E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
RESEAU U.E. D'EXPERTS INDEPENDANTS EN MATIERE DE DROITS FONDAMENTAUX
(CFR-CDF)

THEMATIC COMMENT N° 3:
THE PROTECTION OF MINORITIES IN THE EUROPEAN UNION[*]

25 April 2005

Référence : CFR-CDF.ThemComm2005.en

The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon the request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union. The content of this opinion does not bind the European Commission. The Commission accepts no liability whatsoever with regard to the information contained in this document.

[*] This Thematic Comment was prepared by Prof. dr. Olivier De Schutter, UCL, co-ordinator of the EU Network of Independent Experts on Fundamental Rights on the basis of the information provided by the members of the EU Network of Independent Experts in Fundamental Rights. The author thanks Ms. Celia Belhomme, Ms Julie Ringelheim and Ms Annelies Verstichel for their contributions.

E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
RESEAU U.E. D'EXPERTS INDEPENDANTS EN MATIERE DE DROITS FONDAMENTAUX
(CFR-CDF)

THEMATIC COMMENT N° 3:
THE PROTECTION OF MINORITIES IN THE EUROPEAN UNION

25 April 2005

Ref.: CFR-CDF.ThemComm2005.en

The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon the request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union. The content of this opinion does not bind the European Commission. The Commission accepts no liability whatsoever with regard to the information contained in this document.

Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice, liberté et sécurité), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Elvira Baltutyte (Lithuanie), Florence Benoît-Rohmer (France), Martin Buzinger (Rép. slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (Danemark), Henri Labayle (France), Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), François Moyse (Luxembourg), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Pavel Sturma (Rép. Tchèque), Ineta Ziemele (Lettonie). Le Réseau est coordonné par O. De Schutter, assisté par V. Verbruggen et V. Van Goethem.
Les documents du Réseau peuvent être consultés via :
http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_fr.htm

The **EU Network of Independent Experts on Fundamental Rights** has been set up by the European Commission (DG Justice, Freedom and Security), upon request of the European Parliament. Since 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. A Report is prepared on each Member State, by a Member of the Network, under his/her own responsibility. The activities of the institutions of the European Union are evaluated in a separated report, prepared for the Network by the coordinator. On the basis of these (26) Reports, the members of the Network prepare a Synthesis Report, which identifies the main areas of concern and makes certain recommendations. The conclusions and recommendations are submitted to the institutions of the Union. The content of the Report is not binding on the institutions.

The EU Network of Independent Experts on Fundamental Rights is composed of Elvira Baltutyte (Lithuania), Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (Denmark), Henri Labayle (France), Rick Lawson (the Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), François Moyse (Luxembourg), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czech Republic), Ineta Ziemele (Latvia). The Network is coordinated by O. De Schutter, with the assistance of V. Verbruggen and V. Van Goethem.
The documents of the Network may be consulted on :
http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm

TABLE OF CONTENTS

INTRODUCTION **7**

1. THE DEFINITION OF A MINORITY AND ITS STATUS IN DOMESTIC LAW 9
    1.1. The controversies about the definition of "minorities" 9
    1.2. The understanding of the notion of "minorities" in the Member States 10
    1.3. Recommendation 11
2. MONITORING THE SITUATION OF MINORITIES 12
    2.1. The purposes of monitoring the situation of minorities and the applicable principles 12
    2.2. The purposes of monitoring: the identification of situations of disparate impact discrimination and the promotion of substantive equality 13
    2.3. Meeting the fears raised by monitoring of the situation of minorities : the role of legal safeguards 15
    2.4. The processing of personal data and statistical monitoring 16
    2.5. Recommendation 18
3. ENSURING AN ADEQUATE PROTECTION AGAINST DISCRIMINATION 18
    3.1. Forms of discrimination against minorities 19
        3.1.1. Language proficiency requirements 19
        3.1.2. Access to citizenship and the prohibition on the grounds of ethnic origin 20
    3.2. The affirmative dimension of the requirement of equality 22
        3.2.1. Positive obligations implied in the principle of equal treatment 22
        3.2.2. Special measures and positive action measures 24
    3.3. A potential role for the Union in promoting further the inclusion of minorities 25
    3.4. Recommendations 26
4. PROHIBITION OF INCITEMENT TO NATIONAL, RACIAL OR RELIGIOUS HATRED OR DISCRIMINATION, IN PARTICULAR IN THE MEDIA, AND THE REPRESENTATION OF MINORITIES IN THE MEDIA 28
    4.1 The prohibition of incitement to national, racial or religious hatred or discrimination 28
    4.2 The representation of minorities in the media 29
5. FREEDOM OF RELIGION 31
    5.1 State churches 32
    5.2 The registration and recognition of religious organisations 33
    5.3 Accommodation of religious practices 34
    5.4 The wearing of religious signs in schools 37
6. LINGUISTIC RIGHTS 40
    6.1. The Right to Use a Minority Language in Private 40
    6.2. Use of Minority Languages in the Media 41
    6.3. Use of the Minority Language in Relations with the Administration, in the Context of Judicial Procedures and in Education 43
7. THE SPECIFIC SITUATION OF THE ROMA/GYPSIES 45
    7.1. Segregation in education 45
    7.2. Segregation in housing 49
    7.3. A Directive aiming to achieve the integration of the Roma/Gypsies 52
    7.4. The reliance on an open method of coordination in order to promote the inclusion of the Roma/Gypsies 55
    7.5. The requirement of an active participation of the Roma/Gypsies in the identification of measures which seek to promote their integration 57

LIST OF RECOMMENDATIONS **61**
    Affirming a commitment to the rights of minorities 61
    Monitoring the situation of minorities while fully respecting the applicable legal safeguards 61
    Developing the potential of directive 2000/43/EC as an instrument for the protection of the rights of minorities 62
    Combating racism and xenophobia 63
    Improving the representation of minorities in the media 63
    Addressing the situation of the Roma 64

APPENDIX: THE PROTECTION OF MINORITIES IN THE EUROPEAN UNION **65**

APPENDIX A: THE DEFINITION OF A MINORITY AND ITS STATUS IN DOMESTIC LAW 66

1. States whose internal law formally recognises the existence of minorities 66
1.1 The definition of the notion of minority............ 66
1.2 Legal instruments laying down the rights of the members of minorities 68
1.3 Controversies about the non-recognition of certain groups as minorities............ 70
2. States whose domestic law ignores the notion of "minority" 73
3. Bilateral and multilateral agreements – trans-frontier cooperation 76

APPENDIX B : AFFILIATION WITH A MINORITY............ 78
1. Collection of data concerning the affiliation with a minority in the context of population census............ 78
1.1 The practices of the Member States 78
1.2 Problems raised by the collection of data related to ethnic origin, language or religion............ 81
2. Other situations in which affiliation with a minority is recorded by state's agents 85
2.1 Registration of affiliation with a minority for the purpose of positive action programmes............ 85
2.2 Registration for the purpose of elections 87
2.3 Passports and Identity Cards 88
2.4 Other situations in which people may be required to declare affiliation with a minority 88
2.5 Practice consisting of registering people as belonging to an ethnic group on the basis of their physical appearance............ 88
3. Guarantees ensuring the protection of the confidentiality of the data relating to the affiliation with a national or ethnic, religious or linguistic minority 89

