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The Framework Convention for the Protection of National Minorities and the European Union

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The views expressed are those of the author only

SUMMARY

The Framework Convention for the Protection of National Minorities (FCNM) has played a significant role in the EU pre-accession strategy, having progressively become a key reference point in the Union's monitoring of candidate states' respect for and protection of minorities (1). In the post-accession phase however, i.e. in the EU internal context, the impact of the FCNM appears to be weaker, for the Union is dispossessed of the lever offered by the pre-accession context to exhort candidates to respect minority rights. Indeed, the Union lacks explicit competence to promote minority protection internally, and to monitor Member States' compliance with FCNM standards. Furthermore, there appears to be an inherent tension between measures which Member States might take to protect minorities and some of the fundamental freedoms underpinning the EU legal order. These elements impede the impact of the FCNM on and within the EU, and open the way to a possible setback in the level of minority protection in the new Member States. At the same time, a spin-off of the active EU pre-accession minority policy might be the impetus for the Union to develop an internal minority policy, in which the FCNM could have a significant role, in particular following a possible ratification of the Lisbon Treaty (2).

1. THE EU MINORITY POLICY TOWARDS CANDIDATE STATES: A POSITIVE IMPACT ON THE APPLICATION OF THE FCNM

The EU has articulated a specific minority 'policy' in the context of its 'pre-accession strategy' (A). Given the lack of specific EU standards in the field of minority protection, the FCNM has progressively become the normative basis of this EU policy (B). The FCNM has thus benefited from the influence the Union exercises on the candidates through its pre-accession strategy (C).

A. Protection of minorities as a condition for EU accession

At its Copenhagen meeting in 1993, the European Council established a list of conditions which the countries from Central and Eastern Europe would have to fulfil to become members of the EU. The first of these accession conditions relates specifically to minority protection, in the following terms: 'membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, *and the respect for and protection of minorities'* (emphasis added).[1]

The European Council also established that '(it) w(ould) continue to follow closely progress in each associated country towards fulfilling the conditions of accession to the Union and draw the appropriate conclusions'.[2] On this basis, a so-called 'pre-accession strategy' was set up, whereby the EU institutions have been closely monitoring candidates' progress in satisfying the accession and membership conditions. This strategy notably involves the adoption of so-called *'Accession Partnerships'*, whose purpose is to set out short and medium term priorities

[1] The presence of national minorities in several candidate states from Central and Eastern Europe may explain the EU anxiety not to import unresolved minority issues affecting CEECs, but more generally to ensure stability in that part of Europe. Further: Pentassugia (2001), Sasse (2005).
[2] Conclusions of the Presidency, European Council, Copenhagen, June 1993.

which the candidate is urged to follow ultimately to accede. Each candidate's progress in meeting the conditions, as articulated in individual APs, is assessed by the Commission and recorder in annual *'progress reports'*. These reports are submitted to the Council and the European Council, which thereupon determine whether accession negotiations can begin, or if started, whether they can continue or be suspended, as the case may be. The EU monitoring thus encapsulates a potential sanction, as exemplified by the European Council's decision not to engage in accession negotiations with Slovakia under the Meciar government.[3] The pre-accession strategy, including threat of non-accession, thus provides the Union with a powerful transformative power on the candidate, in all areas covered by that strategy, minority protection included.

Yet, while the EU institutions have been called upon to monitor i.a. the protection of minorities, they cannot rely on specific *EU* instruments or standards to verify the candidates' progress in the field, let alone compliance. At best, parts of the EU *acquis* may indirectly contribute to promote the protection of minorities (e.g. the Race Equality Directive, the Employment Equality Directive,[4] and the principle of non-discrimination more generally), but on the whole, as shall be further explained below, the EU lacks general competence to establish and develop a minority policy.[5] The absence of EU competence and *a fortiori* of secondary legislation in this field has entailed that the EU has had to rely on external sources to articulate and operationalise its accession conditionality, and to ensure effective monitoring. It is in this context that the FCNM has become a significant element of the normative basis of the EU minority 'policy'.

B. A pre-accession minority policy inspired by the FCNM

The FCNM has increasingly filled the normative vacuum affecting the EU minority conditionality, to become a key point of reference in the Union's assessment of candidates' minority policies (i). Indeed, this assessment is no longer confined to the context of *political conditionality*, it also takes place in the context of the evaluation of the candidates' ability to assume the *obligations of membership*, thereby suggesting that minority protection has become part of the *acquis*. Such 'internalisation' of minority protection further strengthens the impact of the FCNM on EU candidate states (ii).

i) A reference point in the assessment of candidates' respect for minorities

In its 1997 **Opinions** on the CEECs' applications for membership, the Commission gave for the first time an assessment of the candidates' compliance with notably the Copenhagen minority criterion. Implicitly acknowledging the lack of specific EU normative basis for conducting part of this assessment, the Opinions emphasise that the Commission's 'task was unprecedented because the Copenhagen criteria are broad in political and economic terms and go beyond the acquis communautaire'. This may partly explain that each Opinion's section

[3] Conclusion of the Presidency, European Council, Luxembourg, December 1997.
[4] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJEC 2000 L 180/22; and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJCE 2000 L 303/16.
[5] Hofmann & Frisberg (2004); Hillion (2004); Sasse (2005); de Schutter (2006).

devoted to the evaluation of the candidate's fulfilment of the political criteria includes a recurrent formula whereby: 'In carrying out the assessment… the European Commission has drawn on a number of sources of information [inter alia]… *assessments by international organisations (including the Council of Europe and the OSCE)*, reports produced by non-governmental organisations, etc.'[6] The only explicit FCNM mention the Commission makes in its Opinions takes the form of a statement on whether or not the candidate has signed/ratified it.

