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The EU's attitude vis-à-vis minorities: a play in three parts and an open end



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1. The idealistic phase of minority protection at EU-level (dominated by soft law resolutions of the European Parliament)

1.1. Introduction

The EU has become a visible player in the field of minority protection with the expansion of the enlargement perspective at the beginning of the 1990s. This, however, does not mean that the Union has not addressed the topic before. Already in the 1980s the European Parliament was addressing minority related issues in specific resolutions. For various reasons, one could characterise this phase as "idealistic". Firstly, neither the Commission nor the Council affiliated with the Parliament in identifying the protection of minorities and their cultures as an EU priority – a fact which makes some of the calls appear isolated. Secondly, initial ideas aimed at the establishment of a full-fledged supranational system of minority protection – an approach which was not even able to achieve consensus within the Parliament and can therefore be characterised as unrealistic. Thirdly, minority protection was in this first phase articulated only in non-legally binding documents and never reached the level of legal norms and obligations. Finally this first phase of European involvement in minority issues finds its motivation not in external pressure but rather in a value-oriented role of the European Parliament. The latter was, as an increasingly self-confident institutional player, more and more identifying the area of human rights as a means for fostering its institutional profile.

1.2. The Parliaments' early efforts in the area of Minority Protection

Most of the Parliament's resolutions of this phase were elaborated in the EP's Committee on Culture and do address culture-related issues. However in the first and second legislative period (1979-1984 and 1984-1989) there have been attempts in the Committee of legal affairs to develop a far reaching Charter of Minority Rights. This initiative came from the South Tyrolean MEP Joachim Dalsass, and in the first legislative period, Mr. Alfons Goppel became rapporteur for this project. However, the draft was never voted upon in the Committee. In the second legislative period, Count Stauffenberg was nominated rapporteur. The so called Stauffenberg draft enshrined a "Charter of group rights". However the seven-page draft report was confronted with over 100 amendments and was never voted upon. In a certain sense, the Stauffenberg draft called

The financing of EBLUL and the establishment of the Intergroup within the Parliament are the most visible results of the first phase of the EU's initial involvement in minority (language) issues.

The perspective of Eastern Enlargement can be considered to be the midwife of the EU's more pronounced minority policies.

for a "supranationalisation" of minority protection in Europe.¹ It aimed at integrating a Charter of group rights into the EC system. For instance, the Stauffenberg draft foresaw that group rights could be invoked before the ECJ.² The draft even installed a sort of emergency

clause allowing 100 persons belonging to a minority group to bring an action against Member States (MS) who failed to recognize the minority group at stake. Of course, in the end, all this would have boiled down to the necessity of amending the Founding treaties – a legal step which was out of political reach.

A more realistic approach was chosen by the EP's Committee on Culture. In the first legislative period, the EP issued two resolutions based on two reports tabled by the rapporteur Gaetano Arfe. The 1981 "Resolution on a Community Charter of regional languages and cultures and on a charter of rights of ethnic minorities" has – despite its title – nothing in common with a proper "Charter".³ It calls on the MS and the Commission to take certain steps favouring minorities. For instance, the MS are called upon to provide for the right to use their own languages in dealings with official bodies and Courts, to promote teaching in regional languages, and to ensure access to local media. As regards the European Commission, the resolution calls for the review all Community legislation or practices which discriminate against minority languages, recom-

...the EU's emphasis seems to shift from a cultural perspective (engagement for the benefit of the languages and cultures of minorities) to a broader perspective including the issue of political participation of minorities.

¹ However, technically speaking the Stauffenberg draft is a resolution calling on the Member States to conclude an international agreement. Stauffenberg himself denied the possibility of providing a catalogue of group rights by means of EU secondary law (based on Article 308 EC). See Franz Ludwig Graf Stauffenberg, "Minderheitenschutz und Volksgruppenrecht aus der Sicht der Europäischen Gemeinschaft. Tendenzen und Stand der Verhandlungen", in Dieter Blumenwitz und Hans von Mangoldt (Hrsg.), Fortentwicklung des Minderheitenschutzes und der Volksgruppenrechte in Europa (Verlag Wissenschaft und Politik, Bielefeld, 1992) S. 37-46.

² Franz-Ludwig Graf Stauffenberg, "Minderheiten und Volksgruppenrechte in Europa – Für eine Charta der Volksgruppenrechte", in Europa als Auftrag, Schriftenreihe der EVP-Fraktion, February 1991. See Art. 5 lit.c) of the proposal.

³ See OJ C 287, p. 106.

mends the use of (more) Regional Fund resources for the support of regional and folk cultures, and proposes to providing comparative data on the attitudes and behaviour of the public in the MS towards regional languages and cultures. The 1983 "Resolution on measures in favour of minority languages and cultures" repeats these calls.⁴

In the EP's second legislative period, the Parliament's Committee on Culture came up with the report by Willy Kuypers leading to the 1987 "Resolution on the languages and cultures of regional and ethnic minorities".⁵ This resolution was more far-reaching than the Arfe-resolutions. It recommends various measures to the MS in the areas of education, language use before local authorities, mass media, cultural infrastructure, transborder cooperation and other areas covered nowadays by the Framework Convention for the Protection of National Minorities (FCNM) developed in the framework of the Council of Europe. One of the claims the resolution addresses to the Commission is the establishment of a separate budget line comprising at least 1 million ECU. Moreover, the Parliament calls on the Commission to accord the European Bureau for Lesser Used Languages (EBLUL) official consultative status and claims that Council and Commission

...the Treaty of Amsterdam elevates all the political criteria of Copenhagen to the level of Primary law - with only the exception of the clause on minority protection. Obviously the Master of the Treaties (i.e. the MS) did not want to grant the "protection of minorities" binding force and a clear internal dimension.

should continue to support EBLUL. Finally, the resolution decides that the "Intergroup on Lesser Used Languages" shall be granted full status as an official Intergroup of the European Parliament.

In the Parliament's third legislative period (1989-1994), the Committee on Culture elaborated a report drafted by Mark Killilea. Based on this report, the Parliament agreed on the 1994 "Resolution on linguistic minorities in the European Community".⁶ This resolution shows some influence of the Treaty of Maastricht, which entered into force at the end of 1993 and underlined in the new Article 128 EC (now Article 151 EC) the cultural dimension of the EU. The Parliament notes that the minority languages and cultures are also an "integral part of the Union's culture and

⁴ See OJ C 68, p. 103.

⁵ See OJ C 318, p. 160.

⁶ See OJ C 61, p. 110.

European heritage" and that therefore the Community should provide the minorities "legal protection and appropriate financial resources".⁷ The Community should especially encourage action by MS in cases where the protection is inadequate or non-existent. Member States are called upon to recognise their linguistic minorities and create the basic conditions for the preservation and development of minority languages. National legal acts should "at

Explicit reference to minorities is only to be found in the agreements concluded with the Baltic States where this reference is not formulated as a general clause of minority protection.

least cover the use and encouragement of such languages and cultures in the spheres of education, justice and public administration, the media, toponymics and other sectors of public and cultural life".⁸ The resolution calls on the Commission and the Council to accommodate minority languages in all its

educational and cultural programmes (a call which was not fully fulfilled) and to propose a multiannual action programme for minority languages (something which until now does not exist).

In conclusion, one can say that the Kuypers resolution was the most successful since the annual budget line on minority languages (in existence till 1998)⁹. The financing of EBLUL and the establishment of the Intergroup within the Parliament are the most visible results of the first phase of the EU's initial involvement in minority (language) issues.

2. The enlargement phase (dominated by conditionality administered by the European Commission)

2.1. Introduction: the European Council sets the stage for a new phase

The perspective of Eastern Enlargement can be considered to be the midwife of the EU's more pronounced minority policies. At a meeting held in Copenhagen in June 1993, the European Council decided that the relevant countries in Central and Eastern Europe that so desire shall become members of the European Union and established the conditions that had to be fulfilled before accession. These conditions included the "respect for and protection of minorities" and represented an important element of the Union's Accession Strategy. They formed part of the matrix used in the

⁷ See consideration no. L of the resolution.

⁸ See Para. 4 of the resolution.

⁹ The budget line came to an end in 1998 when the European Court of Justice since the Court noted that it was not based on an act of Secondary law (such as a Council regulation). See ECJ, C-106/96.

first Opinions of the Commission on the candidate countries, the Accession Partnerships and the regular reports of the Commission on the progress of the candidates towards EU membership. Later on, the criteria for minority protection also became important elements of the EU's new policy towards South-Eastern Europe.

What distinguishes the enlargement phase from the idealistic phase is that, firstly, the EU's engagement in this phase is motivated by an external factor, namely the accession of new Member States; that, secondly, the momentum is dictated by the Council (deciding on accession and its criteria) and the Commission (monitoring the candidate states) and much less by the Parliament; thirdly, that the EU's emphasis seems to shift from a cultural perspective (engagement for the benefit of the languages and cultures of minorities) to a broader perspective including the issue of political participation of minorities; that, fourthly, the EU concentrates on minorities living outside the EU-territory; and that, finally, the Union applies the method of conditionality in order to push for minority-related reforms in the applicant states.

...the conditionality established in the partnerships exceeds the normative pool offered by the Europe agreements by referring back to the Copenhagen criteria.

The exogenous nature of the enlargement phase can easily be explained by the fact that the new Member (at that time: applicant) States have a plurality of minorities as well as the fact that political perceptions at that time were influenced by the events in the Balkans, fuelling fears that minority/majority-relations could become violent EU internal conflicts if the minority issues were not addressed before those states acceded to the Union.

The EU and its ethnic minorities:

<i>The EU and its phases of enlargement</i>	<i>Inhabitants</i>	<i>Minorities</i>	<i>Members of minorities</i>	<i>Share of minorities on total population in %</i>
	In 1000s	Absolute number of minorities	In 1000s	
1. EU - 15 2003	375.418	73	32.138	8,6
2. EU - 25 2004	450.559	156	38.174	8,5
3. EU - 27 2007	480.190	187	42.306	8,8
Europe (39 States)	768.698	329	86,674.000	11,45

Source: Christoph Pan/Beate S. Pfeil (2003), National Minorities in Europe, Vienna, ETHNOS.

2.2. Enlargement phase: legal means applied

Accession to the EU is regulated by Article 49 which depicts the Union as a very open organisation since for a long period the only written criterion for accession was that states applying for the Union had to be "European". Only the Treaty of Amsterdam

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transferred the political accession criteria into EU-Primary law. Since 1999, the EU Treaty makes clear that the Union is "founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States" (Art. 6 EU).

