

Bachelor Thesis (B.A./B.Sc.)

The United Nations Convention on the Rights of Persons with Disabilities in the European Union:

Why has the European Commission assumed a proactive role in the EUs accession and implementation process of the UNCRPD?

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Abstract

On 23rd December 2010 the European Union formally ratified the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which marks the first accession of the EU to a UN human rights body. What appears as extraordinary in this unprecedented process is that, besides the EU ratification of the UN Convention, additionally almost all EU member states have signed and ratified the Convention in parallel. This European dual-ratification of the UNCRPD seems to have created a complex multi-level relationship: Firstly, between the UNCRPD and national as well as the EU disability policy regimes; Secondly, as the member states and the EU share different competencies in the fields covered by the Convention, the institutional relationship between the EU and its member states needed to adapt to the governance provisions of the Convention. Despite entering a seemingly complex multi-level relationship in the sensitive disability policy field, the European Commission has assumed remarkably active roles in the negotiation, ratification and implementation processes of the UNCRPD. Why has this been the case? Based on the analysis of the formal European Disability Governance setting prior and posterior to the UNCRPD ratification, this study attempts to explain the proactive behaviour of the Commission in relation to the UNCRPD. Therefore, this study discusses as to why the European Commission has actively supported the EU's accession to the UN Convention. In parallel to analysing the governance changes induced by the UNCRPD into European Disability Governance, the study assesses changes in the relationship between the Commission *vis à vis* the member states against the backdrop of the UNCRPD to find explanations for the behaviour of the Commission. In sum, it is therefore to be analysed to what extent the ratification by both, the European Union and its member states, induced governance reconfigurations within the European Disability Governance regime that appear to be in line with the interests of the European Commission.

List of Acronyms

ANED	Academic Network of Disability Experts
CoC	Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements relating to the UNCRPD (Council Document 16243/10)
DAP	Disability Action Plan
DHLG	Disability High Level Group
EEFD	Equal Employment Framework Directive (2000/78/EC)
EDF	European Disability Forum
EDG	European Disability Governance
EDS	European Disability Strategy
EES	European Employment Strategy
EIM	EIM Business and Policy Research
EQUINET	European Network of Equality Bodies
EU	European Union
ExpGov	Experimental Governance
GEG	Governmental Expert Group on Anti-Discrimination
IZA	Institute for the Study of Labour, Bonn (Germany)
MS	EU Member State(s)
NGO	Non-Governmental Organisation
OMC	Open Method of Coordination
OP	Optional Protocol of the UNCRPD
PA	Principal-Agent Model
RCS	Rational Choice Supranationalism
RQ	Research Question
SPSI	OMC for Social Protection and Social Inclusion
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities

The United Nations Convention on the Rights of Persons with Disabilities in the European Union:

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1. Introduction

By depositing the instruments of conclusion to the United Nations Secretary General in New York on 23rd December 2010, the European Union formally confirmed the ratification of the United Nations Convention on the Rights of Persons with Disabilities¹ (DHLG, 2012). This marked the first accession of the European Union to a UN human rights convention².

The UNCRPD was drafted in an unprecedentedly broad, yet relatively swift, negotiation process beginning in 2001, which actively involved persons with disabilities and representative organisations in the drafting process (cf. Lawson, 2009; De Búrca, 2010a; Quinn, 2009). The Convention and its Optional Protocol were adopted by the UN General Assembly on 13th December 2006, becoming the first international human rights treaty of the 21st century. The UNCRPD eventually entered into force in the European Union on 22nd January 2011 (DHLG, 2012).

In May 2004, the European Commission received the authorisation by the Council of the European Union³ to unanimously represent the interests of the Community in the negotiations of the Convention⁴. The Commission has also played a key role in coordinating the positions of EU member states⁵, eager to maintain a single voice of the EU in the negotiation process (cf. De Búrca, 2010a). On 30th March 2007, together with 22 EU member states⁶, the Commission signed the Convention on behalf of the EU⁷.

What appears as remarkable in this accession process is that, besides signing and ratifying the UN Convention on behalf of the EU, all MS have signed and 25⁸ states have ratified the Convention. Both the EU and its MS share competences in several fields covered by the UN

¹ Henceforth: UNCRPD or UN Convention

² The accession was enabled through Article 47 TEU, after the EU gained legal personality as a subject of international law through the Treaty of Lisbon.

³ Henceforth: Council

⁴ Cf. COM (2008) 530 final; The conclusion mandate to the Commission was provided after the Commission's proposal (COM (2007) 77 final) by the Council Decision No. 15540/09 of 24/11/2009

⁵ Henceforth: MS

⁶ 17 of the 22 MS have also signed the Optional Protocol, however not the EU. Latvia was the last MS to sign the Convention on 18 July 2008; as of November 2013 the UNCRPD has not yet been ratified by Ireland, the Netherlands and Finland; Retrieved 10/11/2013, from

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en

⁷ Supra 4

⁸ As of November 2013, supra 6

Convention⁹, creating a mixed agreement, i.e. in jointly implementing the Convention by the EU and its MS (cf. Kallehauge, 2009; Reiss, 2012).

Thereby, the UNCRPD regime set out parallel implementation requirements for both the EU and its MS to comply with. As a consequence, by entering a UN human rights regime in the highly sensitive field of disability, the UNCRPD accession has added another layer to the multi-level governance of the European disability regime. In this process, the Commission has assumed a remarkably active role in leading the EU's voice in the negotiation as well as actively supporting the ratification and implementation processes of the Convention in the EU. Considering both, the increase of complexity of the already complex and loosely integrated European disability governance setting, as well as the proactive behaviour of the Commission, this raises the question: Why has the European Commission assumed a proactive role in relation to the UNCRPD?

In other words, this study focusses on the analysis of the governance implications the UNCRPD has induced into the European disability governance in relation to the Commission. In this context it is to be investigated what have been motivating factors constitutive for the Commission's activism in relation to the UNCRPD.

Before entering the analysis and discussion chapters, the following introductory segment shall outline the phenomenon and politics of disability within the broader context of the EU anti-discrimination framework. This forms the backdrop on which the institutional developments taking place through the UNCRPD ratification will be assessed.

1.1. Disability as a Social Phenomenon

Disabilities can take up a multitude of forms, ranging from psychological, intellectual or physical, to single or multiple impairments that may be acquired congenitally or through disease, accident, or ageing. For decades, persons with disabilities have been widely stigmatised by the prejudice of 'suffering' from inherently negatively perceived medical conditions that render a person 'dependent' and 'deficient', and thus 'disabled' (cf. Campbell, 2005; Arneil, 2009).

Even today, persons with disabilities worldwide experience many disadvantages and lower levels of social inclusion through less favourable treatment or discrimination in everyday life (cf. United Nations, 2006). As the category of disability includes a large spectrum of diverse individual impairments, the heterogeneity of this group of persons bears considerable limitations for political participation and interest representation of this rather latent community, being the 'largest minority worldwide' (ibid). Beyond its multifarious concept, disability specific policies are bound to deal with the analytical conundrum that disability does not constitute a

⁹ Cf. COM(2008) 530 final

distinct policy area, as the category spans across many policy fields, such as education, health and employment, which all are pivotal factors for social inclusion respectively (cf. IZA, 2010).

Since the 1970s, the emerging scientific and public discourse on disability has accelerated significantly through a paradigm shift towards a social model of disability, which has gradually superseded the outdated 'medical model' (Traustadóttir, 2009). The medical model on disability focuses on individual impairments and pathologies as being constitutive for perceiving disability primarily as a medical condition (cf. *ibid*; Priestley, 2010); whereas, the social model affirms that the state of disability arises from the failure of social environment to accommodate the needs and aspirations of persons with some form of impairment (Waddington, 2005). From this altered perspective, the condition of disability emerges from restricted interaction with a socially and physically incompatible environment (cf. Lawson, 2009; Arneil, 2009; Priestley, 2010).

What has been achieved through the paradigm shift away from the medical model towards the social model of disability, is that the removal of disabling physical and attitudinal barriers external to the individual has created a sphere for political intervention, and thereby a core element of modern disability policy (cf. Arneil, 2009). The 'social' redefinition of disability has garnered significant political influence for disability movements worldwide (*Ibid*), most visibly in the recent United Nations Convention on the Rights of Persons with Disabilities with extensive participation of persons with disabilities and stakeholder organisations (cf. Waddington, 2005; Lawson, 2009). Furthermore, the UNCRPD represents the highest legal codification of the social model of disability¹⁰.

1.2. Disability in the European Union

Almost one in six citizens of the European Union is living with a disability (European Commission [EC], 2010; IZA, 2010; EUROSTAT, 2002), amounting today in EU-28 to more than 80 million persons or almost the entire population of Germany. The demographic developments of an ageing European population will very likely lead to an increased number of persons with disabilities due to age related impairments or sickness (EC, n.d.). Persons with disabilities in Europe face a significantly disadvantaged status in labour market participation and educational attainment as compared to the non-disabled population (EC, 2011). Consequently, many persons with disabilities are living with higher benefit dependency and an increased risk of poverty, and thus, are likely to enjoy significantly lower levels of social integration and inclusion than non-disabled persons (EIM, 2002).

¹⁰ The social model approach of the UNCRPD is codified in Article 1 UNCRPD: 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'

On this first regard, the livelihoods of a significant and growing population of persons with disabilities in Europe are considerably affected by social and economic disadvantages, which call for European action. Whereas, the sensitive field of disability policy appears to be an unlikely candidate for being 'Europeanised' by integrating diverse national approaches into European policy, as social policies on disability reside in sovereign and diverse national welfare systems (cf. Rodrigues & Shima, 2009).¹¹ Therefore, considering these limitations, this leads to the question: How has European governance of disability developed thus far?

1.2.1. European Disability Governance before the UNCRPD Ratification

The ratification of the Treaty of Amsterdam in 1997 has introduced Article 13 EC¹², which allows the Community to 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'¹³. The introduction of this codification has been described by De Búrca (2010b, p. 220) as a 'legal-constitutional turning point in the field of EU equality policy', including disability policy in particular.

In the beginning of the millennium the European Commission has initiated three directives on the basis of the anti-discrimination provisions of Article 13 EC. Among these proposals was the Employment Equality Framework Directive¹⁴ coming into being on 27th November 2000, which set a basis of minimum requirements for the protection against discrimination on multiple grounds, including disability, within the employment and vocational training sector (Whittle, 2002). This directive constitutes the centrepiece of European Disability Governance, institutionalising the principles of equal treatment and reasonable accommodation at the workplace (cf. Non-Discrimination, 2004). The subsequent 'European Year of the Disabled' and the Disability Action Plan¹⁵ in 2003 set out broad framework strategies and thematic programs for progressing the transposition of the EEFD and adjusting regulatory mechanisms (cf. Priestley, 2010). In the 2003 DAP communication the Commission affirms that '[t]he EU also sees disability as a social construct' and that 'the EU social model of disability stresses the environmental barriers in society which prevent the full participation of people with disabilities in society', and consequently that '[t]hese barriers must be removed'¹⁶.

¹¹ The lack of conclusive EU wide data on the situation of persons with disabilities as well as on the performance of national disability policies, further limits concerted European action in harmonizing disability policies (cf. EIM, 2002). Additionally, several Member States pursue active inclusion strategies that are mainstreamed in labor policy, such as Denmark and Sweden, while other national policies aim to do so via disability specific programs and quota systems (Greve, 2009).

¹² Since the implementation of the Treaty of Lisbon: Article 19 TFEU

¹³ Article 19 TFEU

¹⁴ Henceforth: EEFD; 2000/78/EC

¹⁵ Henceforth: DAP (COM (2003) 650)

¹⁶ Ibid

1.2.2. The United Nations Convention on the Rights of Persons with Disabilities¹⁷

Without creating genuinely new human rights, the UNCRPD clarifies and substantially enhances the applicability and legal protection of existing human rights for persons with disabilities (cf. Quinn, 2009). The UNCRPD provides for a broad range of substantive rights including the respect for dignity, individual autonomy, full and active participation and inclusion, respect for difference, and accessibility, and is thus going far beyond mere principles of non-discrimination (cf. Waddington, 2005). According to Article 1 UNCRPD, the main purpose of the Convention is 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'. The core provisions of the Convention are anchored in Article 3 UNCRPD, including non-discrimination and equality, which provide, according to Quinn, a 'moral compass for change' for global disability policies (Waddington, 2005, p. 4). These general provisions are further elaborated in Articles 5-30 UNCRPD. Article 4 contains the general requirements for signatories to give effect to the UNCRPD within domestic legal realms, to review and change provisions incompatible with the Convention, and to ensure the participation of disability representatives in these processes. Besides these ground-breaking material provisions for persons with disabilities worldwide, the UNCRPD entails a series of governance innovations concerning monitoring, reporting and review mechanisms for the signatory parties¹⁸ (Waddington, 2009).

