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EUROPEAN UNION LEGISLATION AND THE NORMS OF THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES

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INTRODUCTION

The European Union has not been attributed explicit competences in the field of minority protection. However, a number of provisions of the EC Treaty allow for the adoption of certain instruments which may contribute to improving such protection in the EU Member States. Since the entry into force of the Treaty of Amsterdam on 1 May 1999, Article 13 of the EC Treaty allows the Community to 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age of sexual orientation'. This enables the Council of the Union, acting unanimously, to protection ethnic and religious minorities from discrimination. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[1] (hereinafter referred to as the 'Racial Equality Directive') and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[2] (hereinafter referred to as the 'Employment Equality Directive') have been adopted on this legal basis shortly after the Community had received this power. The Racial Equality Directive obliges the Member States to protect all persons from discrimination on grounds of race or ethnic origin in employment and occupation (including conditions for access to employment, to self-employment and to occupation, access to vocational guidance, vocational training, advanced vocational training and retraining, employment and working conditions, and membership of and involvement in an organisation of workers or employers), social protection (including social security and healthcare), social advantages, education, and access to and supply of goods and services which are available to the public, including housing. The Employment Equality Directive obliges the Member States to protect all persons from discrimination on grounds, inter alia, of religion or belief, in employment and occupation.

While Article 13 of the EC Treaty constitutes the most relevant provision for the adoption of measures aiming at the protection of minorities in EU Law, other provisions of the treaties may also be mentioned.[3] The Community may encourage cooperation between Member States and supplement their action, 'while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity' (Article 149 of the EC Treaty). Under Article 151 of the EC Treaty, the Community may encourage cooperation between Member States and, if necessary, support and supplement their action in the field of culture. It may legislate in order to promote the freedom to provide services, including audio-visual services, throughout the Union (Article 49 of the EC Treaty). It may adopt measures establishing the internal market, including by harmonizing national rules (Articles 94 and 95 of the EC Treaty). Still other provisions of the EC Treaty or the EU Treaty could be listed, insofar as they allocate to the Community or the Union certain powers which may be used in order to implement the principles of the Council of Europe Framework Convention for the Protection of National Minorities (hereafter: Framework Convention).[4] Finally, certain soft law mechanisms of coordination in the the employment or social inclusion fields have been relied upon in order to encourage the EU Member States to improve the integration of minorities. In particular, since the European Employment Strategy was launched in 1997, it includes a specific concern of tackling discrimination in employment in order, in particular, to improve access to employment by visible minorities. The revised Employment Guidelines, based on Article 128 of the EC Treaty, provide that the Member States should seek to make their employment markets more inclusive, and that 'Combating discrimination, promoting access to employment for disabled people and integrating migrants and minorities are particularly essential' in this regard.[5]

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[1] OJ L 180 of 19.7.2000, p. 22.
[2] OJ L 303 of 2.12.2000, p. 16.
[3] See for a full list the European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe, adopted on 8 June 2005 and based on the report A6-0140/2005 of 10 May 2005 (rapporteur Claude Moraes).
[4] See also EU Network of Independent Experts on Fundamental Rights, Thematic Comment n°3 : the rights of minorities in the Union (April 2005), available at : http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm.
[5] Council Decision of 12 July 2005 on Guidelines for the employment policies of the Member States (OJ L 205 of 6.8.2005, p. 21). This wording follows the proposal of the Commission, made on 12 April 2005 (COM(2005)141 final) (see the explanations to guideline 18 (To ensure inclusive labour markets for job-seekers and disadvantaged people)).

In addition, the rules pertaining to the free movement of persons within the Union may impose on the Member States that they abandon certain linguistic requirements which might appear indirectly discriminatory against the nationals from other Member States, who seek to exercise their right to free movement in the Union,[6] or that they revise rules, relating for instance to the attribution or the spelling of surnames,[7] which might have such discriminatory effect. This contribution of European Union law to the protection of minority rights in the Union is however limited, insofar as the Union citizens exercising their right to move to another Member State are not in principle considered to form a 'national minority' in the host State, in the meaning of this concept under general public international law or in the case-law of the Advisory Committee on the Framework Convention for the Protection of National Minorities (hereafter: Advisory Committee). Moreover, no legislative measures have been adopted by the European Community specifically in order to ensure that the integration of migrants from other Member States will not take the form of their assimilation, but will respect instead their linguistic identity. More precisely, the only such measure is Council Directive 77/486/EEC of 25 July 1977 on the education of the children of migrant workers[8] obliging both the host States and the States of origin of the migrant workers – in order to ensure the possibility of a future reintegration in the State of origin – to adopt 'appropriate measures to promote the teaching of the mother tongue and of the culture of the country of origin' of the children of migrant workers. In practice, the directive, whose transposition has been very unsatisfactory, has not been effective; moreover, it is considered not to formulate binding obligations on the Member States.[9]

Apart from these limited, but nevertheless significant, competences attributed to the Community or the Union to protect and promote minority rights in the Union (what may be called the *positive* dimension of an EU minority rights policy), both the institutions of the Union – in the exercise of their competences – and the Member States – when they act in the field of application of Union law, in particular in order to implement EU legislation – are obligated to respect both the general principle of equal treatment and certain specific minority rights : this may be called the *negative* dimension of the EU minority rights policy, aimed at not violating those rights rather than at affirmatively contributing to their full realization.

This obligation has its source in the case-law of the Court of Justice of the European Communities (European Court of Justice) which sees equality of treatment as a general principle of law which it is its task to ensure compliance with.[10] Thus for instance, in Case 130/75, the Court of Justice took the view that the institutions – in this case the Council – could be obliged, if informed of the difficulty in good time, to take reasonable steps to avoid fixing for a test designed as part of a recruitment procedure a date which would make it impossible for a person of a particular religious persuasion to undergo the test : in effect, this is an obligation to accommodate all religious religious faiths in the adoption of certain general measures.[11] In that sense, the directives adopted on the basis of Article 13 of the EC Treaty may be said to embody a general principle of equal treatment which preexisted their adoption, and which the Court of Justice imposed in the field of application of European Union law, i.e., which is binding both on the institutions of the Union and on the Member States insofar as they act in the field of application of Union law.[12]

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[6] Case C-379/87, *Groener* [1989] ECR 3967.

[7] See, respectively, Case C-148/02, *Carlos Garcia Alvello* [1997] ECR I-11613 (judgment of 2 October 2003, to which we return below), and Case C-168/91, *Christos Konstantinidis v. Stadt Altensteig* [1993] ECR I-1191 (judgment of 30 March 1993) (condemning as a violation of the right to freedom of establishment the application of national German provisions according to which the spelling of the surname of a Greek citizen would not have been in line with the proper (Greek) pronunciation of the name).

[8] OJ L 199 of 6.8.1977, p. 32.

[9] Statement by Commissioner Reding, reply to written question E-1336/02, 8 May 2002, OJ C 277 E of 14.11.2002, p. 190.

[10] Case C-55/00, *Gottardo* [2002] ECR I-413, para. 34; Case C-442/00, *Caballero* [2002] ECR I-11915, paras. 30 to 32; Joined Cases 201/85 and 202/85, *Klensch* [1986] ECR 3477, paras. 9 to 10; Case C-351/92, *Graff* [1994] ECR I-3361, paragraphs 15 to 17; and Case C-15/95, *EARL de Kerlast* [1997] ECR I-1961, paras. 35 to 40.

[11] Case 130/75, *Vivien Prais v. Council*, [1976] ECR 1589 (para. 19).

[12] See Case C-144/04, *Mangold* v *Helm*, [2005] ECR I-9981 (judgment of 22 November 2005 delivered upon a request for a preliminary ruling under art. 234 EC from the Arbeitsgericht München (Germany)), at paras.74-75 (noting that "Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation (. . .) the source of the actual principle underlying the prohibition of those forms of discrimination being found (. . .) in various international

Indeed, the EU institutions and the Member States implementing Union law are bound to respect the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law on which the Union is founded (Article 6(1) of the EU Treaty). In the opinion of the European Commission, this includes respect for the rights of minorities.[13] This position finds support in the EU Charter of Fundamental Rights, solemnly proclaimed by the Council, the Commission and the European Parliament at the Nice Summit of December 2000,[14] and which should be seen as codifying the fundamental rights recognized as binding in the legal order of the European Union.[15] Although the EU Charter of Fundamental Rights does not provide as such for rights of minorities, it prohibits any discrimination based on, *inter alia*, membership of a national minority (Article 21); it states that the Union shall respect cultural, religious and linguistic diversity (Article 22); and it protects the right to respect for private life (Article 7), freedom of religion (Article 10), freedom of expression (Article 11), and freedom of association (Article 12), all of which may serve to protect certain dimensions of the rights of persons belonging to minorities.

The pre-screening of European Union legislation in order to verify that it complies with the Charter of Fundamental Rights has been recently enhanced. In April 2005, the Commission has adopted a Communication[16] by which it seeks to improve the compliance of its legislative proposals with the requirements of the Charter. On 15 June 2005, it has adopted a new set of guidelines for the preparation of the extended impact assessments accompanying the legislative proposals of its annual workprogramme.[17] Although the new guidelines are still based, as the former impact assessments,[18] on a division between economic, social and environmental impacts, the revised set of guidelines pays a much greater attention to the potential impact of different policy options on the rights, freedoms and principles listed in the EU Charter of Fundamental Rights. In particuler, under this new set of guidelines, the lead department of the European Commission in charge of the initial formulation of the legislative proposal should identify whether the option it has chosen may significantly affect 'ethnic, linguistic and religious minorities' (subgroup 'Social inclusion and protection of particular groups' under the potential social impacts); and it has to identify whether the option chosen might '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'.