This explicit reservoir of values was given an explicit internal as well as external dimension that make Art. 6 EU a neuralgic provision in EU Primary law: According to Article 7, EU Member States can be sanctioned if they commit a "serious and persistent breach ... of principles mentioned in Article 6" (internal dimension), and according to Article 49, EU applicant states have to respect the principles set out in Article 6 (external dimension). It is noteworthy that the Treaty of Amsterdam elevates all the political criteria of Copenhagen to the level of Primary law - with only the exception of the clause on minority protection. Obviously the Master of the Treaties (i.e. the MS) did not want to grant the "protection of minorities" binding force and a clear internal dimension. This is even more relevant since there was hardly any *acquis communautaire* in the area of minority protection available - a fact which left the accession criterion of the "protection of minorities" somewhere in the open field of political obligations lacking any clear cut legal dimension. This sour situation was to a certain degree counterbalanced by the fact that various legal instruments of the accession strategy made reference to the Copenhagen criteria (instead of the reductionist wording in Article 6 EU), thereby granting the protection of minorities a legal dimension in the context of enlargement.

As regards the agreements concluded with the Central and Eastern European Countries (CEECs), only the (legally non-binding) Preambles refer explicitly to minority rights. In the operative (and legally binding) part of the agreements, only four agreements mention human rights as principles that "inspire the domestic and external policies of the Parties and constitute essential elements of the [respective] association" (Article 6 of the Europe agreements concluded with Romania, Bulgaria, the Czech and the Slovak

Republics).¹⁰ Explicit reference to minorities is only to be found in the agreements concluded with the Baltic States where this reference is not formulated as a general clause of minority protection. Rather these three Europe agreements underline that when it comes to cooperation between the Parties in the area of education, this cooperation should focus on "promoting language training ... in particular for resident persons belonging to minorities".¹¹

The non-existent (or very weak) anchorage of the protection of minorities in the Europe agreements was to a certain degree counterbalanced by another feature of the so-called pre-accession strategy, namely, the accession partnership. These "partnerships" are technically speaking unilateral decisions of the Council. Based on the Council Regulation (EC) No 622/98 of 16 March 1998 the Council decided, on a proposal by the Commission, on the "principles, priorities, intermediate objectives and conditions contained in the individual Accession Partnerships" as they were submitted to each applicant State.¹² What is of utmost relevance here is that the conditionality established in the partnerships exceeds the normative pool offered by the Europe agreements by referring back to the Copenhagen criteria. Article 4 of the partnership-regulation establishes that, where an element that is essential for continuing to grant pre-accession assistance is lacking, in particular when the commitments contained in the Europe Agreement are not respected "and/or progress towards fulfilment of the Copenhagen criteria is insufficient, the Council, acting by a qualified majority on a proposal from the Commission, may take appropriate steps with regard to any pre-accession assistance granted to an applicant State." This brings minority protection back in the game through the back-door and equips the non-binding criteria of minority protection with legal force in the context of enlargement-conditionality. This cannot, however, eliminate the fact that the Copenhagen criterion of "respect for and protection of minorities" remains hopelessly vague.

2.3. Enlargement reloaded: the policy vis-a-vis the Western Balkans

This situation has changed slightly in the context of the so-called "third wave" of enlargement, namely the Stabilisation and Association Process (SAP) vis-a-vis the Western Balkan states. In this new and delicate context the Council issued "Conclusions on the Application of Conditionality" that make clear that financial

¹⁰ See for instance the Rumanian agreement in OJ L 357, p. 2.

¹¹ See e.g. Art. 78 of the Lithuanian agreement in OJ L 51, p.3.

¹² See Art 2 of the regulation 622/1998 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships, in OJ L 85, 1.

assistance requires "respect for human and minority rights" and the offer of "real opportunities to displaced persons".¹³ Moreover, negotiations for contractual relations are only possible where the country at hand shows

"a credible commitment" to "generally recognized standards of human and minority rights". These standards are further defined as enshrining three elements, namely the "[r]ight to establish and maintain ... own educational, cultural and religious institutions, organisations or associations", "[a]dequate

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opportunities for ... minorities to use their own language before courts and public authorities" and "[a]dequate protection of refugees and displaced persons returning to areas where they represent an ethnic minority".¹⁴ On a legally binding level the CARDS-regulation on financial assistance in the SAP-framework makes clear that minority rights are an "essential element" for the application of that very regulation and a precondition for the eligibility for Community assistance. If these principles are not respected, the Council can revoke any financial assistance.¹⁵ Since the CARDS-regulation refers back to the Council conclusions of 1997, this is one of the most comprehensive conditionality clauses ever embodied in a Community law measure!

The legal standing of minority rights under the Stabilisation and Association Agreements (in the following: SAAs) is less clear. The latter mention in their Article 3 that human rights and the respect and protection of minorities "are central to the Stabilisation and Association process" but minority rights are not listed as "essential elements" in the sense of Article 2 of the agreements. Therefore, the Council cannot suspend the agreement for the violation of minority rights.¹⁶ However, the agreements at the same time underline that not only the conclusion but also the implementation of the agreements come "within the framework of the regional approach of the Community as defined in the Council conclusions of

¹³ See Annex III to Council Conclusions, Luxembourg 29/30 April 1997, in EU Bulletin, 4(1997), point 2.2.1.

¹⁴ See the Annex to the mentioned Annex III.

¹⁵ See Article 5 of the CARDS-regulation 2666/2000, in OJ L 306, 1.

¹⁶ On suspension see e.g. Art. 133 of the SAA concluded with Serbia. However what remains is the instrument of "appropriate measures" (compare e.g. Art. 129 Para. 4).

29 April 1997". Moreover the European Partnerships – just as the earlier Accession Partnerships – make reference to the Copenhagen criteria and even refer to the Council conclusions of 1997.¹⁷ Again

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these partnerships offer the possibility of translating the rather general obligation to protect minority rights into more detailed and country-specific obligation.

As regards the negotiation phase in the current enlargement it is interesting to note that "Judiciary and fundamental rights" for the first time build an independent chapter (the number of chapter was expanded from 31 to 35) – a fact which once more underlines that the Commission sees minority protection as

building a part of the *aquis communautaire*.¹⁸ Moreover, the screening reports are this time made available to the public.¹⁹ In conclusion, one can say that in the context of enlargement, the momentum of minority protection has not faded away after the "big-bang enlargement" of May 2004 but has rather been fine-tuned and further developed in the context of South-eastern Europe.

3. The internalization phase (involving all players and applying a plethora of means)

3.1. *The political dimension: new postulations by the European Parliament after the experience of Eastern enlargement*

In the fifth legislative period (1999-2004), in 2003, the Parliament's Committee on Culture presented a "resolution with recommendations to the Commission on European regional and lesser-used languages – the languages of minorities in the EU – in the context of enlargement and cultural diversity" based on the report tabled by Michl Ebner (see Chapter VII).²⁰ In this resolution the Parliament proposes various measures in order to foster the standing of regional

¹⁷ The European Partnerships are based on Council Regulation 533/2004 of 22 March 2004, OJ L 86, 1.

¹⁸ Compare Frank Hofmeister, Grundlagen und Vorgaben für den Schutz der Minderheiten im EU-Primärrecht, in 68 Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht (2008), 175-193, at 175.

¹⁹ See http://ec.europa.eu/enlargement/candidate-countries/turkey/screening_reports_en.htm; http://ec.europa.eu/enlargement/candidate-countries/croatia/screening_reports_en.htm.

²⁰ OJ 2004 C 76 E, 374.

and minority languages. Interesting is the annex of the resolution which contains two main recommendations: the establishment of a European Agency for linguistic diversity and language learning and of a multiannual programme for linguistic diversity including regional and minority languages.²¹ Neither such a programme nor the agency have been realised.

The resolution emphasizes that the concept of positive action cannot be reduced to the idea of a quota but may in practice take the most varied forms, such as a guarantee of recruitment interviews, priority access to certain types of training leading to jobs in which certain categories of people are under-represented, priority notification of job vacancies to certain communities and the taking into account of work experience rather than qualifications alone.

Other proposals enshrined in the resolution's Annex also wait for realisation. The Ebner Resolution calls for instance for regular monitoring on the basis of Article 6 EU which should pay particular attention to the protection of human rights in general and the protection of minorities in particular, not only in relation to external policy, but also within the Member States. Another clear reference to the enlargement experience can be seen in the call for further coop-

eration between the European Union institutions and the Council of Europe bodies in the area of minority protection. Various calls in the resolution address the then ongoing IGC and propose amendments of the Treaties in order to allow for a more minority-minded EU-law. Proposals in this regard include a new Article 151a EC calling upon the Union to promote linguistic diversity, including regional or minority languages, by encouraging cooperation between Member States. Moreover, the Ebner Resolution calls for the extension of Article 13 EC to discrimination on the grounds of language (which so far does not fall under the Union's anti-discrimination competence) and the extension of qualified majority voting to cultural matters (Article 151 EC). The Treaty of Lisbon (ToL) addresses only this last postulation (majority voting in the area of culture).

In the sixth legislative period (2004-2009) the Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) came up with the 2005 "resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe" on

²¹ In its early draft version, the Ebner report included a third recommendation, namely the extension of the mandate of the EUMC to the protection of minorities and the protection against linguistic discrimination.

the basis of the report tabled by Claude Moraes.²² Due to its broad mandate this is the most encompassing and far reaching resolution. Its starting point is that enlargement has led to a more diverse Union and that minority issues within the EU need to be given greater attention (considering that the Fundamental Rights Agency must play a key role therein). The Parliament points out "the inconsistency of policy toward minorities — while protection of minorities is a part of the Copenhagen criteria, there is no standard for minority rights in Community policy nor is there a Community understanding of who can be considered a member of a minority". It proposes that a future EU-definition of minorities should be based on the Council of Europe Recommendation 1201(1993) according to which a "national minority" is a group of persons in a state who reside on the territory of that state, who maintain longstanding, firm and lasting ties with that state, display distinctive ethnic, cultural, religious or linguistic characteristics, is sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state and is motivated by a concern to preserve together that which constitutes its common identity, including its culture, tradition, religion or language. At the same time, the Parliament admits that there exists "no single solution" for improving the situation of minorities in all MS. However "some common and minimum objectives for public authorities in the EU should be developed". In this context the Parliament underlines that "effective participation in decision-making based on the principles of subsidiarity and self-governance is one of the best ways of handling the problems of traditional minority communities". Moreover the Parliament gives a list of articles in the EC-Treaty which could be used in order to enhance the FCNM²³:

"(a) Article 13 on anti-discrimination policy; using this legal basis, which is the most far reaching as regards the protection of minorities, the Union could, on the basis of its experience, develop the following initiatives that have already been implemented and strengthen various articles of the FCNM, such as Article 3(1), Article 4(2) and (3) and Articles 6 and 8 thereof,

(b) Article 18 TEC, which deals with freedom of movement and the right of residence, could serve as a strong basis for facilitating the movement of people belonging to minorities, thereby avoiding their isolation, the creation of new "ghettos" or forced assimilation,

(c) Articles 49, 95 and 151 TEC could provide a strong foundation in the Union for safeguarding the principles enshrined in

²² See OJ 2006 C 124, 405.

