard law. Alongside broad consultations, which have been instrumental in legitimising the policy proposals of the Commission¹⁴² and remain the soft tool primarily used by the Commission in the disability field as in other areas,¹⁴³ the Commission has also fostered a range of opportunities for informal (and unformalised) exchanges with the most important umbrella organisation of persons with disabilities (OPD), the European Disability Forum (EDF), which receives EU funding under the Rights, Equality and Citizenship Programme and is listed in the Transparency Register,¹⁴⁴ and other umbrella organisations.¹⁴⁵ Confirming the Commission's active role of advocate of 'participatory engineering', and the large involvement of 'external advice' as 'the watchword for the EU's day-to-day policy making',¹⁴⁶ those soft and informal participatory mechanisms take the form of conferences, workshops, work forums, as well as events to mark the European Day of Persons with Disabilities.¹⁴⁷ The fact that consultations are 'characterised by unequal access, ensuing limited representativeness and ultimately disparate influence of participants',¹⁴⁸ and the lack of transparency of other informal exchanges (and often of consultations themselves), as well as the uncertainty on their legal effects remain their most visible drawback.¹⁴⁹

Further, a chief soft-governance tool, besides the *ad hoc* working groups for the implementation of accessibility legislation that have been created in recent times, has been the High Level Group on Disability (HLGD). Created in 1996 by means of a Council Resolution, the HLGD was the most longstanding forum of dialogue between the institutions of the Member States, the Commission and civil society on issues relating to disability and the chief locus for the exchange of information, experiences and good practices until the creation of a Disability Platform in 2021.¹⁵⁰ While registered in the Register of Commission Expert Groups and Other Similar Entities, and, as such, subject to the rules for the operation of Commission expert groups,¹⁵¹ the work of the HLGD has remained untransparent, and mostly qualifiable as a locus for interaction whereby the Commission could reach what Zegart would define as 'consensus, compromise and cooperation'.¹⁵²

Informal participatory tools are complemented by means of governance that build on the 'experimentalist' features embedded in Article 33 CRPD. This provision, as noted above, mandates for a focal point for the

¹⁴¹Council Recommendation of 4 June 1998 on a parking card for people with disabilities, OJ L 167, 12.6.1998.

¹⁴²Notably, the EDS itself was subject to consultation processes at different stages before its adoption and during its drafting process (see European Commission, 'Preparation of a New EU Disability Strategy 2010–2020, Summary of Main Outcomes of the Public Consultation' (June 2010) 5, available at: <http://ec.europa.eu/social/BlobServlet?docId=5356&langId=en>), as well as in relation to its mid-term and final evaluations. Consultations were also conducted before the release of the relevant legislative proposals, such as the EAA (European Commission, 'European Accessibility Act', available at: <https://ec.europa.eu/social/main.jsp?catId=1202#:~:text=The%20European%20accessibility%20act%20is,EU%20leading%20to%20costs%20reduction>). On consultations, see A. Skorokjær Binderkrantz, J. Blom-Hansen and R. Senninger, 'Countering Bias? The EU Commission's Consultation with Interest Groups' (2021) 28(4) *Journal of European Public Policy*, 469–488.

¹⁴³Among others, C. Quittkat, 'The European Commission's Online Consultations: A Success Story?' (2011) 3 *Journal of Common Market Studies*, 653, 659.

¹⁴⁴European Union, 'Transparency Register' (11 July 2022), available at: <https://ec.europa.eu/transparencyregister/public/homePage.do>.

¹⁴⁵European Commission, 'Persons with Disabilities', available at: <https://ec.europa.eu/social/main.jsp?catId=1137&langId=en>.

¹⁴⁶J. Metz, 'Expert Groups in the European Union: A Sui Generis Phenomenon?' (2013) 32(3) *Policy and Society*, 267–278, referring to E.B. Haas, *The Uniting of Europe: Political, Social, and Economic Forces 1950–1957* (Stanford University Press, 1968).

¹⁴⁷European Commission, 'European Day of Persons with Disabilities 2021' (2–3 December 2021), available at: <https://ec.europa.eu/social/main.jsp?langId=en&catId=88&eventId=1919&furtherEvents=yes>.

¹⁴⁸A. Alemanno, 'Leveling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission's Public Consultations in Light of the Principle of Political Equality' (2020) 26 *European Law Journal*, 114–135, at 123.