In the chapter devoted to the political criteria, **Agenda 2000**[7] contains a section on 'respect for minorities' where the Commission points out that 'a number of texts governing the protection of national minorities have been adopted by the Council of Europe, *in particular the (FCNM)*… (which) safeguards the individual rights of persons belonging to minority groups'. Apart from the non-binding Recommendation 1201 adopted by the Parliamentary Assembly of the Council of Europe, no other external source is cited therein, thereby suggesting that the FCNM has provided a reference point in the EU assessment of the candidates' respect for minorities. Indeed, by stating that the candidate has signed and ratified the FCNM, the Commission suggests that such actions contribute to fulfilling the accession condition of minority protection.

Beyond these explicit references to the FCNM, the Commission also examines, albeit rather randomly, the candidates' observance of various minority standards promoted notably by the FCNM such as the right to use minority language, particularly in relations with administrative and judicial authorities, the right to receive instruction in minority language, participation in public affairs (parliament/government), and non-discrimination. Poor respect of these rights could indeed be used against starting accession negotiations, as exemplified by the Commission recommendation to postpone negotiations with Slovakia.[8]

The 1997 Opinions and Agenda 2000 thus provide evidence that the FCNM is, at the outset, one of the external bases on which the Commission relies to conduct its assessment of candidate states' respect for minorities. Indeed, the candidates' signature and ratification of the Framework Convention contributes to fulfilling the Copenhagen minority criterion. The FCNM thereby constitutes, at least to some extent, a normative basis for the EU assessment.[9]

More comprehensive information as to what the EU requires from candidate states to fulfil the 'minority' accession condition can be found in the **Accession Partnerships** (APs). Envisaged

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[6] http://ec.europa.eu/enlargement/archives/pdf/dwn/opinions/slovakia/sk-op_en.pdf As pointed out by an EU official, not revealing its sources allows the Commission to remain neutral, and to keep as much leeway as possible in using those sources.

[7] Agenda 2000 is a comprehensive Commission report on the implications of the EU eastern enlargement on Union policies accompanying its 1997 Opinions; COM (1997)2000.

[8] The Commission found that the Hungarian minority in Slovakia faced problems in exercising its rights, following the adoption of the legislation on national language, cuts in cultural subsidies and changes in administrative subdivisions of the country 'gave cause for concern'. This concern, combined with serious shortcomings in the democratic life of Slovakia led the Commission to advise against the start of accession negotiations with that candidate.

[9] This initial approach remains valid in the most recent Opinion on Croatia's application for membership; see Communication from the Commission - Opinion on Croatia's Application for Membership of the European Union; COM(2004)257 final.

as the key pre-accession instrument,[10] APs are adopted by the Council, on a proposal from the Commission, which thereby has a pivotal role in setting the targets which the candidates have to meet to fulfil the accession conditions, including that of ensuring respect for and protection of minorities.

Early AP broadly reflect some of the FCNM objectives, but the formulation of their minority-related priorities make it difficult to establish that the EU attempted directly to promote FCNM norms through this instrument. In contrast to Agenda 2000 and the Commission's Opinions, neither the FCNM, nor any other international instruments, is referred to in these APs. For instance, the 1999 Estonia AP exhorts it to align its Language legislation 'with international standards', and to implement concrete measures for the integration of non-citizens, including language training and provide necessary financial support. These priorities are basically reiterated in the 2002 AP.[11]

By contrast, more recent APs do not only mention the FCNM, they also explicitly present the Framework Convention as the normative basis of the pre-accession minority policy, and as the yardstick against which the EU may assess whether the candidates meet the 'minority' accession condition. In other words, not only is it important for the candidate to ratify the FCNM, it is also urged to comply with its provisions. Hence the 2006 AP with Croatia requires it to 'Promote respect for and protection of minorities in accordance with the European Convention on Human Rights and the principles laid down in the Council of Europe's Framework Convention for the Protection of National Minorities and in line with best practice in EU Member States'.[12] The 2008 AP with Turkey includes the same phraseology;[13] while the terms of the 2008 AP with the Former Yugoslav Republic of Macedonia (FYROM) are even more compelling by calling FYROM to '*Fully comply* with the European Convention on Human Rights, the recommendations made by the Committee for the Prevention of Torture as well as the Framework Convention for the Protection of National Minorities' (emphasis added). It is indeed remarkable that this latest formulation appears to put the ECHR and the FCNM on equal footing in terms of candidates' obligation.

The increasing *institutionalisation* of the FCNM as reference point in the EU minority policy is epitomised by the **Progress Reports** which, since 1998, present the Commission's assessment of the candidates' progress in fulfilling the Copenhagen criteria in general, and their fulfilment of the AP 'priorities' in particular. While including the standard paragraph on the diversity of

[10] See Agenda 2000.
[11] The 1999 AP with Bulgaria states, under the 'Political Criteria' section included in 'Short term-priorities', that it has 'to start implementation of the Roma Framework programme and strengthen the National Council on Ethnic and Demographic Issues including provision of necessary financial support; implement measures aimed at fighting discrimination (including within public administration); foster employment opportunities and increase access to education'. The 2002 AP merely calls Bulgaria to 'continue to implement the Roma Framework programme with particular attention to providing necessary financial support, significant strengthening of the National Council of on Ethnic and Demographic Issues, and ensuring equal access to health, housing, education and social security'.
[12] See Council Decision 2006/145/EC of 20 February 2006 on the principles, priorities and conditions contained in the Accession Partnership with Croatia and repealing Decision 2004/648/EC; OJ 2006 L 55/30.
[13] Council Decision 2008/157/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC; OJ 2008 L 51/4.

information sources already found in the 1997 Opinions,[14] the annual reports like the APs themselves have become increasingly explicit as regards the function of the FCNM in the evaluation process.

Much like the 1997 Opinions, initial Reports (1998) merely mention the FCNM in passing to state that the candidate has signed/ratified it.[15] Later Progress Reports however give more visibility and teeth to the Framework Convention. In particular, the Commission occasionally identified potential incompatibilities between a candidate's legal norms and FCNM provisions. Hence, in its 2001 Report on Cyprus, the Commission noted an incompatibility between an article of the candidate's constitution and a provision of the FCNM. [16]

Furthermore, Progress Reports have since 2001 occasionally referred to the evaluation and recommendations of the FCNM Advisory Committee (AC) and to the resolutions of the Committee of Ministers of the Council of Europe (CM).[17] Typically, the 2002 Report on Cyprus points out that the AC expressed the view that the Commission had included in its previous report on the incompatibility between Article 2 of the Cypriot constitution and Article 3 of the Framework Convention, adding that the CM 'concluded … that this issue needs to be addressed'.