²³ See Para. 49 of the above quoted Moraes resolution.

Article 9 of the FCNM, such as freedom of expression or the right not to be discriminated against in access to the media,

(d) Articles 65 TEC and 31 TEU, which deal with judicial cooperation and assistance and cover ground similar to Article 10(3) of the FCNM, are of the utmost importance for any member of a minority seeking assistance, whether in civil or criminal proceedings,

(e) Article 62 TEC, which deals with migration policy, which remains incomplete six years after the entry into force of the Treaty of Amsterdam (consideration must be given to the need for legal migrants to be integrated into society),

(f) Points (g), (h), (i) and (j) of Article 137(1), which deal with the employment of third-country nationals, the integration of persons excluded from the job market and combating social exclusion, would be a strong basis for new initiatives focusing on minorities,

(g) Article 149 TEC on improving access to education could contribute, through furthering the integration of minorities into society, as provided for in Article 12 and 14 of the FCNM,

(h) Articles 151 and 163 TEC, which deal with culture and research, could be of importance for developing common programmes for minorities in these areas (as provided for in Article 12 of the FCNM)".

The Moraes report also underlines the special relevance of the Roma, a community that became with enlargement one of the largest minorities in the EU and that is in need of "special protection".²⁴ This issue is taken up by the same Committee in the 2005 European Parliament resolution on the situation of the Roma in the European Union²⁵ and later again by the Committee on Women's Rights and Gender Equality in the 2006 European Parliament resolution on the situation of Roma women in the European Union²⁶. Finally at the end of January 2008 the European Parliament agreed on a resolution on a "European strategy on the Roma".²⁷

The LIBE-Committee was also the source of another important resolution, namely the 2006 "resolution on non-discrimination and equal opportunities for all - a framework strategy".²⁸ This

²⁴ In another resolution the EP defines the Roma as the "European Union's most disadvantaged ethnic-minority group". See European Parliament Legislative Resolution on the proposal for a Decision of the European Parliament and the Council on the European Year of Equal Opportunities for All, P6_TA(2005)0489, 13.12.2005, consideration no. 12.

²⁵ See OJ 2006 C 45E, p. 129.

²⁶ See P6_TA(2006)0244, 01.06.2006.

²⁷ See P6_TA(2008)0035, 31.01.2008.

²⁸ See P6_TA(2006)0261, 14.6.2006.

resolution is based on the draft by Tatjana Zdanoka and comments on the respective Commission strategy. The Parliament repeats the call that "traditional national minorities urgently need a framework policy standard for their effective participation in decision-making processes concerning their identity, and need to be protected by various forms of

self-government or autonomy to overcome the double standards established by the Copenhagen criteria on the one hand and the lack of any rules in the Member States on the other".²⁹ Moreover, the resolution argues for a clear definition of positive action. The latter concept is based on the acknowledgement of the fact that in certain cases, "effective action to combat discrimination requires active intervention by the authorities for the purpose of restoring a seriously compromised balance". Such circumstances include blatant inequalities of an "endemic", "structural or even "cultural" nature. They justify a temporary exception to be made to the concept of equality based on the individual in favour of group-based "distributive justice" through the adoption of "positive" measures. Such an intervention is not to be regarded as a form of discrimination (not even as a "positive" form). The resolution emphasizes that the concept of positive action cannot be reduced to the idea of a quota but may in practice take the most varied forms, such as a guarantee of recruitment interviews, priority access to certain types of training leading to jobs in which certain categories of people are under-represented, priority notification of job vacancies to certain communities and the taking into account of work experience rather than qualifications alone.³⁰ Next to these important specifications the Parliament underlines that data collection on the situation of minorities and disadvantaged groups is critical and that policy and legislation to combat discrimination must be based on accurate data. Therefore, the Parliament suggests that

What makes, however, the Race Directive such a powerful instrument is the fact that it applies – in contrast to the Framework Employment Directive – not only in the area of employment but also in a variety of other crucial areas such as social protection, including social security and healthcare, education and even access to and supply of public goods and services, including housing. This broad scope makes the Racial Equality Directive a crucial tool for ethnic minorities.

²⁹ P6_TA(2006)0261, Para. 25.

³⁰ P6_TA(2006)0261, Paras. 8 and 9.

the Article 29 Working Party established under the Data Protection Directive should issue an opinion clarifying the provisions of that directive which might hinder the collection of certain sensible data for this purpose.

3.2. The legislative dimension: Article 13 as the new core norm of minority protection

Since the Treaty of Amsterdam entered into force beginning of May 1999, the European Union is equipped with a broad legislative competence "to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" by all sorts of "appropriate action". The Council may act on Article 13 EC by unanimity on a proposal from the Commission and after consulting the European Parliament. The new legislative base has often been labelled as the core norm for any future more normative involvement of the EU in the area of minority protection. However, from a procedural perspective the norm contains an obvious "brake" since its usage needs consensus in the Council – a situation which in certain sensitive areas might be difficult to obtain. This situation is not going to change even if the Treaty of Lisbon should enter into force. Whether the wording of Article 13 draws tangible limits in substance for potential measures based on this very Article is open to discussion. Obviously Article 13 EC does not offer a legislative basis for combating discrimination based on language. Much less clear is whether Article 13 EC could form the base for legislation calling for affirmative action or even group rights. It is submitted here that Article 13 EC can be characterised as a sort of "container-provision" whose concrete reach is dependent on the reading of equality applied.³¹ Indeed one can identify various tendencies which might indicate that the EU is slowly moving away from a formal idea of equality and increasingly applying (or at least arguing for) a more substantive reading of equality – a fact which could legitimise calls for affirmative actions taken at EU level.³² So far, however, a minority protection instrument encouraging the Member State

...the minority-relevant innovations to be introduced by the Treaty of Lisbon are – politically speaking – quite likely to be introduced also by a "reformed" Reform Treaty should the ratification of the Lisbon Treaty indeed fail.

³¹ In this sense I am departing from my earlier, more restrictive reading of this provision.

³² See on this, for instance, Kristin Henrard, "Equal rights versus special rights?", report published by the European Commission, DG Employment, Social Affairs and Equal Opportunities, 2007.

to introduce affirmative actions is out of sight – the only thing current EU legislation does is to explicitly allow for “specific measures to prevent or compensate for disadvantages” at the national level.

So far Article 13 has been used for four different types of measures:

1. as a legal base for directives banning (certain forms of) discrimination in certain fields:

- Racial Equality Directive, 2000³³
- Framework Employment Directive, 2000³⁴
- Service Directive on equal treatment between men and women, 2004³⁵

2. as a legal base for Community action programmes providing financial means:

- programme on combating discrimination (2001-2006)³⁶
- gender programme (2001-2005)³⁷
- programme PROGRESS³⁸
- programme for organisations in the gender field³⁹

3. as a legal basis for the establishment of European Years:

- European Year for Peoples with Disabilities (2003)⁴⁰
- European Year of Equal Opportunities (2007)⁴¹

³³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, in OJ 2000 L 180, 22.

³⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, in OJ 2000 L 303, 16.

³⁵ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, in OJ 2004 L 373, 37.

³⁶ Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination, in OJ L 303, 23.

³⁷ Council Decision 2001/51/EC of 20 December 2000 establishing a Programme relating to the Community framework strategy on gender equality.

³⁸ Decision No 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity — Progress, in OJ L 315, 1.

³⁹ Decision No 848/2004/EC of the European Parliament and of the Council of 29 April 2004 establishing a Community action Programme to promote organisations active at European level in the field of equality between men and women, in OJ L 157, p. 18.

⁴⁰ Council Decision 2001/903/EC of 3 December 2001 on the European Year of People with Disabilities 2003, in OJ 2001 L 335, p. 15.

⁴¹ Decision No 771/2006/EC of the European Parliament and of the Council of 17 May 2006 establishing the European Year of Equal Opportunities for All (2007) — towards a just society, in OJ 2006 L 146, p. 1.

4. as a legal basis for the establishment of the Gender Institute in Wilnius⁴²

5. as a legal base for Council decisions authorising the signing of Framework Agreements or Protocols with States of the Western Balkans allowing these countries to participate in Community programmes⁴³

As is well known, the Racial Equality Directive forbids only discrimination on the basis of racial or ethnic origin, whereas the Framework Employment Directive addresses all the other forms of discrimination listed in Article 13 EC. What makes, however, the Race Directive such a powerful instrument is the fact that it applies – in contrast to the Framework Employment Directive – not only in the area of employment but also in a variety of other crucial areas such as social protection, including social security and healthcare, education and even access to and supply of public goods and services, including housing. This broad scope makes the Racial Equality Directive a crucial tool for ethnic minorities.⁴⁴ Religious minorities, however, are only protected by the Framework Employment Directive and therefore in a much more limited area,

...the Treaty of Lisbon (in the following: ToL) introduces for the first time in the history of European integration the word "minorities" in EU-Primary Law.

namely employment. However, in summer 2008 the Commission proposed a new Directive implementing the principle of equal treatment between person irrespective of religion or belief, disability, age or sexual orientation.

This proposed legislation aims at protecting groups other than *ethnic* minorities outside the sole field of employment.⁴⁵ What must be underlined is that none of these Equality Directives (included the one recently proposed) foresees an obligation for the MS to establish equal opportunities in practice (let alone equal results).

⁴² Regulation (EC) No 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality, in OJ L 403, p. 9.

⁴³ See e.g. Council Decision 2005/518/EC of 22 November 2004 concerning the signing of a Framework Agreement between the European Community and Bosnia and Herzegovina on the general principles for the participation of Bosnia and Herzegovina in Community programmes, in OJ 2005 L 192, 8.

⁴⁴ For more details on the Racial Equality Directive see for instance Gabriel N. Toggenburg, "The Race Directive: A New Dimension in the Fight against Ethnic Discrimination in Europe", in European Yearbook on Minority Issues 2002, Kluwer Law International, The Hague, 2002, 231-244.