Article 33.1 UNCRPD requires signatory parties to designate 'one or more focal points within their governments for matters relating to the implementation of the Convention'¹⁹. A focal point then reports on the respective implementation progress of the signatory party to the UNCRPD Committee. Article 33.2 requires the establishment of a 'framework including one or more independent mechanisms' to 'promote, protect and monitor the implementation of the Convention'. Articles 34-39 of the Convention concern the set up and responsibilities of the central monitoring body of the Convention, which consists of 18 independent experts and acts similar to other UN human rights treaties in monitoring compliance by the signatory parties regarding the implementation of the Convention²⁰. All signatory parties are obliged to regularly submit implementation reports to the Committee (Article 35), on the basis of which

¹⁷ UNCRPD text retrieved 02/08/2013, from: <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>.

¹⁸ However, the EU has neither signed nor ratified the Optional Protocol of the UNCRPD (while 21 MS ratified the OP by November 2013), which allows citizens of signatory parties to directly petition breaches of their rights provided by the Convention to the UN Committee on the Rights of Persons with Disabilities. Furthermore, the OP gives the UNCRPD Committee authority to undertake inquiries of grave or systematic violations of the Convention. The OP is, however, purposively left out of this study to focus on the main provisions of the UNCRPD and their implications for EDG. An EU ratification of the OP remains unclear, which also bears interesting implications for EDG, which need to be studied in more detail. While the Commission has strongly supported the signing of the OP in its communication COM (2008) 530, the signing of the OP has yet not found support from the Council.

¹⁹ States shall also consider designating a coordination mechanism within the respective governments (Article 33)

²⁰ The Committee's capacities in overseeing the implementation of the UNCRPD are significantly enhanced through the OP (cf. supra 18).

the Committee then addresses suggestions and recommendations to the concerned party (Article 39). Furthermore, Article 16.3 on the independent monitoring of programmes and Article 31 on the collection of statistics and data, add to the monitoring and reporting features of Article 33 UNCRPD. These governance provisions of the UNCRPD therefore put a strong emphasis on national implementation and monitoring mechanisms (cf. De Búrca, 2010a). The accession of the EU to the UNCRPD was enabled through Article 44.1 UNCRPD allowing regional organisations to enter the Convention, a provision that was propelled by the Commission in the negotiation process (De Búrca, 2010a).

1.2.3. European Disability Governance after the UNCRPD Ratification

By ratifying the UNCRPD the EU and its MS legally committed themselves to comply with the Conventions' material and formal implementation requirements. The central formal provisions for the EU to comply with are set out in Article 33 UNCRPD.

The successor of the DAP, the European Disability Strategy²¹ from 2010 to 2020 was initiated by the Commission in November 2010²², and inter alia aims to facilitate the UNCRPD implementation in the EU. Two years after the coming into being of the Convention, the Commission proposed a new anti-discrimination framework directive²³ based on Article 19 TFEU in 2008. In this draft the Commission proposes an expansion of the sectorial scope of the equal treatment framework beyond employment to other areas within EU competence, including goods and services, as well as novel institutional provisions against the backdrop of the implementation of the UNCRPD into European Law. However, this 'horizontal' directive remains blocked in the Council by a group of states since December 2011²⁴.

Despite its apparent failure, the Commission's initiative of an anti-discrimination framework revision provides an opportunity for investigating the changes of European disability governance in light of the UNCRPD ratification and the strategic position the Commission has assumed.

2. Research Question

Coming back to the initial question raised in the introduction, this study aims to explain the high level of activeness by the Commission in the recent developments of EDG being ostensibly influenced by the UNCRPD. An overarching research question can thus be phrased:

RQ: Why has the European Commission assumed a proactive role in the EU's accession and implementation processes of the UNCRPD?

²¹ Henceforth: EDS

²² COM (2010) 636 final

²³ COM (2008) 426

²⁴ Retrieved 22/08/2013, from: http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=197196

The central research question splits into two main undertakings²⁵. Firstly, to form the basis of the discussion, the formal re-configurations presumably induced by the UNCRPD into the EDG setting need to be analysed. Secondly, regarding these reconfigurations, it is to be assessed what have been main rationales decisive for the Commission's activism in relation to the changes instigated by the UNCRPD in EDG.²⁶ Therefore, on the basis of these findings, the central research question on explaining the assumed role of the European Commission will be discussed with a focus on processes and, to a lesser extent, on policy outcomes (see note 26).

3. Theory

How can these complex developments in EDG be adequately conceptualised for analysis?

The EDG setting is positioned in a multi-level interplay of legal regimes between the EU and its MS in implementing the UNCRPD. In transposing the Convention to the EU and its MS in parallel, the effective benefits of this dual-ratification (and assumedly dual-provisions) for the quality of rights enjoyed by EU citizens with disabilities appear as uncertain. The EDG is cross-cutting different policy fields and is therefore set in different responsibilities shared by the Community and the MS in dealing with a highly sensitive as well as multifarious phenomenon. Therefore, this process ostensibly requires extensive institutional adaptation as well as additional reporting and monitoring capacities to ensure effective implementation of the Convention in this formally and materially complex policy area. In light of an increased internationalisation of political interdependencies and economic pressures, those problems of outcome uncertainty and overwhelmed capacity are not new to European economic and social governance; yet, these factors of uncertainty and complexity lead involved actors to develop more innovative settings (cf. Begg & Berghman, 2002). Therefore, European policies on disability seem bound to take alternative routes (Eberlein and Grande, 2005).

3.1. Experimental Governance Theory

With regard to the emergence of innovative international regimes under conditions of complexity and strategic uncertainty of outcome, Charles Sabel and Jonathan Zeitlin have authored a theory on Experimental Governance²⁷ (Sabel & Zeitlin, 2008; 2010; 2011a, b). This

²⁵ Before discussing the role of the Commission in relation to the UNCRPD, the governance developments within the EDG in relation to the UNCRPD need to be assessed beforehand, which then provides the basis for the following discussion on the explanation of the Commission's behavior.

²⁶ Furthermore, the latter undertaking can be divided into two aspects, as to identify what have proven to be advantageous processes as well as desired policy outcomes for the Commission, which may have provided incentives for its activism. This study will be focusing on the procedural and formal aspects of European Disability Governance in relation to the UNCRPD. As a comprehensive view on desired policy outcomes, e.g. based on expert interviews of members of the Commission, is not sufficiently feasible under the limitations of this study, the outcome part of the discussion will touch upon rather cautious findings from Commission publications in relation to the UNCRPD that may serve as working hypotheses for further qualitative studies on desired policy outcomes of the Commission.

²⁷ Henceforth: ExpGov

theory corresponds to complex policy architectures that seem to go beyond conventional command and control relationships, in which principal actors find themselves under strategic uncertainty in the attempt to produce effective solutions to increasingly intransparent problems (Sabel & Zeitlin, 2011a, b). In a multi-polar distribution of power in politics, interests and preferred solutions may not be imposed unilaterally by a single actor but need to be adapted to other actors involved (ibid.).

In other words, ExpGov describes a setting, in which a political actor is bound to cope with limited information and implementation capacity in the policy field concerned. Therefore, the actor cannot be certain about the performance of a chosen instrument to achieve a set policy goal and is thus motivated to experiment on possible alternative solutions. Uncertainty as a strategic factor becomes increasingly relevant for legislative and executive bodies in need of controlling policy implementation and monitoring compliance of involved subsidiary units (Sabel & Zeitlin, 2008).

Becoming aware of its own limitations under conventional institutional hierarchies, the centre becomes willing to trade-off responsibilities towards peripheral units, such as monitoring or executive agencies, which are in return for their increased power expected to report back to the centre (O'Donnell, 2003, p.18). Therefore, ExpGov settings support policy activities directly including subsidiary actors into the legislation and implementation processes, for instance by allowing norms to be deliberately agreed upon by a variety of lower-level units. These agreements tend to be flexible and provisional in character and may be subject to recursive review and (re-)adjustments (cf. Sabel & Zeitlin, 2011a; 2008). In sum, ExpGov theory identifies four steps of action in experimental regimes: Agreement on common goals; involvement of lower levels of government propose ways to meet these goals; reporting on their achievement progress of goals; and periodical reevaluation of the review procedures (Sabel & Zeitlin, 2010, p. 3).

Experimentalist governance structures entail three main advantages over traditional hierarchical settings: Firstly, they improve institutional capacity to accommodate diversity, instead of static 'one-size-fits-all' approaches; secondly, they provide a mechanism for recursive²⁸ learning from local experimentation increasing probability of success; and thirdly the means and ends for achieving set goals are purposively provisional and revisable in response to the implementation experience (Sabel & Zeitlin, 2011a; 2008). The complexity of the policy concept of disability within a multi-level setting of European Social Policies, which the Communi-

²⁸ In this context, the term 'recursive' refers to a mechanism in which the 'output from one application of a procedure or sequence of operations becomes the input for the next, so that iteration of the same procedure produces changing results' (Sabel & Zeitlin, 2011b, p. 3). Thus, this implies a constant revision of a policy's 'working hypothesis' in seeking alternatives, which prove to be more efficient than the previous attempt(s), without presupposing an assumedly 'best' instrument.

ty's activities by the European Commission are bound to take into consideration, points at the assumption that the European Disability Governance may be considered as an Experimental Governance regime according to the theory of Sabel and Zeitlin²⁹.

The UNCRPD regime has been identified as an experimentalist governance regime by the following set of parameters, which can be identified in a genuine ExpGov setting (cf. De Búrca & Keohane, 2013):

- (1) Openness to participation of relevant entities in a non-hierarchical process of decision making;**
- (2) Articulation of a broadly agreed common problem and the establishment of a framework understanding which sets open-ended goals;**
- (3) Implementation and elaboration by lower-level actors with local or contextualised knowledge;**
- (4) Continuous feedback, reporting, and monitoring;**
- (5) Established practices, involving peer review, for regular reconsideration and revision of rules and practices.**

By implementing the provisions of the experimentalist UNCRPD regime and adding thereby to the complexity of EDG through a multi-level relationship, it seems plausible that the transition process of the formal provisions of the UNCRPD into the EU may have led to an increase of Experimentalism in the EDG setting. There seems to be a conjunction with the activities of the Commission through its remarkably active level of engagement in the negotiation and implementation of the UNCRPD, which has been an unprecedented process in the EU implying uncertain outcomes. Therefore, an increase of experimentalism seems to be appreciated or even purposively advanced by the Commission.

For the purpose of this study, the theory of ExpGov may serve as a heuristic device that may help to identify formal characteristics of the disability governance setting reflected by an abstract set of parameters, which provide points for comparison and thus allow for demarcating change. However, the broadness of ExpGov theory confines descriptions to identifying formal characteristics of a governance set-up in its entirety, while it neglects the interplay of powers between specific actors and inter-institutional processes internal or external to the respective regime. Consequently, ExpGov falls short in explaining why actors decide to set

²⁹ Börzel (2012, p. 380) holds that despite its increased significance, '[ExpGov] is certainly not the only, and arguably not the most prominent, mode of governance in the EU. Rather, it is embedded in and interacts with supranational decision-making, intergovernmental cooperation, and market-based coordination. The interaction with alternative governance modes is particularly relevant for how EG affects both policy outcomes and the overall governance architecture of the EU.' Consequently, the ExpGov theory appears not applicable to the entire field of EU governance, while it is able to describe specific arrangements, such as the most prominent ExpGov example, the OMC (cf. *ibid*). Börzel (*ibid*, p. 384) ends her comment affirming that 'the virtue of Sabel's and Zeitlin's work, rather, lies in pointing to particular patterns of decision-making that may play an increasingly prominent role in the EU's governance mix'.

up a specific level of experimentalism in governance structures³⁰. ExpGov does not sufficiently explain the procedural interplay between institutions, such as different legislative and executive bodies³¹. Lastly, the merits of ExpGov are basically confined to a heuristic device for describing a particular governance setting, while it is not able to sufficiently explain specific developments and policy strategies pursued by involved actors under (inter-)institutional constraints. In order to explain the assumed position of the Commission in the UNCRPD transposition to the EDG, the study needs to resort to another analysis to account for institutional (inter-)relationships, whose discussion is to be supplemented to the ExpGov debate³².