Comparable references to the assessments of the AC and/or of the CM can be found in other reports as of 2001,[18] though the Commission's reliance on the FCNM, and on its organs, varies. For example, reports on Estonia seem to put less emphasis on the FCNM than on OSCE documents, at least until 2002. Similarly, the work of the Venice Commission has been more significant than the FCNM as an external source in the EU reporting on Hungary. Thus, the reliance of the FCNM in the EU monitoring of candidates is not yet systematised, though the recent insistence that candidates should comply with the FCNM provisions, as evidenced by the 2008 AP with FYROM, could lead to more systematic Commission's references to the FCNM monitoring reports.

[14] Emphasising that the Report draws on numerous sources of information, the paragraph also points out that: 'The Commission also used assessments made by the Member States, particularly with respect to the political criteria for membership and the work of various international organisations, and in particular the contributions of the Council of Europe, the OSCE and the IFIs as well as that of non-governmental organisations in preparation of the regular reports.' See e.g. Regular Report from the Commission on Bulgaria's Progress towards Accession, 1998, p. 5.

[15] Indeed, following reports include in an annex a table recording the international Human Rights conventions ratified by the candidate countries. The table includes the list of ratification of the FCNM which is placed after the ECHR and Protocols 1, 4, 6 & 7, the ECPT, the European Social Charter. It is the first time that the FCNM is mentioned in reports relation to some candidates, e.g. Cyprus. The following reports also include such table, albeit slightly amended. Two additional items have been added above the FCNM in the table: first the Revised European Social Charter and secondly the Additional Protocol to the ESC (system of collective complaints).

[16] In particular, the Commission pointed that Article 2 of the Cypriot Constitution, whereby all citizens are deemed to belong to either the Greek Community or the Turkish Community, may not be compatible with Article 3 FCNM, under which every person belonging to a national minority shall have the right freely to choose whether to be treated as such.

[17] An observation also made by Hoffmeister (2004).

[18] E.g. 2001 and 2002 progress reports on the Czech Republic, Slovakia, Estonia.

To sum up, an analysis of various instruments of the EU pre-accession strategy reveal that the FCNM has progressively become a normative basis of the EU minority policy. Not only does the Framework Convention serve as a reference point for the assessment of candidates, otherwise exhorted to sign and ratify it, the Commission also borrows assessments and conclusions of the FCNM monitoring organs, to substantiate its own progress reports. This apparent incremental 'transfer of standards'[19] from the FCNM to the EU pre-accession strategy, detectable in the text of key instruments, seems to reflect institutional practice. Commission staff involved in the monitoring of candidates acknowledges making use of the FCNM in their assessment. Indeed, informal contacts take place at technical level between staff members of both institutions.[20] Meetings are organised annually in Brussels and in Strasbourg, with staff from the FCNM Secretariat to share information and obtain input in the drafting process of the Commission's regular reports, but also occasionally for the drafting of APs. While contacts are regular, they are not unified in methodological terms: the form they take and the information exchanged tend to vary depending on the candidate country under review, and the issues involved.[21] Further cooperation between the Commission and the CoE in general, and between the Commission (esp. DG enlargement) and the FCNM Secretariat in particular, has been thus called for in order to consolidate the transfer of standards.[22]

ii) From normative basis to an element of the acquis

At the outset, respect for and protection of minorities was part of the first (political) Copenhagen criteria, whose fulfilment in principle conditioned the start of accession negotiations. It is, in other words, an *admissibility condition*.[23] As illustrated above, the FCNM has become increasingly visible and influential (both in substantive and institutional terms) in the Commission's assessment of the candidates' fulfilment of this criterion.

Progressively, respect for minorities has been introduced in, and assessed under the third Copenhagen criterion, dealing with the candidate's 'ability to assume the obligations of membership' that is, to refer to the Commission's definition, 'the acquis as expressed in the Treaties, the secondary legislation, and the policies of the Union'.[24] The protection of minorities is thus not only an accession condition, but has also become a *membership condition*.

An illustration of this shift in the function of the minority criterion in the enlargement methodology can be found in the 2003 'Comprehensive Monitoring Reports' on the candidates' preparations for membership.[25] In this last assessment of the then 10 acceding

[19] Hofmann and Frisberg (2004).
[20] *Ibid*.
[21] Interview, Commission official.
[22] See also de Schutter (2006). Indeed, Article 303 EC stipulates that 'The Community shall establish all appropriate forms of cooperation with the Council of Europe', while Article 302 EC foresees that 'The Commission shall also maintain such relations as are appropriate with all international organisations'.
[23] See Agenda 2000.
[24] e.g. Commission's Progress Report on Slovenia 2000, p. 5.
[25] Comprehensive monitoring report of the European Commission on the state of preparedness for EU membership of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia {SEC (2003) 1200 - 1209}.

states, the Commission gave an overview of where each candidate '[stood] in implementing all commitments and requirements arising from the accession negotiations for each *acquis* chapter'. That assessment was not therefore about the fulfilment of the political criteria. Yet, the Commission's evaluation of the candidates' compliance with Chapter 13 of the *acquis*, on 'Social policy and Employment', includes various observations on discrimination in employment and on social exclusion suffered by minorities, for instance the Roma community in the Czech Republic.[26] The EU thereby suggests that respect for and protection of minorities is not only a political criterion for becoming member of the EU, it is also part of EU employment and social policies with which the candidates will have to comply as membership obligation.