⁴⁵ See COM(2008)426 final, 2.7.2008.

There is only a clause (Article 5 of the respective Directives) which says that the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to the respective grounds of discrimination. This negative wording conveys the impression of a rather formal reading of equality. A more proactive wording encouraging the MS to introduce affirmative measures (without imposing any legal duty in this direction) would have given a different impression that is more in line with the position on equality as it is increasingly developed by the Commission and the Parliament (see on this point 3.4).

3.3. The constitutional dimension: innovations to be introduced by the Treaty of Lisbon

This is not the place to discuss, whether (and to what degree) the Reform Treaty or Lisbon Treaty (ToL) (and with it the substance of the former Constitutional Treaty) is "dead". What one can say, however, is that the minority-relevant innovations to be introduced by the Treaty of Lisbon are – politically speaking – quite likely to be introduced also by a "reformed" Reform Treaty should the ratification of the Lisbon Treaty indeed fail. In the following section, a short description of those pending changes in Primary law is given.

Firstly, the Treaty of Lisbon (in the following: ToL) introduces for the first time in the history of European integration the word "minorities" in EU-Primary Law. The above mentioned lacuna of minority protection in the Treaty of Amsterdam is going to be closed since the ToL complements the reservoir of values in the current Article 6 EU with the following statement: "including the rights of persons belonging to minorities".⁴⁶ However, notwithstanding its historical importance, this provision seems to be worded in a very cautious way. It refers neither to "groups" nor to "group rights". In any event, what is addressed here are not the classical human rights of individuals who coincidentally belong to minorities (such a reading would render the clause useless)⁴⁷ but specifically, individual rights necessary for those people who belong to minority groups. This conforms to the standard of mi-

⁴⁶ See Art. 2 of the consolidated EU-Treaty as to be amended by the ToL. See OJ C 115 of 9 May 2008. This amendment was agreed upon not in the drafting stage of the Constitutional Treaty (which became the basis for the later ToL) but only at the Intergovernmental Conference under the Italian Presidency at end of 2003.

⁴⁷ See Bruno de Witte, "The constitutional resources for an EU minority policy", in Gabriel N. Toggenburg (ed.), *Minority protection and the enlarged European Union: The way forward*, Budapest, 2004, 109-124, at 111.

nority protection as developed by international law.⁴⁸ In fact, one might identify in the wording "including the rights of persons belonging to minorities" the attempt to overcome the tension between, on the one hand, an individualistic notion of rights and a rather formal perception of equality as is so far predominant in EU law and, on the other hand, the realisation that justice and the protection of group identities are hardly possible if any group dimension to rights and any more substantive perception of equality

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are ignored. Of course, this new provision does not prescribe the introduction of group-rights. Nevertheless, politically speaking, it calls for a certain sensitivity towards groups. Legally speaking, such sensitivity should translate to a reading of equality and non-discrimination which operates with affirmative actions and related forms of special attention given to members of minority groups.

Secondly, the ToL aims at equipping the Charter of Fundamental Rights (despite the fact that it is not integrated into the Treaty text) with the rank and power of EU Primary law.⁴⁹ As is well

known, the Charter's Article 21 lists an array of grounds on which discrimination is forbidden and explicitly mentions in this context any discrimination on the basis of "membership of a national minority".⁵⁰ Since the existing (non-written) EU catalogue of forbidden grounds of discrimination is an open one, this might not be all too astonishing and most probably does not add much to

⁴⁸ Anders Rönquist, The Council of Europe Framework Convention for the Protection of National Minorities, in Helsinki Monitor, 6(2005), pp. 38-44, at 40.

⁴⁹ See Art. 6 Para. 1 of the consolidated EU-Treaty as to be amended by the ToL: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

⁵⁰ Note that this prohibition applies only in those contexts where EU-law is relevant. In areas left entirely to the MS, the Charter has no role to play.

the general principle law of equality under current EU law. Nevertheless, this provision can be seen as representing a quantum leap in so far as the term "national minority" will become with entry into force of the ToL a term of EU law.⁵¹ As such it will – sooner or later – (have to) be interpreted by the ECJ. This again lets the above-mentioned call of the Parliament to define the term "national minorities" appear more realistic.

Thirdly, the ToL establishes a new mainstreaming obligation for the Union. According to Article 10 of the consolidated EC Treaty (which is, according to the ToL, to be renamed "Treaty on the functioning of the EU" in the following TFEU), the Union "shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" when defining and implementing any of its policies and activities. Thus, the Union has not only to avoid discriminations (this is clearly already the case due to the current general principle of equality), but it has to actively promote anti-discrimination whenever it is becoming active as legislator or as an executive organ. Only such a proactive reading explains coherently why the mainstreaming provision does not refer to the (broader but only prohibitive) provision in Article 21 of the Charter but to the (more narrow but enabling) competence provision in Article 19 TFEU (corresponding to the current Article 13 EC). Ethnic and religious antidiscrimination will therefore have to be a among the aims of every future EU activity. However, since this new mainstreaming obligation builds on the enabling provision in the TFEU and not the prohibitive provision in the Charter, it will not cover two crucial forms of discrimination, namely, discrimination on the basis of language and discrimination on the basis of membership of a national minority. This, however, does reflect an asymmetry which is already part of current EU law: Linguistic discrimination and discrimination on the basis of membership of a national minority are forbidden (via the general principle of equality), yet the EU has no explicit competence to actively combat these forms of discrimination via Article 13 EC.

Fourthly, by making the Charter legally binding the ToL will also establish an explicit obligation for the EU to "*respect cultural, religious and linguistic diversity*" (Article 22 of the Charter). Studying the drafting history of this provision it becomes obvious that this provision was regarded as the constitutional space to be used

⁵¹ It is interesting to note that the so called "Citizens Directive" does in its consideration no 31 refer to the Charter and establishes that MS "should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as ... membership of an ethnic minority". See OJ 2004 L 229, 35-48.

for protecting minority interests during the drafting of the Charter.⁵² However, the outcome is sobering. The provision – heralded by some as an EU-minority clause – is hopelessly vague. Even the explanatory memorandum of the Charter fails to deliver any argument for identifying Article 22 of the Charter as a clear cut clause of minority protection. As has been maintained elsewhere, the constitutional diversity-*acquis* of the European Union generally oscillates between *inter-national diversity* (diversity *between* the Member States) and *intra-national diversity* (diversity *within* the Member States) but has a certain preference for the former notion.⁵³ In that sense, the Janus-faced notion of European diversity can be referred to as a self-restrictive value. This again will make it rather difficult to hijack the notion of diversity in order to encourage Member States to bring their minority policies in line with a supposed (but in fact, at least so far, non-existent) European notion of minority-related diversity.

In conclusion, one can say that the upcoming constitutional revision at EU-level makes explicit what so far has been latent only: The protection of rights of persons belonging to minorities is not only an EU accession criterion, but it also represents a value the EU “is founded on” and which is “common to the Member States”.⁵⁴ How far this

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protection has to go is however left open to doubts and discussion. This has two implications: As regards the so-called “positive” EU-integration the Treaty of Lisbon does not provide the EU with an explicit competence to rule in the area of minority rights; in fact, it does not add any new policy area which would be crucial to the area of minority protection. In this sense, the new value provision

⁵² See for the various submissions and comments in that process, Sven Hölscheidt, “Artikel 22”, in Jürgen Meyer (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, Nomos, Baden-Baden, 2003, 290-298.

⁵³ See on this Gabriel N. Toggenburg, “Unity in diversity”: searching for the regional dimension in the context of a somewhat foggy constitutional credo, in Roberto Toniatti et al. (eds.), *An ever more complex Union. The regional variable as missing link in the European Constitution*, Nomos, Baden-Baden 2004, pp. 27-56. See recently Armin von Bogdandy, *Die Europäische Union und das Völkerrecht kultureller Vielfalt: Aspekte einer wunderbaren Freundschaft*, *European Diversity and Autonomy Papers*, 1(2007), online at www.eurac.edu/edap.

⁵⁴ See Art 2 of the EU Treaty as to be amended by the ToL.

of the ToL remains a "foundation on which it would be difficult [for the EU] to build a solid edifice".⁵⁵ As regards the so called "negative" EU-integration, the Treaty of Lisbon remains silent on the minority-related obligations of the Member States (and the EU itself). This seems remarkable given the background of the fact that minority protection will become an explicit value of the EU whose violation can lead to a sanctioning procedure according to Article 7 EU. And indeed, one can doubt whether the obligation to respect "the rights of persons belonging to minorities" is so crystal-clear that "Member States can discern the obligations resulting there from".⁵⁶ The Treaty of Lisbon provides – besides more indirect improvements, for instance, in the area of cultural policy or as regards the position of the regions⁵⁷ – a prominent reference point in Primary Law. But it does not provide a compass as to the probability, timing, intensity and direction of future minority-engagement at EU-level: the EU's minority-momentum is entirely left to the area of politics. An example serves in this context in the area of language use. The EU Treaty as amended by the ToL establishes that the Treaties may also be translated into "any other languages as determined by Member States among those which, in accordance with their constitutional order, enjoy official status in all or part of their territory".⁵⁸ This however is of no legal and hardly any political value. Definitively, this modest formulation is light-years away from the call of the European Parliament to improve the communication between the European institutions and their citizens "in their own national language, regardless of whether the language in question has official status at Member

⁵⁵ See Bruno de Witte, "The constitutional resources for an EU minority policy," in Toggenburg (ed.), *Minority protection and the enlarged European Union*, loc.cit., 109-124, at 111.

⁵⁶ The Presidium of the European Convention drafting the constitutional treaty advocated a very short value provision representing "a hard core of values meeting two criteria at once: on the one hand, they must be so fundamental that they lie at the very heart of a peaceful society practicing tolerance, justice and solidarity; on the other hand, they must have a clear non-controversial legal basis so that the Member States can discern the obligations resulting therefrom which are subject to sanction". See See Annex 2 of CONV 528/03 as of 6 February 2003, 11.

⁵⁷ The ToL moves the area of culture (the current Article 151 EC, see Art. 167 TFEU) from unanimity into qualified majority voting in the Council – a step which might prove crucial for sustaining minority identities by means of EU cultural policies. Also, the ToL strengthens in general the regional dimension of the EU's multilevel system of governance and even provides for a mechanism of direct democracy, which could be helpful for a big transnational minority such as the Roma.

⁵⁸ See Art. 55 Para. 2 EU (Art. 358 TFEU refers to this provision).