Thus, both the general principle of equal treatment and certain specific minority rights are part of the general principles of law which the European Court of Justice ensures the respect of by the institutions and the Member States in the scope of application of Union law; and these principles are now embodied in Article 6(1) of the EU Treaty and codified in the EU Charter of Fundamental Rights. At the same time, it is worth emphasizing that neither the Council of Europe Framework Convention on the Protection of National Minorities as such, nor the full set of rights listed in the Framework Convention, have hitherto been considered to be part of the fundamental rights *acquis* of Union law. The Framework Convention as such has never been invoked by the European Court of Justice – which, in contrast, has recognized a 'special significance' to the European Convention on Human Rights, and has also occasionally relied on the International Covenant on Civil and Political Rights. On the contrary, since four EU Member States (Belgium, France, Greece and Luxembourg) still have not ratified the Framework Convention – which France has not even signed –, and since the

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instruments and in the constitutional traditions common to the Member States"). This case concerned an instance of age-based discrimination; however, the very same reasoning could apply to forms of discrimination based on race, ethnicity, or religion or belief, all of which are prohibited under the Racial Equality Directive or the Employment Equality Directive but also under the general principle of equal treatment.

[13] See, e.g., footnote 3 of the Commission's *Regular Reports* on the Accession States from October 9, 2002 (available online at http://europa.eu.int/comm/enlargement/report2002/index.htm#report2002); or the Commission's reply to the written question E-2538/01, in OJ 147 E, 20 June 2002, pp. 27-28.

[14] OJ C 364 of 18.12.2000, p. 1.

[15] See para. 38 of the judgment of the European Court of Justice delivered on 27 June 2006 in the Case C-540/03.

[16] Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring, COM(2005) 172 final of 27.4.2005.

[17] SEC(2005)791, 15.6.2005.

[18] See Communication of 5 June 2005 on Impact Assessment, COM(2002)276.

Framework Convention is considered to set out only 'general principles and goals', illustrating perhaps an emerging consensus within the Council of Europe in favour of the recognition of 'the special needs of minorities and an obligation to protect their security, identity and lifestyle' but betraying at the same time a lack of agreement on concrete means of implementation,[19] it cannot be assumed, in the view of this author, that this instrument will in the future serve as a reference point in the case-law of the European Court of Justice. And the extent to which it will influence the interpretation of the EU Charter of Fundamental Rights by the European Commission or the European Parliament remains to be tested.

A. CONCEPTUAL ISSUES

1. Recognition of national minorities

The instruments cited above do not provide explicitly for a recognition of national minorities in general, or of certain national minorities in particular.[20] Nor do they offer a definition of 'national minorities' or 'minorities' in Union law. Indeed, in 2005 the European Parliament has complained that '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'; and it took the view that this lack of a commonly agreed definition could be compensated by borrowing the definition laid down in Recommendation 1201(1993) adopted by the Parliamentary Assembly of the Council of Europe.[21] In its Thematic Comment on the rights of minorities in the European Union, the EU Network of Independent Experts on Fundamental Rights noted that the different EU Member States had in certain respects different understandings of the notion of 'minority' or 'national minority', and that, as a result of this situation, any reliance in an instrument of the European Union on the notion of "minorities" (as in Article I-2 of the Treaty establishing a Constitution for Europe) or of "national minority" (as in Article 21 of the Charter of Fundamental Rights), as well as the reliance in future accession processes on the notion of rights of minorities, may be subject to diverse interpretations in the different Member States.

2. The principle of non-discrimination and the equality requirement

2.1. Definition – scope of the principle of non-discrimination including direct and indirect discrimination

The Racial Equality Directive may be seen as ensuring a protection of ethnic and racial minorities from discrimination. The Employment Equality Directive protects from discrimination on grounds of religion in the field of employment and occupation.[22] Moreover, as recalled above where the 'negative' dimension of the EU minority rights policy was outlined, the principle of equal treatment forms part of the general principles of law which the European Court of Justice seeks to ensure the compliance with both by the Union institutions and by the Member States in the implementation of Union law.

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[19] Eur. Ct. HR, *Chapman v. the United Kingdom*, Appl. N° 27238/95, judgment of 18 January 2001, para. 93-94.

[20] The Treaty establishing a Constitution for Europe, which was signed on 29 October 2004 but which may never be ratified by all the Member States and thus may never into force, did mention 'the respect for human rights, including the rights of persons belonging to minorities' in Article 1-2, as part of the founding values of the Union. This was not agreed upon during the European Convention convened in February 2002, but was the result of the Intergovernmental Conference of 2003-2004.

[21] Resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe, adopted on 8 June 2005 and based on the report A6-0140/2005 of 10 May 2005 (rapporteur Claude Moraes), para. 7 (citing Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights).

[22] Not all racial, ethnic or religious groups whose members benefit from a protection under these directives will be considered 'national minorities' in the understanding of the Framework Convention for the Protection of National Minorities. Although Article 5 of the Framework Convention imposes on the States parties an obligation to 'undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage', it is understood that 'This provision does not imply that all ethnic, cultural, linguistic or religious differences necessarily lead to the creation of national minorities' (Explanatory Report, para. 43).

However, while the general principle of equal treatment requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified by the pursuit of a legitimate aim and provided that it is appropriate and necessary in order to achieve that aim,[23] the above-mentioned directives adopted on the basis of Article 13 of the EC Treaty adopt a more requiring definition of discrimination. These directives impose on Member States to outlaw both direct and indirect discrimination, and each form of discrimination has a clearly distinct legal regime.

Direct discrimination occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds, *inter alia*, of racial or ethnic origin, or of religion or belief.[24] Direct discrimination thus defined is subject to an absolute prohibition: no difference in treatment resulting in a person because treated less favourably because of his or her race or ethnic origin, or because of his or her religion or belief, is allowable, even where it might be justified as a measure both appropriate and necessary for the achievement of a legitimate aim. There are however three exceptions to this absolute prohibition. First, there are the so-called genuine and determining occupational requirements in the context of employment : where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, a characteristic such as race or ethnic origin or religion or belief constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate, the Member States may provide that a difference of treatment which is based on such a characteristic shall not constitute discrimination.[25] Second, positive action measures may be adopted under certain conditions, to which we return below. Third, as regards differences in treatment based on the religion or belief of the individual concerned, occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief may be made conditional upon the person having a particular religion or belief, where, by reason of the nature of these activities or of the context in which they are carried out, that person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.[26]

Article 2(2)(b) of the Racial Equality and Employment Equality Directives state that *indirect discrimination* "shall be taken to occur where an apparently neutral provision, criterion or practice would put persons [to whom the protected grounds apply] at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary". Therefore, in contrast to the regime of direct discrimination, the regime of indirect discrimination under the Directives is one of open justification : instead of there existing a pre-defined list of exceptions to the principle that the application of apparently neutral measures putting certain categories at a particular disadvantage is prohibited, the application of such measures may potentially be justified by a wide range of circumstances, provided the aim is legitimate and the challenged measure is both appropriate to realize that aim and necessary.

It is important however to highlight also what this definition of indirect discrimination does *not* include. Both directives provide for the shifting of the burden of proof in discrimination cases: "when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment".[27] The facts from which it may be

[23] Case C-56/94, *SCAC* [1995] ECR I-1769, para. 27; Case C-15/95, *EARL de Kerlast* [1997] ECR I-1961, para. 35; Case C-354/95, *National Farmers' Union and Others* [1997] ECR I-4559, para. 61; and Case C-292/97, *Karlsson* [2000] ECR I-2737, para. 39.
[24] Article 2(2)(a) of the Racial Equality Directive (race and ethnic origin) and of the Employment Equality Directive (religion and belief, among other grounds).
[25] Article 4 of the Racial Equality Directive ; Article 4(1) of the Employment Equality Directive.
[26] Article 4(2) of the Employment Equality Directive.
[27] Art.8(1) of the Racial Equality Directive; art.10(1) of the Employment Equality Directive.

inferred that there has been a direct or indirect discrimination are to be left to the appreciation of national judicial or other competent bodies, in accordance with rules of national law or practice. The Preambles to the Directives add that these national rules "may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence".[28] It is therefore left to the Member States to decide whether or not they will allow for a presumption of discrimination to be established by reliance on statistics. They are not obliged to provide for this possibility.

The understanding of indirect discrimination under the Racial Equality Directive and the Employment Equality Directive therefore should not be equated with the concept of *disparate impact discrimination*, i.e., with a form of discrimination which may be identified solely on the basis of statistical data proving that one protected category is disproportionately affected by any particular measure. The Racial Equality and Employment Equality Directives do not seek to take into account that certain measures, despite being apparently neutral, may have a disparate impact on certain protected categories – which, if such impact is proven by statistical means, will require that they be justified as appropriate and necessary for the achievement of certain legitimate aims –. Rather, they are based on the idea that certain apparently neutral measures in fact may be seen as inherently suspect, because although not explicitly differentiating on the basis of a suspect ground, they may be seen as imposing a particular disadvantage on certain protected categories.

