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The Framework Convention on the Protection of National Minorities and the Law of the European Union

By Olivier De Schutter

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Olivier DE SCHUTTER*

Abstract

This study of the role of the Framework Convention for the Protection of National Minorities in the law and policy of the European Union seeks to contribute to a debate concerning the relationship between the fight against discrimination in the EU, and the protection and promotion of minority rights. Whereas the EU has spectacularly occupied the field of antidiscrimination in the recent years, in some respects even overshadowing the efforts made by the Council of Europe in this field, it has been reluctant to address the question of minority rights, some Member States taking the view that the latter route was unnecessary if a strong antidiscrimination agenda was pursued. Yet, enlargement of the EU has brought the question of minority rights to the forefront of the political debate. Whether the EU should develop a specific policy aiming at the integration of minorities, which tools it has at its disposal to do so, and how this would affect the relationships between the European Union and the Council of Europe, are among the questions this paper seeks to address.

1. Introduction

This essay seeks to identify the role the Framework Convention for the Protection of National Minorities has played hitherto in the law of the European Union, and how such a role could be developed further. The European Union has not been given explicit competences in the field of the protection of minorities. However, a number of provisions of the EC and EU treaties allow for the adoption of certain instruments which may contribute to improving such protection in the EU Member States.¹ Moreover, to the extent that it has been given certain competences in fields not specifically related to the protection of minorities, both the institutions, bodies and agencies of the European Union, and the Member States acting under Union law, must comply with certain values, among which are minority rights. These are two different perspectives, therefore, from which to offer an evaluation of the role the Framework Convention for the Protection of National Minorities (FCNM) has played in EU Law, and of the future role it might play in the future. The second section of this paper examines the tools at the disposal of the European Union to promote the rights of minorities in the EU Member States and, thus, to play a positive role in the development of the principles of the FCNM in Europe. The third section of the paper asks how the EU could ensure that it will not lead to violations of the FCNM by its Member States or encourage such violations.

In part, the distinction between these two ways in which EU Law may interact with the FCNM, as expressed above, is too crude to fully capture the different potential interactions which a full study should include. While the second section sees EU Law as a potential vehicle for the implementation and the development of the FCNM in the EU Member States, the third section sees EU Law as a potential threat to the FCNM, against which certain safeguards should be built. This is, of course, an oversimplification. One of the mechanisms which the third section examines is the political

* Professor of Human Rights Law, University of Louvain (Belgium) and College of Europe (Natolin); Member of the Global Law School Faculty, New York University. This study was inspired in part by a contribution prepared upon the request of the Secretariat of the Framework Convention for the Protection of National Minorities, for the Council of Europe intergovernmental working group on the rights of national minorities (DH-MIN).

¹ For a complete overview, see Bruno de Witte, 'The constitutional resources for an EU minority policy', in Gabriel N. Toggenburg (ed.), *Minority protection and the enlarged European Union. The Way Forward*, LGI Books, Budapest, 2004, pp. 109-124.

monitoring of the compliance by the EU Member States with the founding values of the Union, provided for under Article 7 EU : while this can hardly be seen as a means through which the EU may contribute to the development of the FCNM and to promote its further expansion by attracting new ratifications – as this provision clearly is not seen as providing the basis for a policy of systematic monitoring of the Member States² – it nevertheless goes beyond simply ensuring that EU Law will not, in itself, encourage violations of the principles of the FCNM. Similarly, it may be argued that the fundamental rights protected as general principles of law in the legal order of the European Union – including, in particular, the principle of equal treatment – have an overarching function to fulfil: they are not only limitations imposed on the law- and policy-making of the Union, they also have an orientative function, guiding the exercise by the institutions of the competences they have been given.³ Nevertheless, they will be examined in the third section of this paper, as their primary role hitherto has been to ensure that fundamental rights are complied with in the exercise of the powers of the Union, rather than to influence the way the existing powers are exercised.

In addition, certain points of contact between EU Law and the rights of minorities are not explored here, as they should be examined in a more complete study.⁴ For instance, the provisions pertaining to the free movement of persons within the Union may impose on the Member States an obligation that they revise the rules, relating for instance to the adoption of or the spelling of surnames – as in the 1993 case of *Konstantinidis*⁵ – which might have such discriminatory effect.⁶ Thus, in imposing the prohibition of discrimination on grounds of nationality in the field of application of the EC Treaty between nationals from different Member States (Article 12 EC),⁷ the Court considered in the case of *Garcia Alvello* 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.⁸ Similarly, as illustrated by the *Groener* case, 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.⁹

In that sense, as emphasised 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,¹⁰ “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

² See hereafter, text corresponding to notes 102-105.

³ See, *inter alia*, O. De Schutter, ‘Les droits fondamentaux dans le projet européen. Des limites à l’action des institutions à une politique des droits fondamentaux’, in O. De Schutter and P. Nihoul (eds.), *Une Constitution pour l’Europe. Réflexions sur les transformations du droit de l’Union européenne*, Bruxelles, Larcier, 2004, pp. 81-117

⁴ For an excellent overview, see Gabriel N. Toggenburg, ‘A remaining share or a new part? The Union’s role vis-à-vis minorities after the enlargement decade’, *EUI Working Papers* – Law No. 2006/15, 27 pages.

⁵ See Case C-168/91, *Christos Konstantinidis v. Stadt Altensteig* [1993] ECR I-1191 (judgment of 30 March 1993) (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, constitutes a violation of the right to freedom of establishment).

⁶ For a detailed examination, see Gabriel N. Toggenburg, ‘The EU’s ‘Linguistic Diversity’: Fuel or Brake to the Mobility of Workers’, in Andrew P. Morris and Samuel Estreicher (eds.), *Cross-Border Human Resources, Labor and Employment Issues*, Kluwer Law International, 2005, pp. 677-723.

⁷ 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’.

⁸ Case C-148/02, *Carlos Garcia Alvello* [1997] ECR I-11613, judgment of 2 October 2003.

⁹ Case C-379/87, *Groener* [1989] ECR 3967, paragraphs 19 and 23. The case is examined in more detail below (see text corresponding to notes 99-101).

¹⁰ 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.

the free movement of persons, the case law of the European Court of Justice illustrates that ‘the protection of the linguistic rights and privileges of individuals is of particular importance’.¹¹ The right of a national of the Union to use his own language in the exercise 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’.¹² 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) 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 [¹³] and by the Treaty establishing a Constitution for Europe. That principle is a specific expression of the plurality inherent in the European Union’.¹⁴

Therefore, to the extent that 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 them actively into account in the legal and administrative regulations which might affect the freedom of movement of Union nationals. This dimension of the law of the European Union shall not be developed here, however, 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 either under general public international law¹⁵ or in the case law of the FCNM’s 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 workers¹⁶ 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, the transposition of which by the Member States has been very unsatisfactory, has not been effective; moreover, it is considered not to formulate binding obligations on the Member States.¹⁷ For these reasons, while it cannot be denied that such developments, provoked by the need to facilitate the free movement of persons within the EU, might also benefit traditional minorities by their spillover effects, they are left aside in this contribution.

¹¹ Case 137/84, *Mutsch* [1985] ECR 2681, paragraph 11, and Case C-274/96, *Bickel and Franz* [1998] ECR I-7637, paragraph 13.

¹² *Mutsch*, paragraph 16, and *Bickel and Franz*, paragraph 16.