State or EU level".⁵⁹ This call has, at least to a certain degree, received a positive response, not hammered out in Primary law but by political agreement found at the level of EU secondary law. The Council conclusions of 13 June 2005 foresee that acts adopted by the Parliament and the Council in co-decision should be made public also in those languages that are not EU-official languages but "whose status is recognised by the Constitution of a Member State" or "the use of which as a national language is authorised by law".⁶⁰ Such languages can also be used in speeches to Council meetings if the request

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is made reasonably in advance and the necessary staff and equipment for interpretation are available. Most importantly, these languages can also be used in written Communications to Union institutions and bodies.⁶¹ This communication relies on sort of relais-institutions at the national level that translate between the citizen and the respective European institution. Of course, this new system applies only for states like Spain, who introduce such bodies and assume all the direct and indirect costs resulting from

⁵⁹ "Resolution on a new framework strategy for multilingualism", P6_TA(2006)0488, 15.11.2006, Para 21.

⁶⁰ See Council conclusion of 13 June 2005 on the official use of additional languages within the Council and possibly other institutions and bodies of the European Union, in OJ 005 C 148, 1-2. See on the limitations of this wording Antoni Milian-Massana, "Languages that are official in part of the territory of the Member States," in Xabier Arzoz (ed.), *Respecting linguistic diversity in the European Union*, Amsterdam/Philadelphia 2008, 191-229.

⁶¹ See the "Administrative arrangement between the Kingdom of Spain and the Council of the European Union", in OJ 2006 C 40, 2 and the Administrative Agreement between the European Commission and the Kingdom of Spain, in OJ 2006 C 73, 14-15.

this additional translation mechanism. However, what this example shows is that minority-issues are hardly efficiently addressed by cherished principles of Primary Law. What counts are flexible and creative solutions at the level of EU secondary law.

3.4. *The governance dimension: fighting more actively for equality with means beyond the area of law – no place for old minorities?*

It can be argued that the Union has in recent years developed instruments which allow for, without adding new EU competences, the fostering of the minority momentum within the EU framework, outside the area of hard law. These instruments include a system of extended Impact Assessments (IAs), the application of the so-called Open Method of Coordination (OMC) in areas like employment, social inclusion and integration, and the provision of new financial stimuli.

In 2002, the European Commission announced that it was replacing its previous sector-based impact analyses with an ex-ante integrated approach examining potential social, economic and environmental impacts. As regards the social impacts, the new guidelines as of 15 June 2005 prescribe that every Impact Assessment has to check nine subgroups of potential social impacts of a legislative proposal. One subgroup of potential effects has the heading "*Social inclusion and protection of particular groups*".⁶² Another subgroup of potential social effects is headed "*Equality of treatment and opportunities, non-discrimination*".⁶³ So far nearly 300

⁶² Under this subheading, the Commission has to control the proposal's potential impact according to following questions: "Does the option affect access to the labour market or transitions into/out of the labour market? Does it lead directly or indirectly to greater in/equality? Does it affect equal access to services and goods? Does it affect access to placement services or to services of general economic interest? Does the option make the public better informed about a particular issue? Does the option affect specific groups of individuals, firms, localities, the most vulnerable, the most at risk of poverty, more than others? Does the option significantly affect third country nationals, children, women, disabled people, the unemployed, the elderly, political parties or civic organisations, churches, religious and non-confessional organisations, or ethnic, linguistic and religious minorities, asylum seekers?". See "Impact Assessment Guidelines", SEC(2005) 791, 15. June 2005, table 3 (social impacts), 31-32, available online at http://europa.eu.int/comm/secretariat_general/impact/docs/SEC2005_791_IA%20guidelines_annexes.pdf.

⁶³ Under this subheading, the Commission has to take a close look at the following questions: "Does the option affect equal treatment and equal opportunities for all? Does the option affect gender equality? Does the option entail any different treatment of groups or individuals directly on grounds of e.g. gender, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation? Or could it lead to indirect discrimination?". See Impact Assessment Guidelines, SEC(2005) 791.

impact assessments have been concluded since 2003.⁶⁴ An analysis of twenty selected IAs concludes that social impacts are "particularly difficult to identify, time and resource intensive to apply, and/or difficult to reach agreement on"⁶⁵ since quantitative/monetary methodologies and indicators are not always available.⁶⁶ Consequently, the analysis of the short-term economic impacts was found to be often more developed and concrete than the analysis of typically longer term social or environmental impacts.⁶⁷

In fact, 46% of the Commission officials agreed that appropriate tools (i.e. methodologies, analytical models, support groups within the Commission) were not in place to assess the social impacts of the proposals.⁶⁸ This problem has sometimes been aggravated by the fact that representatives of the General Directorates (in the following: DGs) that are mainly concerned with

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social impacts have in the past tended to be less present and active in the Inter-Service Steering Groups (in the following: ISSGs)⁶⁹ than officials from DGs concerned primarily with economic and environmental impacts. At this background it was postulated to foster "more active participation of "social" DGs in ISSGs, as well as a review of the list of social impacts in the IA Guidelines (pos-

⁶⁴ To be more precise: 284 at the beginning of 2008. See "Second Strategic Review of Better Regulation in the EU", COM(2008) 32 final, 30.01.2008, 5. The IAs are all made public and a summary is given in all the official languages.

⁶⁵ See "Evaluation of the Commission's Impact Assessment System", Final Report, April 2007, 45, at http://ec.europa.eu/governance/impact/key_en.htm (see also. 94 and 140).

⁶⁶ See "Evaluation of the Commission's Impact Assessment System", loc.cit., 93.

⁶⁷ See "Evaluation of the Commission's Impact Assessment System", loc.cit., 110. The relative vagueness of the criteria used for "social impacts" might also explain why so many (namely 87%) IAs identified potential social impacts (see Evaluation of the Commission's Impact Assessment System, loc.cit., in fn. 29).

⁶⁸ See "Evaluation of the Commission's Impact Assessment System", loc.cit., at 42.

⁶⁹ Inter-Service Steering Groups are in operation since the introduction of the revised IA Guidelines in 2005. They are the main vehicle for improved internal co-ordination and exchange between Commission services and have to be set up for all IAs for proposals of a cross-cutting nature.

sibly leading to a greater differentiation, especially in the area of "governance and participation" impacts), and clearer guidance as to what constitutes a social impact (and what does not), and how it should be assessed".⁷⁰

In March 2001, the Commission decided to check all of its proposals against the provisions of the Charter, despite the fact that the latter is not (yet) legally binding. In April 2005, this approach was further strengthened by integrating fundamental rights in every IA.⁷¹ Fundamental Rights are not seen as a fourth category of potential impacts but as a horizontal issue

which has to be taken into account when examining potential social, economic or environmental impacts. This is of course per se a positive development. However, one has to underline that the protection of fundamental rights is about the distinction between lawful and unlawful decisions whereas IAs are traditionally about the distinction between informed and less informed decisions.⁷² This might make the "integrated" approach of the current IAs seem less convincing. Moreover, the examination of fundamental rights requires a special knowledge – a fact which legitimizes calls for an active role of the Fundamental Rights Agency in this context. In any event, there is no doubt that IAs can efficiently address minority-issues at an early stage. The proposed Council Framework Decision on certain procedural rights in criminal proceeding might serve as an example in this context. Art. 14 of that proposal foresees the translation of the so-called "letter of rights" into all the official EU languages as a guarantee that all arrested persons receive the letter in a language they understand. For many

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⁷⁰ See Evaluation of the Commission's Impact Assessment System, loc.cit., 85-86.

⁷¹ See the Communication "Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring", COM(2005) 172 final, 27 April 2005. Note that this approach is supposed to be supervised by the newly founded Group of Commissioners on Fundamental Rights, Anti-discrimination and Equal Opportunities.

⁷² Helen Toner, "Impact assessments and fundamental rights protection in EU law", in 31 European Law Review (2006), 316-341, at 335.

speakers of minority languages this guarantee will not prove efficient (as they might not be able to understand the language of their Member State).⁷³

As regards the Open Method of Cooperation, the latter is of relevance for the EU's progress

on minority issues since OMC is regarded as a method able to spread best practices amongst the Member States and thereby achieve greater convergence towards the main EU goals in areas where the EU does not have full fledged legislative competence. OMC is designed to help Member States progressively develop their own policies. This is done by fixing guidelines combined with specific timetables for achieving the goals, which are planned for the short, medium and long terms; establishing, where appropriate, quantitative and qualitative indicators and benchmarks as a means of comparing best practice; and translating these European guidelines into national and regional policies by setting specific targets and adopting measures, while taking into account national and regional differences. The performance of the states is then periodically monitored through a system of national reports and European evaluations.⁷⁴ In fact, OMC allows for a great deal of flexibility. However, this form of governance can hardly be considered to be governed by legal rules. Consequently, it might raise skepticism on the part of the Member States who could look at OMC as an instrument allowing the EU to encroach on policy domains that have traditionally been reserved to them. But OMC might also raise skepticism from those members in the Union that fear that OMC is used to escape to watered-down engagement instead of using traditional hard law solutions at the EU level.⁷⁵ Despite these caveats, OMC is an attractive tool to reconcile the ambition of the European Union to coordinate and influence diverging national policies with the preoccupation of the single Member States with preserving their national autonomy and with preventing the

...minority-issues are hardly efficiently addressed by cherished principles of Primary Law. What counts are flexible and creative solutions at the level of EU secondary law.

⁷³ Niamh Nic Shuibhne, "Recent developments on the status of (minority) languages within the EU framework", in 4 European Yearbook of Minority Issues (2004/2005), 373-388, at 388.

⁷⁴ See e.g. the Presidency Conclusions of the Lisbon European Council, 23 and 24 March 2000, Par. 37.

⁷⁵ The Commission stated quite clearly that the OMC "should not be used when legislative action under the Community method is possible". See the Commission's White Paper on "European Governance", COM(2001) 428 final, 25 July 2001, at p. 22.

Union from encroaching on policy areas which are considered, politically speaking, "sensible". Consequently, it is plausible to look at OMC as a *modus* for Member States to expose their treasured and highly divergent approaches to minority protection to a multilateral policy-shaping process. In fact, minorities play a role in three areas where OMC applies, namely the employment policy, social policy and migration policy.

