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The EU Disability Card “in the making”


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CURRENT REFLECTIONS ON EU ANTI-DISCRIMINATION LAW
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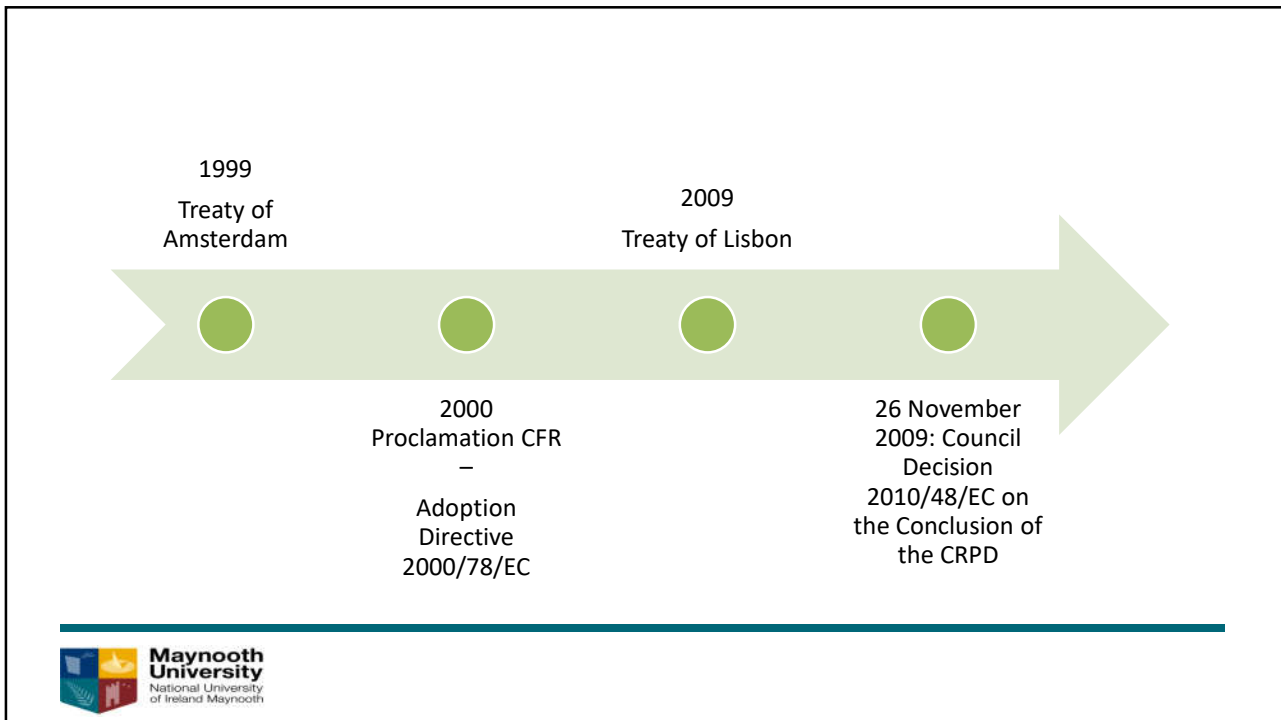
Setting the Scene

From the EU Parking Card to the EU Disability Card

The EU Disability Card: Legal Issues and Potential Spillover

Concluding Thoughts

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The CRPD

- 1st Human Rights Treaty of the 21st century and 1st Human Rights Treaty that the EU has concluded
- Its goal is not to create new rights, but to ensure that all existing rights are equally effective for persons with disabilities
- It embraces a social-contextual understanding of disability
- It encompasses all civil, political as well as economic, social and cultural rights

*“The adoption of the United Nations Convention on the Rights of Persons with Disabilities ... in 2006 **marked a breakthrough** in setting minimum standards for rights of persons with disabilities” (Strategy 2021-2030 - COM(2021) 101 final)*