¹³ Article 22 of the Charter, to which we return below, states that ‘[t]he Union shall respect cultural, religious and linguistic diversity’.

¹⁴ Para. 35 of the opinion.

¹⁵ A nuance should be added. Article 27 of the International Covenant on Civil and Political Rights provides that, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. In its General Comment n°23 on this provision, the Human Rights Committee adopts a generous view of the scope of applicability of this provision: ‘Article 27 confers rights on persons belonging to minorities which “exist” in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term ‘exist’ connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practise their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights. As any other individual in the territory of the State party, they would, also for this purpose, have the general rights, for example, to freedom of association, of assembly, and of expression’ (General Comment n°23: Article 27 (Rights of Minorities), adopted at the fiftieth session of the Committee (1994), in *Compilation of the general comments or general recommendations adopted by human rights treaty bodies*, HRI/GEN/1/Rev.7, 12 May 2004, at para. 5.2.).

¹⁶ OJ L 199 of 6.8.1977, p. 32.

¹⁷ Statement by Commissioner Reding, reply to written question E-1336/02, 8 May 2002, OJ C 277 E of 14.11.2002, p. 190.

2. The potential role of European Union law in contributing to the implementation of the FCNM

This section examines the potential for an active role of the European Union in the promotion of minority rights and, in particular, in encouraging an implementation of the principles of the FCNM by the Member States. It addresses, first, the question of the legal bases for such a minority rights policy (2.1.). Second, it examines the contribution of the anti-discrimination strategy of the European Community to minority rights (2.2.). Finally, by developing two examples – the role of the Community in the promotion of regional and minority languages and the measures adopted in the field of audio-visual services – it seeks to illustrate the limits encountered by the Union in contributing to the protection and promotion of minority rights (2.3.).

2.1. The legal bases for a minority rights policy of the EU

Since the entry into force of the Treaty of Amsterdam on 1 May 1999, Article 13 EC 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 protect 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 origin¹⁸ (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 occupation¹⁹ (hereinafter referred to as the ‘Employment Equality Directive’) which were 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 health care), 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 EC 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.²⁰ 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 EC). Under Article 151 EC, 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 throughout the Union (Article 49 EC). It may adopt measures establishing the internal market, including by harmonising national rules (Articles 94 and 95 EC). Still other provisions of the EC 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. 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

¹⁸ OJ L 180 of 19.7.2000, p. 22.

¹⁹ OJ L 303 of 2.12.2000, p. 16.

²⁰ See for a full list, in addition to the study by Bruno de Witte cited above in note 1, the European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005/2008(INI)), adopted on 8 June 2005 and based on the report A6-0140/2005 of 10 May 2005 (rapp. Cl. Moraes). 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.

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.²¹

2.2. *The anti-discrimination strategy of the EU and the principles of the FCNM*

The existing bases for a minority rights policy of the Union are far from having been explored to their fullest potential. 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 But these instruments, while extraordinarily important in improving the legislative framework against discrimination in the Member States, remain confined to a traditional *non-discrimination* approach, and may therefore be insufficient to promote the effective *integration* of ethnic and religious minorities in the Union²³ – and indeed, this is not part of their ambition.²⁴ Specifically, while both directives provide for the shifting of the burden of proof in discrimination cases,²⁵ these directives do not impose that the Member States provide for the possibility of establishing a presumption of discrimination by bringing forward statistical data which would illustrate the disproportionate impact of certain measures on ethnic or religious minorities: the Member States have the choice whether or not to allow the alleged victim to rely on such statistics, where such statistics may be found. The facts from which it may be 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'.²⁶ 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.

Similarly, under the Racial Equality and the Employment Equality Directives, the EU Member States have the choice whether or not to adopt positive action measures in favour of certain disadvantaged

²¹ 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)).

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 FCNM imposes on the State 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).

²³ Of course, linguistic minorities are not meant to benefit from these instruments, which do not prohibit discrimination on grounds of language. There have been proposals, during the European Convention of 2002-2003 and the following Inter-governmental Conference of 2003-2004, to expand the reach of current Article 13 EC in order to attribute to the Union a competence to adopt measures to combat discrimination on grounds of language. These proposals have failed, however. See, in particular, the resolution adopted by the European Parliament 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)) (P5_TA(2003)0372), where the Parliament asks the Commission to 'ensure that Article 13 TEC also covers discrimination on the grounds of language' (para. 21 of the Recommendation 2 relating to the Programme for linguistic diversity (to include regional and minority languages) and language learning).

²⁴ For a more detailed discussion on this, see Olivier De Schutter, 'Three Models of Equality and European Anti-discrimination law', *Northern Ireland Legal Quarterly*, vol. 57, n° 1 (2005), pp. 1-56 ; and Olivier De Schutter and Annelies Verstichel, 'Integrating the Roma into European Society: Time for a New Initiative', *European Yearbook of Minority Issues*, vol. 4, 2004/5, pp. 411-443.

²⁵ Both Art.8(1) of the Racial Equality Directive and Art.10(1) of the Employment Equality Directive provide that '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'.

²⁶ 15th Recital of the Preamble. This is misleading insofar as statistics may serve to establish a presumption either of direct or of indirect discrimination.

groups, whose integration may not be realised only by relying on the prohibition of (direct and indirect) discrimination. It may be argued however, that in certain cases of systematic inequality – or of what might be called structural discrimination – positive action should not only be allowed, but obligatory, in favour of groups who are politically powerless and thus cannot influence the political process in their favour in order to obtain the adoption of such measures. The International Convention for the Elimination of All Forms of Racial Discrimination,²⁷ which all the EU Member States have ratified, not only provides in Article 1(4) that positive action measures will not be considered discriminatory in the meaning of the Convention,²⁸ but that the adoption of such measures may be required under certain conditions:

State Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.²⁹

In its General recommendation XXVII on discrimination against Roma adopted in 2000, the Committee for the Elimination of Racial Discrimination, although not making explicit reference to Article 2(2) ICERD, encourages the State Parties to ‘take special measures to promote the employment of Roma in the public administration and institutions, as well as in private companies’, and to ‘adopt and implement, whenever possible, at the central or local level, special measures in favour of Roma in public employment such as public contracting and other activities undertaken or funded by the Government, or training Roma in various skills and professions’.³⁰ Under the International Covenant on Civil and Political Rights, the UN Human Rights Committee noted that ‘the principle of equality sometimes *requires* State Parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.’³¹

²⁷ Opened for signature by the UN General Assembly Res. 2106(XX) of 21 December 1965; entered into force on 4 January 1969.

²⁸ Article 1(4) provides that: ‘Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved’.

²⁹ Article 2(2) ICERD.

³⁰ Committee for the Elimination of Racial Discrimination, General recommendation XXVII on discrimination against Roma adopted at the fifty-seventh session (2000), 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. 219, paras. 28-29. Similarly, in its General recommendation XXIX on article 1, paragraph 1, of the Convention (Descent), adopted in 2002, the CERD Committee recommends the adoption of ‘special measures in favour of descent-based groups and communities in order to ensure their enjoyment of human rights and fundamental freedoms, in particular concerning access to public functions, employment and education’, as well as to ‘educate the general public on the importance of affirmative action programmes to address the situation of victims of descent-based discrimination’ and to take ‘special measures to promote the employment of members of affected communities in the public and private sectors’. See Committee for the Elimination of Racial Discrimination, General recommendation XXIX on article 1, paragraph 1, of the Convention (Descent), adopted at the sixty-first session in 2002, 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. 226, paras. 1, f) and h), and 7, jj).