3.2. Principal Agent Theory

The interplay between Commission and the MS in the implementation process of the UNCRPD can be conceptualised through a relationship between principal(s) and agent(s). The Principal Agent model³³ has widely been used to analyse agency relationships between two parties, where one party, the agent, is contractually authorized to act on behalf of the other, the principal, in the expectation that the agent's action will produce outcomes desired by the principal (Moe, 1984, p. 756).

Originating from organisational business science, PA theory has been widely applied in political science to analyse processes of power delegation to agents to reduce transaction costs of policy making for principal actors (Pollack, 1997). The act of delegation can be defined as an authoritative decision, which transfers policy making authority away from established, representative public organs to non-majoritarian public or private institutions (Stone Sweet & Thatcher, 2002, p. 3). Thereby, principal public bodies use their authority to create agents (or NMs), such as monitoring agencies or executive contractors, which then govern by exercising powers bestowed upon them by the principal in a specified level of discretion (ibid).

From a functional perspective, principals create agents for several reasons: These include the assistance to the principal's execution capacity, increasing the credibility of political promises³⁴, overcoming information asymmetries in technical areas of governance (in which agents are expected to develop and employ expertise), enhancing rule making efficiency as well as avoiding blame for unpopular policy goals (ibid, p. 4).

³⁰ There seems to remain the question as to how conscious or strategically motivated experimental features have been implemented by actors in empirical terms (cf. De Búrca, 2010b). Thus, it remains unclear, firstly, whether ExpGov implies that experimentalism may be considered both as a means and an end in itself (which seems to be implied by the theory); secondly, whether this implies a linear transformation towards developing increasingly more experimentalism; and lastly whether experimentalist strategies per se are always conducive to a central actor in complex settings.

³¹ In the case of the EU, ExpGov is not applicable to the entire EU governance setting, which implies that there exist different modes of governance and that hierarchical modes coexist and may interact with less hierarchical modes, which is not accounted for by ExpGov theory (cf. Börzel, 2012; supra 29).

³² This twofold approach allows conjoining the two perspectives on the governance structure and institutional relationships in the EDG relating to the Commission for the discussion.

³³ Henceforth: PA

³⁴ *Vis à vis* multiple principals or the electorate;

Central to the study of this contractual relationship is the so-called ‘principal’s problem’, which arises from the condition that a principal cannot be certain that the agent will always act in the principal’s best interests (Moe, 1984). This is the case when the (rationally behaving) agent pursues its own interests, which are not necessarily in line with those of the principal. As Moe puts it, the agent ‘[...] is induced to pursue the principal’s objectives only to the extent that the incentive structure imposed in their contract renders such behaviour advantageous’ (ibid, p. 756). Thus, the principal needs to be aware of potential ‘agency slack’ through an informational asymmetry in that the agent may either ‘shirk’ the principal through actions outside the discretion of its delegated mandate or resort to ‘slippage’, when an agent ‘opportunistically shifts policy away from its principal’s preferred outcome and toward its own preference’ (Hawkins et al., 2011, p. 4).

Different PA models³⁵ have been applied to explain dynamics of the European integration process in different governance fields, as the general model is able to conceptualise the continuous interaction and power struggle between the Commission, acting as an agent, in relation to the MS, acting as principals (De la Porte, 2011). Yet, in order to analyse the dynamics of the complex institutional arrangement between the Commission, MS and the UNCRPD, the PA model applied here needs to account for the possibility of multiple agents (and principals) beyond two-dimensional conceptions³⁶ (cf. Dehousse, 2008).

4. Methodology

Reflecting on the two theory threads to be applied in this study, Experimental Governance theory and the Principal Agent model, two (descriptive) sub-research questions can thus be formulated more specifically for guiding the two analyses respectively³⁷:

Sub-RQ I: To what extent has the European Commission advanced Experimental Governance features in European Disability Governance in the course of the UNCRPD accession process by the EU?

³⁵ Kassim and Menon (2003) distinguish four main theoretical perspectives on Principal Agent models: Liberal intergovernmentalism (LI), institutional intergovernmentalism (II), historical institutionalist supranationalism (HIS) and rational-choice supranationalism (RCS). While these theories share the basic concept of delegation as being based on the interests of the MS principals, they ‘reach different conclusions about the ability of governments to retain their control and, in the EU context, the extent to which the Commission and the Court are willing and able to act independently’ (ibid; p. 126). This study utilizes a RCS approach by Pollack (cf. 1997), to account for the possibility of independent interest-driven behavior through which (supranational) institutions can assume roles that were not originally anticipated by the principal, thus reflecting dynamisms of power struggle in complex settings (cf. ibid, pp. 118).

³⁶ By that, actors may assume either role depending on the relationship or perspective concerned, which needs to be reflected by a PA model to be more adapt to institutional complexities in EU governance, especially with regard to the novel accession to a UN Convention.

³⁷ As stated earlier, before discussing the research question as to why the Commission has proven to be proactive in matters relating to the UNCRPD transposition, it needs to be assessed as to what have been the formal changes within the EDG setting induced by the UNCRPD, which will be observed through a descriptive ExpGov theory lens, and as to how these changes influenced the institutional relationship between the Commission and the member states, which will be viewed through a Principal Agent lens, on the basis of which explanations for the Commission’s activeness can be examined more comprehensively than by either theory alone.

Sub-RQ II: How has the position of the European Commission in the relationship to the EU Member States within EDG changed through the UNCRPD ratification?

The introduced theory on Experimental Governance enables a broad perspective on analysing the governance implications of the UNCRPD within the EU. However, whereas, the introduction of specific governance changes can be attributed to a certain actor, such as the Commission, ExpGov does not sufficiently reflect institutional relationships between involved actors or interactions towards other modes of governance (cf. Börzel, 2012). This theoretical deficit may be mitigated by applying a PA model³⁸, allowing for a more nuanced view on institutional dynamics between the Commission and the MS in light of the UNCRPD transposition. The PA perspective, however, neglects broader context developments in which the institutional relationships the Commission appears to be involved in are embedded. For that reason, applying ExpGov theory and a PA model in parallel, appears to be complementary for the research purpose. Therefore, this study acknowledges the benefits of applying both theories separately and then conjoining the findings of the analyses later in the discussion³⁹. However, in order to assert what have been plausible policy outcome preferences of the Commission in regard to the UNCRPD transposition, another discussion regarding desired outcomes will be juxtaposed to the procedural debate⁴⁰, as neither theory accounts for a policy outcome perspective.

4.1. Experimental Governance Theory – Method of Analysis

In the course of its transposition process, the UNCRPD can be regarded as an independent variable⁴¹ that exerted influence on a dependent variable, the European Disability policy setting. The ratification of the Convention, in giving legal effect to its provisions for the EU, can thus be regarded as an intervention to EDG, which divides a timeframe into pre-intervention, intervention and post-intervention phases⁴². To retrace the historical developments of institu-

³⁸ Following the assumptions of Rational Supranationalism (cf. Kassim & Menon, 2003); see supra 35.

³⁹ ExpGov has repeatedly been described by its authors to go beyond delegation and thus transcending a conventional hierarchical principal agent model: 'But whatever the precise combination of transnational and domestic factors, the resulting increase in *strategic uncertainty* has overwhelmed the capacities of conventional hierarchical management and principal-agent governance in many settings.' (Sabel & Zeitlin, 2011, p. 10 [emphasis in the original]). However, presupposing from the mere complexity and uncertainty within the EDG setting experimental and non-hierarchical arrangements, this would imply a bias towards ExpGov and against a PA model in the analysis of the EDG, with quite limited insights regarding the RQ. Vice versa, adhering to a conventional PA model would put a bias on hierarchical features of delegation and would preclude reflecting on less hierarchical institutional innovations. Therefore, this study considers the combination of both theories viable for approaching the RQ.

⁴⁰ In order to investigate policy outcome preferences, this supplemented discussion segment will be based on a discussion of arguments and findings from Commission documents and the UNCRPD related to policy outcomes. Well-aware about the explanatory limitations of this approach, a qualitative study based on extensive expert interviews of involved units of the Commission could draw a much more comprehensive picture on preferences and policy strategies than possible in this study. (See also supra 26),

⁴¹ Well aware of the Commission's influential role in the negotiation process of the UNCRPD, in which several elements of EDG appear to have been 'uploaded' to the Convention (cf. de Búrca, 2010a), for the sake of clarity and brevity, this analysis assumes the UNCRPD to be a 'blackbox', and thus a fully independent variable from the Commission.

⁴² This analysis considers the time before March 2007, the EU signing of the UNCRPD as the absence of the UNCRPD (pre-intervention); the time between March 2007, the signing of the UNCRPD by the EU, and 23 De-

tional change in EDG, assumedly linked to the ‘intervention’ of the UNCRPD, firstly, the EDG setting at a point in time prior to the UNCRPD ratification, thus in absence of the influencing variable, is to be compared to the EDG setting after the UNCRPD ratification by the EU, thus in presence of the influencing variable. For the purpose of identifying to what extent the EDG setting has become more experimental in character, the formal developments within EDG prior and posterior to the UNCRPD ratification shall be analysed on the basis of the five ExpGov criteria⁴³ (Sabel & Zeitlin, 2008; De Búrca & Keohane, 2013).

In a first step, according to five criteria of an ExpGov ideal-type (De Búrca & Keohane, 2013) key documents on the framework of EDG before March 2007 (pre-intervention) shall be analysed as to what extent the formal EDG features setting can be identified as being experimentalist according to ExpGov theory. Secondly, these findings shall be put in relation to the assumedly altered setting in the timeframe of UNCRPD ratification process (intervention)⁴⁴. In a third step, the verbatim implementation of the directive proposal⁴⁵ supplementing the existing EEFD framework shall be assumed to assess possible changes within EDG in reference to the UNCRPD that entail features of experimentalism (post-intervention). In these analysis steps, special focus shall be put on the Commission, in order to assert to what extent the Commission has induced or supported experimental features in the EDG regime (sub-RQ I).

4.2. Principal Agent Theory – Method of Analysis

In analysing the dynamics of the relationships between the Commission, the MS and the UNCRPD through a PA model, distinct events that include a change of the institutional relationship are to be investigated. This allows for a comparison of the assumed positions of the involved actors. As a PA relationship is characterised by a contractual agreement, formal and informal revisions of this agreement need to be assessed. For the PA analysis of the EDG setting the three timeframe segments used in the ExpGov analysis are also applied to structure specific contractual arrangements between the Commission, the MS and the UNCRPD regime (while adding the negotiation phase⁴⁶) in order to identify institutional dynamics before

ember 2010, the ratification of the UNCRPD by the Union as the ratification phase (intervention), and the time after January 2011 as the implementation phase (post-intervention).

⁴³ The five ExpGov parameters indicate rather fuzzy thresholds without discrete values and imply binary measurements of fulfillment or non-fulfillment which provides limited insights. Nevertheless, the comparison shall be sensitive to relative changes within the categories between the timeframes to allow for a quasi-ordinal scale. Thus, these parameters shall be considered as heuristic devices to allow for a structured comparison to reflect change.

⁴⁴ The UNCRPD is assumed as a discrete intervention to the EDG to comprehend the overall changes relevant through the EU commitment.

⁴⁵ COM (2008) 426

⁴⁶ In contrast to the ExpGov analysis, which has purposively neglected the negotiation process (as the UNCRPD has been assumed to be a ‘black box’), the negotiation process is included in the ratification timeframe of the PA analysis to reflect the particularity of the Commissions negotiation mandate.

the ratification, during the negotiation, during the ratification and after the ratification processes⁴⁷:

- (1) **Pre-UNCRPD phase**
- (2) **the negotiation process of the UNCRPD**
- (3) **the ratification process of the UNCRPD**
- (4) **Post-UNCRPD ratification phase**

On the basis of these findings concerning changes of the contractual arrangements between the Commission and the MS in relation to the UNCRPD, explanations for this relational development from the perspective of the Commission can be discussed (sub-RQ II).