2.2. Negative and positive elements of the principle of non-discrimination: from the prohibition to differentiate to the obligation to differentiate

As understood by the European Court of Justice, the principle of non-discrimination requires not only that comparable situations must not be treated differently, but also that different situations must not be treated in the same way.[29] Applying this understanding of the principle of non-discrimination to the prohibition of discrimination on grounds of nationality in the field of application of the treaty between nationals from different Member States (Article 12 of the EC Treaty),[30] the Court has considered, for instance, that the children of a Spanish national and a Belgian national, residing in Belgium and having dual Belgian and Spanish nationality should not be treated – as regards the possibility to change surnames, and in particular, to opt for a surname consisting of the first surname of the father followed by that of the mother as according to Spanish law, rather than of the surname of the father only as in Belgian administrative practice – in the same way as persons who have only Belgian nationality simply on the ground that, in Belgium, persons having Belgian nationality are exclusively regarded as being Belgian.[31] Similarly, under the rules pertaining to the free movement of workers in the Community, language requirements which cannot be defended as pursuing a legitimate objective and as proportionate to that objective may be denounced as indirectly discriminatory against nationals from other Member States.[32]

In that sense, as emphasized recently by Advocate General Poiares Maduro in the opinion he delivered in a case resulting from the action brought by the Kingdom of Spain against the linguistic requirements included in calls for applications for the recruitment of temporary staff to serve with Eurojust,[33] 'respect for and promotion of linguistic diversity are not in any way incompatible with the objective of the common market. On the contrary, against the background of a Community based on the free movement of persons, 'the protection of the linguistic rights and privileges of individuals is of particular importance''.[34] The right of a national of the Union to use his own language in the exercice

[28] 15th Recital of the Preamble.
[29] See, inter alia, Case C-354/95, *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 61.
[30] The first paragraph of Article 12 EC provides : 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'.
[31] Case C-148/02, *Carlos Garcia Alvello* [1997] ECR I-11613, judgment of 2 October 2003.
[32] Case C-379/87, *Groener* [1989] ECR 3967, paragraphs 19 and 23.
[33] Case C-160/03, *Kingdom of Spain v. Eurojust*, judgment of 15 March 2005. The opinion of AG Poiares Maduro was delivered on 16 December 2004.
[34] Case 137/84, *Mutsch* [1985] ECR 2681, paragraph 11, and Case C-274/96, *Bickel and Franz* [1998] ECR I-7637, paragraph 13.

of his right to move freely from one Member State to another is 'conducive to his exercise of the right of free movement and his integration into the host state'.[35]

Advocate General Poiares Maduro further noted : 'In a Union intended to be an area of freedom, security and justice, in which it is sought to establish a society characterised by pluralism, respect for linguistic diversity is of fundamental importance. That is an aspect of the respect which the Union owes, in the terms of Article 6(3) of the EU, to the national identities of the Member States. The principle of respect for linguistic diversity has also been expressly upheld by the Charter of Fundamental Rights of the European Union [Article 22 of the Charter, referred to above, states that '[t]he Union shall respect cultural, religious and linguistic diversity'] and by the Treaty establishing a Constitution for Europe. That principle is a specific expression of the plurality inherent in the European Union'.[36] Therefore, to the extent cases such as *Groener*, *Garcia Alvello* or *Christos Konstantinidis* illustrate a requirement to take into account the need to respect the national identities of the Member States and the linguistic diversity resulting from their coexistence within the Union, it may be said that they require the Member States to acknowledge such differences, and to take actively into account in the legal and administrative regulations which might affect the freedom of movement of Union nationals. For the reasons mentioned above, this dimension of the European Union's law shall not be developed here.

A similar obligation to treat differently situations which are substantively different may be derived from the definition of indirect discrimination in Article 2(2)(b) of the Racial Equality Directive and of the Employment Equality Directive, which has been recalled above : this will be the case where not treating differently would result in the apparently neutral measure creating a particular disadvantage on grounds, *inter alia*, of race, ethnicity or religion. Thus for instance, certain clothing regulations, while not openly targeting any particular religious group such as the Muslims of the Sikhs, could be seen as putting them at a particular disadvantage compared with other persons, as where this would discourage them from seeking employment in certain private undertakings or public administrations where the regulations would prohibit the wearing of the turban or the headscarf : in such a situation, unless the regulation can be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, it will be considered discriminatory.

The Employment Equality Directive provides in Article 2(5) that it shall be 'without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others'. Thus, as regards alleged discrimination on grounds of religion, the directive does not afford a protection substantially different from that afforded under Article 9 of the European Convention on Human Rights. There exists no such general limitation clause in the Racial Equality Directive although, as we have seen, in this instrument also the definition of indirect discrimination creates on 'open' system of justifying measures which, while neutral on their surface, put persons of a particular race or ethnicity at a particular disadvantage.

3. Exemptions to equal treatment: what are the positive/preventive measures allowed

Both the Racial Equality Directive and the Employment Equality Directive provide that "With a view to ensuring full equality in professional life [or, more generally, in practice], 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 any of the grounds [such as racial or ethnic origin, or religion or belief]".[37]

When it proposed the insertion of these clauses in the directives, the Commission seemed to assume that the case-law of the European Court of Justice as it has developed in the field of equal treatment

[35] Mutsch, paragraph 16, and Bickel and Franz, paragraph 16.
[36] Para. 35 of the opinion.
[37] Art.7(1) of the Employment Equality Directive; art.5 of the Racial Equality Directive.

between men and women would simply apply, *mutatis mutandis*, to the new grounds of prohibited discrimination.[38] While this case-law cannot be described in any detail here,[39] the general view adopted by the Court is that positive action measures are only acceptable to the extent that they comply with the principle of proportionality, and thus remain within the limits of what is appropriate and necessary in order to achieve the aim in view. The aim being to eliminate or reduce actual instances of inequality which may exist in the reality of social life, any measure which guarantees an equality of result, and does not restrict itself to equalizing opportunities, is considered disproportionate: thus, all schemes which establish an automatic and absolute preference in favour of women are considered in violation of the principle of equal treatment, and incompatible with the requirements of Community Law. This approach thus appears to be based on the idea that affirmative action in favour of women aimed at achieving equal "opportunity" for men and women, cannot go beyond this objective and pursue equal "results". The latter objective would be contrary to the principle of equal treatment whereby each person has the right not to be disadvantaged on grounds of his or her sex. According to the interpretation given by the Court, this limit is exceeded when affirmative action gives preference to women in the acquisition of a *result* (access to employment, obtaining a promotion) which has an *absolute* character*,* that is to say, which does not allow the rejected male candidate to bring forward the arguments that are likely to tilt the balance in his favour. Absolute preference in this sense would be considered discriminatory, since it establishes a non-rebuttable presumption in favour of women in cases where the candidates from both sexes are equally qualified, unless it is based on an "actual fact" such as the proportion of men and women among the persons with such a qualification. On the other hand, the preferential treatment that is accorded to women in terms of access to certain *opportunities* (vocational training, calls to job interviews) will be considered with less severity: even when absolute, such preferential treatment is aimed at achieving equal opportunity for men and women, and on this account should be considered as covered by the exception provided for in Article 2 (4) of Directive 76/207/EEC.

It is not entirely clear, however, how this case-law shall be transposed to the new domains covered by the Racial Equality Directive (which reaches beyond work and employment to sectors such as education, housing, or social advantages), and whether the approach developed in the field of equal treatment between men and women will be valid as regards the integration of ethnic or religious minorities.

4. What are the areas covered by the principles of non-discrimination

As mentioned above, in all their fields of intervention, the institutions of the Union must respect the general principle of equal treatment; under the EU Charter of Fundamental Rights, they also must respect 'cultural, religious and linguistic diversity' (Article 22). The same requirements are imposed on the EU Member States in the field of application of Union law, in particular when they implement Union law or when they seek to derogate from Union law in accordance with an exception stipulated by Union law.

[38] See COM(1999) 565 final, of 25.11.1999, at p.11: "as positive action measures are a derogation from the principle of equality, they should be interpreted strictly, in the light of the current case-law on sex discrimination".

[39] See Case C-450/93, *Kalanke* [1995] ECR I-3051; Case C-409/95, *Marschall v Land Nordrhein Westfalen* [1997] ECR I-6363; Case C-158/97, *Badeck* [2000] ECR I-1875; Case C-407/98, *Abrahamsson v Fogelqvist* [2000] ECR I-5539; Case C-476/99, *Lommers,* [2002] ECR I-2891; Case C-319/03, *Serge Briheche* [2004] ECR I-8807. Reference can also be made to the judgment delivered by the EFTA Court on 24 January 2003*, Surveillance Authority v The Kingdom of Norway*, Case E-1/02, EFTA. These cases were decided under Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p.40), in its original version. After defining the principle of equal treatment as the absence of any discrimination on grounds of sex, whether direct or indirect, Directive 76/207/EEC provided in Article 2(4) that the Directive "shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities".

Morover, under the Racial Equality Directive and the Employment Equality Directive, the Member States must prohibit discrimination on grounds, *inter alia*, of race or ethnic origin, and of religion or belief, in the area of work and employment. This includes, in both the public and private sectors[40] :

> (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
>
> (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
>
> (c) employment and working conditions, including dismissals and pay;
>
> (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

In addition, the Racial Equality Directive also imposes on obligation to prohibit discrimination on grounds of race or of ethnic origin in the following areas :

> (e) social protection, including social security and healthcare;
>
> (f) social advantages;
>
> (g) education;
>
> (h) access to and supply of goods and services which are available to the public, including housing.