³¹ Human Rights Committee, General Comment n°18: Non-discrimination (1989), 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. 146, para. 10.

Again, this suggests that positive action may be not only allowable in certain circumstances, but even obligatory. Nor is this view isolated among the human rights treaty bodies. The UN Committee on Economic, Social and Cultural Rights considered in its first General Comment that ‘special attention [should] be given to any worse-off regions or areas and to any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged’.³² It noted in its General Comment No. 13: The right to education (art. 13), that the adoption of ‘temporary special measures intended to bring about de facto equality for men and women and for disadvantaged groups’ is not a violation of the right to non-discrimination with regard to education, ‘so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved’.³³

It should therefore come as no surprise therefore that, in the conclusions of his 2002 report on this issue, M. Bossuyt notes that ‘a persistent policy in the past of systematic discrimination of certain groups of the population may justify - *and in some cases may even require* - special measures intended to overcome the sequels of a condition of inferiority which still affects members belonging to such groups’.³⁴ At the same time, while the principle seems to be agreed that positive action measures may be required from the State in order to ensure real and effective equality under its jurisdiction, it will be typically difficult for any individual seeking to benefit from such a scheme to impose on the State to take an initiative in this regard, considering the broad margin of appreciation which the State authorities are left as regards the choice of the means through which to achieve substantive equality and the broad panoply of measures they have at their disposal. A deepening of the debate on the notion of ‘structural discrimination’ might serve in the future to clarify the conditions at which, under the international law of human rights, a State may be obliged to adopt positive action measures.³⁵ Structural discrimination should not be seen simply as a particularly serious form of discrimination. Its defining characteristic is, rather, that it cuts across different spheres (education, employment, housing and access to health care in particular), resulting in a situation where the prohibition of discrimination in any one of these spheres or, indeed, in all of them, will not suffice to ensure effective equality. For

³² Committee on Economic, Social and Cultural Rights, General comment No. 1: Reporting by State Parties, adopted at the third session of the Committee (1989), 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. 9, para. 3. See also, e.g. General comment No. 4: The right to adequate housing (Art. 11 (1) of the Covenant), adopted at the sixth session (1991), at para. 11 (‘State Parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others’). See, generally, M. Craven, *The International Covenant on Economic, Social and Cultural Rights, a perspective on its development*, Oxford, Clarendon Press, 1995, p. 126 (emphasizing the obligation of States to focus their efforts on the most vulnerable and disadvantaged groups in society, which may include preferential treatment in favour of the members of these disadvantaged groups).

³³ 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.

³⁴ ‘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. 101 (emphasis added). The Committee on the Elimination of Discrimination against Women also has noted that ‘the International Convention on the Elimination of All Forms of Racial Discrimination (...) mandates temporary special measures. The practice of treaty monitoring bodies, including the Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights, and the Human Rights Committee, shows that these bodies consider the application of temporary special measures as mandatory to achieve the purposes of the respective treaties. Conventions adopted under the auspices of the International Labour Organization, and various documents of the United Nations Educational, Scientific and Cultural Organization also explicitly or implicitly provide for such measures’: Committee on the Elimination of Discrimination against Women, General recommendation No. 25: Article 4, paragraph 1 of the Convention (temporary special measures), adopted at the thirtieth session of the Committee (2004), 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. 282, n. 3.

³⁵ See for a detailed exploration of this notion Christopher McCrudden, ‘Institutional Discrimination’, (1982) 2(3) *Oxford Journal of Legal Studies* 303-367. For a use of this notion in order to address the situation of the Roma in Europe, see O. De Schutter and A. Verstichel, ‘Integrating the Roma into European Society: Time for a New Initiative’, cited above n. 24. See also the reasoning behind the proposal for the adoption of an instrument aimed specifically at ensuring the desegregation of the Roma: EU Network of Independent Experts on Fundamental Rights, Thematic Comment No. 3: *The Rights of Minorities in the European Union*, March 2005, referred to above.

instance, it will not be sufficient to prohibit discrimination in employment if inequalities persist in access to education or vocational training, thus leading to a situation of under-representation of the group concerned in employment, in spite of the effective prohibition of (direct or indirect) discrimination in that sphere. And it will not be sufficient to prohibit discrimination in education if, due to segregated housing, the children of one particular minority community are disproportionately represented in certain educational establishments and never or almost never have access to other establishments attended by children from the majority group, for instance due to the lack of public transportation allowing these minority children to travel from their neighborhood to the mainstream schools. Structural discrimination thus should be understood as a situation where, due to the extent of the discrimination faced by a particular segment of society, more is required in order to achieve effective equality than to outlaw direct and indirect discrimination.

Under Article 4 of the Framework Convention for the Protection of National Minorities, State Parties are to adopt 'adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority', taking due account in this respect of 'the specific conditions of the persons belonging to national minorities' (Article 4(2)); such measures are specifically designated as not being discriminatory in character (Article 4(3)). The Advisory Committee of the Framework Convention encourages the introduction of positive measures in favour of members of minorities which are particularly disadvantaged.³⁶ Thus, in an Opinion on Croatia, the Advisory Committee 'considers that one key to reaching full and effective equality for persons belonging to national minorities is the launching of additional positive measures in the field of employment and it supports efforts to seek financing for such measures. In this regard, the situation of persons belonging to the Serb minority merits particular attention, taking into account the past discriminatory measures, stirred by the 1991-1995 conflict, aimed at curtailing their number in various fields of employment, ranging from law-enforcement to education'.³⁷ In an Opinion on the Czech Republic, the Advisory Committee 'notes with deep concern that many Roma in the Czech Republic face considerable socio-economic difficulties in comparison to both the majority and other minorities, in particular in the fields of education, employment and housing. (...) The situation calls for the preparation and implementation of specific measures to realise full and effective equality between Roma and persons belonging to the majority as well as to other minorities'.³⁸ A very similar observation was made with respect to the situation of the Roma in Hungary.³⁹ In the Opinion it adopted on Ireland on 22 May 2003, the Advisory Committee emphasised the need for setting targets to include Travellers in general recruitment strategies.⁴⁰

In sum, the instruments adopted hitherto on the basis of Article 13 EC have not gone as far as they might have, had the international human rights obligations of the Member States generally, and the requirements of the FCNM in particular, been more systematically taken into account in their formulation. But the absence of any obligation imposed on the Member States either to allow victims of discrimination to establish a presumption of discrimination by putting forward certain statistics demonstrating the disproportionate impact certain measures may have on certain disadvantaged groups, or to adopt certain positive action measures in favour of such groups, also reflect a deeper

³⁶ See also, *e.g.* Opinion on Azerbaijan, 22 May 2003, ACFC/OP/I(2004)001, para. 28; Opinion on Ukraine, 1 March 2002, ACFC/OP/I(2002)010, para. 27; Opinion on Serbia and Montenegro, 27 November 2003, ACFC/OP/I(2004)002, para. 38.

³⁷ Opinion on Croatia, 6 February 2002, ACFC/INF/OP/I(2002)003, para. 26.