4.3. Counterfactual Analysis

The question as to why the Commission has strongly supported⁴⁸ the UNCRPD and advanced the EU to enter a mixed agreement by ratifying the Convention on behalf of the European Union can be discussed by delineating benefits for the Commission of the EU and MS dual ratification as a mixed agreement.

This study is dealing with an N=1 case study of European disability governance having historically developed without a 'control group' or any similar case worldwide. When experimental control and replication are not feasible for singular case studies (N=1), Fearon (1991) argues that there remain two strategies for hypothesis testing: The first one is the comparison of actual cases that resemble the case in question in significant respects except for the absence of the influencing variable, and secondly, counterfactual argumentation, assuming the complete absence of the independent variable⁴⁹. By assuming a counterfactual scenario, it can by implication be evaluated to what extent alterations in the unit of analysis can be attributed to the influence of the independent variable. Thereon, it can be reasoned why this influence and corresponding behaviour may have come about. In terms of the UNCRPD implementation into the EDG, a counterfactual scenario can be constructed through assuming a non-UNCRPD ratification by the EU⁵⁰. Therefore, a counterfactual non-ratification scenario shall be assumed to assess the added value of the dual-ratification for the Commission⁵¹.

⁴⁷ See supra 42

⁴⁸ Considering the negotiation mandate and the communication on a legally binding UN instrument COM(2003)16;

⁴⁹ According to Fearon, counterfactuals 'make claims about events that did not actually occur' and are propositions that take the generic form "If it had been the case that C (or not C), it would have been the case that E (or not E)" (Fearon, 1991, p. 169).

⁵⁰ Ceteris paribus, i.e. EU member states' ratification of UNCRPD

⁵¹ Vice versa, another counterfactual model could be created by a setting in which only the EU would have ratified the convention, without respective MS ratification. However, this model would be inadequate for the research purpose and not be able to delineate the benefits for the Commission respectively, and would be quite an unrealistic scenario in the first place.

5. Analyses

5.1. Experimental Governance Characteristics in the EDG

To what extent has the European Commission advanced Experimental Governance features in European Disability Governance in the course of the UNCRPD accession process by the EU? (Sub RQ I)

Step I: Experimental Governance in EDG before the UNCRPD

(1) The openness to participation of relevant entities in a non-hierarchical process of decision making;

Conceptually, directives are legislative tools that set down a framework of minimum requirements with a binding policy goal⁵². Thus, in case MS' legislation falls short of minimum requirements set by the directive, adaption activities by the MS become legally mandatory, such as changing incompatible legislation or administrative procedures. This leaves the means to effectuate the principles of equality and non-discrimination largely undetermined, which allows MS considerable flexibility in adapting principles of the directive to the respective domestic legal order⁵³. The decision making of the directive followed the community method, starting with the initiative of the Commission. The Commission's EEFD draft⁵⁴ has been agreed upon and slightly revised by the MS representatives in the Council. Involvement and consultation with representative organisations, European level social partners and the European Platform of social non-governmental organisations has taken place in the drafting process of the directive⁵⁵. The effective decision making and review of national laws on the basis of the directive is proceeding in the national legal realms and is encouraged to involve social partners (Article 13) and relevant NGOs (Article 14). Thus, these features represent experimental elements of decision making, through a static policy framework that yet supports considerable flexibility of means.

(2) Articulation of a broadly agreed common problem and the establishment of a framework understanding which sets open-ended goals;

As stated in Article 1, the purpose of the EEFD is 'to lay down a general framework for combating discrimination' towards putting into effect the principle of equal treatment in the MS. Achieving the equal treatment objective is in itself an open-ended process, to which the directive sets minimum requirements for MS to adjust national legislation to. Central categories, such as disability, remain largely undefined in the directive, which bears witness to the flexibility of interpretation in MS legal regimes. The anti-discrimination provisions of the EEFD are limited to the sectors of employment and vocational training, yet still, the central anti-

⁵² See further: http://ec.europa.eu/eu_law/introduction/what_directive_en.htm, Retrieved 22/08/2013

⁵³ Cf. SEC (2008) 2180

⁵⁴ COM (1999) 565

⁵⁵ Cf. COM (1999) 565 ANNEX

discrimination norm has been extended to include positive obligations beyond direct and indirect discrimination, such as the protection against victimisation (Article 11) and harassment (Article 2.3) as well as implementing the obligation for reasonable accommodation (Article 5) at the work place. Furthermore, the anti-discrimination provisions exert vertical as well as horizontal effects and are hence applicable to the public employment sector as well as to private parties (Article 3).

Furthermore, broad framework conceptions have been supported by the DAP⁵⁶, including three two-year operational themes linked to the broader European anti-discrimination framework and the European Action Plan for Social Inclusion⁵⁷. Despite their lacking legally binding character, the strategic programs and mainstreaming efforts by the Commission appear to provide a normative frame of reference for European disability policies to enhance the consolidation of European efforts across different policy sectors on EU institutional and MS level. The ExpGov criteria 2 can be considered as being fulfilled, despite the sectorial limitation of the EEFD.

(3) Implementation and elaboration by lower-level actors with local or contextualised knowledge;

Several elements of the EEFD point at an open level of participation for lower level actors: Article 13 EEFD asks MS to promote social partner dialogue ‘with a view to fostering equal treatment’, while Article 14 EEFD shall encourage MS for dialogue with relevant non-governmental organisations having a ‘legitimate interest in contributing to the fight against discrimination’. Therefore, enhancing the legal standing of interest groups became a key requirement for MS within the framework. Furthermore, Article 9.2 EEFD allows alternative means of remedial action, in that legal entities having a legitimate interest may engage on behalf or in support of a consenting complainant in any judicial or administrative procedure touching upon obligations under the directive. The MS are also free to transpose the directive via collective agreements by social partners (Article 18 EEFD).

Interestingly, the Commission has created and financed transnational networks⁵⁸ and actively supported EU-wide NGOs working in the disability sector, for instance, working for consultation, policy making and application purposes⁵⁹. The Community Action program to combat Discrimination (2001-2006) allowed the Commission to finance a number of activities specifically against discrimination on grounds of disability, including network and partnership building, in collaboration with local actors to achieve higher involvement of disabled persons and

⁵⁶ COM(2003) 650 final

⁵⁷ The latter required MS to develop and report national action plans for social inclusion, which included disability (Flynn, 2011, p. 65).

⁵⁸ Such as the Academic Network of European Disability Experts (ANED);

⁵⁹ Such as the European Disability Forum and the European Network of Legal Experts in the Anti-Discrimination Field;

interest groups⁶⁰. Through the PROGRESS strategic program between 2007 and 2013 the Commission continued to invest in EU capacities and supported transnational networks and NGO's, inter alia in the anti-discrimination field⁶¹. The Commission also provided performance monitoring on EU law developments and created comparative data collecting facilities across MS⁶². Funded by the Commission, the EQUINET is a network of specialised national equality bodies, which independently promote equal treatment, assist victims of discrimination as well as monitor and report on discrimination issues⁶³. The Fundamental Rights Agency (FRA) was founded by the Commission in 2007⁶⁴. The new agency's primary task is to collect and analyse data on the protection of fundamental rights with reference to all rights in the Charter of Fundamental Rights of the EU, yet the FRA is neither empowered to examine individual complaints, exercise regulatory decision making powers nor carry out systematic and permanent monitoring of EU countries (cf. EC, 2012). Overall, the level of participation of local actors and stakeholders appears not only as quite permeable, but also to be actively supported and coordinated by the Commission, while these agencies did not receive substantial regulatory capacities.

(4) Continuous feedback, reporting, and monitoring;

Article 19 EEFD requests MS to report all relevant information on the status of implementation of the directive to the Commission every five years⁶⁵. The Commission then compiles a comprehensive report including viewpoints of social partners and relevant NGOs on the application and potential proposals for revisions of the directive to the European Parliament and Council. Furthermore, Article 17 EEFD requires MS to report on sanctions applicable for infringements of national provisions by 2003. For improving the coordination between the Commission and the MS, the Disability High Level Group⁶⁶, an 'expert group chaired by the Commission and gathering MS governmental disability experts'⁶⁷, was proposed by the Commission in 1996 and 'set up to monitor the latest policies and priorities of Governments concerning people with disabilities, to pool information and experience and to advise the Commission on methods for reporting' (EC, n.d.). Within the DAP (2003-2010) the Commission authored biennial reports on the situation of disabled persons in the EU based on impetus from NGOs and the DHLG⁶⁸. The DAP provided mandates for the DHLG and the disability inter-services group within the Commission, for monitoring progress domestically and im-

⁶⁰ See further COM(2003) 650 final

⁶¹ For the PROGRESS program, see further: <http://ec.europa.eu/social/main.jsp?langId=en&catId=327>; retrieved 12/08/2013

⁶² i.e. through the ANED (cf. Supra 58)

⁶³ See further EQUINET: <http://www.equineteurope.org/-About-us>; Retrieved 02/08/2013

⁶⁴ cf. Council Regulation (EC) No 168/2007

⁶⁵ Beginning from 2005

⁶⁶ Henceforth: DHLG

⁶⁷ See COM(2003)650 final

⁶⁸ Ibid.

plementing follow-up actions on the DAPs⁶⁹, however, these capacities alone appear to be insufficient to centrally gather data on MS' progress. There were no disability specific coordination mechanisms of national action plans or reform programs⁷⁰. In conclusion, continuous reporting, feedback and monitoring mechanisms are present, yet remain at an early stage of development with considerable potentials for more coherent and dynamic review structures.

(5) Established practices, involving peer review, for regular reconsideration and revision of rules and practices.

The periodic reporting every five years of the MS to the Commission provides an evaluation mechanism on the national implementation of the anti-discrimination framework and allows the regular assessment of possible revisions. Yet, the dynamic character of an institutionalised setting of exchanging practices among MS remained marginal⁷¹. As noted by the ANED, while the OMCs on employment and social inclusion do not adequately address disability matters, disability became more prominent in the Social Protection and Social Inclusion OMC (SPSI) (Rodrigues & Shima, 2009). The creation of several networks, such as the EQUINET and the DHLG reflect tendencies towards more open exchange platforms in connection with MS, NGOs and transnational network agencies. The DHLG provides a platform for the exchange of 'good practices'⁷², but has not developed into to a genuine peer review mechanism that would include the review of comprehensive national action plans. Therefore, according to the fifth criteria, recursive and iterative elements remain marginal, yet several platforms have promoted the exchange of practices and formulating inputs for possible revisions of the setting.

Step I: Conclusion – The EDG as an Experimentalist Governance setting?

Within the EDG setting as part of the wider anti-discrimination regime several features can be identified as experimental governance characteristics. These features include broad definitions of an anti-discrimination framework goal, implementation through local actors, active financial support and an open level of participation for NGOs and transnational networks as well as periodic reporting of MS to the Commission. However, the iterative and recursive elements of this framework remain marginal, monitoring mechanisms are rather incoherent and infrequent, the exchange of best practices or peer reviews through social OMCs remains irregular and additionally the sectorial scope of the framework remains limited to the employment sector. The EDG setting includes enhanced elements of ExpGov, which are largely set out within the conventional framework of the EEFD, upon which more experimental fea-

⁶⁹ Ibid.

⁷⁰ However, under the EES some Council guidelines do reference disability (2005/600/EC Annex).

⁷¹ The Commission observed that as of 2010 the exchange of good practices on disability remained low (Cf. COM(2010) 636 final).

⁷² Ibid.

tures of governance have been evolving. These can largely be attributed to activities by the Commission, for instance through supporting transnational disability networks.

Step II: Experimental Governance in EDG after the UNCRPD ratification

As the UNCRPD can be considered as a genuine Experimental Governance regime (De Búrca & Keohane, 2013), it is assumable that through the implementation of provisions of an experimentalist regime the European setting became more 'experimental'⁷³.