While the European Commission is currently considering the possibility of proposing to extend the scope of application *ratione materiae* of the Employment Equality Directive, and has commissioned a study on the situation of the Member States' legislations in this regard, the requirement of unanimity imposed in Article 13(1) of the EC Treaty for the adoption of legislative measures in order to combat discrimination based on the grounds listed in that provisions makes it implausible that such an extension will take place in any predictable future.

5. The role of special measures

5.1. Definition. Are they covered by the instrument concerned and how?

It has already been mentioned that, in the understanding of discrimination under the Racial Equality and Employment Equality Directives, the adoption or maintenance into force of measures which, although apparently neutral, put persons of a particular race or ethnic origin, or of a particular religion or belief, as a particular disadvantage, should be removed unless it can be demonstrated that such measures can be objectively justified as pursuing a legitimate aim by means both appropriate and necessary. To that extent, and to that extent only, the EU Member States are obliged under EU Law to take into account the specific situation of ethnic or religious groups – among which groups who might qualify as national minorities – in order to ensure that this situation is taken into account. The approach of the directives, however, is not that of minority rights : it is not the purpose of the directives to ensure that the Member States 'promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage' (as according to the wording of Article 5(1) of the Framework Convention); the objective is defined, more restrictively, as to prohibit discrimination based, *inter alia*, on religion or on the traditions and cultural heritage of an ethnic group.

[40] Article 3(1) of both Directives.

5.2. Effective equality and protection of one's identity - Temporary (corrective measures) and permanent measures – are these measures permitted?

In contrast with the regime of positive action under international human rights law,[41] European Union law does not explicitly require that the positive action measures which might be adopted by the EU Member States in the fields covered by the Racial Equality and Employment Equality Directives be limited in time, i.e., be of a temporary nature. However, the case-law described above does require that any such measures comply with the requirement of proportionality, as they are seen as exceptions, to be strictly construed, to the principle of equal treatment, rather than as implementing that principle. It follows that, for such measures to be justified, they must correspond to *actual* instances of unequal opportunities, which the positive action measure aims at compensating for. In that sense, the temporary character of positive action measures is a consequence of the fact that they may only be considered compatible with the requirement of non-discrimination if they are strictly tailored to existing inequalities : once such unequalities have disappeared, whether as a result of positive action schemes or of other mechanisms, the positive action measures will cease to be justified.

5.3. Areas covered by special measures?

European Union law does not offer a definition of special measures as understood in the international law relating to minorities. The working definition adopted here sees them as measures taking into account the specific situation of certain groups (in particular ethnic or religious groups) in order to ensure that they will not be disadvantaged by the adoption or maintenance into force of certain apparently neutral measures. In the areas covered by the Racial Equality Directive and by the Employment Equality Directive, special measures thus understood must be adopted to the extent that this is required under the prohibition of indirect discrimination. In other areas, the EU Member States are in principle at liberty, under European Union law, to adopt such special measures. However, such measures must be compliant with the obligations imposed on the Member States by Union law.

In particular, when such special measures are adopted in favor of the nationals of a Member State, such an advantage must be extended to the nationals of other Member States : this follows from the prohibition of discrimination on grounds of nationality between Union citizens, as guaranteed by Article 12 of the EC Treaty. This rule has been confirmed by the European Court of Justice, for instance, in the case of *Bickel and Franz*, on which the Court delivered a judgment on 24 November 1998. In this case, an Austrian lorry driver driving through Italy and a German national and resident visiting Italy were prosecuted for minor offences. Although they requested that the proceedings be conducted in German, they were not allowed to rely on rules for the protection of the German-speaking community of the Province of Bolzano. The Court concluded that this was in violation of Article 12 of the EC Treaty (then Article 6 of the EC Treaty). In the view of the Court, this provision 'precludes national rules which, in respect of a particular language other than the principal language of the Member State concerned, confer on citizens whose language is that particular language and who are resident in a defined area the right to require that criminal proceedings be conducted in that language, without conferring the same right on nationals of other Member States travelling or staying in that area, whose language is the same'.[42]

[41] See, e.g., Article 1(4) of the of the International Convention on the Elimination of All Forms of Racial Discrimination; UN Committee on Economic, Social and Cultural Rights, General Comment No. 13: The right to education (1999), in Compilation of the General Comments or General Recommendations adopted by Human Rights Treaty Bodies, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at p. 72, para. 32. In his 2002 study on the concept of affirmative action prepared upon the request of the UN Sub-Commission on the Promotion and Protection of Human Rights, the Special Rapporteur Bossuyt defines 'affirmative action' as consisting in 'a coherent packet of measures, *of a temporary character*, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality' ('The concept and practice of affirmative action', Final report submitted by Mr. Marc Bossuyt, Special Rapporteur, in accordance with resolution 1998/5 of the Sub-Commission for the Promotion and Protection of Human Rights, UN doc. E/CN.4/Sub.2/2002/21, 17 June 2002, para. 6).

[42] Case C-274/96, *Bickel and Franz* [1998] ECR I-7637, paragraph 31. See also Case 137/84, *Mutsch* [1985] ECR 2681.

Moreover, measures adopted by the Member States which seek to ensure a protection of cultural, religious and linguistic diversity – an objective which Article 22 of the EU Charter of Fundamental Rights confirms to be legitimate – or which, more generally, seek to protect minority rights, should not result in a disproportionate interference with the fundamental freedoms recognized under Community, such as, for instance, the free provision of services,[43] the free movement of goods,[44] or the freedom for workers to seek employment in another Member State. The case of *Groener*[45] provides an example of this latter situation. In this case, the European Court of Justice was asked to interpret Article 3(1) of Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.[46] This article provides that national provisions or administrative practices of a Member State are not to apply where, 'though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered'. But it adds in its last subparagraph that that provision is not to apply to 'conditions relating to linguistic knowledge required by reason of the nature of the post to be filled'. An interpretation of this clause was requested in the context of national rules making appointment to a permanent full-time post as a lecturer in public vocational educational institutions conditional upon proof of an adequate knowledge of the Irish language, after Anita Groener, a Dutch national, was denied appointment to a permanent full-time post as an art teacher after she had failed a test intended to assess her knowledge of the Irish language, the first national language in Ireland. Finding that the policy followed by Irish governments seeks to maintain but also to promote the use of Irish as a means of expressing national identity and culture, the Court noted that although the EEC Treaty 'does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language', insofar as such a policy encroaches upon a fundamental freedom such as that of the free movement of workers, 'the requirements deriving from measures intended to implement such a policy must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States' (para. 19). The Court agreed with the Irish government that in view of the policy it pursued for the promotion of the Irish language, the requirement imposed on teachers 'to have an adequate knowledge of such a language must, provided that the level of knowledge required is not disproportionate in relation to the objective pursued, be regarded as a condition corresponding to the knowledge required by reason of the nature of the post to be filled within the meaning of the last subparagraph of Article 3(1) of Regulation No 1612/68' (para. 21). The Court has thus recognized that a Member State policy designed to maintain and promote the national language should in principle be recognized as pursuing a legitimate objective in the Union, adding however that an EU Member State could not adopt measures protecting its employment market under the pretext of imposing linguistic requirements, as would be the case if such requirements were unrelated to the post offered.

5.4. Scope of States' obligations – positive duty

In the resolution it adopted in June 2005 on the basis of a report by Claude Moraes MEP,[47] the European Parliament 'urges the Commission to establish a policy standard for the protection of national minorities, having due regard to Article 4(2) of the Framework Convention for the Protection of National Minorities (Framework Convention) (...)' (para. 6). This recommendation however, has to this date remained a dead letter. As explained above, only where not doing so would amount to a form of discrimination prohibited under the EC Treaty or under secundary legislation adopted on the basis of the Treaty – in particular, under the Racial Equality and Employment Equality Directives of 2000 – are the EU Member States under a positive duty to adopt special measures taking into account the

[43] See Case 353/89, *Commission v. Netherlands*, [1991] ECR 4089 (para. 30); Case 288/89, *Stichting Collectieve Antennevoorziening Gouda et al. v. Commissariaat voor de Media*, [1991] ECR 4007 (para. 23); Case 148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, [1993] ECR 513 (paras. 9 and 10).
[44] Case C-368/95, *Familiapress*, [1997] ECR I-3689 (para. 24).
[45] Case 379/87, *Groener*, ECR (1989) 3967 (judgment of 28 November 1989).
[46] OJ, English Special Edition, 1968(II), p. 475.
[47] European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005/2008(INI) (rapp. Moraes), cited above.

specific needs of members of ethnic or cultural, religious or linguistic minorities. Beyond these situations, which remain exceptional, European Union law does not provide for the adoption of special measures in favor of national minorities; nor, therefore, does it define the notion.