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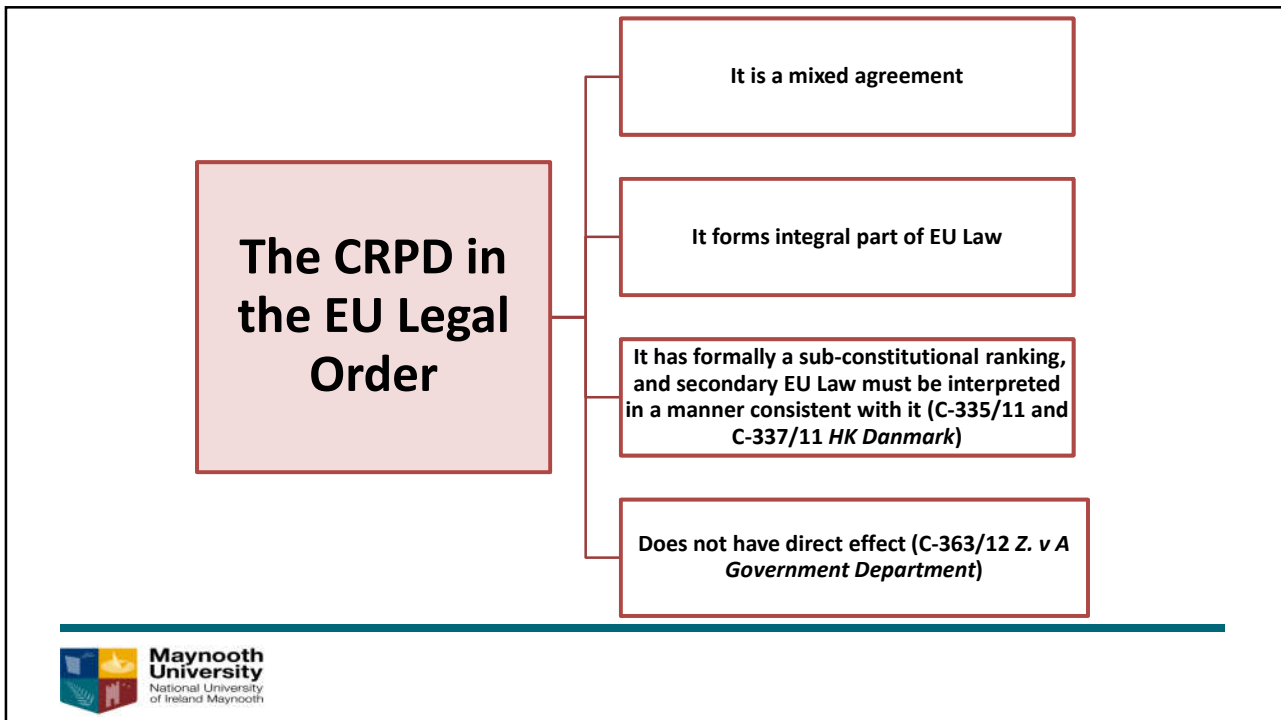
Human Rights Model of Disability

*“The **human rights model** of disability recognizes that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights. It acknowledges that **disability is one of several layers of identity**. Hence, disability laws and policies must take the diversity of persons with disabilities into account. It also recognizes that human rights are interdependent, interrelated and indivisible.” (CRPD Committee, General Comment No. 6 – 2018)*

The CRPD Paradigm of Inclusive Equality

- ❖ **Inclusive equality** requires States Parties to the CRPD
 - ❖ To address **socioeconomic disadvantages**
 - ❖ To **combat stigma**, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality
 - ❖ To reaffirm the **social nature** of people as members of social groups
 - ❖ To **accommodate the difference** of people with disabilities as a matter of human dignity

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



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The CRPD in the EU Legal Order

- ❖ The conclusion of the CRPD has prompted a **twofold shift** in the EU's approach to disability:
 - ❖ **Quantitative shift**
 - ❖ Adoption of wide-ranging disability policy strategies
 - ❖ Progressive mainstreaming of disability issues
 - ❖ Adoption of disability-specific legislation (e.g. WAD, EAA)
 - ❖ **Qualitative shift**
 - ❖ Progressive (although imperfect) adoption of the social-contextual model of disability - Europeanisation of the definition of disability
 - ❖ Progressive embracement of a human-rights approach to disability