APPENDIX C : THE OBSTACLES FACING THE MUSLIM COMMUNITY 92

APPENDIX D: THE RIGHTS OF LINGUISTIC MINORITIES : AN OVERVIEW 94
1. Private use of minority languages 94
2.Access of linguistic minorities to the media 95
2.1. Use of minority languages in public media 95
2.2. Obligation to use the official language in private media 98
2.3 Measures aimed at enhancing the use of minority languages in private media............ 99
3. Use of a minority language in relations with public authorities 100
3.1. Right of the arrested or accused person to obtain the assistance of an interpreter............ 100
3.2. Right to use a minority language in relations with public authorities............ 100
4. Use of minority language for topographical indications 104
5. Use of minority languages in education............ 104
5.1. Access to total or partial education in a minority language at public schools 104
5.2. State financial support for private schools offering education in a minority language............ 108

INTRODUCTION

The present Thematic Comment examines the protection of minorities in the EU Member States. On the basis of that examination, it identifies the initiatives the institutions of the Union might take, in exercising the competences conferred on them by the Member States, in order to improve that protection, where this appears necessary to ensure that the mutual trust on which the area of freedom, security and justice is premised is maintained. In proceeding to examine this question, the EU Network of Independent Experts on Fundamental Rights was motivated primarily by two considerations.

First, when there is a clear risk of a serious breach by a Member State of the values on which the Union is based, certain recommendations may be addressed to the Member State concerned[1]. 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 (…)."[2] Indeed, the European Commission already considers that "the political criteria defined at Copenhagen [for the accession of the countries candidates to the Union] have been essentially enshrined as a constitutional principle" and that Article 6 EU comprises the protection of minorities[3]. Article I-2 of the Treaty establishing a Constitution for Europe now submitted for ratification by the Member States has made this explicit, identifying respect for the rights of persons belonging to minorities, forming part of human rights, as one of the values on which the Union is founded.[4] The EU Network of Independent Experts on Fundamental Rights may contribute to « detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty »[5]. Therefore, one objective of this Thematic Comment is to screen the situation of minorities in the Member States in order to detect any situation the seriousness of which could justify the institutions adopting a recommendation directed to the Member State where a clear risk of a serious breach of the rights of minorities is found to exist.

Second, in the implementation of Union law, the Member States are bound to respect the Charter of Fundamental Rights, as well as the other fundamental rights which belong to the general principles of Union law. The EU Charter of Fundamental Rights does not provide as such for rights of minorities. However, it prohibits any discrimination based on, *inter alia*, membership of a national minority (Article 21 (Article II-81 of the Treaty establishing a Constitution for Europe)); it states that the Union shall respect cultural, religious and linguistic diversity (Article 22 (II-82)); and it protects the right to respect for private life (Article 7 (II-67)), freedom of religion (Article 10 (II-70)), freedom of expression (Article 11 (II-71)), and freedom of association (Article 12 (II-72)), all of which may serve to protect certain dimensions of the rights of persons belonging to minorities. The situation of the Member States is examined under these provisions of the Charter, in order to clarify the requirements which they are bound to respect when the act in the field of application of Union law.

Having organized a thematic discussion on the issue of minority rights in the Union, the Network has concluded that "minority rights" should be understood, rather than a set of rights recognized to certain groups recognized as "(national) minorities", as a list of guarantees which are recognized to

---

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

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

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

[4] "The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." (consolidated version : CIG 87/04, Brussels, 6 August 2004).

[5] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, 15 October 2003, cited above.

individuals as members of certain groups, or to these groups themselves, but whose beneficiaries will vary according to the identity of the right which is at stake. Thus for instance, while freedom of religion or the right to privacy – which includes a right to maintain a certain traditional lifestyle – are to be recognized to all persons under the jurisdiction of the State whatever the nationality of the beneficiaries or the links they have with the State, other rights, such as the right to participate in public affairs, may be granted only to those whose connections to the State are stronger or who have the nationality of the State concerned. The Network therefore adopted an approach of "minority rights" which focuses on the rights themselves, rather than on the notion of "minorities". It has considered ill-advised to make the recognition of certain rights dependent on the prior recognition of a "minority", where this is not required by the nature of the right itself. It considers that this is in conformity with the understanding of the Council of Europe Framework Convention for the Protection of National Minorities, which considers the protection of national minorities to form an integral part of the international protection of human rights.

The Network of Independent Experts has consistently interpreted the Charter of Fundamental Rights in accordance with the requirements of international and European human rights law, in conformity with Article 53 of the Charter. In the preparation of this Thematic Comment therefore, and in particular for the understanding of the prohibition of discrimination based on membership of a national minority (Article 21 of the Charter), the Thematic Comment relies on several international instruments which seek to protect the rights of persons belonging to minorities. At the universal level, Article 27 of the International Covenant of Civil and Political Rights (ICCPR) provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such 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." The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992,[6] which is not legally binding, specifies the implications of this provision by enumerating the rights which persons belonging to minorities enjoy. At the European level, the Concluding Document of the second Meeting on the Human Dimension of the Conference on Security and Co-operation in Europe (the CSCE, later the OSCE) held in Copenhagen in June 1990, lists, in its section IV, the rights of persons belonging to national minorities. This document inspired the drafting of the Council of Europe Framework Convention for the Protection of National Minorities (FCNM), which was opened for signature on 1 February 1995 and entered into force on 1 February 1998. This is the first legally binding multilateral instrument, which is devoted entirely to the protection of minorities. Furthermore, the European Charter for Regional or Minority Languages of the Council of Europe was opened for signature in November 1992 and entered into force on 1 March 1998.[7]

The meaning and scope of these instruments have been clarified in the course of their monitoring within the different international organisations in the framework of which they were adopted. The UN Human Rights Committee has interpreted the meaning of Article 27 ICCPR when examining the state reports and communications of individuals claiming to be a victim of a violation of one of the rights of the ICCPR. Concerning the FCNM, the Committee of Ministers of the Council of Europe is charged with monitoring the implementation of the convention. It is assisted by the Advisory Committee of the Framework Convention (ACFC). This Committee examines the state reports containing information on legislative and other measures taken to give effect to the principles of the FCNM submitted periodically by the states parties, and it adopts an opinion upon examining these reports. On the basis of this opinion, the Committee of Ministers adopts a resolution with conclusions and recommendations. The monitoring of the European Charter for Regional or Minority Languages is

[6] UN General Assembly Resolution No. 47/135 of 18 December 1992.