Similar to the legal nature of directives, the Convention demands the fulfilment of minimal requirements without specifically prescribing policy instruments to be implemented by the ratifying states. The outstanding changes in the EDG realised after 2008 are the ratification of the UNCRPD by the European Union and the newly introduced EDS 2010-2020 by the Commission⁷⁴. The EDS is the successor of the Disability Action Plan and aligned with the broader Europe 2020 agenda on full economic and social participation of people with disabilities⁷⁵. Central to the provisions of the EDS are the successful ratification and implementation of the UNCRPD⁷⁶ in the Union as well as its MS. The strategy aims to identify actions needed at EU level to supplement national activities and determines the mechanisms to be implemented by the UNCRPD ratification at EU level⁷⁷. In the EDS communication, the Commission reaffirms the importance of broad stakeholder involvement⁷⁸, NGO and transnational network participation⁷⁹ and puts emphasis on the support of periodically collected statistical data⁸⁰. Although, the EDS lacks legal bindingness and does not significantly alter the institutional setting of EDG as such, its strategic outline corresponds to the implementation and promotion of the UNCRPD as a 'key tool to facilitate cooperation and interstate learning and implementation and monitoring among MS' (Flynn, 2009, p. 70).

To what extent does the implementation of formal provisions of the UNCRPD enhance Experimentalist Governance within the EDG? Article 33 UNCRPD mandates the establishment of a focal point, independent coordination mechanisms and the involvement of persons with disabilities and their representative organisations. These governance related provisions, require coordination mechanisms firstly, within the EU institutions, and secondly *vis à vis* the MS.⁸¹

⁷³ Thus, this presumes a causal relationship between the independent variable (UNCRPD) and the dependent variable (EDG).

⁷⁴ Cf. SEC (2010) 1323 final; COM(2010) 636 final

⁷⁵ See Further COM (2010) 2020: 'At national level, Member States will need: [...] To define and implement measures addressing the specific circumstances of groups at particular risk (such as [...] people with a disability)'.

⁷⁶ COM (2010) 636 final

⁷⁷ SEC (2010) 1323 final

⁷⁸ Ibid, Chapter 3.3

⁷⁹ Ibid, Chapter 3.3.2

⁸⁰ Ibid, Chapter 4

⁸¹ SEC (2010) 1323 final

The governance provisions of Article 33 UNCRPD require the enhancement of openness for participation of relevant entities in a non-hierarchical process of decision making (ExpGov criteria 1). The UNCRPD includes a broad definition of disability to all segments of life and enhances positive aspects of anti-discrimination provisions in that the denial of reasonable accommodation constitutes discrimination (ExpGov criteria 2). The implementation and elaboration is conducted by the ratifying state parties and the EU, while including civil society actors and relevant stakeholders in the process (ExpGov criteria 3). The establishment of the EU's focal point within the Commission serves to monitor its own implementation and communicate with national focal points in reporting to the UNCRPD Committee. The internal arrangement between Commission, Council and MS established a coordination mechanism as well as an independent framework involving the Commission (Article 33.1, .2 UNCRPD). The yearly output by the DHLG concludes continuous feedback from a variety of stakeholders in the UNCRPD implementation process (ExpGov criteria 4). On the basis of these regular reports and evaluations, the UNCRPD may express recommendations for reviewing and revising rules and practices in the EU and its MS (ExpGov criteria 5).

Step II: Conclusion

In complying with Article 33 UNCRPD the EU agreed to transpose governance provisions that were induced into the existing EDG framework. These procedural provisions entailed remarkable features of ExpGov, in whose transposition the Commission became actively involved: In establishing the Community's focal point within the Commission; creating a coordination mechanism between the Council, the Commission and the MS; as well as in setting up an independent framework⁸², which enhanced reporting mechanisms and stakeholder participation for reviewing the UNCRPD implementation. Therefore, the UNCRPD ratification has led to the creation of institutions and coordination mechanisms previously underdeveloped in EDG and enhanced its ExpGov features⁸³. In several of these provisions, the Commission's position has been addressed directly, such as in becoming the EU focal point, while in others the Commission's action was more indirect, e.g. by enhancing features already existent in the EDG, such as supporting broad stakeholder involvement or broad definitions of disability following the social model and rights-based approach.⁸⁴

⁸² Cf. Güemes (2012), by proposal of the Commission

⁸³ In the accession of a regional organization to the UNCRPD the European Union ceded parts of its control capacity to a UN convention body. This ceding of regulatory control of a regional organization to another, superior body of international law, which then mandates the establishment of regulatory and monitoring bodies in the EU, in itself represents arguably a form of experimentalism.

⁸⁴ Including the organizations supported by the Commission.

Step III: The New Anti-Discrimination Directive Proposal⁸⁵

Notably absent from the EDS communication document is the Commission's proposal⁸⁶ for a new anti-discrimination directive in 2008, which was intended to significantly expand the anti-discrimination framework beyond the employment sector to other sectors of EU competence in light of the UNCRPD ratification. In an impact assessment document⁸⁷, the Commission discussed three scenarios for legislating on a revision of the anti-discrimination framework with reference to the UNCRPD, which is bound to be implemented in any case: A 'baseline scenario', continuing under the previous framework, an 'ambitious reinforcement scenario', implementing new framework legislation and an institutional 'overhaul', fully exploiting regulatory capacities. Regarding the lacking legal clarity of the first scenario and the risk of over-regulation and non-compliance of the third scenario, the Commission argued for pursuing an 'ambitious reinforcement' through a new framework directive.

The Commission argued that national differences in implementing the Convention may exacerbate differences in the levels of protection against discrimination on grounds of disability, which would hinder the effective application of the freedom of movement of people, goods and services⁸⁸. Furthermore, according to the Commission, a consistent framework ensuring legal certainty and clarity for disabled persons would be better secured through a horizontal directive rather than relying on the work of the legally non-binding UNCRPD Committee⁸⁹. A directive would serve as an 'effective and coherent' facilitator for MS to implement relevant parts of the UNCRPD. Consequently, the directive would conjoin reforming the existing disability framework with supporting the implementation of UNCRPD provisions. Building on the existent framework of the EEDF, the proposed directive would extend the sectorial scope of the EDG framework beyond employment to all areas lying within EU competence (Article 3.1). It further requires the establishment of national equality bodies (Article 12) on the grounds covered in the directive, including disability, and affirms that the denial of reasonable accommodation (Article 2.5) constitutes discrimination.

The proposed anti-discrimination directive would enhance the experimental aspects in the EDG, primarily through the sectorial expansion, which would also bring forth an increased institutionalisation of stakeholder involvement in new areas of the revised anti-discrimination framework, such as goods and services. Considering the denial of reasonable accommodation as discrimination broadens the central norm (ExpGov criteria 2) and the equality body

⁸⁵ In order to assess whether the UNCRPD is serving as a catalyst for the Commission to enhance experimental features in the EDG framework, it needs to be investigated what legislative changes in the existing instruments going beyond the internal arrangements are introduced in reference to the Convention, that is the directive proposal.

⁸⁶ This study assumes the verbatim implementation of the Commission's proposal.

⁸⁷ Impact Assessment SEC(2008) 2180;

⁸⁸ Ibid;

⁸⁹ Ibid;

requirement enhances coordination, independent reporting, local actor involvement and alternative remedial mechanisms for complainants (ExpGov criteria 1; 3).

In parallel to the proposal, the Commission set up a governmental expert group⁹⁰ on anti-discrimination in August 2008, to enhance cooperation and exchanging good practices between national bodies, and to develop national or European anti-discrimination measures. The governmental expert group is chaired by the Commission and regularly meets with civil society organisations. It can be consulted by the Commission on any matter relating to anti-discrimination policies⁹¹. The set-up of the GEG enhances flexibility and mutual learning aspects within the EDG and thus ExpGov criteria 3 and 5. However, substantial peer review or benchmarking mechanisms going beyond the monitoring of the MS compliance framework of minimum requirements by the Commission are still not being initiated.

Conclusion: Experimental Governance Analysis

By applying Experimental Governance theory to the EDG, the previous chapter has 'mapped' the formal developments of the EDG regime, which has been found to have become to some extent more experimental overall through the UNCRPD implementation. Emerging policy activities in terms of innovations in disability governance can be predominantly attributed to the Commission in regard to its central role in the negotiation, advancing the UNCRPD implementation through the EDS, acting as a focal point in Community matters, actively creating agencies and organisations, setting up a governmental expert group on anti-discrimination, formulating broad strategies, and authoring policy initiatives. The correlation of the increase of experimental features and the activities of the Commission, point at a strong interest of the Commission in advancing experimental features in the EDG setting. However, the extent of genuine iterative elements has been found to be rather limited, for instance through the absence of peer review mechanisms or an OMC in the disability field⁹². Before discussing explanations for this and assessing for what intended outcomes these means may have been applied for, the institutional relationship dynamics and acts of delegation under which these experimental features were advanced shall be investigated.

⁹⁰ Decision by the Commission to set up Governmental Expert Group C(2008)3261 final; see also COM(2008) 420, accompanying communication to the framework directive proposal;

⁹¹ The GEG has published several reports, however, none yet specifically on disability.

⁹² These limitations of experimentalism could either be interpreted as restrictions of regulatory capacity by the Commission to create such mechanisms in path-dependent settings, which may be in conflict with the MS. Also, this approach may reflect a strategic reasoning in which the Commission benefits from a decentralised experimental setting without delegating substantial capacities and autonomy to other actors. The discussion in Chapter 6.1. will come back to this point.

5.2. Principal Agent Analysis

To what extent has the position of the European Commission in the relationship with the EU Member States in the EDG setting changed through the UNCRPD ratification? (Sub RQ II)

From a principal agent perspective the institutional dynamics between the Commission and the MS in EDG reflect a contractual relationship that seems to have undergone changes through the UNCRPD accession process.

(1) Pre-UNCRPD ratification phase

In the EDG framework setting before the UNCRPD, the central EEFD was legislated through the community method. In this mode, the MS have delegated legislative initiative capacity for the Commission to act specifically on anti-discrimination (including disability) matters through Article 19 TFEU. Thus, the Commission assumed the role of an executive agent, i.e. in initiating policies to the principal Council⁹³ specifically on anti-discrimination or reporting on policy implementation. This constellation can be considered as a starting point of the PA relationship.

(2) Negotiation process of the UNCRPD

In early 2003 the Commission issued a Communication⁹⁴ on the upcoming UNCRPD, which affirms the Commission's 'support for this instrument and explains why the European Community's active participation in its development is 'indispensable'⁹⁵. Consequently, the Commission recommended the Council to award a negotiating mandate to the Commission, arguing that a significant part of the Convention concerns anti-discrimination, a Community competence on grounds of Article 19 TFEU⁹⁶. This provision has enabled a broad level of interpretation for the Commission and became the central legal reference for the negotiation mandate⁹⁷. The Commission was authorised by the Council in May 2004 to negotiate on behalf of the Community⁹⁸. Through the negotiation mandate the Commission has been awarded with an unprecedented competence as an agent in representing and coordinating the views of the Community and supporting the compatibility of the UN and EU disability regimes. In relation to the negotiation of the UNCRPD, the Council delegated the negotiation capacity to the Commission, which acted as a quasi-trustee for representing the EU's interests. The Commission was furthermore enabled to play a coordinative role for the positions of the MS. Therefore, the Commission as an agent gained considerable degrees of autonomy through the negotiation mandate of the UNCRPD.

⁹³ Which is the actual addressee of Article 19 TFEU

⁹⁴ COM (2003) 16

⁹⁵ COM (2003) 650

⁹⁶ Cf. *ibid.*;

⁹⁷ While the other was Article 114 TFEU, concerning the functioning of the internal market;

⁹⁸ Cf. Council Decision No. 15540/09, 26/11/2009

(3) Ratification process of the UNCRPD

In the novel triangular constellation between the UNCRPD regime, European Union and MS, the UN regime became a principal to the signatory parties from the ratification phase onwards. The MS as well as the EU in relation to disability governance became agents for giving legal effect to the Convention's provisions. Thus, at the same time, while the Commission remained an agent to the principal MS, both the EU and the MS have submitted themselves by force of the ratification to become agents to the UNCRPD regime acting as a principal. The Code of Conduct (CoC) for the UNCRPD entails several novel coordination settings between the Commission, the Council as well as the MS in the framework of an international human rights body: It sets out internal arrangements for the preparation and participation in meetings of the bodies created by the UNCRPD and states that mechanisms for coordination are to be established between the Union and the MS as well as the Commission Directorate Generals and the Union institutions based on existing facilities⁹⁹. Common positions shall be coordinated within the 'competent Council Working Group', which includes the MS as well as the Commission and becomes active especially 'in cases where the respective competences are inextricably linked'¹⁰⁰.