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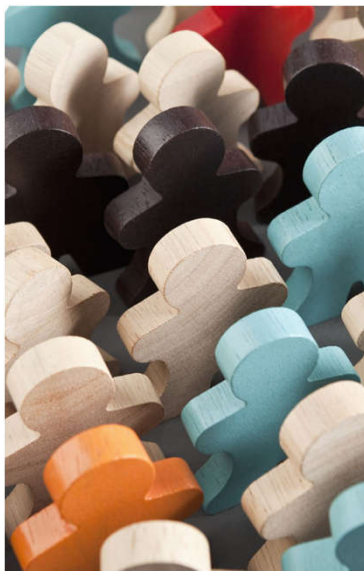
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Disability Law as 'Hybrid' Field

The European Disability Strategy 2010-2020 and its successor, the "Union of Equality - Strategy for the Rights of Persons with Disabilities 2021-2030 (COM(2021) 101 final), design EU disability law as a **hybrid 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

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Strategy 2021-2030

Accessibility – an enabler of rights, autonomy and equality

Enjoying EU rights

Decent quality of life and living independently

Equal access and non-discrimination

Promoting the rights of persons with disabilities globally

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Flagship Initiative - Strategy 2021-2030

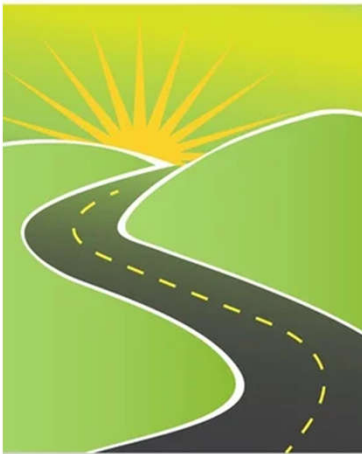
Enjoying
EU Rights

“When moving to another Member State for work, studies, or other reasons, persons with disabilities may experience difficulties to have their disability status recognised.

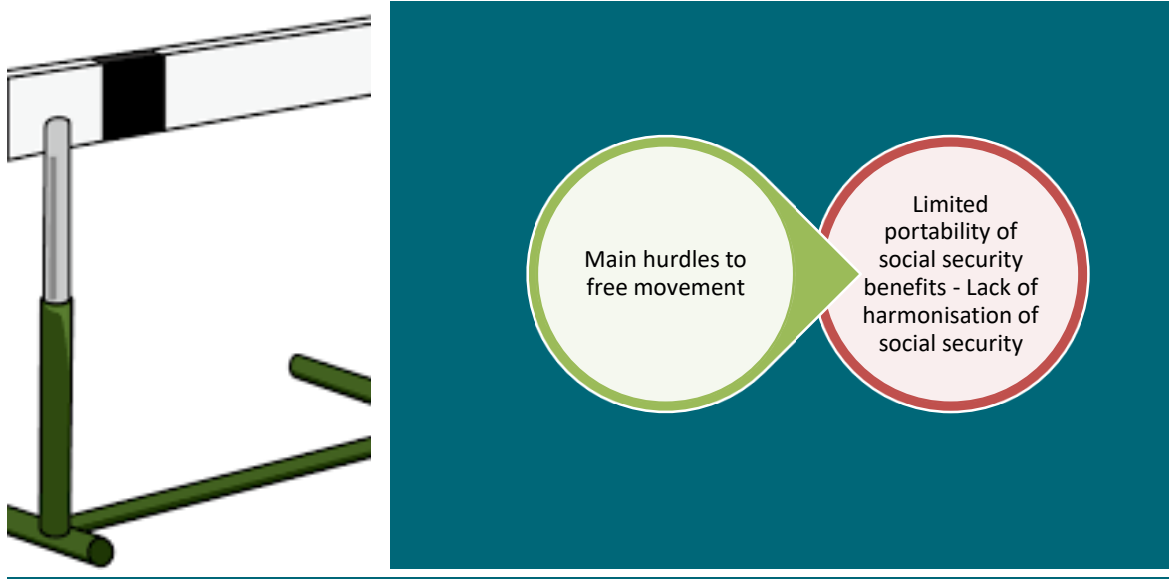
*[...]The Commission will propose creating a **European Disability Card by end of 2023** with a view to be recognised in all Member States”*



How did we arrive at the current EU Disability Card Flagship Initiative?