[7] The European Charter for Regional or Minority Languages of the Council of Europe consists of three parts. Article 2 of Part I (General Provisions) provides that each Party will undertake to apply the objectives and principles of Part II to all the regional or minority languages spoken within its territory. Furthermore, it provides that each Party undertakes to apply a minimum of 35 paragraphs or sub-paragraphs chosen from among the provisions of Part II of the Charter. Of these 35 paragraphs, at least three must be chosen from each of the Articles 8 (education) and 12 (cultural activities and facilities) and one from each of Articles 9 (judicial authorities), 10 (administrative authorities and public services), 11 (media) and 13 (economic and social life).

also based on a reporting procedure. A committee of independent experts examines the periodical state reports and prepares a report. This report is forwarded to the Committee of Ministers, which can make recommendations to states with a view to the adoption of the necessary action to bring their policies, legislation and practice into line with their obligations under the Charter. Finally, in the framework of the OSCE, the Office of the High Commissioner on National Minorities (HCNM) was established in 1992. Conceived as an instrument of conflict prevention, its mission consists of identifying and seeking early resolution of ethnic tensions that might endanger peace, stability or friendly relations between OSCE participating States. Apart from country recommendations, the HCNM periodically formulates recommendations on certain issues of minority protection, in which he attempts to clarify and build upon the content of the relevant international standards.[8]

1. The Definition of a Minority and its Status in Domestic Law

1.1. The controversies about the definition of "minorities"

Several definitions of "minorities" or "national minorities" have been proposed within international organisations. Mr Francesco Capotorti drafted a study in 1977 for the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities.[9] Mr Jules Deschênes was charged in 1985 by the same body with the study of the question of the definition of minorities.[10] More recently, the Parliamentary Assembly of the Council of Europe defined the nation of a "national minority" in its Recommendation 1201 (1993).[11] Although these definitions are not legally binding, they serve as a reference to determine the meaning of the notion of a "minority" in international law. Indeed, although States are recognized a margin of appreciation in identifying the "minorities" which exist under their jurisdiction, they may not use this margin of appreciation in order to evade their obligations under international law. Thus, international bodies have been led to note that the qualification of "minority" is a matter of fact and not of law[12]: a group has to be recognised as a "minority" in the sense of international law when it possesses all the characteristics, independent of whether it is recognised as such by national law. In its General Comment on Article 27 ICCPR, the UN Human Rights Committee states: "The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria."[13]

In the absence however of a consensus among states on the definition of a minority, neither the FCNM, nor any other legally binding international instrument contains such a definition.[14] The ACFC recognises that the states parties have a margin of appreciation to determine the personal scope of application of the FCNM in order to take the specific circumstances prevailing in their country into account. However, it notes, on the other hand, that this margin of appreciation "must be exercised in

---

[8] See The Hague Recommendations Regarding the Education Rights of National Minorities (1996); The Oslo Recommendations Regarding the Linguistic Rights of National Minorities (1998); The Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999); Warsaw Recommendations to assist national minority participation in the electoral process, elaborating on the Lund Recommendations (2001); Guidelines on the use of Minority Languages in the Broadcast Media (2003). The High Commissioner on National Minorities has also adopted several recommendations regarding the Roma (see http://www.osce.org/hcnm/documents/recommendations/roma/index.php).

[9] F. Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities,* New York, United Nations, 1991, para.568.

[10] J. Deschênes, *Proposal concerning the definition of the term "minority"*, E/CN.4/Sub.2/1985/31, 14 May 1985.

[11] Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights.

[12] Permanent Court of International Justice, Advisory opinion regarding Greco-Bulgarian communities, 31 July 1930, *PCJ Reports, Series B* No. 17.

[13] UN Human Rights Committee, General Recommendation on Article 27 ICCPR, para.5.2. See also the Advisory Committee of the Framework Convention for the Protection of National Minorities: "[T]he applicability of the Framework Convention does not necessarily mean that the authorities should in their domestic legislation and practice use the term "national minority" to describe the group concerned." (Opinion on Norway, 12 September 2002, ACFC/INF/OP/I (2002)003, para.19) See also Parliamentary Assembly of the Council of Europe, Recommendation 1623 (2003), para.6.

[14] See the Explanatory Report of the FCNM: "It was decided to adopt a pragmatic approach, based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States." (para.12)

accordance with general principles of international law and the fundamental principles set out in Article 3 of the Framework Convention. In particular, it stresses that the implementation of the Framework Convention should not be a source of arbitrary or unjustified distinctions."[15]

In the view of the Network of Independent Experts on Fundamental Rights, it is this latter requirement which is crucial. Where certain specific rights or protections are granted only to groups who are recognized as "minorities", or to individuals under the condition that they are considered members of "minorities", the definition relied upon by the States should not lead to arbitrary distinctions being introduced, which would be the source of discrimination. For instance, a State defining "minorities" under its jurisdiction as a group of persons who reside on the territory of a State and are citizens thereof, display distinctive ethnic, cultural, religious or linguistic characteristics, are smaller in number than the rest of the population of that state or of a region of that state, and are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language[16], although it would be resorting to a definition which appears dominant in Europe, should not be allowed to rely on that definition to exclude non-citizens from a full range of protections granted to its own nationals, even where these protections contribute to the preservation of "minority rights". As recalled by the UN Committee on the Elimination of Racial Discrimination in its General Recommendation 30 on "Discrimination against non-citizens", although some fundamental rights "such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, *human rights are, in principle, to be enjoyed by all persons*. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law"[17]. Nor should such a State be allowed to use such a definition in order to reserve to the category of citizens certain rights, while imposing excessive barriers to the access to nationality for persons who are under its jurisdiction and have strong and permanent links to the State.

1.2. The understanding of the notion of "minorities" in the Member States

It is on the basis of these considerations that the Network has reviewed the understanding of the notion of "minorities" in the Member States of the Union. The examination shows that only three Member States – **France**, **Luxembourg**, and **Malta** – state that there are no minorities on their territory, although for very different reasons : while in France this position appears dictated by the constitutional principle of the indivisibility of the Republic, in Luxembourg and Malta, this position is based, rather, on an understanding that there exist on the national territory of those countries no "minorities" in the meaning of the Framework Convention for the Protection of National Minorities. In **Belgium** finally, no position has been definitively adopted, despite the fact that the Belgian government stated, when signing the Framework Convention, that the minorities to whom the Convention would apply would be defined by an inter-ministerial conference, which still has not been convened.

Although **France** appears to be in a unique position insofar as it denies, as a matter of principle, the very possibility that minorities could exist within the French Republic, the particularity of this position should be relativized, taking into account the diversity of the positions adopted by the other Member States, some of which, while accepting that minorities exist on their territory, restrict the notion only to certain groups (the Muslim minority of Thrace in **Greece**, the German-speaking minority located in the Southern part of Jutland in **Denmark**, and, arguably the Italian and Hungarian « autochthonous national communities » in **Slovenia**), while other groups are being excluded from that notion which, arguably, should be recognized as applicable to them (for instance, the Roma in **Denmark** and **Italy**, the *Faeroese people* and the *Greenlanders* in **Denmark**, the Polish-speaking Austrian citizens in

[15] This is a standard paragraph of the Advisory Committee in all its opinions. See e.g. Opinion on Albania, (ACFC/INF/OP/I(2003)004), 12 September 2002, para.18; Opinion on Croatia, (ACFC/INF/OP/I(2002)003), 6 April 2001, para.15; Opinion on Italy, (ACFC/INF/OP/I(2002)007), 14 September 2001, para.14.
[16] Definition of a national minority taken from the *Report on the Situation of Fundamental Rights in the European Union* presented in 2003, p.100, with some modifications.
[17] General Recommendation 30 adopted at the 64th session of the Committee on the Elimination of Racial Discrimination (CERD/C/64/Misc.11/rev.3), para. 5.

Austria, the ethnic communities from other parts of former Yugoslavia in **Slovenia**, or the Silesian minority in **Poland**).