B. SUBSTANTIVE ISSUES

1. Freedom of assembly, freedom of association, freedom of religion for national minorities

All the rights recognized in the European Convention on Human Rights, such as in particular freedom of assembly, freedom of association, freedom of expression, or freedom of religion, are among the general principles of law which the European Court of Justice ensures the respect of in the scope of application of the EU treaties. This only implies, however, that a) the institutions of the Union must respect those rights in the exercise of their competences, and that b) the EU Member States must respect those rights when they adopt measures in the scope of application of Union law. The latter hypothesis includes both situations where the Member States implement Union law – for instance, where they implement directives under the EC Treaty or framework decisions under the EU Treaty – and situations where the Member States seek to restrict rights afforded under Union law – in which case, while they may invoke the need to respect fundamental rights in order to justify such restrictions, they also have to comply with those fundamental rights in the restrictions they adopt[48] –. It should be emphasized however that, while fundamental rights are to be complied with in the legal of the European Union, this constitutes only a limitation imposed on the institutions and on the Member States : its does not lead to impose a positive obligation to adopt measures in order to protect or to promote those fundamental rights. The European Union (or the European Community) have not been attributed a general competence to legislate in the field of fundamental rights; unless a specific legal basis may be identified in the treaties, they have no power to intervene in situations where the Member States would be violating fundamental rights outside the scope of application of Union law.

The only exception to this rule resides in the possibility of the Council of the Union relying on Article 7 of the EU in order either to impose sanctions on an Member State persistently committing a serious breach of the values on which the Union is founded, or to address recommendations to the concerned Member State where there is a clear risk of a serious breach by that State of those values.[49] The communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, states that in order to evaluate the 'seriousness' of a breach of one of the principles of Article 6(1) of the EU 'the analysis could be influenced by the fact that [the victims of such violations] are vulnerable, as in the case of national, ethnic or religious minorities (…).'[50] Indeed, the European Commission already considers that 'the political criteria defined at [the June 1993 European Council of] Copenhagen [for the accession of the countries candidates to the Union] have been essentially enshrined as a constitutional principle' and that Article 6 of the EU comprises the protection of minorities[51]. As already mentioned, Article I-2 of the Treaty establishing a Constitution for Europe now submitted for ratification by the Member States has made this explicit, identifying respect for the rights of persons belonging to minorities, forming part of human rights, as one of the values on which the Union is founded.

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[48] See, e.g., Case C-368/95, *Familiapress*, [1997] ECR I-3689 (Recital 24) (the preservation of pluralism in the Austrian media, which serves the objective of freedom of expression, may legitimately justify a restriction to the free movement of goods under the EC Treaty) ; Case C-112/00, *Schmidberger*, [2003] ECR I-5659 (Recital 81) (the need to respect freedom of assembly may justify an interference with the free movement of goods recognized in the EC Treaty).

[49] Article 7(1) EU; Article I-59 of the IGC Draft Treaty establishing a Constitution for Europe.

[50] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, 15 October 2003, *Respect for and Promotion of the Values on which the Union is Based*, COM (2003) 606 final, p. 8.

[51] See footnote 3 of the Commission's *Regular Reports* from October 9, 2002. Available online at http://europa.eu.int/comm/enlargement/report2002/index.htm#report2002

2. Media

2.1. The freedom of the Member States to promote cultural, religious and linguistic pluralism

In principle, the EU Member States are at liberty to seek to promote cultural, religious and linguistic pluralism, by the adoption of national laws and regulations even where this imposes certain restrictions to fundamental economic freedoms guaranteed under the EC Treaty. For instance, the *Mediawet* cases of 1991 and 1993 concerned alleged restrictions to the freedom to provide audio-visual services contained in the Dutch Mediawet (the Dutch Law of 21 April 1987 laying down rules on the broadcasting of radio and television programmes, royalties from broadcasting and measures for support of the press, published in Staatsblad No 249 of 4 June 1987).[52] Under Article 31 of the Mediawet, radio and television broadcasting time on the national Dutch network is allocated by the Commissariaat voor de Media to broadcasting organizations, which are associations of listeners or viewers set up in order to represent a given social, cultural, religious or spiritual trend indicated in their statutes. These organizations must seek to ensure the production of programmes for broadcasting, and thus satisfy the social, cultural, religious and spiritual needs of the Dutch people. When confronted with the question of the compatibility of this system with the rules of the internal market, the Court noted that 'the Mediawet is designed to establish a pluralistic and non-commercial broadcasting system and thus forms part of a cultural policy intended to safeguard, in the audio-visual sector, the freedom of expression of the various (in particular social, cultural, religious and philosophical) components existing in the Netherlands',[53] and recalled that 'those cultural-policy objectives are objectives relating to the public interest which a Member State may legitimately pursue by formulating the statutes of its own broadcasting organizations in an appropriate manner'.[54]

2.2. The absence of an obligation of the Member States to promote cultural, religious and linguistic pluralism

Apart from this liberty recognized to the EU Member States, within certain limits, EU law imposes on them certain obligations in the sector of the media, which correspond in part to certain requirements of the Framework Convention. In particular, in line with Article 20 of the International Covenant on Civil and Political Rights, which prescribes the prohibition of '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence', Article 6 (2) of the Framework Convention imposes the obligation on states parties "to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural or religious identity." The Advisory Committee has insisted on several occasions on the necessity to ensure this protection in an effective way, in particular through the criminal law.[55] Although the Council has failed to agree on a proposal of the European Commission for a Council Framework Decision on combating Racism and Xenophobia,[56] the objective of which would have been to realise the approximation of laws and regulations of the Member States and the closer co-operation between judicial and other authorities of the Member States regarding offences

[52] See Case 353/89, *Commission v. Netherlands*, [1991] ECR 4089; Case 288/89, *Stichting Collectieve Antennevoorziening Gouda et al. v. Commissariaat voor de Media*, [1991] ECR 4007; Case 148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, [1993] ECR 513.
[53] Case 148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, [1993] ECR 513 (para. 9).
[54] Case 148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, [1993] ECR 513 (para. 10).
[55] Opinion on Slovakia, 22 September 2000, ACFC/OP/I(2000)001, para.29; Opinion on the Czech republic, 6 April 2001, ACFC/OP/I(2002)002, para.40. See also ECRI General Policy Recommendation No.1 on combating racism, xenophobia, anti-Semitism and intolerance, 4 October 1996, CRI (96) 43 rev. This recommendation encourages states to take measures to ensure that "racist and xenophobic acts are stringently punished through methods such as defining common offences but with a racist or xenophobic nature as specific offences" and "enabling the racist or xenophobic motives of the offender to be specifically taken into account". Moreover, it recommends that "criminal offences of a racist or xenophobic nature can be prosecuted ex officio".
[56] Proposal of 28 November 2001 for a Council Framework Decision on combating racism and xenophobia, COM(2001) 664 final.

involving racism and xenophobia,[57] Article 22b of Directive 89/552/EC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (directive 'TV without borders'),[58] as amended by Directive 97/36/EC of the European Parliament and the Council of 30 June 1997,[59] imposes an obligation on the Member States to ensure that 'broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality' (Article 22).

This remains a very limited obligation, in comparison to what the Framework Convention requires which the regulation of television broadcasting services at the level of the Union could provide for. In particular, there is no obligation, under Directive 89/552/EC, to ensure pluralism in the media, or the guarantee that members of minorities will have access to the media. Article 6 (1) of the Framework Convention provides that states parties 'shall encourage a spirit of tolerance and intercultural dialogue' and 'take measures to promote mutual respect and understanding and co-operation among all persons living on their territory (…) in particular in the field of education, culture and the media.'[60] The Advisory Committee insists on the importance of the access of persons belonging to minorities to the media as a means to promote intercultural understanding.[61] In its Recommendation 1589 (2003) on the freedom of expression in the media, the Parliamentary Assembly of the Council of Europe urges the states "to abolish restrictions on the establishment and functioning of private media broadcasting in minority languages".[62] According to the Advisory Committee, an overall exclusion of the use of languages of minorities in the nation-wide public service and private broadcasting sectors is not compatible with Article 9 of the Framework Convention.[63] Restrictions to the freedom to broadcast in a minority language, such as the obligation to use the official language for at least 50% of the broadcasting time[64] or the obligation to translate all broadcasting in the minority language into the official language,[65] could also be problematic with regard to Article 9 of the Framework Convention. Moreover, the Advisory Committee is of the opinion that states should take positive measures to ensure the access of minorities to the media, in particular by allocating sufficient time for minority language broadcasting on public service TV in relation to the needs and the size of the population concerned.[66]

2.3. The modified Audiovisual Media Services Directive

In its Thematic Comment (n°3) on the rights of minorities in the European Union, the EU Network of independent experts on fundamental rights recommended that, in the revision of Council Directive 89/552/EEC, special consideration be given to the added value which a specification at Community level of the requirements concerning the representation of minorities in the media would present, in particular in order to clarify the legal framework applicable to such initiatives adopted by the Member

[57] See, for a comparison of the legal frameworks of the EU Member States in this field, Opinion n°5-2005 of the EU Network of Independent Experts on Fundamental Rights, Combating Racism and Xenophobia through the Criminal Law : the Situation in the EU Member States, 21 November 2005.
[58] *O.J.* L 298, 27 November 1989, pp.0023-0030.
[59] *O.J.* L 202, 30 July 1997, pp.0060-0070.
[60] See also Article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965.
[61] See Opinion on Cyprus, 6 April 2001, ACFC/OP/I(2002)004, para. 36. Reference should be made for instance, to illustrate the range of options which exist in this regard, to the Netherlands. In 1999, the Dutch Government submitted a White Paper to the Parliament with many action points to enhance diversity in the media, to promote access of the media to cultural minorities, and to stimulate balanced reporting on the multi-cultural society (*Kamerstukken II,* 1998-1999, 26597, No. 1).
[62] Recommendation 1589 (2003) on the freedom of expression in the media, para.17, vi. See also Recommendation 1623 (2003) on the rights of national minorities, paras. 7 and 11.
[63] Opinion on Ukraine, 1 March 2002, ACFC/OP/I(2002)010, para.43; Opinion on Azerbaijan, 22 May 2003, ACFC/OP/I(2004)001, para.50.
[64] Opinion on Serbia and Montenegro, 27 November 2003, ACFC/OP/I(2004)002, para.69.
[65] Opinion on Estonia, 14 September 2001, ACFC/OP/I(2002)005, para.38.
[66] Ibid., para.37. See also the HCNM's Oslo Recommendations Regarding the Linguistic Rights of National Minorities (1998), para.9 and Guidelines on the Use of Minority Languages in the Broadcast Media (2003). Moreover, the ACFC considers it useful that minority language broadcasting on public TV is subtitled in the official language, in order to stimulate knowledge of the minority language by the whole of the population. See Opinion on Sweden, 20 February 2003, ACFC/OP/I(2003)006, para.45.