This perceptible process of 'internalisation'[27] of the minority protection requirement is not only confirmed by the Commission's latest progress reports e.g. with Croatia,[28] it is also typified by the recent inclusion in the accession negotiations of a new chapter 23 on 'Fundamental Rights and Judiciary' and which conspicuously includes a section on minority protection. Thus in Chapter 23 of the 2007 report on Croatia, one can read the Commission's views on Croatia's 'progress in the area of minority rights and cultural rights'. The report notably evokes the candidate's 'recruitment plan for minorities in the State administration', 'funding for minority organisations'; 'increased funds for implementation of the Roma Action Plan', and points out that 'a number of important challenges still remain, especially in terms of implementation'. It equally spots the difficult 'return of Serb refugees', 'remaining housing concerns', 'as well as problems with validation of pension rights'.

This incremental entry of minority protection in the 'obligations of membership' is typified by the so-called **screening** reports, which present, in detail, the contents of each part of the acquis that the candidate must be prepared to take on upon accession. The screening report on 'Fundamental Rights and Judiciary' includes a section devoted to the minority standards which are said to belong to the acquis:

> 'According to Article 21 of the Charter of Fundamental Rights of the EU, members of national minorities shall not be discriminated against. Article 1 of the Framework Convention for the Protection of National Minorities confirms that human rights include minority rights. The latter include the right to non-discrimination of a person belonging to a national minority; the freedom of association, to assembly, of expression; the freedom of religion; the right to use one's language; and the effective

[26] For instance in the 2003 comprehensive monitoring report for SK, the Commission points out in chapter 13 that: 'Despite continuous efforts across all sectors, the situation of the Roma minority remains very difficult. The majority of the persons belonging to the Roma community are still exposed to social inequalities, social exclusion and widespread discrimination in education, employment, the criminal justice system and access to public services. Living conditions, including housing and infrastructure, as well as health status, are essentially far below the average. The gap between good policy formulation and its implementation on the spot has not significantly diminished. Considerable efforts need to be continued and reinforced to remedy this situation'.

[27] Toggenburg (2000); Hillion (2004); Sasse (2005).

[28] Similarly in the 2007 Commission Report on Croatia, minority protection is assessed not only under 'political criteria', but also under Chapter 19 on *Employment and Social Policy*; SEC(2007) 1431.

> participation in public affairs. Measures against racism and xenophobia cover areas such as anti-Semitism, Islamophobia, anti-gypsism.[29]

While this passage epitomises the consolidation of the minority protection requirement in the pre-accession strategy, it also suggests that the EU minority policy has an *EU* normative basis as well. The logic goes as follows: Since minority rights are included in human rights as provided in Article 1 of the FCNM, and given that human rights are part of the EU *acquis*, then minority rights as articulated in the FCNM can also be viewed as belonging to the *acquis*.[30] Arguably, the screening report of chapter 23 offers the strongest admission by the EU, albeit in somewhat cryptic terms, that FCNM rights are part of the EU *acquis* with which candidates have to comply as membership obligations.[31]

As the place of the minority protection requirement in the EU pre-accession conditionality has evolved to being increasingly looked at as a condition for being a Member State, and not only for becoming a Member State,[32] the monitoring of this requirement has as a result changed in terms of timing, length, and intensity. The inclusion of some minority rights into the *acquis* entails that the monitoring of candidates' protection of those rights is more systematic than in the context of the assessment of the political criterion. As a political criterion, minority protection is to be guaranteed essentially before accession negotiations start, whereas as part of the third Copenhagen criterion, it is monitored closely throughout the negotiation process. Part 2 of this report will come back to the process of internalisation, when looking at EU competence in the field of minority protection. It will become evident that there remains a discrepancy between the 'minority acquis' applicable to the candidates in the accession process, and the more limited minority acquis applicable to the Member States in the EU.

C) Limits to the impact of the FCNM

Arguably, the accession conditionality has strengthened minority protection in the pre-accession phase. In effect, the fear that non-compliance with minority protection rights advocated by the EU (by explicit or implicit reference to FCNM standards) might cost postponement of accession to the EU, though probably not denial altogether, has most certainly provided the EU with a strong lever to push for tangible improvement in minority protection.

Since the EU minority policy has increasingly relied on the FCNM as reference, as well as on AC recommendations and CM resolutions, that policy has also given teeth to the FCNM, and fostered the candidates' compliance with its provisions. In other words, the FCNM may have benefited from this EU leverage.[33] To recapitulate: at one level, the pre-accession strategy may have encouraged the candidates' ratification of the FCNM. At another level, the latter has played an increasing role as a reference point for the Commission to monitor candidates' progress in meeting the minority accession criterion. At a third level, the EU recently appears

[29] The screening report adds that 'the importance of preventing and combating these phenomena is stressed in Article 29 of the EU Treaty. The Council adopted, in 1996, a Joint Action to combat racism and xenophobia'.
[30] The Commission had already considered since the entry into force of the Treaty of Amsterdam that the protection of minorities was encapsulated in the principles referred to in Article 6(1) TEU; further Hoffmeister (2004).
[31] Hoffmeister (2008).
[32] Toggenburg (2006).
[33] Hoffmeister (2004).

not only to require fulfilment of the FCNM norms as part of the accession conditions, it also requires certain norms of the FCNM to be complied with as part of the *acquis*. If this latter requirement is confirmed, the impact of the FCNM in the pre-accession context could be boosted. It may also entail more scrupulous EU verification of compliance which in turn could generate, or at least call for more systematic use by the Commission's services of the AC expertise, and more reliance on CM resolutions.