The result of this situation is that 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) may be subject to diverse interpretations in the different Member States. Moreover, insofar as the notion of rights of minorities is relied upon in the future accession processes with respect to Romania and Bulgaria, as well as Croatia and Turkey – as it should, according to the criteria defined by the Copenhagen European Council of June 1993 –, the understanding of the concept of minority in the law of the European Union should be clarified.

Although the different approaches adopted by the Member States with respect to the definition of minorities call for a clarification of the meaning recognized to that notion in Union law, these approaches do not exclude the identification of such a meaning on which a consensus between the Member States may be found, insofar as it is based on the *acquis* of international and European human rights law. The instruments constituting this *acquis* on which the institutions of the Union could build are easily identifiable. Although neither **Latvia**,[18] although it acceded to the Union on 1st May 2004, nor **Belgium**, nor **France**, nor **Greece**, nor **Luxemburg**, have ratified the 1995 Council of Europe Framework Convention for the Protection of National Minorities, this convention is based on the Copenhagen Document adopted on 29 June 1990 in the framework of the Conference on Security and Cooperation in Europe, which lists the rights of the members of national minorities and has been agreed by all the Member States. Moreover, all States are bound by the European Convention on Human Rights, which already protects an important range of minority rights; all States are bound by a range of international instruments, including in particular the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which contain equality clauses which protect the right of members of minorities not to be subjected to discrimination – and, indeed, all States are bound by Article 27 of the International Covenant on Civil and Political Rights, which recognizes the rights of ethnic, religious or linguistic minorities.[19]

1.3. Recommendation

At the present stage of the development of the Union the institutions of the Union should send a clear message that they will take into account the rights of minorities in the exercise of their competences, that they will seek inspiration in this regard from the Copenhagen Document adopted on 29 June 1990 in the framework of the Conference on Security and Cooperation in Europe, and that they will comply with the Council of Europe Framework Convention for the Protection of National Minorities of 1st February 1995. Such a clarification could take the form of an inter-institutional declaration, or even of a communication by the Commission, affirming a willingness to respect, protect and promote the rights of minorities and the understanding the institution intends to give to this term as it appears in Union law. Such an initiative would not only send a powerful message to the general public, that the rights of minorities shall be taken into consideration in the development of the law of the Union. It could also offer an important contribution to legal certainty.

[18] In forwarding the documents to the parliament for ratification of the Framework Convention for the Protection of National Minorities on 17 May 2005, the Latvian government supported an explanatory declaration to the Convention, which approves the definition of national minorities as proposed by the Foreign Ministry: "According to Latvia's understanding of the convention, the notion 'national minorities' shall mean citizens of Latvia, who are different from Latvians by their culture, religion or language, have traditionally lived in Latvia for generations and regard themselves as belonging to the Latvian state and community, and who wish to preserve and develop their culture, religion or language." It will be noted that this definition seeks to exclude the Russian-speaking minority established in Latvia since the Soviet occupation from the scope of application of the Convention. Latvia has moreover planned two reservations to the document. One will partly prohibit use of any other language on the street signs, and the other bans official use of any other language but Latvian at the local governments.

[19] France, it should be noted, has made a reservation to this provision,

2. Monitoring the situation of minorities

2.1. The purposes of monitoring the situation of minorities and the applicable principles

Both the European Commission against Racism and Intolerance (ECRI)[20] and the ACFC insist on the necessity for states to dispose of precise data as to the situation of minorities, in order to combat discrimination more effectively.[21] The ACFC notes in this regard that "If, in view of the historical context and the particularly sensitive nature of this information for persons belonging to national minorities, exhaustive statistical data pertaining to national minorities cannot be collected, other methods should be used, with the co-operation of the national minorities, such as estimates based on *ad hoc* studies, special surveys, polls or any other scientifically sound method (…). This data should be broken down by age, gender and location".[22] The data collected should be both accurate and regularly updated, as any discrepancies between official data and the actual number of persons belonging to a minority will hamper the ability of the State to protect them in an effective way.[23] Moreover it complicates the task of international monitoring bodies to ascertain whether a state is meeting its international obligations.[24] Yet, the treatment of data on individuals' affiliation with an ethnic, cultural, religious or linguistic minority needs to be coupled with adequate legal safeguards.[25] In this respect, two principles have to be taken into account.

First, the affiliation with an ethnic, cultural, religious and linguistic minority falls under the right to respect for private life. Therefore Articles 7 and 8 of the Charter of Fundamental Rights as well as Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) are applicable. The processing of data regarding the affiliation with an ethnic, cultural, religious and linguistic minority must comply with the guarantees stipulated by Article 8 of the Charter of Fundamental Rights, Convention No. 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data[26] and 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.[27] Moreover, the principles of Recommendation No. 97(18) of the Committee of Ministers of the Council of Europe concerning the protection of personal data collected and processed for statistical purposes and Recommendation No. (91) 10 of the Committee of Ministers on the communication to third parties of personal data held by public bodies must be taken into account.

Second, Article 3 (1) FCNM provides that every person shall have the right freely to choose to be treated or not to be treated as belonging to a national minority and no disadvantage shall result from this choice. State authorities cannot impose the quality of belonging to a minority on individuals.[28]

With respect in particular to the collection and use of data relating to the affiliation with an ethnic, cultural, religious or linguistic minority by public authorities, the abovementioned principles have two

---

[20] 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.

[21] 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.

[22] Opinion on Germany, 1 March 2002, ACFC/OP/I(2002)008, para.23.

[23] See Opinion on Croatia, 6 May 2001, ACFC/OP/I(2002)003, para.29.

[24] See Opinion on Cyprus, 6 April 2001, ACFC/OP/I(2002)004, para.27.

[25] See Article 6 of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (No. 108): "Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions." See also Opinion on Serbia and Montenegro, 27 November 2003, ACFC/OP/I(2004)002, para.27.

[26] 28 January 1981.

[27] *O.J.* L 28 of 23 November 1995, pp. 0031-0050.

[28] This right implies as well that each person shall have the liberty to request to stop being treated as belonging to a minority: the right of opting-out. See Opinion on Cyprus, 6 April 2001, ACFC/OP/I(2002)004, para.18.

implications. First, when a population census contains a question on the affiliation with an ethnic, cultural, religious or linguistic minority, answering this question may not be made compulsory[29] and persons should be informed of the voluntary nature of the collection of this information.[30] In the view of the Advisory Committee on the Advisory Committee of the Framework Convention on the Protection of National Minorities, an obligation to reply to a question relating to the affiliation with a minority is not compatible with article 3(1) of the Framework Convention on National Minorities, which protects the right not to be treated as a person belonging to a minority.[31] The Advisory Committee has taken the view that replying to such a question should be fully optional, and that this is a suitable way to reconcile the need to have quality data in this field with the right to be treated or not to be treated as a person belonging to a national minority.