States. Citing the *Mediawet* cases referred to above, it noted : 'The Member States should not be chilled from adopting certain regulations in this regard which could be seen as violating the freedom to provide audio-visual services or the freedom of expression of audio-visual service providers. At a minimum, an initiative could be taken in order to codify in European legislation the existing case-law of the European Court of Justice on this question'. Recalling that the Preamble and Article 7 of Council Directive 89/552/EC allow the Member States, '(…) in order to allow for an active policy in favour of a specific language, (…) to lay down more detailed or stricter rules in particular on the basis of language criteria, as long as these rules are in conformity with Community law',[67] the Network also recommended that Directive 89/552/EEC be amended in order to ensure that television broadcasting within the Union will fully respect the rights of linguistic minorities by imposing corresponding positive obligations on the Member States.

On 13 December 2005, the Commission proposed a new series of amendments to Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities. The amendments aim at the adoption of a modified Audiovisual Media Services Directive (COM(2005) 646 final, 13.12.2005). The Commission proposes, in particular, the insertion of a new Article 3 e in Directive 89/552 , stating that 'Member States shall ensure by appropriate means that audiovisual media services and audiovisual commercial communications provided by providers under their jurisdiction do not contain any incitement to hatred based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. By its reference to all the grounds of prohibited discrimination mentioned in Article 13 of the EC Treaty, this formulation goes further than current Article 22 a of Directive 89/552/EEC, inserted by Directive 97/36/EC, according to which 'Member States shall ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality'. Yet, the amendments proposed do not go as far as suggested by the EU Network of independent experts on fundamental rights. And they certainly cannot be said to take adequately into account the provisions of the Framework Convention which relate to the audio-visual media. Under the Framework Convention, the States parties must ensure in the legal framework of sound radio and television broadcasting 'that persons belonging to national minorities are granted the possibility of creating and using their own media' (Article 9(3)); and they shall adopt 'measures in order to facilitate access to the media for persons belonging to national minorities' (Article 9(4)).[68] Although Article 11(2) of the EU Charter of Fundamental Rights guarantees the respect for the freedom and pluralism of the media, it does not impose on the institutions of the Union any positive obligation to take action in this regard; and it applies to the Member States only insofar as they implement Union law, without imposing on them an obligation which would result in extending the scope of application of Union law.

3. Use of minority languages in public

The EC/EU has no formal competences to regulate the use of languages in public in the Member States. This remains, therefore, a matter for the Member States to decide. However, the EC/EU does have a language policy of its own. It has 20 official languages. Moreover, one language (Irish), while not an official language in which all the EU official documents and secondary legislation are translated, is a 'Treaty language', in the sense the Treaties have an official translation in Irish which is equally authentic (Article 314 of the EC Treaty). Under Article 21, al. 3, every citizen of the Union may write to any of the institutions or bodies of the Union in one of the 21 Treaty languages and have an answer in the same language.

The European Community has also adopted timid initiatives in order to promote regional and minority languages in the EU Member States,[69] implementing in that respect Article 22 of the EU Charter of

[67] See the preamble and Article 7 of Directive 89/552/EEC.
[68] See also the HCNM's Oslo Recommendations Regarding the Linguistic Rights of National Minorities (1998), para.8 and Guidelines on the Use of Minority Languages in the Broadcast Media (2003).
[69] In accordance with this notion as it is used in the 1992 European Charter for Regional or Minority Languages, these are indigenous languages traditionally spoken by part of the population of Member States of the European Union, or EEA

Fundamental Rights.[70] In particular, it has supported the European Bureau for Lesser Used Languages, a network representing lesser-used language communities in all the EU Member States, and the Mercator information network. Up to the year 2000, it has also funded projects for practical initiatives aimed at protecting and promoting regional and minority languages. However, the judgment adopted by the European Court of Justice on 12 May 1998[71] has led to the suppression of the budget line initially established in 1982, upon the request of the European Parliament, for projects seeking to promote regional and minority languages.[72]

The European Parliament has strongly advocated a more active role for the Community in the promotion of regional and minority languages. In 2003, it adopted a resolution following upon the European Year of Languages 2001,[73] in which it expressed its support for a multi-annual programme on linguistic diversity and language learning, part of the financial appropriations of which, in the view of the Parliament, should be 'specifically earmarked for concrete measures and for regional and less widely used languages. The aim of these measures is to reinforce the European dimension with a view to promoting and protecting regional and minority languages and cultures'. In a communication on 'Promoting Language Learning and Linguistic Diversity: An Action Plan 2004-2006' adopted only days after the Parliament has passed its resolution,[74] the Commission suggests that a programme such as Socrates[75] may in the future 'play a greater part in promoting linguistic diversity by funding projects to raise awareness about and encourage the learning of so-called 'regional' 'minority' and migrant languages, to improve the quality of the teaching of these languages, to improve access to learning opportunities in them; to encourage the production, adaptation and exchange of learning materials in them and to encourage the exchange of information and best practice in this field. In the longer term, all relevant Community programmes and the Structural Funds should include more support for linguistic diversity, *inter alia* for regional and minority languages, if specific action is appropriate'.[76] The Commission also invites national and regional authorities to 'give special attention to measures to assist those language communities whose number of native speakers is in decline from generation to generation, in line with the principles of the European Charter on Regional and Minority languages'.[77] The communication also announces that from 2004 onwards, support for projects relating to regional and minority languages will be made available from mainstream programmes rather than specific programmes for these languages, and that the Commission's annual monitoring report on culture will monitor the implementation of this new approach.[78] This response of the Commission to the wishes expressed by the European Parliament therefore has been encouraging. At the same time, it illustrates the difficulties of achieving an objective such as the promotion of regional and minority languages without an appropriate legal basis, or in fields in which the Community can do no more than support and supplement the actions of the Member States.[79]

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countries. This definition does not include the languages of immigrant communities, artificially created languages or dialects of an official language of the state in question.

[70] In its resolution on the role of regional and local authorities in European integration (2002/141(INI)), the European Parliament has moreover called for the following new article to be inserted in the EC Treaty: 'The Community shall, within its spheres of competence, respect and promote linguistic diversity in Europe, including regional or minority languages as an expression of that diversity, by encouraging cooperation between Member States and utilising other appropriate instruments in the furtherance of this objective'.

[71] Case C-106/96, *United Kingdom and Others v. Commission*, [1998] ECR I-2729 (deciding that every significant EC expenditure should be grounded in the prior adoption of a legislative act).

[72] This action line was called *Action line for the Promotion and Safeguard of minority- and regional languages and cultures.*

[73] European Parliament 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 (2003/2057(INI)), 14 July 2003, P5_TA(2003)0372 (rapp. M. Ebner). See the European Parliament and Council Decision No 1934/2000/EC of 17 July 2000 on the European Year of Languages 2001, OJ L 232, 14.9.2000, p. 1.

[74] COM(2003) 449 final, of 24.7.2003.

[75] See below on the limited contribution of this programme to the promotion of regional or minority languages.

[76] COM(2003) 449 final, at p. 12.

[77] Id.

[78] Ibid., at p. 19.