In the framework of the European Employment Strategy (EES), every Member State draws up a National Reform Programme (until 2005, National Action Plans, NAPs) which describes how the Employment Guidelines, which are proposed by the Commission and approved by the Council, are put into practice at the national level. They present the progress achieved in the Member State over the previous 12 months and the measures planned for the coming 12 months, and are hence both reporting and planning documents. From 1999 onwards, the Guidelines have expressly referred to "ethnic minorities and other groups and individuals who may be disadvantaged"⁷⁶, "ethnic minorities and migrant workers"⁷⁷, "immigrants, and ethnic minorities"⁷⁸. Since 2005 the reference can be found in the explanatory remark: "Combating discrimination, promoting access to employment for disabled people and integrating im-

As regards the Open Method of Cooperation, the latter is of relevance for the EU's progress on minority issues since OMC is regarded as a method able to spread best practices amongst the Member States and thereby achieve greater convergence towards the main EU goals in areas where the EU does not have full fledged legislative competence.

migrants and minorities are particularly essential." The policy performance of the Member States is assessed on an annual basis in the progress reports which are adopted by the Council together with the Commission (Joint Employment Report). These contain country-specific information as well as a comparison and synthesis of developments in the

area of employment from a European point of view. With regard to minorities, the reports state that the "lack of comparable data describing the scale or nature of the needs of disabled people and ethnic minorities is a serious handicap for assessing policies ad-

⁷⁶ Employment guideline no. 9 in 1999 and 2000).

⁷⁷ Employment guideline no. 7 in 2001 and 2002.

⁷⁸ Employment guideline no. 7 in 2003 and 2004.

dressed to these groups".⁷⁹ Moreover, the reports complain about the fact that the term "ethnic minorities" has been interpreted in the various National Action Plans in a different way which leads to a lack of comparability between them. Some Member States (UK, Netherlands) use a broad definition to encompass "visible minorities" (i.e. people who appear to be of foreign origin, irrespective of their nationality), while others restrict the scope either to non-nationals or non-EU nationals (Germany, Sweden) or to national minorities (Ireland, Finland, Austria).⁸⁰ However, it also becomes quite clear from the reports mentioned that the minority issue is, in this context, not addressed

as a cultural phenomenon or a question of political participation but as an issue of inclusion in the employment market. Belonging to an ethnic minority is seen primarily as a "particular risk factor" which enhances exclusion⁸¹ and traditional (national) minorities seem to play only a very limited role in the European Employment Strategy.⁸²

This picture is also offered in the Social Inclusion Process which seems primarily concerned with migrants

(and therefore new minorities as opposed to so called old minorities). The "impact of increased migration and growing ethnic diversity" is identified as one of six core structural changes which are impacting poverty and social exclusion.⁸³ In the context of the new Member States, a certain emphasis was also placed on the Russophone minorities and Roma, whereas migrants played a

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⁷⁹ 1999 Joint Employment Report, Part I: the European Union, adopted by the Joint Council (Labour and Social Affairs/ECOFIN) at its session on 29 November 1999, pp. 29 and 46.

⁸⁰ 1999 Joint Employment Report, loc.cit., at p. 47.

⁸¹ See Communication from the Commission "Strengthening the implementation of the European Employment Strategy", 7 March 2004, COM(2004) 239 final, at p. 27.

⁸² Note for instance that the most recent Joint Employment Report 2007/2008 does not at all mention minorities (but does refer to migrants). See Council doc. 7169/08, 3.3.2008.

⁸³ Joint Report on Social Inclusion 2004, p. 32.

lesser role.⁸⁴ This can on the one hand be explained by the (so far) considerably lower levels of immigration in these countries. On the other hand, Roma and the Russophone minorities can in fact be seen – due to their special situation – as a sort of *tertium datur* beyond the cleavage old minorities/immigrant minorities.⁸⁵ As regards this latter distinction, the Social Inclusion Process calls to differentiate between “immigrants/refugees” on the one hand and “ethnic minorities” on the other but leaves it to the Member States whether or not to include traditional minorities under the definition of “ethnic minorities”.⁸⁶ The situation of traditional minorities is not an issue the NAPs should specifically focus on, whereas they do have to focus on the specific indicator “employment gap for immigrants”.⁸⁷

Another area where the OMC applies is the area of migration and integration. Already in 2003, the Commission handed down its report on immigration, integration and employment.⁸⁸ There the Commission admitted that the characteristics of the host societies and their organizational structures differ “and there are, therefore, no single or simple answers”. Nevertheless it stresses that “much can be learned from the experiences of others”. The Commission identified a need for “greater convergence” and proposes therefore

⁸⁴ However this is a situation which is expected to change after enlargement. See the “Report on Social Inclusion 2005: An analysis of the National Action Plans on Social Inclusion (2004-2006)”, submitted by the 10 new Member States, 86.

⁸⁵ Note that also the study “Examination and Evaluation of Good Practices in the Promotion of Ethnic Minority Entrepreneurs” commissioned by the European Commission says in its final report (March 2008): “The focus of this study is on ethnic minorities that have come about by international migration....In this study it has not been the intention to collect data on ethnic or national minorities that have come about by historical boundary change (like for example the Hungarians in Rumania). An exception was made for Russians in the Baltic States who had been internal migrants and who can only be considered as a “foreign born population” Another category that is not an immigrant group in the strict sense, but is included in the research is the Roma.” See page 5 of the report available at: http://ec.europa.eu/enterprise/entrepreneurship/support_measures/migrant/eme_study_en.pdf.

⁸⁶ See “Recommended Format for Presenting Good Practice” in Guidance Note for Preparing National Strategy Reports on Social Protection and Social Inclusion 2008-2010, Annex 1.

⁸⁷ This indicator “SI-P7” refers to the percentage point difference between the employment rate for non-immigrants and that for immigrants. Immigrants are defined on the basis of the variable “born abroad” (and it is up to each Country to decide whether to include nationals born abroad or not, as appropriate). See the Commission’s updated portfolio of overall indicators, April 2008.

⁸⁸ “Communication on immigration, integration and employment,” COM(2003) 336 final of 3 June 2003.

to develop co-operation and exchange of information within the newly established group of national contact points on integration. As the main focus of this necessary co-ordination exercise between the states, the Commission proposes the exchange of experience and ideas regarding introduction programmes for newly-arrived immigrants, language training and the participation of immigrants in civic, cultural and political life.⁸⁹ The use of OMC conforms with the fact that migration is, on the one hand, international in nature but raises, on the other hand, "many sensitive and far-reaching issues which directly affect civil society which need to be discussed openly, at both national and European levels, in order to reach a consensus on policy positions".⁹⁰ Moreover, the application of OMC is supposed to guarantee that immigration policy is complementary and consistent with other policies such as the employment strategy and social policies, such as social inclusion and the Community's antidiscrimination strategy.⁹¹ However - for obvious reasons - the area of migration and integration policies is dominated by the interest in new minorities and does not look at traditional minorities.

Besides IAs or the OMC, the provision of financial stimuli through, for instance, "European Years" can also be seen as means of "governance" rather as a facet of "government". Here, too, the European Commission puts special emphasis on disadvantaged groups. Recent examples include the European Year of Equal Opportunities for All (2007, in the following: EYEO)⁹² and the current European Year for Intercultural Dialogue (2008, in the following: EYCD)⁹³. Interestingly the heading "equal opportunities" seems to advocate a new understanding of equality - namely one which applies a substantive reading of equality - within the EU-context.⁹⁴ And in fact, the Commission states in its framework

⁸⁹ COM(2003) 336 final, pp. 28-30.

⁹⁰ COM(2001) 387 final, at p. 5.

⁹¹ COM(2001) 387 final, at p. 13.

⁹² Decision No 771/2006/EC of the European Parliament and the Council establishing the European Year of Equal Opportunities (2007), in OJ 2006 L 146, pp. 1. The EYEO disposed over a financial budget of 15 Mio EUR (1 January 2006 - 31 December 2007).

⁹³ Decision No 1983/2006/EC of the European Parliament and the Council concerning the European Year of Intercultural Dialogue (2008), in OJ 2006 L 412, pp. 44. The EYID disposes over a financial budget of 10 Mio EUR (1 January 2007 - 31 December 2008).

⁹⁴ Erika Howard, *The European Year of Equal Opportunities for All - 2007: Is the EU moving away from a formal idea of equality?*, in *European Law Journal*, Vol. 14, No. 2, March 2008, pp. 168-185.

strategy "Non-discrimination and equal opportunities for all" (2005): "It is clear that the implementation and enforcement of anti-discrimination legislation on an individual level is not enough to tackle the multifaceted and deep-rooted patterns of inequality experienced by some groups. There is a need to go beyond anti-discrimination policies designed to prevent unequal treatment of individuals. The EU should reinforce its efforts to promote equal opportunities for all, in order to tackle the structural barriers faced by migrants, ethnic minorities, the disabled, older and younger workers and other vulnerable groups".⁹⁵ The Commission confirms that protection of individual rights is clearly important, however it stresses that it is difficult for legislation alone to tackle the complex and deep-rooted patterns of inequality experienced by some groups. "Positive measures may be necessary to compensate for long-standing inequalities suffered by groups of people who, historically, have not had access to equal opportunities."⁹⁶

...Roma and the Russophone minorities can in fact be seen – due to their special situation – as a sort of tertium datur beyond the cleavage old minorities/immigrant minorities.

This view has been welcomed by the Parliament in the already quoted resolution on non-discrimination and equal opportunities for all. To the (diverging) degree that the various policies and initiatives launched in the areas described above address also traditional minorities, this revamped reading of diversity is also of relevance for national minorities. For instance, the report delivered in December 2007 by the "High Level Advisory Group of Experts on the Social Integration of Ethnic Minorities and Their Full Access to the Labour Market" (established according to the mentioned Framework Strategy; in the following: HLG)⁹⁷ had the mandate to address inter alia "the different situations and needs of minority groups, including recent migrants, established ethnic minorities, national minorities, the Roma and stateless persons" and therefore also the situation of traditional minorities.⁹⁸ In fact, the report is of obvious relevance for this group of minorities as well since it "draws a line neither between citizens and non-citizens, nor between ethnic minority citizens of immigrant and non-immigrant

⁹⁵ COM (2005) 224 final, 1.6.2005, at p. 2.

⁹⁶ COM (2005) 224 final, 1.6.2005, at p. 6.

⁹⁷ COM (2005) 224 final, 1.6.2005, at p. 10.