Second, insofar as data relating to the membership of any particular person with a minority (linguistic, religious, or ethnic) constitute personal data, the legal guarantees applying to the processing of such data are applicable. Thus, when state officials collect data relating to the affiliation with an ethnic, cultural, religious or linguistic minority in other contexts, these practices need to have a clear legal basis and need to be carried out on the basis of voluntary identification by the persons concerned.[32] In the terms of Convention No. 108 of the Council of Europe, "[personal data undergoing automatic processing" shall be "obtained and processed fairly and lawfully", "stored for specified and legitimate purposes" and "adequate, relevant and not excessive in relation to the purposes for which they are stored" (Article 5 (a), (b) and (c). The ACFC insists rightly on the necessity of protecting the confidentiality of these data.[33] According to Convention No. 108 of the Council of Europe, personal data cannot be used in a way incompatible with the purposes for which they are collected (Article 5 (b)). States have to take the appropriate security measures for the protection of personal data stored in automated data files against unauthorised access, alteration or dissemination (Article 7).[34] Moreover, under this same Convention, data relating to ethnic origin or the religion of an individual may not be automatically processed, unless domestic law provides for appropriate safeguards (Article 6). The principles set forth in the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data have been expanded within the Member States of the Union by 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, which applies also to the processing of personal by non automatic means.

2.2. The purposes of monitoring: the identification of situations of disparate impact discrimination and the promotion of substantive equality

An adequate monitoring of the impact on certain minorities of policies adopted in the fields of housing, education, health or employment requires that the public authorities possess adequate and reliable data on the situation of these minorities. Only on the basis of such data, relating, e.g., to the ethnic break-up of the workforce in certain administrations or private undertakings or to the use of health services by certain religious minorities in comparison to their representation in the whole population, may we identify instances of indirect discrimination resulting from an unjustifiable disparate impact of certain laws or policies on minority groups.

Under the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal

---

[29] See Opinion on Azerbaijan, 22 May 2003, ACFC/OP/I(2004)001, para.21 and Opinion on Ukraine, 1 March 2002, ACFC/OP/I(2002)010, para.22.
[30] See Opinion on Croatia, 6 May 2001, ACFC/OP/I(2002)003, para.18 and Opinion on Serbia and Montenegro, 27 November 2003, ACFC/OP/I(2004)002, para.27.
[31] Opinion on Estonia, 14 September 2001, ACFC/INF/OP/I(2002)005, para. 19; Opinion on Poland, 27 November 2003, ACFC/INF/OP/I(2004)005, para. 24.
[32] See Opinion on Ukraine, 1 March 2002, ACFC/OP/I(2002)010, para.23 and Opinion on Slovakia, 22 September 2000, ACFC/OP/I(2001)001, para.16.
[33] Opinion on Italy, 14 September 2001, ACFC/OP/I(2002)007, para.20.
[34] Appropriate security measures shall be taken as well for the protection of these personal data against accidental or unauthorised destruction or accidental loss.

treatment between persons irrespective of racial or ethnic origin[35] and under the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[36], the Member States may, but are not under an obligation to, provide for the possibility of establishing a presumption of direct or indirect discrimination by statistical evidence (Recital 15 of the Preamble of each of the Directives). Indeed, these Directives leave it to the Member States to determine which "facts" shall lead to a presumption that discrimination has occurred, thus shifting the burden of proof to the defendant in judicial civil or administrative proceedings. However, allowing proof by statistics of instances of discrimination is required in order for the prohibition of indirect discrimination to be truly effective. Indeed, in the *Enderby* case, it is by taking into account the fact that the plaintiff had submitted statistical evidence making it possible to establish a *prima facie* case of discrimination that the Court considered, "Where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory"[37]. Because Directives 2000/43/EC and 2000/78/EC only provide for the *possibility* that Member States allow for the statistical proof of discrimination, without creating an *obligation* in this regard, they may be considered to offer an insufficient protection against certain forms of institutional discrimination which are revealed by the disparate impact of certain regulations, criteria or practices. Whether or not these directives are seen to be insufficiently protective in this regard should not be seen as an obstacle to encouraging collection of data relating to the situation of minorities in certain identified sectors, in order for the public authorities to better direct their efforts to improving the integration of minorities where this is most needed.

Only on the basis of such data may the State pursue active policies in favour of the integration of certain groups, for instance, in the employment market or in education. Directives 2000/43/EC and 2000/78/EC allow the Member States to launch positive action programmes in favour of ethnic or religious minorities. Although the Member States are not obliged to launch such programmes under these directives (Article 5 of Directive 2000/43/EC; Article 7(1) of Directive 2000/78/EC), the Member States have been encouraged since the Lisbon European Council of 2000, in the framework of the open method of coordination for combating social exclusion, to identify and develop policy responses to assist "those who are most marginalised and excluded and who experience particularly severe integration problems"[38]. Although the categories thus targeted "will vary depending on specific national circumstances", they "could include for example women from ethnic minorities"[39]. In this context, the use of indicators broken down not only by gender, but also by different groups of the population, is recommended, not only in order to monitor past performance, but also in order to facilitate the setting of targets (preferably quantifiable) by each Member State, on the basis of the comparison between its own performances and those of other Member States making use of similar indicators. Similarly in the context of the European Employment Strategy, an adequate attention paid to the situation of minorities in the labour market and their specific needs should be seen as part of an overall strategy both for economic growth and for the creation of jobs. The Commission has been asked by the March 2005 European Council[40] to incorporate the priority given to growth and employment into new Broad Economic Policy Guidelines, based on Article 99, to ensure the economic consistency of the three economic, social and environmental dimensions of the Lisbon strategy, and to prepare new Employment Guidelines, based on Article 128 of the Treaty. In the recent proposal of the Commission, following that request, for a Council Decision on guidelines for the employment policies of the Member States made on 12 April 2005 (COM(2005)141 final), the Commission notes, explaining guideline 18 (To ensure inclusive labour markets for job-seekers and disadvantaged

[35] OJ L 180 of 19.7.2000, p. 22.
[36] OJ L 303 of 2.12.2000, p. 16.
[37] ECJ, 27 October 1993, *Enderby*, C-127/92, *ECR*, p. I-5535, Recital 18.
[38] Common outline for the preparation of the National Action Plans against Poverty and Social Exclusion (NAPs/inclusion) 2003/05, prepared by the Social Protection Committee, December 2002, p. 2.
[39] Id.
[40] Conclusions of the European Council of March 2005, http://ue.eu.int/cms3_fo/showPage.asp?lang=en&id=432&mode=g&name=).

people):

> Facilitating access to employment for job seekers, preventing unemployment and ensuring that those who become unemployed remain closely attached to the labour market and increase their employability are essential to increase participation and combat social exclusion. This requires breaking down barriers to the labour market by assisting with effective job searching, facilitating access to training and other active labour market measures and ensuring that work pays, as well as removing unemployment, poverty and inactivity traps. Special attention should be paid to promoting the inclusion of disadvantaged people in the labour market, including through the expansion of social services and the social economy. The unemployment gaps for people at a disadvantage, as well as between non-EU and EU nationals, remain too high and should be substantially reduced in line with any national targets. Combating discrimination, promoting access to employment for disabled people and integrating migrants and minorities are particularly essential.

The quality of the implementation of the Lisbon strategy would be greatly enhanced if the Member States were invited to include, in the future national reform programmes – the first of which the Member States are asked to present in the autumn of 2005 – and sectorial reports, data reflecting the specific situation of minority groups. The objective of combating barriers to their employment which members of disadvantaged groups still face is to be commended. However, where there is a lack of reliable statistical data, this can seriously hamper the ability of the State to target, implement and monitor measures to ensure the full and effective equality of persons belonging to national minorities, and to implement remedial policies and programmes.