- ❖ The predecessor is the EU Parking Card (Council Recommendation 98/376/EC on a parking card for people with disabilities [1998] OJ L167/25)
- ❖ Disability advocates heralded the EU Parking Card as ‘one of the most practical and visible EU initiatives on disability issues’, but questioned its soft nature
- ❖ Since 2010, the European Disability Forum (EDF) has suggested to build on the experience of the EU Parking Card and **adopt an EU Disability Card as a tool to ensure the equal enjoyment of free movement rights for citizens with disabilities**



Main hurdles to free movement

Limited portability of social security benefits - Lack of harmonisation of social security

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The Pilot Project for an “EU Disability Card”

- ❖ Based on Mutual Recognition of National Disability Status
- ❖ Financed under the Rights, Equality and Citizenship Programme 2014-2020
- ❖ Territorially limited (participating MS - Belgium, Cyprus, Estonia, Finland, Italy, Malta, Romania, Slovenia)
- ❖ Limited *ratione materiae* (the very purpose of the card was that of facilitating access to transport, leisure, sport and cultural activities)
- ❖ “Soft”
- ❖ Voluntary
- ❖ Modest practical impact but important in raising awareness (*Ex post* IA Study, 2022; Van Dijck, 2018)

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The Future “EU Disability Card”

- ❖ Relatively vague and broad political commitment in the Strategy 2021-2030
- ❖ Potential for a groundbreaking development
- ❖ Potential for the EU Disability Card to support the model of inclusive equality

BUT...



Call for Evidence - Different Policy Options

Legislative proposal based on Article 21 TFEU

Soft Law

Creating a unique EU Disability Card that incorporates the EU Parking Card



Legal Issues and Potential Spillover

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Procedural Issues

❖ The Commission set out a 'Call for Evidence' (between 23 November 2022 and 9 January 2023) as well as a 'Public Consultation' (between 10 February 2023 and 5 May 2023).

- ❖ **Transparency**
- ❖ **Accessibility** (BUT...No sign language)

272 contributions to the CfE

Contributions welcome the initiative BUT largely focus on social assistance/social security/personal assistance (which are outside the scope of the Commission's initiative) or support harmonization of disability assessment (which is not an option on the table)

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Procedural Issues

Legal effects?



Consultation as
“Legitimation”/“Validation”
tool

Substantive Issues: One Card or Two Cards?



- ❖ Merging the EU Parking Card and EU Disability Card seems unadvisable
 - ❖ The two cards have a rather diverse scope and purpose, with parking cards being relevant to people travelling by car only
 - ❖ While not all Member States have a disability card, disability parking cards exist in all Member States, albeit with some differences
 - ❖ The most appropriate legal basis would be Article 91 TFEU (and not Article 21 TFEU), which also supported the Council Recommendation

Substantive Issues: Limited Material Scope


- ❖ Limited material scope reflects limited EU powers in the field of social security
- ❖ Material scope covers areas of supporting competence such as “culture”, eroding MS’ prerogative in that field
- ❖ The sectors covered seem to underpin the notion of consumer as inherent to that of citizen (*‘civis economicus’*)

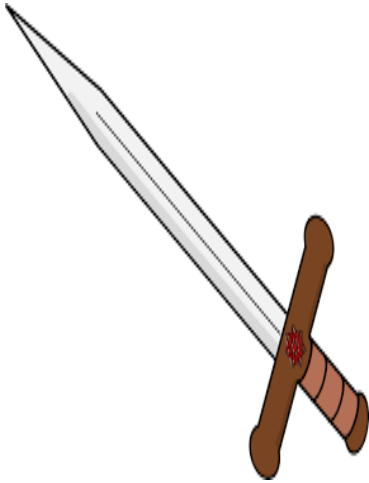
Substantive Issues: Mutual Recognition?