⁹⁸ See Art. 2 of the Commission decision of 20 January 2006 establishing a high-level advisory group on social integration of ethnic minorities and their full participation in the labour market (2006/33/EC), in OJ 2006 L 21, p. 20.

origin".⁹⁹ Also, the EYID might prove to address traditional minorities. The decision launching the EYID does not define what "Intercultural Dialogue" is. There is no reason why it should not also include the dialogue between the majority population and traditional minorities.¹⁰⁰

In conclusion, one can say that minorities have been increasingly addressed by means of governance rather than government. In doing so, the EU also advocated a more substantial reading of equality. Member States are encouraged "to make use of the possibility to promote positive action".¹⁰¹ However, "Positive measures may be necessary to compensate for long-standing inequalities suffered by groups of people who, historically, have not had access to equal opportunities."

there are at least three limitations to this rather new development. Firstly, this minority engagement of the EU primarily addresses the issue of economic inclusion and social integration and does not address special minority rights. Secondly, national minorities play – in comparison to new or migrant minorities – only a minor role. Thirdly, the new "substantial equality-talk" of the Commission and the Parliament cannot hide the fact that, legally speaking, there is no duty arising from EU law to actively promote minorities or to make use of proper positive action, let alone to install any sort of group rights.

3.5. *The institutional dimension: the newly established Fundamental Rights Agency*

Far away from the prominent (but unsuccessful) development at the EU constitutional level, the post-enlargement phase witnessed an unexpected development at the institutional level. At the end of 2003, the Heads of State agreed on the establishment of a European Union Agency for Fundamental Rights (FRA). The FRA replaced the European Monitoring Centre on Racism and Xenophobia which was in existence since 1998. Furthermore, the FRA took over the tasks of the independent fundamental rights experts

⁹⁹ See the report "Ethnic Minorities in the labour market. An urgent call for better social inclusion", at http://ec.europa.eu/employment_social/fundamental_rights/pdf/hlg/etmin_en.pdf, at p. 27. Note, however, that the HLG emphasizes that for due to the fact that "for legal, political and practical reasons" the issue of "specific minority rights lies clearly outside the scope of its work", *op.cit.*, at 29.

¹⁰⁰ This is confirmed by a study prepared for the Commission by the European Institute for Comparative Cultural Research and presented in March 2008, available online at <http://www.interculturaldialogue2008.eu/>.

¹⁰¹ So for instance the report delivered by the HLG, see *op.cit.*, at. 101.

— a private network contracted by the European Commission that between 2002 and 2006 delivered annual and thematic reports on human rights issues within the EU (one of the thematic reports dealt with the protection of minorities in the EU).¹⁰²

In a way, the FRA is supposed to be the “National” Human Rights Institution (NHRI) of the EU. The overwhelming majority of MS dispose over such NHRIs. These are inspired by the so called “Paris Principles” established by a resolution issued by the UN General Assembly in 1993.¹⁰³ However their mandate and function diverge significantly. The FRA is, legally speaking, a rather weak institution.¹⁰⁴ It cannot deliver legally binding decisions, nor do individual

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violations of human rights fall within in its ambit of responsibility. The Agency’s objective is to provide assistance and expertise in the field of fundamental rights to bodies of the Community as well as to member states. The Agency is to support them “to fully respect fundamental rights” within their respective fields of competence.¹⁰⁵ The Founding Regulation identifies eight tasks that the Agency is set to fulfil.¹⁰⁶ It seems, however, that these can be subsumed under three major functions, namely data collection,

¹⁰² The network delivered 4 annual reports (on the MS as well as on the EU), each accompanied by a thematic report (2002: The balance between freedom and security in the response by the EU and its MS to the terrorist threats; 2003: on the exercise by the Union or the Community of their external competences in the fields of justice and asylum or immigration; 2004: The protection of minorities in the European Union; 2005: Implementing the rights of the child in the European Union). Moreover the network has delivered 15 legal opinion on specific topics. The documents can be accessed at http://ec.europa.eu/justice_home/cfr_cdf.

¹⁰³ See the principles relating to the Status of National Institutions (The Paris Principles) as adopted by UN General Assembly resolution 48/134 of 20 December 1993.

¹⁰⁴ See the Council regulation (EC) No 168/2007 of 15 February 2007, in OJ L 53, 22.2.2007, 1-14 (hereinafter: Founding Regulation). For a more detailed analyses on the Agency’s potential, see Gabriel N. Toggenburg, “The role of the new EU Fundamental Rights Agency: Debating the “sex of angels” or improving Europe’s human rights performance?”, in *European Law Review*, June 2008, 385-398.

¹⁰⁵ See Art. 2 of the Founding Regulation. When it comes to the Agency’s reach vis-à-vis the member states, the Founding Regulation remains very cautious. The Agency’s competence is limited to those cases where the states are “implementing Community law.”

¹⁰⁶ Art. 4 para. 1 lit a) – lit g) of the Founding Regulation.

the production of expert opinions (advice to EU institutions and MS), and the establishment of a communication strategy (including an institutionalised dialogue with civil society). Of course, these tasks of the Agency are all additionally relevant for the field of minority protection. Whether or not the Agency is dealing with minorities – apart from the “fight against racism, xenophobia and related intolerance” which is according to the Agency’s Founding Regulation a permanent thematic area of the Agency¹⁰⁷ – depends on the Agency’s Multiannual Framework (MAF). The MAF determines the Agency’s work for 5 years and is decided by the Council of European Union.¹⁰⁸ However, one could argue that minorities – being weak parts of the European societies – should be listed in every MAF as an area the Agency should focus on. This view is supported by the (though legally non-binding) consideration No. 10 of the Agency’s Founding Regulation which underlines that the Agency should continue to cover not only the phenomena of racism and xenophobia but also “the protection of rights of persons belonging to minorities, as well as gender equality, as essential elements for the protection of fundamental rights”.¹⁰⁹ In fact the first MAF agreed upon at the beginning of 2008 does contain a reference to minorities. It says that between 2007 and 2012 the Agency will – next to eight other areas¹¹⁰ – deal with the fight against discrimination based on the elements listed in the current Article 13 EC, including the discrimination of “persons belonging to minorities” and the phenomenon of “multiple discrimination”. The Parliament was pressing, without success, for a more detailed minority-reference, namely “traditional national and linguistic minorities”.¹¹¹ Since “minorities” is the more general term in comparison to “linguistic” or “national” minorities, the fact that this proposal was not accepted in the Council can, however, not

¹⁰⁷ See Art. 5 para. 2 lit b) of the Founding Regulation.

¹⁰⁸ See Art. 5 of the Founding Regulation.

¹⁰⁹ This reference goes back to an amendment proposed by the European Parliament. See amendment no. 4 in the Parliament resolution P6_TA(2006)0414, 12 October 2006.

¹¹⁰ Other important areas included in the MAF are those contained in title IV of the EC Treaty (“asylum, immigration and integration of migrants”, “visa and border control”). Moreover, the first MAF contains the areas of “compensation of victims”, “information society and, in particular, respect for private life and protection of personal data” as well as “access to efficient and independent justice”. Finally the MAF lists “participation of the citizens of the Union in the Union’s functioning” as another thematic area of the Agency’s activity. See for the first MAF, the Council decision of 28 February 2008, in OJ 2008 L 63, 14–15.

¹¹¹ See Amendment 11 of the Parliament’s legislative resolution of 17 January 2008 (P6_TA(2008)0014) which is based on the Cashman report A6-0514/2007 as of 20 December 2007.

be construed as limiting the mandate of the Agency. The effective position minority issues will take within the Agency's agenda depends on the annual working programmes of the Agency, on the EU institutions (Parliament, Council and Commission) that have the privilege to request from the FRA opinions on specific thematic topics¹¹² and, finally, on the management of the Agency (thus the Director and the Executive Board).

The European Parliament has already stressed on various occasions that the Agency should deal specifically with minority issues. In the Parliament's view, "the Roma issue and minority rights and respect for cultural, religious and linguistic diversity"

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should be part of the Agency's work since "protecting national minorities in an enlarged EU is a major issue ... that ... will not be achieved simply by fighting against xenophobia and discrimination". It underlines that the issue of minority protection is "a complex problem that has to be addressed from other angles".¹¹³ Therefore, it was proposed (in the report drafted by Kinga Gál which formed the basis of this resolution) that "a separate sector of the Agency should deal with the question of national minorities based on the experience of existing European and national institutions and networks in this field".¹¹⁴

In another resolution (based on the already mentioned report tabled by Claude Moraes), the Parliament takes "note of the fact that, in general, minority issues in the Union have not been high enough on the agenda of the Union and now need to be given greater attention, in order to strengthen the ef-

¹¹² See Art. 4 Para. 1 lit. d) of the Founding Regulation.

¹¹³ See the "European Parliament resolution on promotion and protection of fundamental rights: the role of national and European institutions, including the Fundamental Rights Agency," P6_TA(2005)0208, 26 May 2005, Paras. 39 and 40, published in OJ 2006 C 117 E, 242.

¹¹⁴ See Para. 19 of the explanatory statement attached to the report on promotion and protection of fundamental rights: the role of national and European institutions, including the Fundamental Rights Agency, A6-0144/2005, 11 May 2005.

fectiveness of the measures taken by the public authorities in this domain". With this background, the Parliament comes to the conclusion that the FRA "must play a key role" in this area.¹¹⁵

Due to the above-mentioned normative insecurities surrounding the issue of national minorities at the EU level, it seems implausible that a separate sector of the Agency will exclusively focus on national minorities. However, it seems likely and necessary that the Agency will be dealing with thematic areas which are of crucial relevance for national minorities such as the principle of equality and the role of fundamental rights in the "management of diversity"¹¹⁶. A look at the first annual working programme of the FRA shows that the Agency is already active in the areas of discrimination and victimization, Roma rights and ethnic profiling and will launch a new project on the situation of Roma and Travellers in the EU in 2008.¹¹⁷ As regards

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upcoming legislation and EU involvement in more general terms the role of the Agency could, firstly, be that of identifying special areas or problems where EU involvement seems necessary and, secondly, that of mainstreaming minority interests into already proposed legislation. This could be best done if the Agency is "closely involved" in the Impact Assessments as was proposed by the Parliament.¹¹⁸

¹¹⁵ See the already quoted "European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe," 8 June 2005, Para. 3.

¹¹⁶ Admittedly, diversity management is not a term traditionally used by lawyers and rather refers to the area of internal management of ethnically diverse enterprises. Nevertheless, especially with the background of the EU's multilevel system of governance, "managing" diversity has obvious legal implications. See Gabriel N. Toggenburg, "Who is managing ethnic and cultural diversity within the European Condominium? The moments of entry, integration and preservation," in 4 Journal for Common Market Studies (2005), 717-737.

¹¹⁷ See the Annual Work Programme 2008, published in April 2008, online accessible on the website of the FRA.