2.3. Meeting the fears raised by monitoring of the situation of minorities : the role of legal safeguards

Whether is serves to combat forms of indirect discrimination which only statistical monitoring may reveal, or whether it is a tool for an active social and employment policy aimed at combating the social exclusion of vulnerable grounds or categories disadvantaged on the employment market, a monitoring of the impact on minorities of general policies or generally applicable legislation must be part of any effective framework for the protection and promotion of the rights of minorities. The Network is fully aware that there are cultural obstacles to such monitoring, especially with respect to ethnic or religious minorities, but also, to some extent, with respect to linguistic minorities. Certain States fear that, by improving the monitoring of the impact on these groups of their laws and policies, they would be recognizing the existence of such groups and open the way to the vindication of "special rights" of minorities. The members of the groups concerned, on the other hand – or, for that matter, the population at large – may fear that data relating to the ethnic, religious or linguistic membership will be misused, and may lead to discrimination. In order to meet the legitimate fears expressed by the authorities of certain States, it should be clearly emphasized that ethnic, religious or linguistic monitoring should not be equated with the recognition of "special rights" to minorities : indeed, as explained further in the next section of this Thematic Comment, it should be seen, rather, as a tool in an anti-discrimination strategy, and it is without prejudice of any measures which could be adopted – or not – based on the recognition of certain groups as "minorities" deserving of special rights. Protecting ethnic, religious or linguistic groups from discrimination, including indirect discrimination which is revealed by statistical data, must not necessarily be seen as implying the recognition of "minorities" in the meaning of Article 27 of the International Covenant on Civil and Political Rights or of the Framework Convention on the Protection of National Minorities.

In order to meet the legitimate fears expressed by the members of the groups concerned, it should be emphasized that monitoring should not be equated with the recognition of any special rights to the members of the groups whose situation is thereby made more visible. The importance of the protection of the private life of the individual vis-à-vis the processing of personal data should moreover be emphasized. The rules relating to the processing of personal data, including the heightened protection of sensitive data relating to the ethnic origin or the religious beliefs of the individual, should not be seen however as an obstacle to an adequate monitoring of the impact on certain ethnic, religious or

linguistic groups of either public policies or legislation or private practices. On the contrary, they constitute a necessary and welcome safeguard against any risk of abuse in the process of such monitoring, a pre-condition for which therefore is that these rules protecting personal data are strictly adhered to. Although a number of States seem to consider that this form of monitoring is in conflict with the protection of personal data, especially as guaranteed under their national legislation implementing Directive 95/46/EC of the European Parliament and of 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, there is no such contradiction in fact. In the opinion of the Network, although there may be strong cultural obstacles to ethnic, religious or linguistic monitoring, there are no insuperable legal obstacles to such monitoring. The following paragraph describes why.

2.4. The processing of personal data and statistical monitoring

According to Article 2(a) of the Personal Data Directive, personal data are

> any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.

Therefore, once personal data are made anonymous in order to be used in statistics, the information contained in such statistics should not be considered as personal data. This should be taken into consideration when comparing the three possible forms which monitoring, based for example on ethnic or religious categories, is envisaged. Such a monitoring may consist in :

1° collecting information from the individuals concerned, in order to use this information for statistical purposes after these data are anonymized;
2° processing information not obtained from the individuals concerned but relating to particular individuals, for the same statistical purpose;
3° the use of other reliable techniques, such as those traditionally used in social science empirical research, including the use of representative samples, personal interviews conducted by independent researchers, under the principle of anonymity.

In many cases, this latter approach (3°) may lead to obtaining results both reliable and comparable. Indeed, the collection of data relating, for instance, to ethnicity or religion, or even language, by the use of individual questionnaires initially linked to identified or identifiable individuals, as in the case of censuses including an item on the membership of the individual to any particular group, may in many cases lead to underreporting or over-reporting, for a variety of reasons reported in Appendix B to this Thematic Comment (under point 1.2.3.); the underreporting of the Roma, leading to – in many cases – a serious underestimation of the representation of the Roma within the population, serves to illustrate this. Therefore the latter monitoring technique, where it is practicable and presents a same or better degree of reliability, may be preferred to a monitoring based on the collection of personal data from the individuals concerned, because of the absence of risk it presents for the protection of personal data.

Where monitoring techniques are used which imply the processing of personal data, the rules relating to the protection of personal data must be fully observed, and the interference with the right to respect for private life limited to what is strictly necessary. Under these forms of monitoring, certain data, some of which may be sensitive (ethnicity and religion), may be collected from the individual concerned for statistical purposes, for instance on the basis of a questionnaire addressed to him/her (primary collection of personal data) (1°); or certain data collected for other purposes may be processed or communicated for statistical purposes (secondary collection of personal data) (2°). Recital 29 of the Preamble and Article 6(1)(b) of the Data Protection Directive make it clear that, insofar as the initial collection of personal data took place for specified, explicit and legitimate purposes, the further processing of personal data for historical, statistical or scientific purposes should

not generally to be considered incompatible with the purposes for which the data have previously been collected provided that Member States furnish suitable safeguards, which must in particular rule out the use of the data in support of measures or decisions regarding any particular individual.

However, where the monitoring involves the use of personal data, the principles enumerated in the Recommendation No. R (97) 18 of the Committee of Ministers of the Council of Europe to the Member States concerning the protection of personal data collected and processed for statistical purposes, adopted by the Committee of Ministers on 30 September 1997 at the 602nd meeting of the Ministers' Deputies, should be complied with. In particular, this Recommendation prescribes that personal data collected and processed for statistical purposes shall be made anonymous as soon as they are no longer necessary in an identifiable form (Principle 3.3.), i.e., immediately after the end of the data collection or of any checking or matching operations which follow the collection, except if identification data remain necessary for statistical purposes and the identification data are separated and conserved separately from other personal data, unless it is manifestly unreasonable or impracticable to do so (Principle 8.1. and Principle 10.1), or if the very nature of statistical processing necessitates the starting of other processing operations before the data have been made anonymous and as long as all the appropriate technical and organisational measures have been taken to ensure the confidentiality of personal data, including measures against unauthorised access, alteration, communication or any other form of unauthorised processing (Principle 8.1. and Principle 15). It also prescribes that, where personal data are collected and processed for statistical purposes, they shall serve only those purposes, and shall therefore not be used to take a decision or measure in respect of the data subject, nor to supplement or correct files containing personal data which are processed for non-statistical purposes (para. 4.1.); and that, in order for the processing of personal data for statistical purposes to remain proportionate, only those personal data shall be collected and processed which are necessary for the statistical purposes to be achieved, which implies in particular that identification data shall only be collected and processed if this is necessary (para. 4.7.). Specific principles governing the information of the persons concerned apply, moreover, in the context of either the primary or the secondary collection of personal data for statistical purposes (Principles 5.1. to 5.5.).

Recommendation No. R (97) 18 provides that when, for statistical purposes linked to monitoring, personal data are collected from the person concerned, he/she must be informed of the compulsory or optional nature of the response and the legal basis, if any, of the collection (Principle 5.1.), and any penalties for a refusal to reply may only be imposed by law (Principle 6.4.). However, where the data collected from the person concerned relate directly or indirectly to the membership of the person of a minority, replying to such a question should always be optional. This follows both from Article 3 of the Framework Convention on the Protection of National Minorities, which provides that every person belonging to a national minority shall have the right freely to choose to be treated as such, and, with respect to the membership of ethnic or religious minorities which require that the person concerned provide information about his/her ethnic origin or religion, from Principle 6.2. of the Recommendation No. R (97) 18 of the Committee of Ministers of the Council of Europe to the Member States concerning the protection of personal data collected and processed for statistical purposes, which provides that "Where the consent of the data subject is required for the collection or processing of sensitive data, it shall be explicit, free and informed. The legitimate objective of the survey may not be considered to outweigh the requirement of obtaining such consent unless an important public interest justifies the exception".