The impact of the EU pre-accession strategy on minority protection, and its contribution to enhancing the effectiveness of the FCNM, should not be overstated however. Respect for minorities has improved in those candidates that were prepared to listen to the Commission's suggestions. Indeed, while such improvement can be identified,[34] it is difficult to establish a direct causal link with the EU minority conditionality. The latter's impact has to be related to numerous other factors which may have contributed to the overall progress in minority protection.[35]

Indeed, despite the FCNM increased prominence in the pre-accession strategy, and regular EU exhortations to meet its standards, it appears that neither compliance with its norms nor its ratification by the candidate has been a conditio since qua non, at least in the context of the 2004-7 enlargement. This is evidenced by the EU admission of Latvia without its having ratified the FCNM. In the same vein, the Commission itself notes in its 2004 Strategy Paper when evoking Bulgaria, that 'Efforts have been made in the past years to develop a framework to tackle the problems faced by minorities, but the situation on the ground has not evolved much. Sustained efforts including allocation of appropriate financial resources will be necessary to effectively implement the intentions'.[36] To be sure, the 2005 Comprehensive Monitoring Report on Bulgaria makes it clear that respect for minorities still has lot to be deserved.[37]

In that, the impact of the FCNM on the EU pre-accession strategy, and the latter's effective influence on the situation of minorities within the candidate states has to be nuanced.[38] While the pre-accession strategy may have fostered new legislation aimed at protecting minorities,[39] the implementation of these new norms remains unsatisfactory as suggested by various Comprehensive Monitoring Reports of the Commission, i.e. the last reports the Commission

[34] Hoffmeister, (2004)

[35] As pointed out by Gwendolyn Sasse (2005): 'EU conditionality has… contributed to the salience of minority rights on the domestic political agendas in CEE but a range of factors, such as the size of the minority, its location, resources and degree of political mobilisation, the relations between majority and minority groups, the involvement of kin states, the constitutional design of the new regime and its transition path, has interacted with external conditionality and produced varied policy outcomes.'

[36] See Communication from the Commission to the Council and to the European Parliament - Strategy Paper of the European Commission on progress in the enlargement process, COM(2004)657 final, p. 9.

[37] 'Key reforms in combating discrimination in education, healthcare and housing are still outstanding. A long-term action plan in line with the "Decade of Roma Inclusion 2005-2015" (launched in Sofia in February 2005) has been drawn up and contains objectives in the areas of education, healthcare, housing, culture and discrimination. Bulgaria needs to ensure that this action plan is properly resourced and implemented'; see Communication from the Commission - Comprehensive monitoring Report on the state of preparedness for EU membership of Bulgaria and Romania {SEC(2005) 1352, SEC(2005) 1353 SEC(2005) 1354 }.

[38] See report on SEE (2008), Pentassuglia (2001), Sasse (2005).

[39] Hoffmeister (2004).

publishes on candidates before their accession, as indeed also confirmed by AC opinions. Some explanation has been suggested: 'EU conditionality has anchored minority protection in the political agenda of the candidate states, but the EU had little to offer in terms of substantive guidance, as the lack of benchmarks, inconsistencies and the limited scope for follow-up on implementation in the Regular Reports demonstrate'.[40]

These sobering views suggest that more monitoring of the monitors may be needed to improve the effectiveness of the EU's pre-accession minority policy, and thus the impact of the FCNM as the normative basis of this policy.[41] In this sense, further institutionalisation of the contacts between the EU and the FCNM secretariat would be welcome.[42]

2. THE EU MINORITY POLICY TOWARDS THE NEW MEMBER STATES: THE RISK OF A SETBACK IN MINORITY PROTECTION

In the post-accession context, the EU looses the powerful leverage it has vis-à-vis the candidates thanks to the accession 'carrot' and the non-accession 'stick'. Moreover in the field of minority protection, the Union lacks the power to articulate internally a policy that can emulate the one it has developed in the pre-accession context. Put differently, the EU's clout as regards the protection of minorities diminishes as candidate states become Member States, and the impact of the FCNM is reduced accordingly. The resulting risk of a setback as regards minority protection in the new Member States is aggravated by the inherent tension between the logic of minority protection and fundamental norms of the EU legal order (A). On the other hand, the evolution of the minority protection in the context of the pre-accession strategy, and in particular its inclusion in the *acquis*, may suggest that minority protection is acquiring an increasing internal dimension as well. Indeed, new legal developments in the EU - and notably the reform treaty signed in Lisbon – could contribute to enhance the protection of minorities in the EU in general, and improve the FCNM impact in particular (B).

A. The narrow margin of manoeuvre of the EU in the field of minority protection

It has become commonplace to emphasise that the EU lacks competence to take measures specifically aimed at minority protection. Absent this competence, neither the EU nor the EC can be signatory to the FCNM. As a result, Member States are not, formally, bound by EU law to comply with the FCNM. Nevertheless, the EU is not totally dispossessed of 'resources' to take measures which may contribute to improving the protection of minorities. It is not the place to explore each and every such resource in detail,[43] suffice to recall some of them.

On the basis of **Article 13 EC**, the Community has the power to adopt measures to combat discrimination based *inter alia* on racial or ethnic origin, and it is in this context that the

[40] Sasse (2005).
[41] As already established by various authors, the EU minority policy has indeed 'fine-tuned' as illustrated by the accession policy geared towards SEE. See e.g. Toggenburg (2006); Sasse also demonstrates that the monitoring has improved (2005).
[42] See, in this respect, the recommendations included in the Juncker Report: 'Council of Europe – European Union: A sole ambition for the European continent', 16.04.2006.
[43] de Witte (2004); de Schutter (2006); Toggenburg (2006).

Council adopted the important Equality Directives evoked earlier.[44] One could also mention *inter alia*, **Article 151 EC,** which allows the Community to contribute to the flowering of cultures of the Member States while respecting their national and regional diversity, **Article 49 EC** on freedom to provide services, or **Article 95** on the functioning of the internal market.[45] Beyond those EU competences to act and contribute to minority protection, certain minority rights are encapsulated in the **General Principles of Community Law** (GPCL), such as the protection against discrimination based 'on association with a national minority', inspired by Article 14 ECHR.[46] Indeed, other rights enshrined in the ECHR and which are equally part of the GPCL, e.g. Article 8 (right to family life), 10 (freedom of expression) and 11 (freedom of association), may also have some relevance for minority protection, as confirmed by the case law of the European Court of Human Rights.[47]

The contribution that EU law provisions can make to foster minority protection within the Union is enhanced by the latter's ability to enforce those rules and principles. In particular, the Commission can force the Member States, both old and new, to comply with EC law on the basis of Articles 226-228 EC. Furthermore, if as the Commission suggests, human rights referred to in Article 6(1) TEU encompass the rights of persons belonging to minorities, then the sanction mechanism envisaged by Article 7 TEU could be used against a Member State in case of a 'serious and persistent' breach of minority rights encapsulated therein. It has indeed been argued that the latter mechanism could justify the setting up of a monitoring mechanism in order to detect and substantiate possible risk of such 'serious and persistent breach'.[48]

The EU is therefore not totally powerless in the field of minority protection. In various ways it can contribute to enhancing minority protection within its borders. Indeed, to the extent that some EU rules may reflect FCNM principles, it can even be suggested that EU law may contribute to ensure compliance with FCNM standards, notably in new Member States. However, these tools have limited potential, at least compared to what that of the EU action in the pre-accession context.