¹⁴⁹*Ibid.*, 123.

¹⁵⁰Commission Decision of 27 October 2021 setting up the group of experts 'Disability Platform', 2021/C 457 I/01 C/2021/7591, OJ C 457I, 11.11.2021, 1–5.

¹⁵¹Commission Decision of 30 May 2016 establishing horizontal rules on the creation and operation of Commission expert groups, C (2016) 3301 final.

¹⁵²A.B. Zegart, 'Blue Ribbons, Black Boxes: Toward a Better Understanding of Presidential Commissions' (2004) 34(2) *Presidential Studies Quarterly*, 366–393.

implementation of the CRPD and a monitoring mechanism, as well as requires the participation of persons with disabilities in the implementation and monitoring of the Convention.¹⁵³ Without engaging in a lengthy discussion, it suffices to point out that the Council Decision on the EU accession to the CRPD¹⁵⁴ designates the Commission as the focal point for matters relating to the implementation of the Convention, and refers further to implementing rules to be established in a code of conduct with regard to the monitoring of the CRPD.¹⁵⁵ In 2012, the Council entrusted the promotion, protection and monitoring of the CRPD (EU CRPD Framework) to five bodies¹⁵⁶: the European Parliament, the European Ombudsman, the European Commission, the EU Agency for Fundamental Rights (FRA) and the EDF. Given the criticism of the CRPD Committee,¹⁵⁷ in 2017, the Commission withdrew from the monitoring mechanism, and limited its role to acting as a focal point for the implementation of the CRPD.¹⁵⁸

In EU disability law and policy, hybridity constitutes what Trubek and Trubek define as transformation: hard law, soft law and soft governance (participatory) mechanisms being harnessed together. The plethora of informal participatory mechanisms, and even more so the EU CRPD framework, contribute to shape the EU action on disability, to increase the accountability of the Commission and other EU institutions, to inform the policy debate and to embed the diversity of concerns and demands of people with disabilities. Yet, questions of legitimacy and transparency consistently highlighted by the legal literature remain. In fact, the use of soft law per se escapes the procedural legitimacy typical of hard law. As will be further discussed below, the implementation of the CRPD and the obligations included in Articles 4(3) and 33 call for further reflection on how participatory mechanisms can be truly transparent as well as accessible to people with disabilities across the EU.

5 | THE FUTURE OF EU DISABILITY LAW: PUSHING HYBRIDITY FURTHER?

On 3 March 2021, the European Commissioner for Equality presented the 2021 Strategy, which lays out the renewed policy framework to implement the CRPD and identifies the core tenets of EU disability policies for the next decade. As noted above, while building on its predecessor, the 2021 Strategy adopts an even more ostensible rights-based approach to disability, immediately perceivable from the denomination adopted, confirming its value-setting role.

Like the EDS, the 2021 Strategy also provides for commitments about the conduct of the Commission in relation to disability,¹⁵⁹ and fulfils a planning function. Notably the key policy initiatives that the Commission has identified are articulated around three main themes: EU rights, independent living and autonomy, and non-discrimination and equality. The latter was one of the key areas of the EDS and, more generally, of EU disability policy in the past two decades. However, the EU action has mostly revolved around the implementation of the Employment Equality Directive. By contrast, the 2021 Strategy adopts a wider and more ambitious approach and aims to realise equality in all areas of life, revamping the need to adopt the multi-grounds horizontal directive on implementing the principle of equal treatment outside the field of employment, proposed in 2008,¹⁶⁰ and fostering a number of soft collaborative initiatives with Member States with regard to education and healthcare.

¹⁵³C. Conte, *The UN Convention on the Rights of Persons with Disabilities and the European Union: The Impact on Law and Governance* (Hart, 2022).

¹⁵⁴Council 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 OJ L 23.

¹⁵⁵Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ C 340, 15.12.2010, 11–15.

¹⁵⁶Council Press Release 15,491/12 (Luxembourg, 29 October 2012).

¹⁵⁷Principles relating to the Status of National Institutions (The Paris Principles) adopted by General Assembly resolution 48/134 of 20 December 1993.

¹⁵⁸Waddington and Broderick, above, n. 19.

¹⁵⁹The FRA report 2022 also explicitly discusses the 2021 Strategy as including ‘Commission commitments’ (FRA, Fundamental Rights Report 2022 (Publications Office of the European Union, 2022) 242).