Where the monitoring involves the use of data which have not been collected directly from the individual whom these data relate to (secondary collection of personal data (2°)), this individual should in principle be informed of the use of these data when the data are recorded or at the latest when the data are first disclosed to a third party, for instance where an employer communicates certain statistical data on the ethnic break-up of his workforce to the public authorities, unless providing the individuals concerned with such information would involved disproportionate efforts, for instance because of the large number of persons concerned or because the further processing is purely for statistical purposes. In the view of the Network, this follows from Recitals 39 and 40 of the Preamble of the Data Protection Directive, and from its Article 11. This is also compatible with Principles 5.2.

and 5.3. of Recommendation No. R (97) 18 of the Committee of Ministers of the Council of Europe to the Member States concerning the protection of personal data collected and processed for statistical purposes.

In certain cases, the processing of data relating to the ethnic, religious or linguistic affiliation of an individual will be required not only for statistical purposes, in order to ensure that the situation of minorities under generally applicable laws or policies is adequately monitored, but also in order to grant the individual members of minorities certain advantages or to offer them specific treatment: this, indeed, is required under positive action programmes. The relevant rules relating to the protection of personal data must be fully complied with in the framework of such a policy. Where it is based on the use of data relating to the ethnic origin or the religion of individuals, monitoring involves the processing of sensitive data, which – because of the risk of discriminatory practices inherent to the use of such data – enjoy a reinforced protection under Article 8 of the Data Protection Directive. However, it should be emphasized that the Directive authorizes the Member States, when justified by grounds of important public interest, to derogate from the prohibition on processing sensitive categories of data where important reasons of public interest so justify, for instance for the preparation of government statistics (Recital 34 of the Preamble and Article 8(4) of the Data Protection Directive).

2.5. Recommendation

As illustrated in Appendix B, certain Member States justify their resistance to ethnic or religious monitoring – although recommended by the Advisory Committee of the Framework Convention for the Protection of National Minorities and by the European Commission on Racism and Intolerance – by the requirements of the protection of private life with regard to the processing of personal data. It may therefore be useful to clarify the scope of these requirements, and more clearly distinguish the processing of personal data (as may be required for the implementation of positive action programmes) from the statistical use of data, whether these are personal data which have been anonymized, or whether these have been collected by means which exclude that they may be linked to particular individuals. An opinion from the Data Protection Working Party established under Article 29 of 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 could be requested by the European Commission, or the Data Protection Working Party could formulate in this respect a recommendation on its own initiative.

3. Ensuring an Adequate Protection against Discrimination

Every person should be protected from being discriminated against on the ground of his/her membership of a national minority. Equality and the prohibition of discrimination are recognised in Articles 20 and 21 of the Charter of Fundamental Rights. Article 21 (1) of the Charter prohibits discrimination based on membership of a national minority, ethnic origin, language and religion. Article 14 ECHR mentions among the prohibited grounds of discrimination in the enjoyment of the rights and freedoms set forth in the ECHR: association with a national minority, language and religion.[41] Directive 2000/43/CE of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[42] and Directive 2000/78/CE of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[43] protect against contain forms of direct or indirect discrimination exercised in particular on the ground of racial or ethnic origin or religion.

An examination of the situation of minorities in the Member States illustrates that, despite the important contribution of European Community law to this dimension of the protection of persons

[41] These criteria are also listed by Article 1 (1) of Protocol No.12 to ECHR, which prohibits discrimination in a general way. However, this Protocol has not yet entered into force.
[42] *OJ* L 180 of 19.7.2000, p. 22.
[43] *OJ* L 303 of 2.12.2000, p. 16.

belonging to minorities, a number of problems remain, which could justify the adoption of further initiatives. The question of the Roma will be treated in a separate section of this Thematic Comment. The following comments therefore focus on minorities other than the Roma.

3.1. Forms of discrimination against minorities

3.1.1. Language proficiency requirements

The Network would first remark that in certain situations, language proficiency requirements, or the failure to accommodate the needs of linguistic minorities, may constitute a disproportionate, and therefore discriminatory, obstacle to the integration of the members of certain minorities. This concerns especially the access to employment, but it also may affect access to education of to health care. Where a language proficiency requirement is a condition for access to citizenship, the impact on certain minorities may be particularly important, and the way such a condition is imposed and implemented thus deserve to be closely scrutinized.[44]

As remarked by the ACFC, the imposition of language proficiency requirements may be especially problematic when the legislation is drafted in such a way that it allows an extensive interpretation of the linguistic requirements.[45] In **Slovakia**, the Act on State Service requires knowledge of the Slovak language as a condition for being admitted (employed) to any State service. In **Latvia**, Article 6 of the Language Law requires knowledge of the State language for employees in the public sector and for employees in the private sector to the extent that there exists a "legitimate public interest". The Cabinet of Ministers Regulations No. 296 provide for an extensive list of professions and positions in which an appropriate level of language proficiency is required.[46] As concerns the private sector, the Regulations demand that where there is a public demand for services in the State language, this should be provided, and where there is a legitimate interest that a particular professional would know Latvian, this should be ensured. However, it remains unclear what a 'legitimate interest' is. Concerns have been expressed as to the effects Regulations No. 296 may have for non-Latvian speakers on their access to employment and services. Moreover, the State Language Centre is entrusted to supervise the compliance with this Law and Regulations and it has the power to fine persons for its violation, although there are uncertainties about the precise extent of its powers : although, in a recent report to the CERD, the Latvian government submitted that the inspections could only be carried out either upon the request of a person or with respect to the verification of the existence of the appropriate language certificate,[47] the *Administrative Violations Law* is more broadly formulated in this regard and the inspectors appear to rely on this Law in basing their right to assess the Latvian language knowledge.[48]

Whether or not language proficiency requirements or the failure to provide for the accommodation of the specific needs of certain linguistic minorities may be considered reasonable, and therefore as non discriminatory, will depend on which opportunities are given to the members of minorities to acquire the linguistic skills which are required. For instance, **Denmark** has recently adopted an amendment which seeks to encourage newly arrived immigrants to learn Danish, by providing that a fee will be charged for the services of an interpreter in hospitals if the person has stayed in Denmark for over seven years.[49] This would only be acceptable, in the view of the Network, if newly arrived immigrants have sufficient opportunities to learn the Danish language. Certain States, such as **Luxembourg** by the regulation of 10 July 2003, have sought to facilitate the integration of children of immigrants, by the adoption of special measures in the field of education. Such initiatives are to be welcomed and, wherever possible, they should be encouraged. Similarly, the Network has consistently encouraged the