[79] The Socrates programme is based on Articles 149 and 150 of the EC Treaty. Article 149 provides that the Community 'shall contribute to the development of quality education by encouraging cooperation between Member States' through a range of actions, such as promoting mobility, exchanges of information or the teaching of the languages of the European Union. The Treaty also contains a commitment to promote life-long learning for all the Union's citizens : Article 150 EC

In the context of this study, it may be of interest to recall that the European Parliament, in its 2003 resolution following upon the European Year of Languages 2001, stressed that the aim of promoting and protecting regional and minority languages and cultures 'cannot be effectively pursued without proper coordination with the machinery existing within the Council of Europe, avoiding overlapping or encroachment in terms of responsibilities and/or operations. In particular, because monitoring is carried out under the European Charter for Regional or Minority Languages, the key Europe-wide legal frame of reference applying in this sphere, and above all through the work of the independent committee responsible for supervising implementation of the Charter as well as the two-yearly reports submitted by the Secretary-General of the Council of Europe, it is possible to identify problem areas, often horizontal by nature to the extent that several countries are affected, in which action needs to be taken as a matter of priority. In their activities, therefore, the agency and the Commission should take account of the findings of this monitoring when determining aims, financial guidelines, and priorities so as to enable the right measures to be taken at the right time as regards the problem areas (similar considerations apply to the monitoring carried out under the Framework Convention for the Protection of National Minorities, in so far as it also relates to linguistic profiles)'. More concretely on this point, the Parliament recommended that the Commission should ensure, on the basis of Articles 149(3) and 151(3) of the EC Treaty, that it is regularly and officially informed, respectively by the secretariat of the European Charter on Regional or Minority Languages and that of the Council of Europe Framework Convention for the Protection of National Minorities implementation, of the Charter in the EU Member States, concerning the state of ratification, and developments in relation to the implementation, of the Framework Convention in the EU Member States;[80] and that, 'when determining aims, financial guidelines, and priorities, take into account the findings of the monitoring carried out under both the Council of Europe's European Charter for Regional or Minority Languages and, in so far as it also relates to linguistic profiles, its Framework Convention for the Protection of National Minorities; to that end, cooperation should be established on a regular basis between the appropriate Commission and Council of Europe departments'.[81]

However, in the communication[82] it adopted following upon this recommendation and the mandate of the Education Council,[83] the Commission does not mention the building of a formal relationship with the secretariats of the Charter for Regional or Minority Languages and of the Framework Convention for the Protection of National Minorities is not mentioned in the communication and is thus not part of the Action plan.

4. Education in and of the minority language

In the absence of legal competences allowing the Community to regulate language, including language in education, in the EU Member States, it is essentially through policy measures that the Union has encouraged the teaching of languages in the Union. However, these measures essentially aim at encouraging the learning of the official languages of the Member States (and, in addition, Irish, as a Treaty language, as well as Lëtzeburgesch (which has an official status in Luxembourg)); they are hardly significant as regards their contribution to the preservation of minority or regional languages.

The Socrates programme referred to above is based on Articles 149 and 150 of the EC Treaty. Article 149 provides that the Community 'shall contribute to the development of quality education by encouraging cooperation between Member States' through a range of actions, such as promoting

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provides that the Community 'shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training'. Thus, the Community supports and supplements the actions of the Member States in the field of education while respecting their responsibility for the content of teaching and the organisation of national education systems. In this field, the Community plays a role complementary to that of the Member States: its objective is to add a European dimension to education, to help to develop quality education and to encourage life-long learning.

[80] See paras. 6 and 7 of the operative part of the European Parliament's resolution.

[81] Para. 17.

[82] COM(2003) 449 final, of 24.7.2003.

[83] Council Resolution of 14 February 2002, OJ 2002 C 50, p. 1 (inviting the Member States to take concrete steps to promote linguistic diversity and language learning, and inviting the European Commission to draw up proposals in these fields).

mobility, exchanges of information or the teaching of the languages of the European Union. The Treaty also contains a commitment to promote life-long learning for all the Union's citizens : Article 150 of the EC Treaty provides that the Community 'shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training'.

The Community supports and supplements the actions of the Member States in the field of education while respecting their responsibility for the content of teaching and the organisation of national education systems. In this field, the Community plays a role complementary to that of the Member States: its objective is to add a European dimension to education, to help to develop quality education and to encourage life-long learning. The Socrates programme is the main tool for putting this ambition into practice. Decision n° 253/2000/EC of the European Parliament and the Council of 24 January 2000 establishing the second phase of the Community programme in the field of education 'Socrates'[84] includes (as action 4) the Lingua programme on the teaching and learning of languages, the aim of which is – according to the description provided in Decision 253/2000/EC –, to 'support transversal measures relating to the learning of languages, with a view to helping to promote and maintain linguistic diversity within the Community, to improve the quality of language teaching and learning and to facilitate access to life-long language learning opportunities tailored to individual requirements'. Under the programme, language teaching covers the teaching and learning as foreign languages of all the 21 Treaties languages and Lëtzeburgesch. Decision 253/2000/EC states that 'Special attention shall be paid throughout the programme to promoting the less widely used and less widely taught of these languages'. The Socrates programme is not focused on the preservation of minority languages : on the contrary, it seeks to promote the learning and teaching of the European languages which are most widely in use and does not include the promotion of languages such as Breton, Catalan, or Welsh.

5. Participation of national minorities in public, social and economic life

There are no provisions in EU law providing for the participation of national minorities in public, social and economic life in the EU Member States.

C. Enforcement/Implementation

1. Judicial vs non-judicial remedies

The right to an effective judicial remedy constitutes a general principle of EU Law. Therefore, as confirmed by Article 47 of the EU Charter of Fundamental Rights, all rights attributed under EU (or EC) law must be protected through effective judicial remedies against their violation. Certain instruments of secundary legislation, such as, in particular, the Racial Equality Directive and the Employment Equality Directive, specify further the scope of this requirement, by detailing the nature of the remedies which should be made available. These directives contain provisions relating to the possibility of shifting the burden of proof in civil actions alleging discrimination. They also seek to ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in combating discrimiation, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of the obligations laid down under the Directives. Finally, under both Directives, complainants are protected from victimisation : they should not be adversely subjected to reactions following the introduction of a complaint or the filing of any legal proceedings aimed at enforcing compliance with the principle of equal treatment. In addition, the Racial Equality Directive (Article 13) provides that the EU Member States must establish Equality Bodies, which should provide independent assistance to victims of discrimination in pursuing their complaints about discrimination, conduct independent surveys concerning discrimination, and publish

[84] OJ L 28 of 3.2.2000, p. 1.

independent reports and make recommendations on any issue relating to such discrimination. Although such bodies are not mentioned under the Employment Equality Directive, most Equality Bodies established under the Racial Equality Directive have also been attributed powers as regards the prohibition of discrimination on grounds other than race or ethnic origin, including in particular religion.

2. *Participation of national minorities associations*

Under EU law, national minorities associations are not guaranteed a right to participate in public decision-making, or to be consulted.

3. *Proving discrimination: quantitative and other evidence of discrimination, obligations of the State in this area*

It has been recalled above that, under the Racial Equality Directive and the Employment Equality Directive, while the Member States are obliged to prohibit discrimination, they are not under an obligation to allow for a presumption of discrimination to be established on the basis of statistical data. Nor are the EU Member States under any obligation, in EU law, to collect data which would allow for such statistics to be invoked in favor of a claim of discrimination.

There is a growing recognition that this might have to change in the future, if the existing anti-discrimination is to be truly effective. A study[85] commissioned under the Community action programme to combat discrimination (2001-2006) concluded from a comparative study on the EU-15 Member States that data collection ought to be improved in order to gain a better understanding of discrimination in the EU Member States: "Data is needed to guide decision-makers, to facilitate awareness-raising activities, to enable the work of international human rights monitoring bodies, to facilitate legal action and to facilitate research on discrimination. Indeed, more than 90% of the experts surveyed were convinced that data collection on discrimination helps to improve the situation of individuals and groups vulnerable to discrimination." Among its recommendations, the report proposed that "States should develop their social and economic statistics in such a manner that they would be more useful in disclosing data on the (potentially) disadvantaged economic and social position of members of groups vulnerable to discrimination. Data related to employment, housing, education and income should be broken down by the grounds of discrimination, *e.g.* national origin, disability, gender and age", and that "Larger companies, public and private, should keep track of their workforce so as to be able to assess their recruitment, promotion and firing policies and practices". However, the survey prepared for that study also illustrated the high level of uncertainty about whether or not the existing rules on data protection represented an obstacle to the collection of data relating to discrimination, for the purposes recalled above.

The authors of the 2004 Comparative Study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, Great-Britain and the Netherlands noted the paradox underlying the debate in Europe on the implementation of anti-discrimination strategies: "Although there is a lack of statistical indicators to assess the extent of discrimination in the Member States, the belief is widely shared that discrimination is widespread and that there is a need to mobilise all social institutions and stakeholders to reduce this discrimination. Nevertheless, the collection of statistics relating to ethnic or racial origin, religion, disability or sexual orientation has been the subject of strong resistance. The experience of the countries under study in this report demonstrates that the lack of sufficient statistics to illustrate and evaluate discrimination is not compatible with establishing an operational scheme whose main characteristic is the intensive use of statistical data. It appears necessary – and possible – to transcend the European paradox opposing the fight against discrimination and the production of 'sensitive' statistics."[86]

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[85] Reuter *et al*., *Study on data collection to measure the extent and impact of discrimination in Europe*, Final report of 7 December 2004.

[86] *Comparative Study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, Great-Britain and the Netherlands* (Medis Project (Measurement of Discriminations), co-ord. P. Simon (INED – Economie & Humanisme), August 2004, p.82, at 87.

In its resolution on non-discrimination and equal opportunities for all - A framework strategy (2005/2191(INI)) adopted on 8 May 2006,[87] noting that 'the detection of indirect forms of discrimination (which are explicitly banned under Community law) must be based upon reliable statistics relating in particular to certain groups with special characteristics; whereas any unavailability of statistics will in effect deny potential victims of indirect discrimination access to a tool which is essential if their rights are to be recognised' (Preamble, R.), the European Parliament took the view that 'notwithstanding cultural, historical or constitutional considerations, 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' (para. 14). It therefore called for a clarification of the requirements of data protection legislation on this issue. Il also called upon the Member States to 'develop their statistics tools with a view to ensuring that data relating to employment, housing, education and income are available for each of the categories of individual which are likely to suffer discrimination based on one of the criteria listed in Article 13 of the EC Treaty' (para. 20).