The framework set up of the independent mechanism as required by Article 33.2 UNCRPD was proposed by the Commission and includes besides the Commission itself, the European Parliament's Petitions Committee, European Ombudsman, the EU Agency for Fundamental Rights (FRA) and the European Disability Forum (EDF) (cf. Güemes, 2012). In that way, the independent framework institutions are acting under existing mandates, while no legal changes or additional resources became necessary. Through the internal arrangements of the CoC the Commission has been assigned with several competences¹⁰¹: Becoming the focal point for the Union in Community matters: becoming part of the competent Council Working group and presenting the outcomes in UNCRPD meetings; reporting on behalf of the Union to the UNCRPD Committee; and lastly becoming part of the Article 33.2 UNCRPD independent framework in the EU¹⁰². In the implementation process the Commission has thus become a 'double' agent towards two principals, firstly in relation to the MS, and secondly as part of the EU being an agent to the UNCRPD. In the latter case, the Commission could assume a central representative and coordinative role¹⁰³ with increased regulatory capacities in relation to its co-agent MS in relation to the UNCRPD.

⁹⁹ 2010/C 340/08

¹⁰⁰ *Ibid.*: 6.c

¹⁰¹ The Commission may hold coordination meetings with national focal points in matters under shared competence (par. 11d); also it prepares the EU report (par. 12c), avoiding a duplication of monitoring and reporting.

¹⁰² The independent framework includes institutions supported by the Commission by its own proposal.

¹⁰³ The Commission could arguably convince the Council, that without delegating coordinative capacities to the Commission, the Council would face considerably higher transaction costs in coordinating and communicating common positions and collecting implementation information.

(4) Post-UNCRRPD ratification phase

As stated earlier in the ExpGov analysis, the Commission has created and coordinated a governmental expert group for exchanging anti-discrimination experience of MS, and supported private bodies, NGOs and transnational networks for consultation, policy making and application. These activities¹⁰⁴ reflect a constellation in which the Commission assumes a principal position towards subsidiary actors¹⁰⁵ as it has delegated capacities to non-majoritarian institutions acting as agents. The Commission has advanced this delegation process through a variety of strategic programs, such as PROGRESS, the DAP or the EDS. It has thus interpreted its competences for decision making¹⁰⁶ in a way that allowed the creation of these bodies, without breaching its agency mandate to the principal MS. In regard to the UNCRRPD, the implementation progresses of the EDS and the UN Convention are regularly discussed at the DHLG, which was proposed and is chaired by the Commission, and includes representatives of the MS and their national focal points, disability organisations and stakeholders. In the DHLG, the Commission thus acts as a principal coordinator for participating agencies it has created, as well as other independent stakeholders.

The new framework directive proposal follows the Community method on grounds of Article 19 TFEU. This implies an adherence to the conventional principal – agent relationship between the Council and the Commission, in which the Commission aims to sustain the position of an executive agent with the right for legislative initiative. Substantially, the sectorial expansion of the framework would lead to an enhancement of the broadness of the Commissions existing capacities in relation to the principal MS, with regards to authoring reports, monitoring and overseeing the implementation in broader policy sectors, including goods and services.

Conclusion – Principal-Agent Analysis

Applying a PA model to the UNCRRPD implementation process and the EDG institutional setting has shown in what way the Commission, acting as an executive agent to the MS, has significantly enhanced its regulatory powers. This has been done without breaching the contractual agreement by ‘shirking’ the principal (cf. Hawkins et al., 2011). Instead the Commission has gradually extended its regulatory capacities by re-interpreting its agency mandate according to its preferences: Firstly, through requesting the negotiation mandate to assume a quasi-trustee position for the representation of the Communities interests to the UNCRRPD; secondly, in the coordinative role in the internal arrangement *vis à vis* the Council as co-agents *vis à vis* the UNCRRPD regime being a principal; and thirdly, in creating or supporting

¹⁰⁴ The creation of these agencies has taken place independently from the UNCRRPD, yet the point is made with regard to the utility of these agencies for the Commission in the EU implementation process of the UNCRRPD.

¹⁰⁵ Governmental representatives in the GEG, as well as independent non-governmental actors;

¹⁰⁶ See also, the references of Article 19 TFEU in C(2008)3261

agencies as a principal within the provisions of Article 19 TFEU mandated by the MS and integrating these agents into the independent framework and monitoring meetings in the DHLG reporting on the UNCRPD implementation progress of the MS. The framework directive proposal reflects a conventional PA relationship of the community method. This can reflect by implication an interest of the Commission to adhere to this particular legislative agency relationship, which was assumedly expected by the Commission to become enhanced through transposing the horizontal directive proposal¹⁰⁷.

5.3. Counterfactual Analysis: A Non-EU Ratification Scenario of the UNCRPD

Assuming the non-ratification of the UNCRPD by the EU and given that all MS would have fully ratified the convention, what would be different from the status quo?

In a non-EU-ratification scenario¹⁰⁸, the material provisions of the UNCRPD would equally be given effect in the signatory MS. Formally, the MS, which have ratified the Convention, would still be required to comply with the governance provisions in setting up national focal points and independent monitoring mechanisms, alter incompatible legislation and include disability actors in consultation and law implementation. In this case, however, the Commission could only have assumed an informal position in coordinating MS, while its legitimacy to do so would solely rely on the consent of the MS. In regard to national implementation, the Commission would not be in the position to act as the EUs focal point in community matters, coordinate national focal points and report on implementation progress. The EDS would remain the main strategic tool for facilitating the UNCRPD implementation. However, it would lack the Commission's direct regulatory capacity in overseeing the UNCRPDs implementation by the MS. As stated earlier, respective national implementation processes could take up different paths, potentially exacerbating existing differences in disability policies, statistical indicators and legal definitions¹⁰⁹. Beyond the procedural limitations, the Commission would lack an increased normative point of reference¹¹⁰ through a UN human rights convention external to the EU and the EU Charter¹¹¹, which can serve as a strategic device for justifying the extension of framework provisions in the field of anti-discrimination in light of 'fundamental rights provisions' (cf. Bell, 2002).

Arguably, the non-ratification of the UNCRPD would not have equally created momentum for political action for the Commission as an EU ratification scenario¹¹². In the former case, the

¹⁰⁷ In Chapter 6 this assumption shall be explained in more detail.

¹⁰⁸ By implication from the influence of the Commission in the negotiation process (cf. De Búrca, 2010a), through the assumption of its absence in the negotiations representing the EU's interest and coordinating the MS positions, the UNCRPD could likely have taken a substantially different form, which implies possible incompatibilities with the EDG setting. Yet, this scenario assumes the UNCRPD to remain unchanged as a black box to the EU.

¹⁰⁹ Ibid.

¹¹⁰ Cf. COM(2010) 636 final, p. 3

¹¹¹ The Charter on the fundamental right references disability in Articles 1; 21; 26

¹¹² The common reference of the UNCRPD transposition in the EDS supports this assumption.

Commission would not be able to equally garner support or compliance among the MS in adopting new provisions, such as adopting a new framework directive. This momentum could be fostered through framework strategies and agenda setting competences, such as the EDG, whereas the Commission would be external to these implementation processes in a non-ratification scenario. Despite lacking a direct link between the UNCRPD and the new anti-discrimination directive draft, the proposal's provisions intend to significantly advance the EDG in direct reference to the UNCRPD¹¹³. Without the EU ratification of the UNCRPD, the Commission would still be able to propose a new framework directive in accordance with the UNCRPD to support and facilitate implementation of the Convention in the MS, yet it would lack the direct implementation mandate and the normative reference point of human rights obligations to be integrated in the EU legal hierarchy to extend the anti-discrimination framework beyond employment and occupation.

Applying the PA model and by implication of the counterfactual, these gained competencies of the agent *vis à vis* the principals would thus be lacking without EU-ratification. Furthermore, the European Union would not subsume itself as an agent in the field of disability policies to the principal UNCRPD regime, implying that the Commission could not enhance its agency mandate in relation to the MS in the UNCRPD negotiation, ratification and implementation processes or the EDG in general. Additionally, the Commission would not have been able to increase its competencies in relation to its principals in the internal institutional arrangement, in assuming significant coordinating and representation functions. With regards to experimentalist governance features, the Commission would lack the destabilising effect of the novel multi-level adjustment to a UN regime for reinterpreting contractual arrangements, reporting and monitoring capacities, acting as a focal point and within the independent framework, as well as lacking a direct point of reference, e.g. for broad problem definitions. Thus, the EDG would entail significantly less ExpGov features, in which the Commission would likely not have been equally directly involved because lower regulatory influence.

Concluding from this non-ratification scenario, the added value for the Commission is found to be the facilitation of UNCRPD implementing as well as incorporating the Conventions broad material scope and institutional features into the EDG setting. The ratification could thus contribute to a stronger convergence of national disability policies through an EDG framework enhanced by UNCRPD provisions. Consequently, a main rationale for the Commission in supporting the EU ratification appears to be the establishment of a regulated level of institutional cooperation within the anti-discrimination framework, on one side as well as enhanced regulatory capacities in relation to the MS' UNCRPD implementation (and possibly beyond) on the other.

¹¹³ See: Impact Assessment SEC(2008) 2180

6. Discussion

Why has the European Commission assumed a proactive role in the accession and implementation processes of the UNCRPD in the European Union?

In other words, this discussion ascertains plausible rationales of the Commission for its active behaviour in the UNCRPD negotiation, ratification and implementation, regarding both processes and outcomes as separate, yet interrelated, motivating factors.

6.1. Processes

The procedural objective for implementing the UNCRPD in the Union and its MS is described in the CoC Annex document 'with a view to appropriate monitoring and reporting' to 'strengthen and coordinate capacities at both national and Union levels to collect and analyse appropriate information' where necessary¹¹⁴. The analysis of the institutional reconfigurations induced by the UNCRPD has shown that this process has been procedurally beneficial for the Commission, in gaining regulatory capacities through the delegation of powers by the Council.

Although there are apparent intersections and possibly overlapping provisions of the UNCRPD and the EDG regime¹¹⁵, a state of power play between the two regimes has been prevented by the active participation of the Commission in ensuring the compatibility between the two regimes in the negotiation process, as well as through the internal arrangement of the CoC. Without EU ratification, the parallel provisions of the UNCRPD and the EDG framework, both being implemented in the signatory MS, could have led to frictions or duplication of regulatory provisions implying incompatibilities with the EDG framework to some extent. Therefore, the Commission would have been side-lined to an informal actor in the UNCRPD implementation process of the MS. This could have had the possible consequence for the Commission to lose powers in the in the EDG itself, as the UNCRPD could have led to a possible re-nationalised perspective on anti-discrimination policies for persons with disabilities.

Within the EDG regime, the activity of the Commission has pointed at a power struggle as an agent in relation to the principal MS¹¹⁶. Why has the Commission behaved like that?

According to Pollack (2003, p. 21), the Commission acting as an executive agent, firstly, can develop credible expertise in areas where the principal has limited information, secondly, it can put issues on the EU agenda, thirdly, it can lobby for its interests, and fourthly, it can

¹¹⁴ UNCRPD Code of Conduct Annex (2010/C 340/08)

¹¹⁵ For instance, in addressing discrimination of persons with disabilities through national policy changes and including similar monitoring and reporting obligations;

¹¹⁶ The application of the PA model has shown how the Commission acting as an (executive) agent has repeatedly re-interpreted the contractual arrangement with the Council in light of the UNCRPD according to its preferences in such a way that increased its own power to exercise more autonomy from the principal.

'shirk' the principal by breaching delegated tasks. Rein and Schön (1993) add to this the agent's potential for taking ideational action, through shaping a policy discourse around a specific policy problem for a solution in line with the interests of the agent.

Concerning the first point made by Pollack (2003), the Commission has gained expertise and informational advantages by the broad involvement of stakeholders as well as actively supporting and coordinating agencies and transnational networks in the anti-discrimination field. Through the broad consultations on its strategic programs and draft directives, the Commission garnered support from civil society organisations and other stakeholders in the disability field and also ensured that policy proposals corresponded with the needs of disabled persons. Thereby, the Commission could acquire credibility and legitimacy for taking legislative action. Following these initiatives and development of credible expertise, the agent (Commission) convinced the principals (MS) to delegate responsibilities related to the UNCRPD implementation to the Commission¹¹⁷.

Concerning the second point, the Commission can make use of formal agenda setting where it has the exclusive right of initiative, as well as use its informal right to propose policy priorities in high-level debates, communications and strategic programs (Pollack, 1997; pp. 124)¹¹⁸. The Commission seems to do this to gain influence and discursive power in a particular policy area (cf. De la Porte. 2011).