For example, Article 13 EC gives authority to the Community to take measures to combat only certain forms of discrimination and that, 'within the limits of the powers conferred by [the Treaty] upon the Community'.[49] Though Article 13 EC arguably holds a potential that could be further exploited,[50] it remains to be seen whether this article constitutes a basis for the Community to take e.g. affirmative action towards national minorities within the EU, or more generally to adopt measures aimed at fulfilling FCNM standards.[51] In this sense, it has been

[44] On the contribution of these directives to minority protection: de Witte (2004), de Schutter (2006: 6), Toggenburg (2006).
[45] Pentassuglia (2001); de Witte (2004); Toggenburg (2006); see also the EP Resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005).
[46] Hillion (2004).
[47] E.g. *Ouranio Toxo and others v.* Greece (Nº 74989/01); *Gorzelik and others v. Poland* (Nº 44158/98); *Slivenko v. Latvia* (no. 48321/99); *Chapman v. the United Kingdom* (No. 27238/95). Further: Hoffmeister (2004, 2008), Hofmann & Friberg (2004), Gilbert (2002).
[48] Hoffmeister (2004, 2008); de Witte (2004: 114).
[49] Cp. Article 13 EC, Articles 21 Charter of Fundamental Rights and 14 ECHR.
[50] Toggenburg (2006); see also on-going discussion on the principle of non-discrimination (SEC 2008).
[51] Hillion (2004).

suggested that the 'most promising instrument adopted on Article 13 EC', namely the Race Equality Directive, only gives effect to the FCNM in an indirect way and cannot be regarded as generated by the FCNM.[52] In the same vein, even if the GPCL include some minority rights based on the ECHR as interpreted in the ECtHR case law, that would not in itself warrant an EU competence to exhort Member States e.g. to comply with the FCNM the way the Commission has done in relation to candidates.[53] It is also arguable that the ECHR-based minority rights do not replicate all those that are envisaged by the FCNM. Moreover, the GPCL can only be invoked against institutions, and against Member States 'acting in the context of EC law'.[54]

Though the EU may have some 'constitutional resources' to foster minority protection internally, it is not presently in a position legally to adopt in relation to the Member States instruments equivalent to the AP,[55] or to monitor their compliance with many of the minority protection standards it advocated towards the candidate states. In particular, it is unlikely that, as EU law presently stands, the EU institutions and particularly the Commission would be in a position to require a Member State to 'fully comply' with the FCNM, as it currently does in relation to the candidates, e.g. FYROM.[56]

In other words, EU membership results in a relaxation of the pressure to ensure respect for and protection of minorities in general, and to comply with FCNM standards in particular. Except in situations of 'serious and persistent' breach of minority rights if it is admitted that the latter are encapsulated in the human rights referred to in Article 6(1) TEU, the EU institutions are ill-equipped to address unresolved minority issues, and to prevent a setback in the protection of minority rights in the new Member States.[57] By the same token, the Union is equally unable to address minority rights violations that may arise in 'old' Member States.[58]

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[52] de Schutter (2006).

[53] Some rules now refer to the principle of non-discrimination based on membership of national minority. Hence, the Preamble of the Citizens Directive states at pt 31 that 'This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation'.

[54] See discussion below.

[55] It may be wondered whether Article 308 EC Since has served to establish the EU Fundamental Rights Agency could also be used for minority protection measure; the European Court of Justice recently seems to envisage Article 308 more restrictively than the decision-making institutions: see case C-402/05 P and C-415/05 P, *Kadi & Al Barakaat International Foundation*, judgment of 3 September 2008, n.y.r.

[56] In this regard, see C-106/96, *United Kingdom v Commission* [1998] ECR I-2729.

[57] See: Resolution CM/ResCMN(2008)5, on the implementation of the Framework Convention for the Protection of National Minorities by Cyprus (adopted by the Committee of Ministers on 9 July 2008); Memorandum to the Latvian Government: Assessment of the progress made in implementing the 2003 recommendations of the Council of Europe Commissioner for Human Rights, CommDH(2007)9, 16 May 2007; Resolution ResCMN(2006)1, on the implementation of the Framework Convention for the Protection of National Minorities by Estonia, adopted by the Committee of Ministers on 15 February 2006; see also: Amnesty International Report on Estonia, EUR 51/002/2006, 7 December 2006.

[58] In this regards, see Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Italy on 19-20 June 2008, CommDH(2008)18, 28 July 2008.

The risk of a setback in minority protection stemming from a laxer EU monitoring, itself engendered by the limited Union's minority competence, is increased by the potential collision between Member States' minority policies and EU norms. Indeed, it has been argued elsewhere that accession to the Union may actually *cause* such a setback.[59] For instance: as a principle, new Member States must ensure that their commitments under international treaties which they have concluded prior to their accession are compatible with EC law (Article 307(2) EC). To be sure, they may be forced to review, if not to denounce, their pre-accession international commitments to guarantee such compatibility.[60] Hence, if the obligation under Article 17 FCNM (i.e. not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons with whom they share ethnic, cultural linguistic or religious identity) were to collide with e.g. obligations under EU external border rules (i.e. visa requirement applicable to those latter persons, or fee for obtaining such a visa), the new Member States may have to set aside the former to ensure that they comply with the latter. Similar tension could arise between affirmative action that minority policy may require, and the EC principle of non-discrimination, and/or the application of fundamental freedoms that underpin the internal market.[61] In other words, EU membership potentially entails, if not infringements of the FCNM, at least a watering down of its impact in the new Member States.