4. Monitoring the impact of State policies on the situation of national minorities

One of the recommendations contained in the abovementioned resolution adopted on 14 July 2003 by the European Parliament, following the Ebner report on European regional and lesser-used languages - the languages of minorities in the EU - in the context of enlargement and cultural diversity, was that the EU should play a more active role in monitoring the impact of the State policies on the situation of national minorities. It proposed, in particular, that 'a specific section of the European Parliament's reports on human rights, or its own specific reports, deal with the protection of minorities, and that its Committee on Culture is regularly and officially informed by the secretariat of the European Charter on Regional or Minority Languages concerning the state of ratification, and developments in relation to the implementation of, the European Charter for Regional or Minority Languages in the Member States' (paras. 25-26); that the Member States should 'compile, as a basis for further measures, reliable data on ethnic, linguistic and religious minority groups, including immigrants and refugees, on their economic and social isolation/exclusion, and on the legal and practical status of regional and minority languages, and send such data to the European Monitoring Centre on Racism and Xenophobia in Vienna' (para. 29); and that the Council 'include in its annual report on the human rights situation an analysis of the development of human rights, including the rights of national minorities, in the individual Member States, taking into account also the outcome of Council of Europe activities in this field, to make it possible to formulate strategies to ensure that national and European policies in this area are more consistent' (para. 30).

More recently, in the resolution it adopted in July 2005 on the basis of a report by Claude Moraes MEP,[88] the European Parliament calls for 'data to be collected on direct and indirect discrimination (i.e. the percentage of people belonging to national minorities among those living at risk of poverty and among the employed and unemployed, their level of education, etc.) so as to ensure proper feedback on the effectiveness of Member State anti-discrimination and minority-protection policies' (para. 54).

These proposals have not been followed upon, however. Currently, there exists under EU law no systematic monitoring of the impact of the Member States' laws and policies on the minorities which are present under their jurisdiction. Since 2003, the European Parliament has suspended its practice, inaugurated in 1999, of adopting annually a report on the situation of fundamental rights in the Union, although its thematic reports on specific issues allows it, on a less systematic basis, to review to a certain extent the situation of minorities in the Member States. The EU Network of independent experts on fundamental rights, which ensured such a monitoring on the basis of the weak and general provisions of the EU Charter of Fundamental Rights which related to minorities (Articles 21 and 22, essentially), shall cease to exercise its functions after September 2006, in order to leave place to the

[87] EP doc. A6-0189/2006 (rapp. T. Zdanoka).
[88] European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005/2008(INI)) (rapp. Moraes).

Fundamental Rights Agency. This Agency itself, which is still currently under discussion over a year after it has been proposed by the European Commission,[89] will be in charge of providing the institutions, bodies, offices and agencies of the Union and its Member States when implementing Union law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights. Apart from the fact that its mandate will not extend beyond situations where the Member States implement Union law, it shall not have monitoring functions per se; and it will not focus particularly on the question of minority rights. To the extent it can be described as a monitoring body, the European Union Monitoring Centre on Racism and Xenophobia (EUMC), established in 1998, does not focus specifically on minorities, although its mandate naturally includes the situation of ethnic and religious minorities in the Union, to the extent they are the target of racism or xenophobia, antisemitism, or islamophobia.

D. CONCLUSION

The description above illustrates the complexity of the question whether the European Union should play in the future a more active role in the protection and promotion of minority rights in the EU Member States. There are two forms such a development could take.

First, a more active role of the EU in this field could consist in monitoring the EU Member States in order to ensure that they comply with the values of the Framework Convention. While it is highly implausible that this will develop on the basis of Article 7 of the EU, considering the current understanding of the significance of this provision, other avenues, it has been sometimes suggested, may be explored. As we have seen, one of the recommendations contained in the abovementioned resolution adopted on 14 July 2003 by the European Parliament, following the Ebner report on *European regional and lesser-used languages - the languages of minorities in the EU - in the context of enlargement and cultural diversity*, was that the EU should play a more active role in monitoring the impact of the State policies on the situation of national minorities. While the focus in that resolution was on linguistic minorities and on the the European Charter on Regional or Minority Languages, such a development could be imagined, *mutatis mutandis*, as regards other rights than those of linguistic minorities ; and it could focus on the Framework Convention rather than on the European Charter on Regional or Minority Languages. This would present us both with an opportunity and with a risk. The opportunity would be to use the powerful institutional machinery of the European Union in order to improve the implementation of the relevant Council of Europe instruments by the EU Member States, not only by encouraging the ratification of those instruments, but also by monitoring the commitments of the EU Member States in that framework and, especially, by ensuring that the findings of the monitoring bodies of the Council of Europe are followed upon. The risk, at the same time, would be to substitute one form of monitoring within the Union (through the European Parliament, in particular, perhaps in the future with the assistance of the EU Fundamental Rights Agency) to the form of monitoring which is already performed by the Council of Europe bodies. In the worst case scenario, this could lead to diverging interpretations of the requirements of the relevant standards, and to the authority of the monitoring by the Council of Europe being undermined. In order to ensure that this does not happen, any monitoring performed by the institutions of the European Union on the EU Member States' compliance with the values of the Framework Convention should be based explicitly on that standard – in other terms, minority rights should not be reinvented by the EU; and any country-specific follow-up should be based, equally explicitly, on the findings of the monitoring bodies of the Council of Europe – particularly here, on the opinions of the Advisory Committee on the Framework Convention and on the resolutions of the Committee of Ministers of the Council of Europe.

[89] Commission of the European Communities, *Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union*, COM(2005)280, 30.6.2005.

However, a second and quite distinct way to understand the more active role the European Union might play in protecting and promoting the rights of minorities in the EU, is to see the Union as developing new standards, by the adoption of new legislation implementing the values of the Framework Convention to the extent the Union has been attributed certain powers to do so. While this may be an attractive option, the danger is that by adopting such regulations or directives, the European Union may in fact be pre-empting a field which, then, the EU Member States will consider less important to cover by reference to the Council of Europe instruments or to their interpretation by the monitoring bodies these instruments have set up. Nowhere is this more clearly visible than in the anti-discrimination field. For instance, as explained above, the EU Member States are not currently under EU law under a positive duty to adopt special measures taking into account the specific needs of members of ethnic or cultural, religious or linguistic minorities : more precisely, only in the exceptional circumstance where not doing so would amount to a form of discrimination prohibited under the EC Treaty or under secundary legislation adopted on the basis of the Treaty – in particular, under the Racial Equality and Employment Equality Directives of 2000 – is such an obligation imposed on them under EU law. In the understanding of discrimination under the Racial Equality and Employment Equality Directives, the adoption or maintenance into force of measures which, although apparently neutral, put persons of a particular race or ethnic origin, or of a particular religion or belief, as a particular disadvantage, should be removed unless it can be demonstrated that such measures can be objectively justified as pursuing a legitimate aim by means both appropriate and necessary.[90] To that extent, and to that extent only, the EU Member States are obliged under EU Law to take into account the specific situation of ethnic or religious groups – among which groups who might qualify as national minorities – in order to ensure that this situation is taken into account. It would be unacceptable however that, under the pretext that they are bound by the requirements of the Racial Equality and Employment Equality Directives, the EU Member States either choose not to ratify the Framework Convention, or if they are parties to the Framework Convention, not to take the measures required under Article 5(1) of the Framework Convention, which is more ambitious than the EU directives adopted in the anti-discrimination field.

The example of anti-discrimination law, like the example of the regulation of audio-visual services referred to above, both lead to a more general point : while the fact that the European Union legislates in fields which concern minority rights should in principle be welcomed, as this may contribute significantly to an improved protection of these rights on the European continent, it should in doing so aim at achieving a standard of protection at least as strong as the standard defined by the instruments of the Council of Europe. The risk otherwise may be to undercut the efforts of the Council of Europe, by creating the impression that an alternative standard is available within the Union, from which the States belonging to both organisations simply may choose from.

The EU Fundamental Rights Agency, the structure and mandate of which are still under discussion at the time of writing over a year after it has been proposed by the European Commission,[91] will be in charge of providing the institutions, bodies, offices and agencies of the Union and its Member States when implementing Union law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights. For the reasons just stated, it will be crucial that the Agency base itself not only on the EU Charter of Fundamental Rights, but on the Charter as interpreted in the light of the broader acquis of international and European rights law, and especially, of the Council of Europe instruments which the EU Member States are parties to. And it will be essential also that the Agency, like the other EU institutions, bodies or agencies, establish systematic links with the secretariat of the Framework Convention within the Council of Europe, whenever they

[90] See Article 2(2) of the Racial Equality Directive and of the Employment Equality Directive. As we have seen, the definition of indirect discrimination as provided by the directives do not amount to a prohibition of disparate impact discrimination : the disproportionate impact of certain neutral measures, as it might be highlighted by statistics, will not necessarily lead to shifting on the author of the contested measure the burden of justifying its adoption.

[91] Commission of the European Communities, *Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union*, COM(2005)280, 30.6.2005.

are confronted with questions related to minority rights. Only under these conditions can the European Union develop itself into an actor actively contributing to the protection and promotion of minority rights in the EU Member States.