The card is not meant to affect the way in which Member States do recognise disability.

It will not regulate/harmonise the so called ‘disability assessment’.

It will be based on the **principle of mutual recognition**.


 If we look at disability as one **layer of a person’s identity** (CRPD Committee GC No. 6), CJEU case-law on names (Case C-148/02, *Garcia Avello* - Case C-208/09 *Sayn-Wittgenstein*) might offer an important bedrock to support the use of the principle of mutual recognition and understanding its limitations.



Substantive Issues: Mutual Recognition?


- ❖ If MS do not want to recognize an individual's disability status they will have to demonstrate why disability assessments 'are not good enough' in a way that infringes specific national constitutional values (Case C-208/09 *Sayn-Wittgenstein*)
- ❖ In this perspective, the principle of mutual recognition can be seen as a double-edged sword
 - ❖ It will facilitate free movement of persons with disabilities and their access to services in host Member States (within the material scope of the card)
 - ❖ It runs the risk of legitimising disability assessments that are based on extremely medicalised models that are at odds with the CRPD and arguably with the principle of human dignity

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Substantive Issues: The Card *vis-a-vis* the CRPD

- ❖ The EU Disability Card will be an important step further in the implementation of the CRPD, mostly Articles 18 and 30 CRPD
- ❖ It will respond to the **participatory dimension** of the model of inclusive equality, but will **not** address socio-economic disadvantages that hamper free movement rights



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Is the EU Disability Card another Step towards the Europeanization of the Definition of Disability?



The EU Disability Card is a little step to further Europeanize the notion of disability as it brings ‘the potential for greater harmonisation or shared principles of disability assessment’, which may be achieved ‘softly’ aside the card via EU support for the voluntary incorporation ‘of one or more core components of assessment.’ (Priestley, 2022)

What Does the Trajectory towards a Disability Card Tell Us?

- ❖ The trajectory towards the card is the latest evidence that the implementation of the CRPD is pushing EU action on disability far beyond the boundaries of equality law
- ❖ The broad consultation processes engaged with are notable for the effort towards accessibility, inclusiveness and transparency. Yet, they are more a validation tool than a participatory tool. They have little or no influence on the design of the final proposal
- ❖ Free movement rights within the internal market are pushing the boundaries of EU disability law, but not enough to address the slippery terrain of social security

Thank you for your attention!

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Ferri, D. (2020), 'The New Strategy for the Rights of Persons with Disabilities 2021-2030: A Step Forward in Realising the Human Rights Model of Disability' (EU Law Live, 5 March 2021)

Ferri, D. (2023), 'The role of soft law in advancing the rights of persons with disabilities in the EU: A 'hybridity' approach to EU disability law' *European Law Journal* 1-20 <https://doi.org/10.1111/eulj.12454>

O'Sullivan, C. (2020) EU Citizenship and Disability in D Ferri and A Broderick (eds), *Research Handbook on EU Disability Law* (Edward Elgar 2020)

Priestley, M. (2022), 'Disability assessment, mutual recognition and the EU Disability Card' (European Parliament – PE 739.397 – November 2022)

van der Mei, A.P. (2020), 'Freedom of movement for persons with disabilities and coordination of social security within the EU' in D Ferri and A Broderick (eds), *Research Handbook on EU Disability Law* (Edward Elgar 2020)

van Dijck, C. (2018), 'Case Study—The European Disability Card' in T Brandsen, T Steen and B Verschuere (eds), *Co-Production and Co-Creation. Engaging Citizens in Public Services* (Routledge 2018)

Waddington, L. and Broderick, A. (2020), 'The Post-2020 European Disability Strategy' (European Parliament – PE 656.398 – July 2020)

Waddington, L. and Priestley, M. (2021), 'A human rights approach to disability assessment' 37(1) *Journal of International and Comparative Social Policy* 1-15

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