B. The potential impact of recent EU legal developments on minority protection in the Union legal order

The 2004-7 enlargement and the pre-accession strategy may nevertheless have a 'spill-over' effect on the internal EU discourse on minority issues.[62] As pointed out by Sasse, one of the main achievements of the EU's normative overstretch has been to implant the value and objective of minority protection in 'EU speak', which could be a first step towards internalisation, institutional change and modified political behaviour.[63] Arguably, this spill over effect is already perceptible in EU constitutional (ii) and judicial (i) speaks.

i) The protection of minority rights as an integral part of the General Principles of Community Law?

At the judicial level, the European Court of Justice has recognised that the protection of minorities is a legitimate aim which could justify derogations to the fundamental freedoms underpinning the EU legal order, provided such derogations are proportionate to that aim.[64] The Court thus accepts to balance minority and Community interests, and tolerates, in specific circumstances, Member States' measures of minority protection that fall foul of EC law.

Beyond this judicial tolerance, the Court of Justice could develop a more active minority rights jurisprudence, through the prism of the General Principles of Community Law. As pointed out

[59] Hillion (2004).
[60] See e.g. Case C-62/98 *Commission v Portugal* [2000] ECR I-5171.
[61] Hoffmeister (2008).
[62] Hillion (2004).
[63] Sasse (2004).
[64] See e.g. Case C-274/96, *Bickel & Franz* [1998] I-7639.

above, the Court ensures that EU institutions and Member States acting in the context of EC law comply with the GPCL. The latter include fundamental rights, some of which may have some relevance for minority protection. While the ECHR plays a 'special significance' in the Court's articulation of the fundamental rights component of the GPCL, it is not the only source of inspiration. The Court has usually emphasised that it 'draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories'.[65] Since, as recalled by Article 1 FCNM, 'The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights', it is not inconceivable for the Court to start referring to the FCNM as well as a source of inspiration.

The background to such a development could be, for instance, a conflict between an EC measure and a Member State's constitutional provision on minority rights. If that Member State's constitutional court were to consider that such provision prevents the application of the EC measure on the ground that it breaches it - the way the German Constitutional Court invoked basic rights enshrined in the *Grundgezets* to prevent the application of an EC act in the *Solange I –*[66] the European Court of Justice may have to carve out a minority rights jurisprudence, along the lines of its human rights jurisprudence.[67] In particular, the Court may have to demonstrate that it ensures an effective protection of minority rights at EU level, and that this protection is similar to that required at the Member State's level to prevent that 'the validity of a Community measure or its effect within a Member State… be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state'.[68] The Court could do so by establishing that the protection of minority rights is an integral part of GPCL, and in this context, draw inspiration from the FCNM.[69]

Indeed, the FCNM appears to meet the test set by the Court as regards the source of fundamental rights contained in the GPCL: the FCNM is an 'international instrument' on which 'the Member States have collaborated or to which they are signatories' that supplies 'guidelines… for the protection of human rights'. Moreover, the protection of the rights of persons belonging to minorities can be seen as part of the constitutional traditions common to the Member States. Some of the Member States have a constitution that includes provisions

[65] See e.g. C-402/05 P and C-415/05 P, *Kadi & Al Barakaat International Foundation*, judgment of 3 September 2008, n.y.r.
[66] *Internationale Handelsgesellschaft mbH v. Einfuhr – und Vorratstelle für Getreide und Futtermittel* [1974] 2 CMLR 540.
[67] Case 4/73, *Nold v. Commission* [1974] ECR 491; Case 44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.
[68] Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr – und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.
[69] Beyond the ECHR and national constitutional principles, the Court of Justice has occasionally found inspiration in other international instruments. Hence, in Case 149/77, *Defrenne v. Sabena* [1978] ECR 1365, the Court referred to the 1961 European Social Charter and ILO Convention No 111 to support its conclusion that the elimination of sex discrimination is a fundamental right under EC law.

related to minority protection,[70] and a quasi-unanimity of them has ratified the Framework Convention.[71]

ii) The Treaty of Lisbon: Towards a constitutionalisation of minority rights?

The trend towards the recognition of minority protection as one of the principles of the Union is typified by the attempted constitutional codification of that protection in Article 2 of the Lisbon version of the TEU.[72] This provision defines respect of the rights of persons belonging to national minorities as one of the *values* of the Union.

The entry into force of the Lisbon Treaty could thus foster the *mainstreaming* of minority rights in EU law and policy making.[73] Also, it would expressly provide for the possibility to sanction a Member State in case of a serious and persistent breach of those rights (Article 7 TEU), and would formally empower the Court to articulate what 'rights of persons belonging to national minorities' stand for, in order to ensure their protection. In this context as in that of GPCL, the FCNM could provide a significant source of inspiration.

The Treaty of Lisbon would also entail that the EU Charter of Fundamental Rights (CFR) become a legally binding document (Art 6(1) TEU - Lisbon). Its provisions concerning the protection of minorities, notably Article 21 prohibiting discrimination on the basis of membership of a minority,[74] would thus become mandatory and enforceable. Incidentally, the recent creation of the EU Agency for Fundamental Rights (AFR) may already enhance the effects of such provisions. According to the 2007 Regulation establishing the Agency,[75] the latter is notably to publish 'thematic reports' and to provide assistance and expertise to 'institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law' relating to fundamental rights. The Multi-annual Framework for 2007-2012 adopted by the EU Council in February 2008 foresees that the 'thematic areas' of operation of the AFR not only includes (a) racism, xenophobia and related intolerance; but also (b) discrimination inter alia against persons belonging to minorities.[76]