³⁸ Opinion on the Czech Republic, 25 January 2002, ACFC/INF/OP/I(2002)002, para. 29. In para. 30, the Advisory Committee further 'welcomes the decision of the Czech authorities to adopt the "Concept of the Government policy towards the members of the Roma community, supporting their integration into society" (Resolution of the Government of the Czech Republic No. 599 of 14 June 2000). It also welcomes the fact that the Government has already launched a strategic action plan for the period 2001-2020, in order to implement the above-mentioned policy. The Advisory Committee is of the opinion that greater participation of Roma women should be ensured in that process'.

³⁹ In an Opinion on Hungary it adopted on 22 September 2000, the Advisory Committee 'notes with concern, that, as the Government openly recognises, the Roma/Gypsies in Hungary face a broad range of serious problems to a disproportionate degree, be it in comparison to the majority or in comparison to other minorities. This state of affairs certainly justifies that specific measures be designed and implemented to tackle these problems' (ACFC/INF/OP/I(2001)004, at para. 18).

⁴⁰ Opinion on Ireland, 22 May 2003, ACFC/INF/OP/I(2004)003.

disagreement between the Member States as to the legitimacy and desirability of an approach towards the integration of minorities based on the identification of certain individuals with the group they are presumed to belong to. Both the Council of Europe's European Commission against Racism and Intolerance (ECRI) and the Advisory Committee of the FCNM insist on the need for States to dispose of precise data as to the situation of minority groups, in order to combat discrimination more effectively.⁴¹ In practice however, only a minority of the EU Member States have developed such monitoring strategies. 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.⁴²

With regard to the contribution of the European Union anti-discrimination strategy to the implementation of the principles of the FCNM, therefore, the fundamental question is not simply whether the EU could go further – it is clear that it could. It is whether it will be possible, in time, to achieve a sufficiently strong consensus within the EU Member States to move in a direction which may be perceived as opting for one model of integration (based on the acknowledgement and promotion of differences) rather than another, competing model (based on integration by assimilation, and the imposition of uniform standards to all, in combination with a robust protection from discrimination).⁴³ The European Parliament has recently adopted a resolution following the presentation by the Commission of a communication entitled 'Non-discrimination and equal opportunities for all – a framework strategy',⁴⁴ in which the Parliament insists that:

if blatant inequalities of an 'endemic', 'structural or even 'cultural' nature are to be remedied and a seriously compromised balance is thus to be restored, it may be necessary in certain cases for a temporary exception to be made to the concept of equality based on the individual in favour of group-based 'distributive justice' through the adoption of 'positive' measures

⁴¹ For the views of the ECRI, see the Third report on Hungary, 5 December 2003, CRI (2004) 25, para.93 and Third report on the Czech Republic, 5 December 2003, CRI (2004) 22, para.86; see also ECRI General Policy Recommendation No.1 on combating racism, xenophobia, anti-Semitism and intolerance, 4 October 1996, CRI (96) 43 rev For the views of the Advisory Committee of the Framework Convention (ACFC), see the Opinion on Slovakia, 22 September 2000, ACFC/OP/I(2000)001, para.21; Opinion on Croatia, 6 April 2001, ACFC/OP/I(2002)003, para.29; Opinion on the Czech republic, 6 April 2001, ACFC/OP/I(2002)002, para.28.

⁴² *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. 87.

⁴³ The first model is perhaps most clearly illustrated by the approach of the United Kingdom, and the second model by that of France. For an attempt to conceptualise the differences between the two models, see A. Geddes & V. Guiraudon, 'Britain, France and EU Anti-Discrimination Policy': The Emergence of an EU Policy Paradigm', (2004) *West European Politics* 27, 334-353.

⁴⁴ COM(2005)0224.

and 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.⁴⁵

While this resolution is one sign among many others that the debate continues on this issue,⁴⁶ it is not at all clear that the balance has decisively shifted from the ‘republican’ model, emphasising sameness and integration through assimilation, to the ‘multiculturalist’ model, emphasising differences and integration through their recognition; indeed it is unclear whether the anti-discrimination strategy of the EU will lead to the definition of one model specific to the EU and common to all the Member States: for the moment at least, this strategy has preserved sufficient room for manoeuvre for each Member State, and it has proven to be compatible with a wide variety of approaches towards the question of how to best ensure the inclusion of minorities. Whether such an agnostic stance will be tenable in the long term remains to be seen. EU law imposes limits to the use of positive action measures,⁴⁷ as well as to the processing of personal data which may be required for the implementation of such measures.⁴⁸ It therefore already sets certain limits to the extent to which the EU Member States may wish to move ‘beyond’ the anti-discrimination law model of the Racial Equality and Employment Equality Directives, in order to improve the situation of certain segments of the community by affirmative measures going beyond the elementary requirement that the members of such categories shall not be discriminated against. We should thus consider with caution the statement contained in both the Racial Equality and the Employment Equality Directive, according to which these instruments only set minimum requirements for the Member States, and that the Member States therefore ‘may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment’ than those laid down in these instruments.⁴⁹ This statement is misleading to the extent that it underestimates that the Equality Directives themselves impose severe restrictions, in particular, on the use of positive action measures in order to compensate for, or prevent, certain disadvantages, in particular linked to race or ethnic origin or to religion⁵⁰; and of course, it does not

⁴⁵ European Parliament resolution on *Non-discrimination and equal opportunities for all - A framework strategy*, (2005/2191(INI)), 8 May 2006 (rapp. T. Zdanoka), paras. 7 and 14.

⁴⁶ The resolution was strongly influenced by the positions adopted by the EU Network of Independent Experts on Fundamental Rights in its Thematic Comment n° 3 on the rights of minorities in the European Union, published in April 2005. That Comment in turn resulted to a large extent from an attempt to develop an anti-discrimination agenda for the EU which would better take into account the principles from the FCNM and from other instruments which protect minority rights in the international law of human rights.

⁴⁷ The general view adopted by the European Court of Justice has been 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 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. 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’.

⁴⁸ Directive 95/46/CE of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 28 of 23.11.1995, p. 31.

⁴⁹ Article 6(1) of the Racial Equality Directive; Article 8(1) of the Employment Equality Directive.

⁵⁰ The debate concerning the implementation of the 1998 Belfast Agreement in the Police Service of Northern Ireland (PSNI) provides one particularly vivid expression of the dilemmas facing Community anti-discrimination law when confronted by national situations which adopt schemes based on the need to remedy imbalances between communities, by measures which may be denounced as adopted in violation of the prohibition of discrimination. Following the recommendations of the Patten Commission about the means by which the Police Service of Northern Ireland was to become more representative of the community it serves, the Police (Northern Ireland) Act 2000 introduced new recruitment mechanisms in the PSNI, through

imply that any measures seeking to implement the principle of equal treatment may disregard the requirements of European Union law, in particular as regards the protection of personal data.