¹⁶⁰Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 0426 final.

The 2021 Strategy depicts EU disability law as a field anchored in the Employment Equality Directive, the EAA and the WAD, but as increasingly reliant on soft law to integrate and support this legislative framework. The enactment of new legislation seems confined to limited issues. Alongside the renewed commitment to the adoption of the 2008 proposal for a horizontal directive on non-discrimination (which is fraught by difficulties and at present in the hands of the Member States),¹⁶¹ the Commission, within the remit of internal market policies, aims to examine whether the existing fragmentation of rules related to assistive technologies harms competition, and it cannot be excluded that it will push forward a proposal for novel harmonising legislation in the field. Several soft law instruments, such as the EU digital strategy or the Action Plan on Social Economy are mentioned as tools to enhance disability rights. With regard to employment, the Commission aims to rely almost exclusively on soft law and the 2021 Strategy mentions a ‘package to improve labour market outcomes of persons with disabilities’, which will ‘support Member States in the implementation of the relevant Employment Guidelines through the European Semester. In fact, in late September 2022, the Commission launched the Disability Employment Package in the form of a paper jointly released by the Commission and the newly formed Disability Platform, a document that in turn already plans an array of guidelines, toolkits, catalogues and other instruments devoid of prescriptive power and normative force, aimed mainly at guiding Member States.’¹⁶²

The 2021 Strategy also refers to other measures (e.g., studies, exchange of good practices, funding of training for public officials), and places emphasis on peer pressure and peer review among Member States. In that regard, it mentions the creation of a European resource centre ‘AccessibleEU’ to enhance accessibility and increase coherence and coordination among national policies, stimulating exchanges between experts, national policy officers and EU institutions. This centre will not be an agency, as called for by the European Parliament and EDF,¹⁶³ and it is unclear whether it will take the form of an expert group to be created by means of a Commission decision. It is also rather uncertain how this will relate to existing participatory tools and whether it will contribute to the monitoring of accessibility obligations of the CRPD in conjunction with the existing EU framework. In June 2022, no steps were taken raising questions from MEPs.¹⁶⁴ The Langensiepen Report, adopted by the Internal Market and Consumer Protection Committee of the European Parliament in early July 2022, called on the Commission ‘to ensure adequate funding both in terms of financial and human resources for the establishment and functioning of the Centre’ and encouraged the ‘Member States to ensure the resources needed for the implementation and enforcement of accessibility policies, including through EU funds’.¹⁶⁵ In a similar vein, the most recent Resolution of 4 October 2022 of the European Parliament,¹⁶⁶ *inter alia* ‘calls on the Commission to ensure adequate resources, both in terms of funding and human resources, for the establishment and functioning of the Centre’.¹⁶⁷

With regard to EU rights, the Commission aims primarily to foster free movement of people with disabilities across the EU territory. To that end, the Commission aims to ‘work with Member States to expand the scope of the mutual recognition of disability status in areas such as labour mobility and benefits related to conditions of service provision’.¹⁶⁸ The flagship initiative that the Commission intends to put forward is an expansion and re-design of the ‘EU disability card’. This card was an EU pilot project, involving eight Member States (Belgium, Cyprus, Estonia, Finland, Italy, Malta, Romania, Slovenia), which voluntarily mutually recognise each other’s cards. While it was up to each Member State to decide the eligibility criteria for receiving the card and identify the benefits offered to the card

¹⁶¹At the time of revising this article, a progress report was released by the Council (Interinstitutional File: 2008/0140(CNS), 16 November 2022 Progress Report), which highlights some progress but the clear ‘need for significant further work before the required unanimity can be reached in the Council’.

¹⁶²Joint Commission Services—Disability Platform Paper Package to Improve Labour Market Outcomes of Persons with Disabilities (Disability Employment Package—‘Employment Package’).

¹⁶³European Parliament resolution of 18 June 2020 on the European Disability Strategy post-2020, 2019/2975(RSP).

¹⁶⁴Parliamentary Question, ‘AccessibleEU—State of Play’ (16 June 2022), Question for Written Answer E-002188/2022 to the Commission Rule

138 Cindy Franssen (PPE), available at: https://www.europarl.europa.eu/doceo/document/E-9-2022-002188_EN.html.

¹⁶⁵Langensiepen report ‘AccessibleEU Centre in support of accessibility policies in the EU internal market’, 2022/2013(INI), available at: https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/IMCO/DV/2022/07-11/14-Final_CAs_AccessibleEUCentre_EN.pdf.