It has been suggested that in carrying out its tasks, the Agency should '[base] itself not only on the (CFR) but on the Charter as interpreted in the light of the broader acquis of international and European human rights law, and especially of the Council of Europe instruments', it should also establish systematic links with the Secretariat of the FCNM.[77] Indeed, links

[70] E.g. Austria, Belgium, Estonia, Hungary, Italy, Latvia, Poland, Slovakia, Slovenia, Sweden.
[71] The recent amendment of the French Constitution, whereby local and regional languages are envisaged as being part of the French heritage could signal a change of France's attitude towards the question of minorities, and possibly a step towards its eventual signature of the FCNM.
[72] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJEU 2008 C 115.
[73] On mainstreaming, see Toggenburg (2006).
[74] Also, Article 22 CFR foresees the Union's obligation to respect cultural, religious and linguistic diversity languages.
[75] Council Regulation 168/2007, OJEU 2007 L 53/1.
[76] Council Decision implementing Regulation 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012, OJEU 2008 L 63/14.
[77] De Schutter (2006). It can be recalled that the Network of Independent Experts established by the Directorate General Freedom, Security and Justice of the European Commission, and which has been invited to support the

between the Community and the Council of Europe are expressly called for in Article 9 of the 2007 Regulation, and in this context an agreement was concluded in February 2008.[78] Acknowledging that 'the Council of Europe has acquired extensive experience and expertise in intergovernmental cooperation and assistance activities in the field of human rights, having also established several human rights monitoring and control mechanisms', the agreement aims to set up a cooperation framework between the Agency and the Council of Europe 'in order to avoid duplication and ensure complementarity and added value'. It notably stipulates that 'regular contacts' between the Agency and the Council of Europe shall be established at the 'appropriate level', and foresees the appointment by the Council of Europe of an independent person to sit on the Agency's management and executive boards. Methods of cooperation envisaged by the agreement include mandatory 'regular consultations', as well as 'exchange of information and data'. Indeed, the Agency 'shall take due account… where relevant, of findings, reports and activities in the human rights field of the Council of Europe's human rights monitoring and intergovernmental committees', defined as including the Advisory Committee of the FCNM for the purpose of the agreement. While it is too early to assess the practical effects of such provisions, it may be argued that the agreement provides a basis to enhance the impact of the FCNM within the EU. In particular, it institutionalises the contacts between the Community and the FCNM bodies, and also codifies the transfer of standards between the AC and the Agency.

Further rapprochement between the EU and the Council of Europe is envisaged in the Lisbon Treaty, by requiring the EU to accede to the ECHR (Art 6(2) TEU – Lisbon). It may be wondered whether such a move could trigger a momentum for the EU also to seek closer ties with the FCNM.[79] Accession to the latter would obviously strengthen the Framework Convention's impact within the EU legal order, by turning it into a binding text on the EU institutions and Member States. Incidentally, it would align the EU internal minority policy with the pre-accession conditionality, thereby addressing the risk of setback in minority protection evoked earlier. The formal entry of the FCNM within the EU legal order would not however necessarily entail immediate rights within the Union, since the FCNM mainly provides program-type provisions concerning state obligations rather than individual or collective rights.[80] The growing body of interpretations given by the AC would thereby be important to help the EU institutions articulate further the rights that could be derived from the FCNM within the Union legal order.

The foregoing suggests that the EU is internalising the minority protection discourse. Indeed, the Treaty of Lisbon could offer new constitutional tools to enhance such protection internally. Yet, the entry into force of this Treaty would not immediately close the gap between the pre-accession minority policy explored earlier and the EU policy towards its Member States. For example, the Lisbon formulation of Article 6(1) TEU still fails to reflect the phraseology of the

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work of the FRA, had produced a report on Minority Protection in the Member States: Thematic Comment No 3; the Protection of Minorities in the European Union; CFR-CFF.ThemComm2005

[78] Agreement between the European Community and the Council of Europe on co-operation between the European Union Agency for Fundamental Rights and the Council of Europe; OJEU 2008 L 186/7.

[79] A provision to that effect had been proposed by a Hungarian MP but unsuccessfully; see Hofmann & Frisberg (2004).

[80] Hofmann & Friberg (2004).

Copenhagen accession condition relating to minority protection.[81] Similarly, the Lisbon version of Article 13 EC (Article 19 of the Treaty on the Functioning of the EU) falls short of explicitly empowering the Union to combat discrimination based on membership of a national minority, thereby maintaining the current mismatch between Article 13 EC and Article 21 CFR.[82] While the EU accession to the Framework Convention could bridge that gap, notably by allowing the Commission to require any Member State to 'fully comply' with the FCNM the way it has been doing with current candidates for accession, it remains to be seen whether EU Member States can be persuaded to support such an accession, and whether the Treaty allows it. After all, EU accession to the ECHR has been made legally conceivable thanks to an explicit enabling clause, which does not exist in the case of the FCNM. Indeed, as that enabling clause concerns the ECHR specifically, it is questionable whether it may serve as a basis for the EU to sign other Council of Europe fundamental rights' conventions.

Conclusion

The FCNM has become a key normative source of the EU minority policy in the pre-accession context. This role, and the effectiveness of the FCNM, has been enhanced by the potential EU suspension of accession talks in case of unsatisfactory progress of the candidate state in meeting the accession criteria. However, the acquisition of the status of Member State annihilates the no-accession threat that is characteristic of the pre-accession context which, combined with the EU limited means to enforce minority protection (e.g. compliance with FCNM), engenders the risk of a setback in minority protection in the new Member States, itself aggravated by the potential conflict between some aspects of EU law and minority rights. The entry into force of the revised Treaty on European Union, coupled with a more audacious judicial control by the European Court of Justice of EU respect of minority rights, and an effective cooperation between the EU Agency for Fundamental and the FCNM bodies, would have a positive impact on minority protection in the EU, and incidentally on the effectiveness of the FCNM within its Member States.

[81] Hillion (2004).
[82] Further on the limited contribution of those changes in terms of improving minority protection, see Toggenburg (2006).