2.3. *The other contributions of the EU to the implementation of the principles of the FCNM*

While the adoption of measures to combat discrimination on the basis of Article 13 EC clearly makes the most direct contribution to an EU minority rights policy, other competences attributed to the Community or the Union may also serve as tools in the implementation of such a policy. The possibilities remain limited, however: in many areas which are relevant to the protection of minority rights, the European Union (the European Community, more precisely) has had no choice but to resort to soft law measures, such as the funding of certain programmes or the encouragement of an improved coordination between the initiatives adopted by the Member States. Even where the Union does have competences to adopt legislative measures, the potential of European Union law has remained under-utilised, in the absence of a systematic attempt to exercise the existing competences in order to implement the values of the FCNM, including those values which are replicated in the EU Charter of Fundamental Rights. Two examples may serve as illustrations.

a) The promotion of regional and minority languages

The measures adopted by the Community to promote regional and minority languages illustrate the first difficulty. Implementing in that respect Article 22 of the EU Charter of Fundamental Rights,⁵¹ the European Community has taken certain actions to safeguard and promote the regional and minority languages of Europe.⁵² 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 1998⁵³ 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.⁵⁴

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 2001,⁵⁵ in which it expressed its support for a multi-annual programme

the creation of a pool of candidates who are qualified for appointment as police trainees, followed by the selection from that pool of the same number from each category (Catholics and Protestants). Due to the fears that these mechanisms might not be compatible with the Employment Equality Directive, even taking into account the allowability of positive action measures under Article 7(1) of that Directive, the United Kingdom negotiated an exemption from its provisions: see Article 15 (1) of the Employment Equality Directive. I am grateful to Christopher McCrudden for having suggested to me this example. See further his piece: 'Consociationalism, Equality and Minorities in the Northern Ireland Bill of Rights Debate : The Role of the OSCE High Commissioner on National Minorities', in J. Morison et al. (eds), *Judge, Transition and Human Rights Cultures*, OUP (forthcoming), on file with the author.

⁵¹ 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'.

⁵² 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 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.

⁵³ 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).

⁵⁴ This action line was called *Action line for the Promotion and Safeguard of minority and regional languages and cultures*.

⁵⁵ 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.

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 had passed its resolution,⁵⁶ the Commission suggested that a programme such as Socrates⁵⁷ 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'.⁵⁸ 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'.⁵⁹ 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.⁶⁰ 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.⁶¹

b) The regulation of audio-visual services

The regulation of audio-visual media provides an illustration of the under-utilisation by the Community even of the competences it has at its disposal to protect and promote the rights of minorities. 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, in three cases of 1991 and 1993, the European Court of Justice was confronted with alleged restrictions to the

⁵⁶ COM(2003) 449 final, of 24.7.2003.

⁵⁷ 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' (OJ L 28 of 3.2.2000, p. 1) 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 Treaty languages and *Lëtzeburgesch*. Although 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.

⁵⁸ COM(2003) 449 final, at p. 12.

⁵⁹ *Id.*

⁶⁰ *Ibid.*, at p. 19.

⁶¹ 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 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.

freedom to provide audio-visual services contained in the Dutch law on the media (*Mediawet*).⁶² 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 organisations, 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 organisations 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’.⁶³ It 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’.⁶⁴

Apart from this liberty recognised by the EU Member States, within certain limits, EU law imposes on them certain obligations in the media sector, which correspond in part to certain requirements of the FCNM. 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) FCNM imposes the obligation on State 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 of the Framework Convention (ACFC) has insisted on several occasions on the necessity to ensure this protection in an effective way, in particular through the criminal law.⁶⁵ Although the Council has failed to agree on a proposal of the European Commission for a Council Framework Decision on combating Racism and Xenophobia,⁶⁶ 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 involving racism and xenophobia,⁶⁷ 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’),⁶⁸ as amended by Directive 97/36/EC of the European Parliament and the Council of 30 June 1997,⁶⁹ 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 FCNM requires, and to which the regulation of television broadcasting services at the level of the Union could provide for. In particular,

⁶² On 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, 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.

⁶³ Case 148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, [1993] ECR 513 (para. 9).

⁶⁴ Case 148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, [1993] ECR 513 (para. 10).

⁶⁵ 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’.

⁶⁶ Proposal of 28 November 2001 for a Council Framework Decision on combating racism and xenophobia, COM(2001) 664 final.

⁶⁷ 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.

⁶⁸ *OJ* L 298, 27 November 1989, p. 23.

⁶⁹ *OJ* L 202, 30 July 1997, p. 60.

there is no obligation, under Directive 89/552/EC, to ensure pluralism in the media, or to guarantee that members of minorities will have access to the media. Article 6(1) FCNM provides that State 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.’⁷⁰ The ACFC insists on the importance of the access of persons belonging to minorities to the media as a means to promote intercultural understanding.⁷¹ Under the FCNM, the State 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)).⁷² 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’.⁷³ According to the ACFC, 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 FCNM.⁷⁴ 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 time⁷⁵ or the obligation to translate all broadcasting in the minority language into the official language,⁷⁶ could also be problematic with regard to Article 9 FCNM. Moreover, the ACFC 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.⁷⁷

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 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’,⁷⁸ 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.

⁷⁰ See also Article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination.

⁷¹ 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).

⁷² 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).

⁷³ 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.

⁷⁴ 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.

⁷⁵ Opinion on Serbia and Montenegro, 27 November 2003, ACFC/OP/I(2004)002, para.69.

⁷⁶ Opinion on Estonia, 14 September 2001, ACFC/OP/I(2002)005, para. 38.

⁷⁷ *Ibid.*, para. 37. See also the Oslo Recommendations of the OSCE High Commissioner on National Minorities 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.

⁷⁸ See the preamble and Article 7 of Directive 89/552/EEC.

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.⁷⁹ The Commission proposes, in particular, the insertion of a new Article 3 e in Directive 89/552/EEC, 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 EC, this formulation goes further than the 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 FCNM which relate to the audio-visual media. 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 cannot reasonably be interpreted as embodying the much more far-reaching and specific requirements of the FCNM with regard to the access to the media of persons belonging to national minorities.

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What we have seen in the promotion of regional and minority languages are the limits of what Bruno de Witte has called the integration of minority rights in the EU through the ‘backdoor’ of cultural, linguistic diversity and educational policies.⁸⁰ What we see in the field of the audio-visual media exemplifies that, even where the Union has been attributed legislative competences which it could rely upon in order to promote the rights of minorities, it is hesitant to do so, perhaps for subsidiarity reasons or because of an absence of consensus between the Member States as to what should be provided in this regard; or simply, because the Union does not see itself as a human rights organisation, whose role it is to contribute to the protection and promotion of human rights in the EU25 – and it is indeed a real question, to which the conclusion returns, whether the Union should play a more active role in the protection and the promotion of the rights of minorities.

3. The obligation not to violate the rights of the FCNM in the field of application of European Union Law

Actively protecting and promoting minority rights by the exercise of the powers attributed to the Union by its Member States is one, certainly important, dimension of the policy the Union might develop in this field. Another dimension however, which the former dimension in a way presupposes, consists of the development of tools which should ensure that minority rights are not violated by the development of Union laws or policies. The preceding section has provided a few examples of the 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). Apart from those competences however, 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

⁷⁹ COM(2005) 646 final, 13.12.2005.

⁸⁰ Bruno de Witte, “The constitutional resources for an EU minority policy”, cited above n. 1.

affirmatively contributing to their full realisation. It is this ‘negative’ side of the Union policy in the field of minority rights which this section briefly addresses. Its components are recalled (3.1.). Certain of its limitations are then described (3.2.).