¹⁶⁶European Parliament Resolution of 4 October 2022 on AccessibleEU Centre in support of accessibility policies in the EU internal market, 2022/2013 (INI).

¹⁶⁷*Ibid.*, para. 6.

¹⁶⁸Commission, ‘Union of Equality: Strategy for the Rights of Persons with Disabilities 2021–2030’, COM (2021)101 final.

holders, the card was meant to facilitate access to transport, leisure, sport and cultural activities, but has not gone anywhere close to granting access to disability benefits or social protection. Hence, the European Disability Card envisaged in the 2021 Strategy significantly departs from the pilot project, but it is still unclear whether it will actually be based on a hard regulatory framework entailing coordination of domestic systems (on the basis of existing Regulation 883/2004).¹⁶⁹ On 14 September 2022, in a Letter of Intent to Roberta Metsola, the President of the European Parliament,¹⁷⁰ on occasion of the State of the Union address, the Commission President von der Leyen mentioned, in the stream of action 'A New Push for European Democracy' a 'legislative proposal the European Disability Card' among the key initiatives for 2023. In November 2022, the Commission initiated a consultation—namely a call for evidence to commence an impact assessment—and identified Article 21 TFEU (on free movement of persons) as an appropriate legal basis.¹⁷¹ The document launching this consultation states that such card would fall under EU shared competence. Nonetheless, it explicitly affirms that the impact assessment 'will also consider alternative, non-binding legislative instruments, such as a recommendation', ultimately leaving the door open to the use of soft law.

The heavy reliance on soft law goes hand in hand with a renewed emphasis on governance tools. In order to support the implementation of the CRPD, the Commission aims to strengthen coordination at EU level in line with the recommendations by the CRPD Committee and 'will reinforce the governance mechanism for cooperation at EU level'.¹⁷² With regard to the latter, the Commission planned and actually established, at the end of 2021, a Disability Platform, to replace the existing HLGD. The Disability Platform currently includes representatives of national CRPD focal points of the Member States, representatives of OPDs and civil society organisations active at the EU level,¹⁷³ and the Commission. While sitting outside constitutionalised procedures, the Disability Platform has been set up via a binding Commission decision, and, in line with this decision and with the standard rules of procedure of expert groups, its functioning is far more formalised than that of the HLGD. The rules of procedure adopted for the Platform aim to streamline the role and operation of this Platform, and make a strong pivot on transparency, which is guaranteed through the making public of all relevant documents, including the agendas, the minutes and the participants' submissions. The 2021 Strategy also suggests that the website of the Disability Platform should contain 'analysis and country information, including promotion of accessible and inclusive good practices'. In fact, at the time of writing this article, the website mostly contains dates and minutes of meetings, while more substantial information is not available. The work of the Disability Platform is still in the early stages. Notably, however, the aforementioned Disability Employment Package was released in September 2022 as a jointly authored document between the Commission and the Disability Platform. The document is said to reflect the 'views from exchanges at Ministerial level, including a discussion in EPSCO on 16 June 2022, a hearing with Social Partners, and meetings with the Disability Platform and its sub-group Employment Package which brings together Member States and disability organisations and providers of services for persons with disabilities'—somewhat blurring the authorship of the document but denoting it as a collaborative and participatory effort.

The 2021 Strategy (as subsequent documents, such as the Disability Employment Package) engenders the 'hybridity' of EU disability law, with its reliance on soft law and highly variegated governance tools, as well as on the prominence of guidelines, benchmarking, mutual learning and peer pressure. It demarcates the roles of EU institutions and Member States' responsibilities, framing the function of hard and soft law, both underpinned by values and goals articulated on the basis of the CRPD. While disability governance remains peripheral to constitutionalised processes and strongly in the hands of the Commission, the 2021 Strategy moves towards a formalisation of participatory tools. The Disability Platform is, at least at first sight, more transparent in its tasks and role than the HLGD. If

¹⁶⁹Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, 1.

¹⁷⁰The letter of intent is available at: https://state-of-the-union.ec.europa.eu/system/files/2022-09/SOTEU_2022_Letter_of_Intent_EN_0.pdf

¹⁷¹The call for evidence is available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13517-European-disability-card_en

¹⁷²COM (2021)101 final.