In the UNCRPD implementation process, the Commission has taken discursive action largely through communications and strategic programs, in institutionalised working groups, requesting the negotiation and conclusion mandate for the EU in reference to treaty provisions¹¹⁹ and addressing MS through documents from institutionalised or *ad hoc* intergovernmental working groups, such as the DHLG, the GEG or the COHOM. With regard to point 3, the Commission has thus lobbied for its interests by taking discursive action in reference to human rights provisions of the Convention and applying expertise by involving stakeholder experience in consultation processes. Regarding the fourth point by Pollack, what the Commission as an agent has clearly avoided, however, is breaching the institutional relationship and mandate by the principals. This would have put the Commission's credibility at stake, which could have resulted in a more restricted agency mandate in the participation of the UNCRPD implementation. Instead the Commission has gradually expanded its mandate in line with its preferences in this sensitive policy field, which can be interpreted as a form of 'slippage'

¹¹⁷ For instance through delegating the negotiation mandate and the focal point mandate for Community matters;

¹¹⁸ Pollack further argues that where the Commission enjoys the exclusive right of initiative it 'is easier to adopt than to amend a Commission proposal [...] differences in member state preferences can be effectively exploited, and [...] member states are dissatisfied with the status quo and impatient to adopt a new policy' (Pollack 1997, p. 124). Informal agenda-setting influence depends on 'member state uncertainty regarding the problems and policies confronting them and on the Commission's acuity in identifying problems and policies that can rally the necessary consensus among member states in search of solutions to their policy problems (ibid, p. 128).

¹¹⁹ Articles 19; 114 TFEU

(Hawkins et al., 2011, p. 4). Thereby the Commission could shape policy discourses around the specific problem of disability policies in reference to the UNCRPD implementation. This has advanced ideational action in the sense of Rein & Schön (1993) through the reference to normative provisions of the social model of disability and a human rights-based approach. Ideational action seems to have served as a persuasive factor for the Commission to convince the Council to consider delegating authority to the Commission or getting support in legislative processes¹²⁰.

In regard to the Council acting as a principal to the Commission, two logics for delegation as efficiency and credibility (Franchino, 2002; Majone, 2001) appear plausible. The institutional reconfigurations in delegating the negotiation mandate to the Commission and enhancing its coordinative roles in the internal arrangement, point at a reduction of transactional costs and thus follow the logic of efficiency. Allowing the Commission to involve and support transnational agencies and ensuring broad stakeholder involvement in the accession process to a human rights convention, also supports the logic of credibility for the MS in delegating powers to the Commission to gain reputational benefits¹²¹.

With regard to the experimental governance analysis, why has the Commission supported ExpGov features in the EDG?

To ascertain possible rationales for introducing experimentalism in governance settings and legislation, a broader view on structural influences of European social policies needs to be taken into account. Eberlein and Grande (2005) have described the structural limitations of the European regulatory state, as while there remains a rising need for uniform European rules, the EU lacks formal powers and institutional capacities needed to establish appropriate rules as well as to monitor and enforce compliance and transposition thereof by the MS. As a greater centralisation of formal powers in European social policies has been barred politically, a regulatory lacuna has emerged (ibid). Scharpf (2002) coined this discrepancy the 'dilemma of Social Europe'. To attenuate this lacuna, alternative routes have been sought to close this existing regulatory gap, including the emergence of the OMC and the European Employment Strategy¹²² (Eberlein & Grande, 2005).

¹²⁰For instance, by indirectly referring to possible reputational costs for the EU and its MS in case of non-participation or non-compliance with the UNCRPD internationally as well as in civil society;

¹²¹Vice versa, the Commission could adjust its actions to the logics of the principal Council, by lobbying for enhanced mandates through emphasising its regulatory and monitoring potentials as well as considerable credibility effects through broad civil society support.

¹²²In response to the challenges of 'Social Europe', several EU activities taken up since the Treaty of Maastricht in 1992 reflect a distinctive shift away from traditional, top-down command and control governance to more flexible and participatory approaches, such as the European Employment Strategy or the Open Method of Coordination (Trubek & Mosher, 2001; Mosher, 2003). These new modes of governance have emerged in EU institutional practice for several reasons, including 'the need for additional expertise to regulate a complex area of policy-making', 'the need to take "some" action even where law-making competences are unavailable or difficult to use', as well as 'the wish to improve the implementation of EU law' (De Witte, 2012, p. 70).

Thus, it appeared as evident that centralised EU legislation and regulation on anti-discrimination and disability would risk to be met with reluctance and that monitoring compliance would exceed the administrative capacity of the European Union¹²³. These regulatory limitations seem to have been mitigated through advancing experimentalist governance, which has been actively pursued by the Commission.

According to ExpGov theory (cf. Sabel & Zeitlin, 2011a; 2008), advantages for the Commission to deploy experimentalism over a hierarchical (or intergovernmental) setting in EDG include¹²⁴: An improvement of institutional capacity to accommodate the diversity of the disability concept as well as diverse anti-discrimination policies on disability; secondly, enabling a mechanism for recursive learning from local experimentation to increase the possibility of policy success by enhancing the epistemic quality of policy making; and, thirdly, as the means for achieving set goals are purposively provisional and revisable, this iterative rule-setting mode is mainly based on soft-law mechanisms and able to avoid cases of non-compliance while the EDG provisions provide considerable degrees of freedom for MS yet based on a common framework of minimum requirements¹²⁵.

The implementation of procedural experimentalist features can be conceptually considered as acts of delegation from a principal actor to lower-level agents, and thus seem to follow the same two logics for PA delegation: efficiency and credibility (Franchino 2002; Majone, 2001). The logic of efficiency can thus explain the Commissions experimentalist activities in regards to administrative efficiency: By establishing experimentalist governance features the Commission could attenuate administrative overload through (re-)distributing regulatory capacities on complex political issues to lower-level actors, thus acting according to an administrative self-interest rationale. Collecting information from disability networks and garnering stakeholder support constitutes also a reduction of transactional costs for legislative proposals as well as monitoring implementation. Thus, the outcome performance of policies through review, policy learning and stakeholder participation can be enhanced.

The logic of credibility can explain the discursive value of civil society and stakeholder involvement as well as the creation of anti-discrimination networks, in order to enhance both expertise and legitimacy by involving independent actors. The factor of efficiency may also explain the limitations of the experimentalist features, as the progression of experimentalism appears to have slowed in approaching a state in which implementing more features of experimentalism seems not to be beneficial for the Commission (that is when transaction and delegation costs surpass regulatory benefits) or in which progress has been blocked political-

¹²³ These benefits have been presented in Chapter 3.1.

¹²⁴ The advantages introduced in the ExpGov theory chapter 3.1. are applied here to findings of the analysis.

¹²⁵ This level of flexibility implies that this iterative rule-setting mode is mainly based on soft-law mechanisms may adjust to cases of non-compliance rules and provisions may be altered without changing the entire framework.

ly¹²⁶. The level of political credibility may also have reached a sufficient point, where the amount of implemented resources, e.g. for institutionalised stakeholder involvement, would exceed the utility of an increase of credibility.

The new framework directive could have paved the way for substantially improving the anti-discrimination framework, which has yet failed until now. The analysis of the directive proposal has nevertheless revealed two factors: Firstly, despite the enhancement of experimentalist provisions, the level of experimentalism has been limited by the Commission in order to avoid ceding substantial control and regulatory capacity in this working field, as well as by the reluctance of principal MS in the Council. Secondly, the Commission has strongly adhered to the Community method of a framework directive, for sustaining its central discursive and more importantly legislative initiative powers and to affirm its standing in the anti-discrimination field in relation to the MS.

The failure of the new anti-discrimination directive, a formal tool for harmonisation, points at more informal mechanisms for harmonising disability policies in the EU to be supported by the Commission in the future¹²⁷. Experiencing these regulatory limitations in general, the Commission seems to actively promote common regulatory concepts, regulatory networks and sharing of good practices (Eberlein & Grande, 2005; Majone, 2001), while trying to avoid non-compliance by too restrictive provisions¹²⁸. Through the OMC the Commission is able to act as an informal agenda setter to indirectly influence the direction and topic the OMC discussions would pursue (cf. de la Porte, 2011). However, thus far, the SPSI only marginally touches upon disability and anti-discrimination. Arguably, a case for an anti-discrimination or disability specific OMC might become more probable in the future in view of the rejection of the new framework directive and the implementation requirements of the UNCRPD. A preferred governance setting for the Commission could arguably be considered as an enhancement of the overall static framework of minimum requirements in tandem with more dynamic informal mechanisms, such as the OMC and peer review, to allow MS more flexibility and policy learning within a common framework setting of minimum requirements.

In conclusion of the procedural debate, the application of a PA model could provide explanations why the Commission has aligned its activities and interests gradually to the UNCRPD regime as an external legitimising factor, by actively reinterpreting (and not breaching) contractual arrangements with the MS. The ExpGov debate has outlined the Commission's efforts to attenuate regulatory gaps in European social policies in the disability field through experimenting on alternative means and flexibility to a significant extent. Without ceding sub-

¹²⁶ As seen in the failure of the new directive.

¹²⁷ Such as the Governmental Expert Group on Anti-Discrimination

¹²⁸ The same logic applies in the EDG.

stantive autonomous regulatory powers to its agents and promoting the extension of the anti-discrimination framework, the Commission appears to adhere to more conventional command and control features¹²⁹, albeit with some degrees of flexibility, rather than resorting to fully experimentalist features. Thereby, in the process of the EU accession to the UNCRPD the Commission could sustain its executive powers and assume novel regulatory capacities and coordinative functions¹³⁰.

6.2. Outcomes

Having discussed the procedural reconfigurations within the EDG, what policy outcomes¹³¹ seem to be favoured by the Commission in deploying these ‘experimental’ means and increasing regulatory capacities in light of the UNCRPD¹³²?

‘By signing the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) the EU and all its EU countries have committed themselves to create a barrier-free Europe’ (EC, 2013).

This statement by the European Commission on the inauguration of the EDS, which has to a large extent been designed to facilitate the UNCRPD conclusion, appears to conflate a central functional aspect about the UNCRPD transposition process to the EDG: The statement defines the UNCRPD ratification as a normative commitment in terms of creating a ‘barrier-free Europe’ with the policy objective of removing these barriers. Interestingly, the policy objective of barrier-removal has already been coined in the title of the Commission’s communication ‘Towards a Barrier Free Europe for People with Disabilities’¹³³ adjacent to the EEDF of 2000. This barrier-removal perspective was reaffirmed in 2010 by the Communication ‘European Disability Strategy 2010-2020: A renewed commitment to a Barrier Free Europe’. This notion is accompanied by the EU’s ‘rights-based approach to disability’, giving ‘a renewed impetus towards the rights-based equal opportunities approach to disability’¹³⁴, both at MS and at Community level, according to which disabled persons are considered as full subjects that enjoy the same legal status and rights as other citizens.

¹²⁹ For instance, through the promotion of a new framework directive, rather than introducing more flexible and iterative elements of policy experimentation;

¹³⁰ The novelty of the UNCRPD accession and the unprecedented constellation of the two international regimes, might pave the way for a stronger involvement of the EU in UN matters, such as acceding to other conventions or human rights treaties. The analyses have shown factors which have proven to be beneficial for a EU accession in disability matters, which might not be given for other areas. Nevertheless, this poses intriguing questions for further research with regards to the constitutional relationship and future governance developments between the EU, its MS and the UN.

¹³¹ Another reason for supplementing an outcome perspective besides a procedural discussion relating to the EDG is the significance of a bias towards output legitimacy in European policy making: “What differentiates the EU from other governance systems is that a large part of this public rulemaking is indeed goals-based – in other words, “output” based. [...] this characteristic means that the democratic legitimacy of the EU is partially achieved through “output” rather than “input” legitimacy (Verdun, 2012)’. This remark aligns with the significance of common problem definitions and framework policy goals for ExpGov set-ups.