3.1. The components of the negative dimension of the EU approach to minority rights

The obligation not to violate minority rights currently still has no explicit constitutional foundation, none at least which refers explicitly to the rights of minorities.⁸¹ It has its source in the case law of the Court of Justice of the European Communities (European Court of Justice) which, since the late 1970s, considers that fundamental rights are part of the general principles of law which it is the duty of the Court to ensure respect for. Fundamental rights recognised as general principles of law are binding both on the institutions of the Union and on the Member States acting in the scope of application of Union law.⁸² The Court sees equality of treatment, in particular, as a general principle of law which it is its task to ensure compliance with.⁸³ The principle of equal treatment requires that comparable situations are not treated differently and that different situations are not 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.⁸⁴ In that sense, the directives adopted on the basis of Article 13 EC 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.⁸⁵ The Court also ensures the protection of other fundamental rights, derived from the constitutional traditions of the Member States and from the international instruments for the protection of human rights to which the Member States are parties or in which they have cooperated. Freedom of religion forms part of this catalogue of rights: 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.⁸⁶ The European Court of Justice also ensures that other fundamental rights are complied with in the sphere of European Union law, such as freedom of expression, freedom of association, or the right to respect for private life, all of which may contribute to the rights of minorities.

As a result of a partial constitutionalisation of this case law, the EU institutions and the Member States implementing Union law are bound to respect the principles of liberty, democracy, respect for human

⁸¹ 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 enter 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.

⁸² See, e.g. Case 36/75, *Rutili*, [1975] ECR 1219; Case 201/85, *Klensch*, [1986] ECR 3477; Case 5/88, *Wachauf / Bundesamt für Ernährung und Forstwirtschaft*, [1989] ECR 2609; Case C-260/89, *ERT*, [1991] ECR I-2925.

⁸³ 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.

⁸⁴ 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.

⁸⁵ 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 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.

⁸⁶ Case 130/75, *Vivien Prais v. Council*, [1976] ECR 1589 (para. 19).

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.⁸⁷ 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 2000,⁸⁸ and which should be seen as codifying the fundamental rights recognised as binding in the legal order of the European Union.⁸⁹ 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 – as well exemplified by the case law of the European Court of Human Rights⁹⁰ – 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 adopted a Communication⁹¹ by which it seeks to improve the compliance of its legislative proposals with the requirements of the Charter. On 15 June 2005, it adopted a new set of guidelines for the preparation of the extended impact assessments accompanying the legislative proposals of its annual work programme.⁹² Although the new guidelines are still based, as the former impact assessments,⁹³ on a division between economic, social and environmental impacts, the revised set of guidelines pays 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 particular, 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’.

The main function of fundamental rights included among the general principles of law which the European Court of Justice ensures respect for is to impose a limit both on the institutions of the European Union and on the national authorities implementing Union law: they may not adopt, under Union law, any act, or take any measure, which would result in a violation of these rights. The pre-screening of the legislative proposals of the European Commission, which has been referred to, simply constitutes one means, among others perhaps, to ensure that this requirement is complied with. However, the fundamental rights recognised in the legal order of the European Union also may be invoked by the EU Member States to justify certain restrictions to fundamental freedoms of the EC Treaty or, for instance, to the rules on competition law, where they have adopted measures the purpose

⁸⁷ 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. For a detailed exposition of this position, see Frank Hoffmeister, ‘Monitoring Minority Rights in the Enlarged European Union’, in Gabriel N. Toggenburg (ed.), *Minority protection and the enlarged European Union. The Way Forward*, LGI Books, Budapest, 2004.

⁸⁸ OJ C 364 of 18.12.2000, p. 1.

⁸⁹ See para. 38 of the judgment of the European Court of Justice delivered on 27 June 2006 in the Case C-540/03.

⁹⁰ See, *inter alia*, P. Thornberry, ‘Treatment of Minority and Indigenous Issues in the European Convention on Human Rights’, in G. Alfredsson and M. Stavpoulou (eds.), *Justice Pending: Indigenous Peoples and Other Good Causes*, The Hague, Kluwer, 2004; G. Pentassuglia, ‘Minority Issues as a Challenge in the European Court of Human Rights: A Comparison with the Case Law of the United Nations Human Rights Committee’, *German YB Int’l Law*, 2004, pp. 401-451; Julie Ringelheim, *Diversité culturelle et droits de l’homme. Le droit des minorités dans la jurisprudence de la Cour européenne des droits de l’homme*, Bruxelles, Bruylant, 2006.

⁹¹ 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.

⁹² SEC(2005)791, 15.6.2005.

⁹³ See Communication of 5 June 2005 on Impact Assessment, COM(2002)276.

of which is to ensure a protection of the fundamental rights thus recognised.⁹⁴ Here, fundamental rights are not limits imposed on the Member States acting under Union law; on the contrary, as we have seen in the *Mediawet* cases of 1991-1993 referred to above,⁹⁵ they serve to protect the freedom of the Member States to maintain or develop certain policies, or to adopt certain measures, in the name of safeguarding fundamental rights. The general purpose of recognising such rights as part of the EU legal order remains however to ensure that the development of EU law will not result in a lowering of the protection of fundamental rights protected under the jurisdiction of the Member States, to the extent at least that such rights are collectively recognised as part of their common constitutional traditions or are identified in international law instruments (such as, in particular, the European Convention on Human Rights) on which a sufficient degree of consensus exists. Thus, while these two functions fulfilled by the recognition of fundamental rights in the EU legal order are very different, they may be said to constitute two different means to achieve one single end.

The protection of fundamental rights, including minority rights, may thus constitute a legitimate aim for an EU Member State to pursue. However, in order to be acceptable under Union law, any special measure adopted by an EU Member State in order to take into account the specific needs of a minority must respect certain conditions. First, when such special measures are adopted in favour of the nationals of a Member State, the advantage they afford 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 EC. 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 EC (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’.⁹⁶

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 recognised under the Community, such as, for instance, the free provision of services,⁹⁷ the free movement of goods,⁹⁸ or the freedom for workers to seek employment in another Member State. The case of *Groener*⁹⁹ already referred to above 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.¹⁰⁰ 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

⁹⁴ 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 recognised in the EC Treaty).

⁹⁵ *Supra*, text corresponding to nn. 62-64.

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

⁹⁷ 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).

⁹⁸ Case C-368/95, *Familiapress*, [1997] ECR I-3689 (para. 24).

⁹⁹ Case 379/87, *Groener*, [1989] ECR 3967 (judgment of 28 November 1989).

¹⁰⁰ OJ, English Special Edition, 1968(II), p. 475.

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 education 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' (para. 19), 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 recognised that a Member State policy designed to maintain and promote the national language should in principle be recognised 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 or if, for instance, they were to be proven to be complied with only by means of a document delivered in the Member State in question or a part thereof.¹⁰¹

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: it does not lead to imposing 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 EU in order either to impose sanctions on a 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.¹⁰² 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) 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 (...).'¹⁰³ Indeed, as noted above, the European Commission already considers that Article 6 EU comprises the protection of minorities,¹⁰⁴ and the Treaty establishing a Constitution for Europe intended to make this explicit in Article I-2, identifying respect for the rights of persons belonging to minorities, forming part of human

¹⁰¹ See the case of *Groener*, cited above, para. 23; or Case C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano*, [2000] ECR 4139, at paras. 43-44, which concerned the situation of an Italian national who applied to take part in a competition for a post with a private banking undertaking in Bolzano, but whose application was rejected because, although perfectly bilingual in Italian and German, he could not obtain a certificate of bilingualism issued by the public authorities of the province of Bolzano.