¹⁷³European Commission, 'Equality: All Members of the New Disability Platform Now Known' (13 December 2021), available at: <https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=10124&furtherNews=yes>.

accessibility of all relevant information will be ensured and if the collaborative work with the Commission and other institutions would be made visible, the Platform could enhance the legitimacy and participatory imprinting of EU disability law. Although it is not functional *per se* to increase the effectiveness of disability policies, it is also likely to substantiate policy solutions put forward by the Commission and support compliance with the CRPD.

6 | CONCLUDING REMARKS

This article has examined the role of soft law and governance in advancing the rights of persons with disabilities, revisiting the evolution of EU disability law as a cross-cutting and currently hybrid field of EU law.

Until the entry into force of the Treaty of Amsterdam, soft law was crucial to attract disability within the sphere of action of the EU and to orientate the EU towards the social model of disability, displaying an essential value-setting role. Looking at the mutual interaction of soft law instruments in this period, a process akin to what has been defined as 'layering' can be identified.¹⁷⁴ Layering—a situation in which gradual change is achieved by adding to existing institutions new elements, which do not replace the existing ones, but may add up and incrementally change their existing structure—has been ignited in particular by the 1996 Strategy, which paved the way for the development of EU disability law. However, neither the 1996 Strategy nor any of the recommendations entailed statutory language, nor referred to rules and implementation deadlines. They did not have normative ambitions, and their effects on national disability policies were negligible.

Further to the entry into force of the Treaty of Amsterdam, soft law maintained its value-setting role, further embedding the social model of disability into EU policies, and supporting policy change, but became complementary to hard law in pursuing the achievement of equality of opportunity. Soft law promoted convergent objectives, overcoming the rigidities deriving from the principle of conferral and the division of competences.

After the conclusion of the CRPD, EU disability law has become an inherently 'hybrid' field, in which a net of directives, regulations and soft law juxtapose and interact with soft governance processes. All soft law measures have been functional to the implementation of the CRPD. They have acquired an expanded normative dimension in fulfilling CRPD obligations. The EDS as key soft law document has contributed to embedding the human rights model of disability into EU law, has fostered the mainstreaming of disability across various areas of EU action, and has served as a stimulus to enhance convergence among the Member States in areas where the EU has limited competence. It has also engendered a range of expectations when it comes to the Commission's conduct, enhancing its accountability. Hard law and soft law have been buoyed by soft governance, which has been the result of an array of participatory tools (some of those traditional tools rooted in the Commission's practice across different fields). The EU CRPD framework, created to fulfil the obligations of Article 33 CRPD, has reached a degree of formalisation. However, as noted by Conte, in the context of the implementation of the CRPD, the Commission, as yet, has privileged informal arenas and flexible instruments to facilitate exchange and mutual learning between the Member States and the EU.¹⁷⁵ By leveraging on processes parallel to institutional ones and on a constellation of unformalised fora, the Commission has endeavoured to produce bottom-up and evidence-based policies, and to expand soft law that responds to OPDs' quests. Those participatory tools also embed a form of instrumental hybridity, being a means to develop and enhance the effectiveness of existing legal norms (e.g., the Employment Equality Directive).

The 2021 Strategy, by combining hard and soft law, has confirmed that the choice between hard and soft law is not a binary one. This is no surprise. In the disability field, hybridity responds to the general obligations of the CRPD, and is vital to address a range of politically sensitive issues and to devise the radically innovative approach requested by the CRPD. Soft law itself has had the capacity to steer and to inform the normative direction of the CRPD implementation, thereby securing accountability of the Commission. Governance instruments supporting participation of

¹⁷⁴W. Streeck and K. Thelen (eds.), *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford University Press, 2005); J. Mahoney and K. Thelen, *Explaining Institutional Change: Ambiguity, Agency, and Power* (Cambridge University Press, 2010).

¹⁷⁵Conte, above, n. 153.

OPDs in the creation of EU disability law, in its monitoring and evaluation, attempt to mitigate one of the major drawbacks of soft law, i.e., the lack of democratic legitimacy, although their own transparency would arguably need to be further bolstered.

All in all, 'hybridity' theories seem to give helpful insights when revisiting the development and functioning of EU disability law. However, such field can be considered still in its infancy, and further research on the role played by soft law and governance in enhancing disability rights will be needed and will contribute to the overall longstanding reflection on soft law in the EU.

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