¹³² This part of the discussion addresses outcome dimensions of the Commission’s activities to supplement the procedural debate, yet it is confined to lines of arguments on overt policy objectives extracted and interpreted from official documents, which may not reflect underlying intentions or covert motives within the Commission’s Directorate Generals. (Cf. supra 26)

¹³³ COM (2000) 284 final;

¹³⁴ COM (96) 406

This political action is primarily defined as a 'barrier removal' in line with the social model of disability. Thus, it identifies these external barriers to be subject to possible political intervention. This reasoning appears to be similar to the predominantly negative integration rationale of the Single Market of 'barrier removal' in correcting market inefficiencies (cf. Stein, 2003) rather than pursuing genuine human rights objectives. Therefore, these statements appear to appropriate the UN convention as a reference point in legitimising political action in light of a (human) rights-based approach and the social model of disability.

As arguably '[the] origins of the European Community lie in the furtherance of principles not of human rights, but of market economy' (Lawson, 2009, p. 82) and as the existing framework directive on equal treatment is limited to employment and vocational training, the anti-discrimination regime for persons with disabilities appears to be emerging from economic rationales rather from human rights concerns exclusively. Bell (2002) suggests two poles for describing the development of European anti-discrimination law: Firstly, a market integration model, whose primary goal is economic integration with a limited case for EU social policy only intervening when necessary 'to support and sustain the smooth functioning of the common market'; Secondly, the 'social citizenship' model considers social policy as a genuine policy field holding fundamental rights independently from economic policies.

A European 'social citizenship' model on equal treatment and anti-discrimination seems to find support through the disability provisions in the EU Charter of Fundamental Rights introduced in 2009¹³⁵. However, the highly set normative provisions of the Charter alone lack a legally binding character and do not prescribe concrete policy action for disability policy. Still, it provides a normative foundation and point of reference upon which activities of the Union and its MS in the field of disability may be justified upon.

In light of the 'market integration model' (cf. Bell, 2002), anti-discrimination provisions appear as a market intervention to correct labour market inefficiencies (cf. Stein, 2003). Through a discriminating decision, an employer may reject an applicant with a disability, solely judging by the criteria of the applicant being somehow 'disabled'. The employer is thus wrongly assuming the applicant to be less productive, while in fact the person may be equally capable of performing tasks relevant for the position like a 'non-disabled' applicant. From this perspective, the ignorance of recognising the added value of the work force of a person with disabilities constitutes an employment market inefficiency that is to be corrected (cf. *Ibid*).

In the EDS communication, the Commission affirms that:

¹³⁵ 2000/C 364/01: Article 20 of the Charter provides the general principle of equality before the law, while Article 21 recognizes disability as one of the grounds on which discrimination is prohibited, while not being limited to a particular context, such as employment. Article 26 stipulates that the "Union recognizes and respects the rights of persons with disabilities to benefit from measures to ensure their independence, social and occupational integration and participation in the life of the community".

“EU action will support and supplement national efforts to: analyse the *labour market situation of people with disabilities*; fight those *disability benefit cultures and traps* that discourage them from *entering the labour market*; help their *integration in the labour market* making use of the European Social Fund (ESF); develop *active labour market policies*; make workplaces more accessible; develop *services for job placement, support structures and on-the-job training*’ (emphasis added)¹³⁶.

This quotation is followed in the same document by the ‘key objective’ to ‘[e]nable many more people with disabilities to earn their living on the open labour market’¹³⁷. A statement from the DAP communication affirming that ‘greater attention is being paid to the provision of work-related benefit incentives to make work pay and to overcome the effects of ‘benefit traps’¹³⁸, aligns with the above. These statements reflect a strong emphasis on perceiving progress in disability policies as based on a market integration rationale in activating labour force of persons with disabilities through anti-discrimination and accommodation provisions.

According to Calmfors (1994), Active Labour Market Policies (ALMPs) include measures for guidance and counselling, training and education and job placement. The EDS quotation references all types of these measures, also in explicit reference. As the above statements have been formulated in different strategic programs of the Commission before and after the UNCRPD ratification, and the latter has been written in direct reference to the UNCRPD, this reflects a persistent interest of the Commission for enhancing activation policies and employability measures for persons with disabilities that seems to be compatible with, and enhanced by, the provisions of the UNCRPD.

The activation paradigm¹³⁹ serves as an important element for inclusion strategies for socially vulnerable persons in the EU. These strategies attempt to overcome detrimental effects of social exclusion and barriers for social interaction mainly through work integration and job creation (EIM, 2002). The term ‘activation’ itself is firstly used to describe the activation on an individual level in providing incentives for taking up new positions or training to raise his or her employability and preventing of entering ‘benefit traps’¹⁴⁰. Secondly, it additionally refers to efforts aimed at ‘activating’ welfare regimes away from passive welfare structures, to diversified measures more adapt to modern challenges of flexible labour markets to increase working productivity, provide flexible social security and lessen the strains of public spending (ibid). The new paradigm demands the transformation from long-term dependency on passive welfare benefits towards active market participation with positive effects on the economic situation of the beneficiaries, self-esteem and the overall economic situation.

¹³⁶ COM(2010) 636, Chapter 4

¹³⁷ Ibid

¹³⁸ COM(2003) 650 final

¹³⁹ In the 1994 Essen Council Meeting, then Commission president Jacques Delors presented a new perspective of employment policies that developed eventually towards a paradigm shift away from the supply side focus of unemployment reduction towards actively promoting employment through improving employability, capacity building and social partnership in Europe, which has later been encapsulated in the European Employment Strategy (Weishaupt, 2011).

¹⁴⁰ COM(2010) 636 final

Active Labour Market Policies (ALMPs) are a centrepiece of the EES ensuring the paradigmatic transfer from passive income support systems to active labour market integration (Kluve, 2010). ALMPs can be considered as policy interventions to the labour market, which are aimed at enhancing employment market efficiency and correcting disequilibria through providing incentives towards or against particular patterns of employment behaviour (EIM, 2002). Most of the ALMPs, however, remain embedded in national employment strategies, within a decentralised and subsidiary setting. The scattered organisational structures and diverse statistical measurements complicate evaluation, monitoring and reporting processes on the effectiveness of implemented ALMPs, especially in regard to disability employment (Kluve, 2010, p. 905). Lacking sufficient and reliable data and common analysis mechanisms forestalls coherent impact analyses, as well as implementation and effectiveness review that would be needed to improve coordination mechanisms across the MS¹⁴¹. (Kluve, 2010, p.905; cf. Greve, 2009, p. 4; IZA, 2010)

The Commission's proposal for expanding the sectorial scope of anti-discrimination through the new directive aligns with the broadness of the UNCRPD's human rights provisions to applying anti-discrimination measures to broader EU policy sectors. A multi-sector protection would serve as a logic extension of the employment market-integration and market-correction rationale to be applied to sectors closely related to employment, such as education, accessibility and goods and services (cf. EASPD, n.d.). This could serve as an instrument for harmonisation of activation policies for persons with disabilities. Nevertheless, the enhanced sector broadness remains compatible and not in contradiction to a human rights approach, i.e. considering the broad material provisions of the UNCRPD. In light of heightened human rights protection, the sectorial extension of the framework appears as a logic enhancement of existing provisions that would otherwise seem likely to be rejected by the MS. Therefore the UNCRPD¹⁴² may have arguably been adopted by the Commission for normative justification for advancing economic interests on disability employment through enhanced non-discrimination provisions and supporting ALMPs for persons with disabilities in line with human rights.

¹⁴¹ See also the discussion on the 'dilemma of Social Europe' (Scharpf, 2002), introduced on page 30.

¹⁴² Although the UNCRPD itself does not directly promote activation policies, it contains features that are compatible and supportive to activation mechanisms, including the principle of reasonable accommodation and the overall pro-active and self-determined perspective on disability (see also social model and rights-based approach), which enables implementation policies by signatories to take up forms of activation measures.

7. Conclusion

The analyses of this study have shown that there are several plausible explanations for the active behaviour of the Commission in the UNCRPD accession process, thus there is no single answer to the central RQ, but rather several interrelated aspects were found. The findings of the analyses using the theory of Experimentalist Governance by Sabel and Zeitlin and a Principal-Agent model separately, have shed light on how the UNCRPD dual-ratification has induced governance reconfigurations in the institutional setting of the EDG on one side, and influenced the institutional standing of the Commission in the EDG on the other. Supporting the EU ratification has provided the opportunity for the Commission to ensure compatibility with the Convention and facilitate the national implementation of the UNCRPD through which convergence among the MS regarding anti-discrimination and disability policies could be improved. The signing of the Convention itself seemed to have served as a normative point of reference for the Commission to justify the extension European disability policies aligned with the social model as well as the rights-based approach to disability.

Applying a PA model to the UNCRPD implementation process and the EDG institutional setting has shown in what way the Commission acting as an executive agent to the MS has significantly enhanced its regulatory powers in relation to the UNCRPD. This has been achieved without breaching its delegated mandate, through reinterpretations of the contractual relationship according to the Commission's preferences, thus resorting to agency 'slippage' rather than 'shirking' (cf. Hawkins et al, 2001). Enhancing experimentalist features in the EDG through the UNCRPD provided opportunities for the Commission to reconfigure the complex and sensitive policy field of disability, beyond the limitations of the European Social Policy dilemma. Following two logics of delegation, efficiency and credibility, the Commission seems to have supported experimental features in the anti-discrimination framework to a significant, yet limited extent, against the backdrop of regulatory restrictions of loosely integrated European social policies. Thereby the Commission could extend its regulatory and coordinating capacities without creating frictions with its principals and lessening bureaucratic strains through delegation, while sustaining a sufficient level of control in these processes.

The Commission appeared as eagerly willing to enhance the scope and coherence of the anti-discrimination framework via a new directive proposal in partial reference to the UNCRPD, for facilitating the implementation and partially going beyond the Conventions formal requirements. This has shown that the Commission, besides its informal activities, seems to adhere to the Community method, which gives the Commission a considerable range of influence as compared to more decentralised settings. While in a possible anti-discrimination or disability OMC in the future, the Commission at least could assume an informal agenda setting function and coordinative role, and thus avoid being fully side-lined in

this flexible legislation processes. The development of a disability specific OMC might progress in the years to come, which could advance dynamic elements and recursive learning while being based on a binding framework directive of minimum requirements. Arguably, this may constitute a preferred setting for the Commission of complementary static framework and flexible informal mechanisms in the EDG.

Among the Commission's desired outcomes of these processes appeared to be the advancement of anti-discrimination provisions, which economically can be interpreted as market correcting tools for inefficient discriminatory behaviour against persons with disabilities. Extended European regulatory capacities and harmonisation among MS in anti-discrimination policies on disability may unlock considerable potentials for activating the working force of persons with disabilities and lessen the strains of European social systems for an ageing European population with an increasing number of persons with disabilities.

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Appendix

Overview of Cited EU Documents with Titles

Commission Documents	
COM (96) 406	Equality of Opportunity for People with Disabilities: A New European Community Disability Strategy
COM (1999) 565 final	Proposal for a Council Directive establishing a general framework for equal treatment in employment and education
COM (1999) 565 Annex	Annex
COM (2000) 284 final	Towards a Barrier Free Europe for People with Disabilities
COM (2003) 16 final	Towards a United Nations Legally Binding Instrument to Promote and Protect the Rights and Dignity of Persons with Disabilities
COM (2003) 650 final	Equal Opportunities for People with Disabilities: A European Action Plan
COM (2007) 77 final	Proposal for a Council Decision on the signing, on behalf of the European Community, of the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol
COM (2008) 3261 final	Commission Decision setting up a Non-discrimination Governmental Expert Group
COM (2008) 420 final	Non-discrimination and Equal Opportunities: A Renewed Commitment
COM (2008) 426 final	Proposal 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) 530 final	Proposal for a Council Decision Concerning the Conclusion, by the European Community, of the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities
COM (2010) 2020 final	EUROPE 2020: A Strategy for Smart, Sustainable and Inclusive Growth
COM (2010) 636 final	European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-free Europe
SEC (2008) 2180	Commission Staff Working Document Accompanying the Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation - Impact Assessment {COM(2008) 426 final}
SEC (2010) 1323 final	Commission Staff Working Document: European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe {COM(2010) 636 final}
Council Documents	
Directive 2000/78/EC	Equal Employment Framework Directive
Decision 2005/600	Guidelines for the Employment Policies of the Member States
Decision No. 15540/09	Conclusion of EU Ratification of the UNCRPD
Regulation (EC)No 168/2007	Establishing EU Agency for Fundamental Rights
2010/C 340/08	UNCRPD Code of Conduct & Annex