¹⁰² Article 7 EU; Article I-59 of the IGC Draft Treaty establishing a Constitution for Europe.

¹⁰³ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, *Respect for and Promotion of the Values on which the Union is Based*, COM (2003) 606 final of 15.10.2003, p. 8.

¹⁰⁴ See *supra*, n. 87 and corresponding text.

rights, as one of the values on which the Union is founded. However, the political sanctioning mechanism established in Article 7 EU is anything but a provision which may be relied upon on a routine basis: on the contrary, it is meant to function as a safeguard clause in only the most extreme circumstances, where the situation in a Member State would have become so deplorable – or would risk becoming so – that it threatens even the possibility of cooperating with that State in the framework of the European Union. It is for the time being highly implausible that this understanding of this provision will change, i.e. that Article 7 EU will form the basis for a systematic monitoring, by the Council, of the situation of human rights in the EU Member States, and in particular, of the treatment in those States of minorities.¹⁰⁵

Leaving aside, then, any potential future development of the political sanctioning mechanism of Article 7 EU, we may conclude that 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, a number of limitations may be noted.

3.2. The limitations of the negative dimension of the EU approach to minority rights

First, it is worth emphasising 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 FCNM, have hitherto been considered to be part of the fundamental rights *acquis* of Union law. The Framework Convention has never been invoked by the European Court of Justice – which, in contrast, has recognised a ‘special significance’ of 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 FCNM – which France has not even signed – and since the FCNM 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,¹⁰⁶ it is highly implausible, 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, or that it will influence the interpretation of the EU Charter of Fundamental Rights.¹⁰⁷ Although the EU Network of Independent Experts on Fundamental Rights has insisted on many occasions on the need to interpret the Charter in accordance with the broader *acquis* of international and European human rights law, it is by no means certain that this interpretative practice will be followed by the EU Fundamental Rights Agency, which should take over the functions of the Network after 2007, or by the other actors involved in the interpretation of the Charter.

Second, neither the inclusion of the rights of minorities in the current understanding of Article 6(1) EU, nor the explicit recognition in the EU Charter of Fundamental Rights of the right not to be discriminated against on the basis of one’s membership of a national minority (Article 21) or the inclusion of a concern for the impact on minorities in the pre-screening of EU legislation in the context of extended impact assessments, will be fully effective until three conditions are fulfilled. For

¹⁰⁵ See, in particular, the resolution adopted by the European Parliament: Respect for and promotion of the Values on which the Union is based, EP doc. P5_TA(2004)0309 (stating that “Union intervention pursuant to Article 7 of the EU Treaty must (...) be confined to instances of clear risks and persistent breaches and may not be invoked in support of any right to, or policy of, permanent monitoring of the Member States by the Union”). The resolution is adopted in response to the Communication of the Commission to the Parliament and the Council, ‘Article 7 of the TEU: Respect for and promotion of the Values on which the Union is based’, cited above, where the Commission advocated a more systematic use of Article 7 EU in order to prevent the risk of serious human rights violations being committed in the Member States.

¹⁰⁶ Eur. Ct. HR, *Chapman v. the United Kingdom*, Appl. N° 27238/95, judgment of 18 January 2001, para. 93-94.

¹⁰⁷ See however, for a more optimistic appreciation, Erik Friberg and Rainer Hoffman, ‘The Enlarged EU and the Council of Europe: Transfer of Standards and the Quest for Future Cooperation’, in Gabriel N. Toggenburg (ed.), *Minority protection and the enlarged European Union. The Way Forward*, LGI Books, Budapest, 2004.

these mechanisms to work to their full potential, we require: 1° a clear understanding of what the concept of “minorities” refers to in the context of EU law; 2° a shared commitment of the EU Member States to improve their monitoring of the situation of minorities under their jurisdiction, in areas such as housing, employment or education; and 3° a working relationship to be established between the competent institutions of the European Union and the Secretariat of the Framework Convention for the Protection of National Minorities. At the moment however, none of these conditions are satisfied.

1° The first condition is perhaps at the same time the least important and the easiest to fulfil. None of the instruments cited above, which ensure that the rights of minorities will be taken into account in the law- and policy-making of the EU and in the evaluation by the EU institutions of the compliance by the Member States with the founding values of the Union, offer a definition of ‘national minorities’ or ‘minorities’ in Union law. Indeed, in 2005 the European Parliament 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 for by borrowing the definition laid down in Recommendation 1201(1993) adopted by the Parliamentary Assembly of the Council of Europe.¹⁰⁸ In its Thematic Comment on the rights of minorities in the European Union adopted at the same time, the EU Network of Independent Experts on Fundamental Rights noted that the different EU Member States had in certain respects quite dissimilar 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. The Network called upon the Union, therefore, to clarify that where the notion of ‘minorities’ was referred to in European Union law, it should be understood as referring to the above-mentioned definition proposed in 1993 by the Parliamentary Assembly of the Council of Europe.

Whether this should be seen as a priority may be doubtful, however. After all, the monitoring bodies of the Council of Europe Framework Convention for the Protection of National Minorities have managed to breathe life into the Convention without having to rely on a clear-cut definition of ‘national minorities’ and the absence of such definition in the FCNM may even appear, in retrospect, to present certain advantages, apart from that of encouraging the Member States of the Council of Europe to ratify the instrument while retaining a certain margin of appreciation on the minorities protected under their jurisdiction: it has allowed the Advisory Committee to progressively adapt its understanding of which groups should be protected as ‘national minorities’ under the Convention to a diverse set of changing circumstances, and to develop its ‘article-by-article’ approach which avoids the pitfalls of an overambitious attempt to provide an across-the-board definition, valid for all situations and for all provisions of the Convention. Moreover, even in the absence of a unanimously agreed upon definition of ‘national minorities’ or ‘minorities’ in European Union law, there exists among the EU Member States a sufficiently wide consensus on the meaning of the notion to ensure that it is workable in practice.

2° A second difficulty may be more serious. As already mentioned above, the EU Member States have taken strikingly diverging approaches towards the question of the recognition of minorities in general, and towards the monitoring of the situation of minorities under their jurisdiction in particular. 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

¹⁰⁸ 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) of the Parliamentary Assembly of the Council of Europe on an additional protocol on the rights of national minorities to the European Convention on Human Rights).

EU Member States under any obligation, in EU law, to collect data which would allow for such statistics to be invoked in favour of a claim of discrimination.

The lack of a common approach to this question has raised certain concerns. In its resolution on *Non-discrimination and equal opportunities for all - A framework strategy* adopted on 8 May 2006,¹⁰⁹ noting that ‘the detection of indirect forms of discrimination (...) 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. It 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).

This is not a new theme in the European Parliament’s approach to this issue. 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 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). In the resolution it adopted in July 2005 on the basis of a report by Claude Moraes MEP,¹¹⁰ 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).