¹¹⁸ See the already quoted resolution P6_TA(2006)0261 (based on the Zdanoka report) in its Para. 7.

4. EU and minority protection: overall assessment and outlook

4.1 *EU constitutional level*

At the constitutional level of the European Union minority protection is not mentioned explicitly. Nevertheless both Commission as well as the Council see the protection of minorities as (partially) covered by the *Acquis*.¹¹⁹ Should the Treaty of Lisbon enter into force, the EU Treaty would explicitly include the rights of persons belonging to minorities amongst the constitutional principles of the EU. With the Treaty of Lisbon, the Charter of Fundamental Rights will also enter into force and thereby explicitly forbid any discrimination on the basis of membership in a national minority. However, a full-fledged proactive EU-system of minority protection would require legislative competences that are missing and that the Treaty of Lisbon is not meant to introduce.

4.2 *EU legislation*

When it comes to legislation, the Union can further build on its strong competence based in Article 13 EC. Moreover, it can build on other competence bases that function to protect minorities. In this regard, the Treaty of Lisbon is of major relevance since it aims at introducing Qualified Majority Voting as the ordinary legislative procedure. This might help to overcome resistance against using already existing "constitutional resources"¹²⁰, such as, for instance, the competence provision in the area of culture (Article 151 EC), specifically for the promotion of minority-cultures.¹²¹ As regards the distribution of tasks between the Member States and the European Union, it seems within the legal and political situation within the European "Condominium" adequate for the EU to focus on issues of anti-discrimination, integration and social inclusion. Additionally, the issue of identity preservation can be addressed by the Union. However, as regards group rights and constitutional engineering, this is an area left to the discretion of

¹¹⁹ The Commission underlines that the rights of minorities are covered by the values enshrined in Art. 6 EU. See reply to the written question E-1227/02, in OJ 2002 C 309 as of 12 December 2002, 100. The Council said, for instance, that the protection of persons belonging to minorities is covered by the non-discrimination clause in Article 13 EC. See Council of the European Union, "EU Annual Report on Human Rights 2003", 3 January 2004, 22.

¹²⁰ See in detail Bruno de Witte, "The constitutional resources for an EU minority policy," *op.cit.*

¹²¹ Compare Tawhida Ahmed and Tamara Hervej, "The European Union and Cultural Diversity: A missed opportunity?," in 3 Yearbook of Minority Issues 2003/2004, 43-62.

the Member States.¹²² The main challenge here is rather to guarantee that EU-law (i.e. the legal mechanisms fuelling the Common Market) does not do away with special legal regimes introduced at the (sub)national level and aimed at providing minorities with specific advantages.¹²³

4.3 EU Governance

Beyond alternative legislative ways of "governance" like mainstreaming, impact assessment and OMC can play an important role in bringing the interest of minorities to the fore. Should the Treaty of Lisbon enter into force, mainstreaming will become an explicit duty for the Union and lead to a situation where the Union will be *semper et ubique* obliged to actively promote anti-discrimination. Impact assessment has in the last five years gained in profile. In order that fundamental rights are taken seriously in this framework the Commission could in the future increasingly rely on the knowledge which will be built up at the FRA in Vienna. Minority rights have to form an integral part of such assessments. As regards OMC, the latter seems an ideal mechanism for areas such as minority protection, where the Member States do not want to give away their primary competence but where they, at the same time, recognize a need to exchange ideas, know-how and best practices. OMC applies in areas of social inclusion, employment and migration and

The European Council could even think of introducing an OMC-mechanism on minorities as such which does not look at one policy area only (such as unemployment) but rather takes a transversal look at the general situation of minorities within the different Member States in order to allow for a broad picture on how minority-issues are tackled in the different national systems. Such an exercise could lead to cross-fertilisation between the Member States systems without calling for any sort of harmonisation at the European level.

¹²² See on this Toggenburg, Gabriel N., Who is managing ethnic and cultural diversity within the European Condominium? The moments of entry, integration and preservation, op.cit.

¹²³ See in this regard the experiences with EU law so far in South Tyrol: Gabriel N. Toggenburg, "Regional autonomies providing minority-rights and the law of European Integration: experiences from South Tyrol," in Joseph Marko et al. (eds.), *Tolerance established by Law. The Autonomy of South Tyrol: Self-Governance and Minority Rights*, (Martinus Nijhoff, The Hague 2008), 177-200.

integration. OMC reporting in these areas does take account of minorities and their needs. However, this exercise presently focuses on new minorities. The situation of national minorities could also be taken into account since the latter are also threatened by unemployment and are in need of more social inclusion. The European Council could even think of introducing an OMC-mechanism on minorities as such which does not look at one policy area only (such as unemployment) but rather takes a transversal look at the general situation of minorities within the different Member States in order to allow for a broad picture on how minority-issues are tackled in the different national systems. Such an exercise could lead to cross-fertilisation between the Member States systems without calling for any sort of harmonisation at the European level.

4.4 The international law perspective

The European Union has established the protection of minorities as a criterion for accession. From an international law perspective, there is no duty of reciprocity and therefore no legal obligation that the Union (and its MS) has to fulfil all the accession criteria itself. At the same time, it is obvious that the efficiency of conditionality is contingent on its legitimacy, and the latter will be undermined if the Union and its Member States are not themselves protecting their minorities. Moreover, the question arises, whether, again from an international law perspective, the Union is affected by the international obligations the Member States assume vis-à-vis other international Organisations, for instance, in the context of the FCNM. In fact, it has been argued that succession is potentially even wider than that currently accepted by the ECJ, which accepted that the EU is bound by the GATT (even though the GATT was concluded by the Member States but *not* by the Community itself).¹²⁴ Can the Union therefore be considered as being bound by the FCNM? The answer must be no since it remains a fact that not all the Member States have yet ratified the FCNM. For this reason, it is impossible to argue that the Union is bound by this instrument. What one could eventually argue is that the Union is foreclosed from frustrating Article 27 of the International Covenant on Civil and Political Rights (ICCPR) since it has indeed been ratified by all the EU Member States¹²⁵.

¹²⁴ Ahmed Tawhida and Israel de Jesús Butler, "The European Union and Human Rights: An international law perspective", in 17(4) *European Journal of International Law* (2006), 771-801, at 790.

¹²⁵ The fact that France submitted a reservation saying that Article 27 "is not applicable so far the Republic is concerned" should not be of relevance in this context since a Union obligation not to act against Art. 27 ICCPR does not interfere with this reservation.

Article 27 ICCPR states that "minorities shall not be denied the right ... to enjoy their own culture, to profess and practise their own religion, or to use their own language."¹²⁶ As the Human Rights Committee monitoring the ICCPR came to the conclusion that Article 27 of the ICCPR "may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities",¹²⁷ such an obligation should arguably prevent the EU (i.e. the Common Market principles) from threatening measures of positive discrimination taken by the Member States. Of course, a more clear cut international obligation of the European Community (or European Union) could be achieved if the European Community (or – after the entry into force of the ToL – the Union) would ratify the FCNM. However, such a step might prove less useful than some might think since most of the FCNM-provisions are not applicable to the Union and is therefore likely to provoke more problems than solutions.¹²⁸

4.5 The need for "inter-organisational" cooperation

After World War II, nation states underwent a process of internationalization meaning that they started to cooperate with each other. With the beginning of the new century, it seems timely to ask whether international organizations themselves have not reached a level of consolidation which allows and calls for a comparable process. In fact, a frequent criticism is the EU, OSCE, Council of Europe and NATO are not only geographically expanding but also steadily extending their tasks and responsibilities and thereby mutually interpenetrating their traditional areas of competence. This "imperialism of tasks" and the increasing territorial overlap calls for efficient modes of cooperation. In fact, on the European soil a tendency

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¹²⁶ The ECJ sees the ICCPR (merely) as "one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law". See ECJ, case C-540/03, judgment of 27 June 2006, Para 37.

¹²⁷ HRC General Comment 23 in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.7, 12.05.2004, 165, Para. 7.

¹²⁸ See for more details Gabriel N. Toggenburg, "Minority Protection in a Supranational Context: Limits and Opportunities", in Gabriel N. Toggenburg (ed.), *Minority Protection and the enlarged European Union: The way forward* (LGI Books, Budapest 2004), 1-36, at 15-16.

towards of a sort of interorganisational cooperation has become more and more visible.¹²⁹ In this context, a convincing division of labor seems more important than ever before. This is even more so for the area of minority protection where the Council of Europe and the OSCE have already developed considerable experience. As regards the protection of old minorities, it is obvious that the Council of Europe is with the FCNM and the Advisory Committee best equipped to provide standards in that area. The Union has

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already helped to provide the FCNM with additional teeth by using it as a conditionality tool during the enlargement process. Now that the carrot of membership has been consumed, it will be important that the EU complements the normative standing of the FCNM with its considerable political power. The EU should make extensive reference to the work of the Advisory Committee and develop close links between the Advisory Committee and the

Commission as well as the FRA. The FRA, which was initially seen as a threat to a synergetic relationship between the Council of Europe and the EU, has, quite to the contrary, the potential to become the guarantor of a solid, institutionalized and serious cooperation between the two international players.¹³⁰ Due to its

¹²⁹ Just see for instance the following recent documents: Joint Declaration on cooperation and partnership between the Council of Europe and the European Commission, signed on 3 April 2001; the Warsaw Declaration of 17 May 2005 and Appendix number 2 of the action plan listing 10 "Guidelines on the Relations between the Council of Europe and the European Union"; Council Conclusions of 17 November 2003, "EU-OSCE cooperation in conflict prevention, crisis management and post-conflict rehabilitation"; "Council of Europe-European Union: a sole ambition for the European continent", report delivered by Jean-Claude Juncker, 2006; Agreement on the strengthening of cooperation between the Parliamentary Assembly of the Council of Europe and the European Parliament, 28 November 2007. See in more detail on this cooperation Gabriel N. Tögggenburg, "A remaining share or a new part? The Union's role vis-à-vis minorities after the enlargement decade", European University Institute Florence, 15 Working Papers (2006), 20-25, available at <http://www.iue.it/PUB/LawWPs/law2006-15.pdf>.

¹³⁰ Compare the agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe, in OJ 2008 L 186, 7.

strong legislative competence in the area of anti-discrimination and its plethora of soft-law means available to foster integration within the Member States societies, the Union could primarily focus on new minorities. The FRA should develop into a centre of excellence for the use of Fundamental Rights in the context of diversity management – a topic which is nowadays of obvious importance but which is so far not systematically dealt with by the international players.

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