There are two distinct rationales for insisting on the improvement of data collection relating to the situation of minorities – especially ethnic minorities – in the fields of education, employment or housing. First, this may improve the effectiveness of anti-discrimination legislation, by helping both the public authorities to identify instances of discrimination and the victims of discrimination to bring forward data which might lead such discrimination to be presumed. This objective may be achieved by the development of certain statistical tools by each Member State, according to its own priorities and specificities, and of course, taking into account the situation of minorities on its territory. Second however, an improved system of data collection on the situation of minorities in the EU Member States may serve the preparation of European laws and policies whose impact on the situation of minorities is more carefully considered, which are directed more precisely to the identified needs of minorities, and which may be revised in the light of their effectiveness – or lack of effectiveness – as highlighted by the evolution of certain data. For this purpose, it has been suggested that it may not be enough for each Member State to define a set of indicators related to the situation of minorities on its territory: a unified approach, allowing for inter-State comparisons and European-level impact assessments, might require one single set of indicators, and agreement on one single methodology, across all the Member States. While such a unified approach may appear desirable in theory, however, it is probably overambitious: the problems differ so widely from State to State that it may prove impossible to arrive at one single methodology in order to describe adequately such diverse situations. While such an attempt could lead to a superficial consensus on a basic set of indicators, this risks going hand in hand with such diverging methodologies, for instance in the collection of data or in the

¹⁰⁹ 2005/2191(INI), EP doc. A6-0189/2006 (rapp. T. Zdanoka).

¹¹⁰ European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005/2008(INI)) (rapp. Cl. Moraes), cited above, n. 20.

interpretation of common guidelines, that the agreement arrived at would be purely illusory – a fig leaf barely concealing a continued disagreement on principles. Finally, it may be asked whether it is even necessary to aim at defining such a common set of indicators: after all, in order to identify the potentially discriminatory impact on national minorities of certain European laws or policies, as required under Article 21 of the Charter and as should be encouraged by the revised methodology for impact assessments, it might be sufficient to identify whether, in any of the Member States, such discrimination may occur, using whichever tools have been considered most relevant in the context of that particular State. We should not wait for there to be a consensus on which indicators, relating in particular to which ‘minorities’, we should adopt at the European level; a consensus on the need for each State to develop a set of indicators allowing more focused anti-discrimination public strategies, and to facilitate the task of the victims of discrimination to collect statistics in order to build their case, would already be a significant step forward.

3° A third difficulty may be the lack of any formal link between the institutions of the European Union and, within the Council of Europe, the Secretariat of the Framework Convention for the Protection of National Minorities, in order to ensure consistency between the approaches of the two European organisations. In its 2003 resolution on *European regional and lesser-used languages - the languages of minorities in the EU - in the context of enlargement and cultural diversity* following the Ebner report, the European Parliament took the view that the aim of a European policy on regional and lesser-used languages should be to ‘reinforce the European dimension with a view to promoting and protecting regional and minority languages and cultures’. It stressed that:

this aim 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, insofar 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) EC and 151(3) EC, that it is regularly and officially informed, respectively by the secretariat of the European Charter on Regional or Minority Languages and that of the FCNM, on the implementation of the Charter and the FCNM by the EU Member States¹¹¹ and that, ‘when determining aims, financial guidelines, and priorities, [the Commission should] 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’.¹¹² However, 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 of the European Commission on ‘Promoting Language Learning and Linguistic Diversity: An Action Plan 2004-2006’, already referred to above,¹¹³ and is thus not part of the Action plan.

¹¹¹ See paras. 6 and 7 of the operative part of the European Parliament’s resolution.

¹¹² Para. 17.

¹¹³ COM(2003) 449 final, of 24.7.2003.

While the progressive recognition of minority rights in the legal order of the European Union, as expressed most clearly in the reading of Article 6(1) EU including such rights and in an attempt to identify the impact on minorities of the legislative proposals of the Commission, is to be welcomed, this should not lead to new standards being developed in this field, which would somehow be competing with those already existing in the framework of the Council of Europe. It would also risk undermining the authority of the findings of the Advisory Committee established under the FCNM and, indeed, of the Council of Europe Committee of Ministers as a supervisory body under the Framework Convention, if these country-specific opinions and resolutions were not taken into account in the use of the tools which the European Union itself has been developing. This, indeed, is also one of the core messages of the report prepared upon the request of the Heads of State or Government of the Member States of the Council of Europe convening at the Warsaw Summit of the Council of Europe on 16-17 May 2005 by Mr Juncker, Prime Minister of Luxembourg, on the future of the relationship between the European Union and the Council of Europe;¹¹⁴ ‘The EU bodies should recognise the Council of Europe as the Europe-wide reference source for human rights. The decisions and conclusions of its monitoring structures should be systematically cited as a reference’.

4. Conclusion

The description above shows the different levels at which the contribution of the European Union to the protection and the promotion of minority rights in the EU Member States might be envisaged. It also illustrates the complexity of the question whether the European Union should play in the future a more active role in this field. There are two forms such a development could take.

First, a more active role of the EU in this field could consist of monitoring the EU Member States in order to ensure that they comply with the values of the FCNM. While it is highly implausible that this will develop on the basis of Article 7 EU, considering the current understanding of the significance of this provision, other avenues, it has been sometimes suggested, may be explored. For instance, 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).

Such a development could be imagined, *mutatis mutandis*, as regards other rights than those of linguistic minorities and it could focus on the FCNM rather than on the European Charter on Regional or Minority Languages. This would present both an opportunity and a risk. The opportunity would be to use the powerful institutional machinery of the European Union in order to improve the

¹¹⁴ Council of Europe – European Union: A sole ambition for the European continent, Report by Jean-Claude Juncker, Prime Minister of the Grand Duchy of Luxembourg to the Heads of State or Government of the Member States of the Council of Europe, 11 April 2006.

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 up. 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) for a 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. Precedents exist.¹¹⁵ 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 FCNM should be based explicitly on that standard – in other words, 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 of the FCNM and on the resolutions of the Committee of Ministers of the Council of Europe.

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 FCNM to the extent the Union has been attributed certain powers to do so. Who, in principle, would not be in favour of such a development? Especially considering that not all the EU Member States are parties to the FCNM, should we not welcome the idea of Union laws imposing obligations of a similar kind, thus filling what might be seen, otherwise, as a regrettable gap in the protection of the rights of minorities in Europe?

The danger, however, 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 secondary 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, at 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.¹¹⁶ 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) FCNM); the

¹¹⁵ See for instance, on the risks entailed by the OSCE High Commissioner on National Minorities providing a reading of the FCNM which may not correspond to that of the Council of Europe monitoring bodies, which in turn may lead national authorities to practices akin to forum-shopping, Ch. McCrudden, 'Consociationalism, Equality and Minorities in the Northern Ireland Bill of Rights Debate: The Role of the OSCE High Commissioner on National Minorities', cited above at n. 50.

¹¹⁶ 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.

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.

In the resolution it adopted in June 2005 on the basis of a report by Claude Moraes MEP,¹¹⁷ 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 (FCNM) (...)’ (para. 6). As we know however, this recommendation has hitherto remained a dead letter. But as a result of the Racial Equality and Employment Equality Directives having been adopted, certain EU Member States – whether or not they are State Parties to the FCNM – believe, or want to believe, that they comply fully with the internationally defined requirements of equality law, to the extent that they have adequately implemented the Equality Directives. The very fact that they have implemented the directives may make it difficult to convince them that they should go further.

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 was proposed by the European Commission,¹¹⁸ 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 FCNM within the Council of Europe, whenever they 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.

¹¹⁷ European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005/2008(INI)) (rapp. Moraes), cited above.

¹¹⁸ 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.