---

[44] Opinion on Estonia, 14 September 2001, ACFC/OP/I(2002)005, para. 26.
[45] Opinion on Estonia, 14 September 2001, ACFC/OP/I(2002)005, para. 60.
[46] Ministru kabineta *Noteikumi par profesion_lo un amatu pien_kumu veik_anai nepiecie_amo valsts valodas zin__anu apjomu un valodas prasmes p_rbaudes k_rt_bu*, 22.08.2000, *Latvijas V_stnesis*, No. 302, 29.08.2000.
[47] See Fifth report of Latvia to the CERD. CERD/C/398/Add.2, point 52.
[48] "Valodas inspekcija soda skolot_ju", 08.12.2004.
[49] Act. No. 441 of 9 June 2004.

authorities in **Latvia** and in **Estonia** to improve the availability of training courses in Latvian and Estonian for the Russian-speaking minority, acknowledging that important efforts have already been made in this regard, for instance through the introduction, in **Latvia**, of bilingual education programmes. In the **Netherlands**, measures have been adopted which seek to ensure a basic level of knowledge of Dutch and of Dutch society among potential immigrants, in order to achieve the speedy integration of newly arrived immigrants into Dutch society. Thus a bill was submitted to Parliament in August 2004,[50] according to which a residence permit will only be given if the applicant has successfully completed a Dutch language course and an introductory programme in his or her country of origin.[51] Such requirements, it should be emphasized, not only should go in hand with facilities provided to those concerned to learn the language; they also should not result in limiting the obligation of the authorities to provide reasonable accommodation to the members of minorities, whether they are newly arrived immigrants or not, which take into account their specific needs. Thus, despite their insistence on *inburgering* – seeking to ensure the integration of newly arrived immigrants in the Dutch society –, the **Netherlands** ensure that most information distributed by municipalities, as well as announcements for local elections, in which all residents can participate, will be in four languages: Dutch, English, Turkish and Arabic ; and many hospitals use the *tolkentelefoon*, a telephone service that allows interpreters to follow a discussion taking place in, for instance, a hospital and to translate questions and answers.

The use of language requirements in the areas covered by Council Directive 2000/43/CE of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin should be carefully scrutinized, in order to ensure that they are not unreasonable or disproportionate, thus leading to a form of indirect discrimination on the grounds of ethnic origin as prohibited under this Directive.

3.1.2. Access to citizenship and the prohibition on the grounds of ethnic origin

In a number of Member States of the Union, the conditions of access to citizenship have been a source of concern, either because of their potentially discriminatory nature, or because, where they are unable of becoming citizens, the members of certain minorities face heightened difficulties of integration. The Roma in particular encounter problems in States, such as in **Italy** and **Slovenia**, when applying for citizenship. In **Slovenia** for instance, the authorities distinguish between the autochthonous (those whose families have lived continuously in Slovenia for generations) and non-autochthonous Roma. The Roma community states that many Roma (about two thirds), who are considered non-autochthonous, are not able to become Slovenian citizens. This results in heightened difficulties with regard to access to employment, and in a greater vulnerability, for instance in the context of ill-treatment by the police. In **Lithuania**, the law on citizenship currently in force is potentially discriminatory, insofar as it provides for different rules on the dual citizenship subject to ethnic origin: indeed, in accordance with Article 18 of the law, the general rule that Lithuanian citizenship shall be lost where an individual acquires the citizenship of another State does not apply to persons of Lithuanian origin.[27]

Some States give preferential treatment to certain groups regarding access to nationality. Examples of such groups are in **Finland**, the citizens of other Nordic countries and in **France**, citizens or former citizens of the territories and states over which France exercised sovereignty or a mandate or supervision and citizens of the territories or states where the official language or one of the official languages is French. Thus, in **Finland**, the Aliens Act (ulkomaalaislaki 301/2004), section 30 establishes preferential treatment of citizens of other Nordic countries, as they obtain Finnish

[50] *Wetsvoorstel inburgering in het buitenland, Kamerstukken II* 2003/04, 29 700, Nos. 1-3.
[51] It is estimated that some 17,000 potential immigrants per year will take the *inburgeringsexamen* [integration exam], of which 15 to 20% is expected to fail. To take the exam will cost the immigrant 350 euros.
[27] Lietuvos Respublikos pilietyb_s _statymas [The Law of the Republic of Lithuania on citizenship] Official Gazette 2002, Nr. 95-4087.

citizenship through a simplified procedure within a period of two months.[52] In **France**, there exists a difference in treatment in several respects between different categories of persons applying for French nationality. In accordance with Article 21-19, 5° of the Civil Code, citizens or former citizens of the territories and states over which France exercised sovereignty or a mandate or supervision may be given French nationality without them having to fulfil the condition habitual residence in France in the five-year period prior to the application. Article 21-20 of the Civil Code lifts the condition of residence for five years prior to the application for persons who belong to the "French cultural and linguistic entity" if they are citizens of the territories or states where the official language or one of the official languages is French, or if their native language is French, or they can prove that they have been to a French-speaking school for at least five years. Although these provisions are not automatic, they institute a form of discrimination between citizens of the above-mentioned territories or states and citizens of other states. Finally, Article 21-24 of the Civil Code contains a condition of sufficient knowledge of the French language for being granted French nationality which, although this provision applies to all applicants for French nationality, reinforces the *de facto* and *de jure* advantage of French-speakers. This preferential position given by the laws to the French-speaking community is explained by historical considerations; its impact, however, is mitigated by the current policy of immigration control which aims to make access to French nationality more complex for all foreigners.

Progress has been made in this field by a number of States recently, however. In the **Czech Republic**, certain problems relating to the access to nationality for persons of Roma origin, who after the dissolution of Czechoslovakia did not acquire the Czech nationality, have been resolved by Law No. 194/1999 Coll. and Law No. 357/2003 Coll., amending the Law on Nationality of the Czech Republic.[53] In **Estonia**, the naturalization of Russians-speakers has been facilitated, although approximately 160,000 Estonian permanent residents still do not have Estonian or any other citizenship. In **Greece**, the former Article 19 of the Nationality Code, which stipulated that Greek citizens not belonging to the community of Greek stock could be stripped of their nationality if they leave the country for good, was repealed in June 1998, and the former Greek citizens who lost their nationality on the basis of that article could request the Nationality Board to annul the decision to withdraw their nationality if they can prove that this decision was taken by mistake, or apply for Greek nationality by ordinary naturalization. This responds partly to the wishes expressed by the CERD[54], ECRI[55] and the National Human Rights Commission[56], which nevertheless consider that additional measures need to be taken to make it even easier for the persons concerned to (re)acquire Greek nationality. The Ministry of Interior of the **Slovak Republic** has drafted an amendment of the Act on Citizenship, which aims at facilitating the acquirement of citizenship for certain categories of applicants, e.g. for a person granted asylum.

Although each Member State of the Union may determine who are its own nationals and, thus, is exclusively competent to define the rules according to which nationality may be attributed, it should be emphasized that Council Directives 2000/43/EC and 2000/78/EC apply to all persons, without distinction as to their nationality. Although, according to Recital 13 of the Preamble of Directive 2000/43/EC, the prohibition of all direct or indirect discrimination on grounds of racial or ethnic origin, although it also applies to third-country nationals, does not concern differences in treatment on grounds of nationality, it cannot be ruled out that the very conditions for granting nationality constitute that kind of discrimination, prohibited by the Directive. As a matter of fact, there where they create differences in treatment between certain categories of persons, the conditions for granting nationality

[52] Moreover, Section 48 of the Aliens Act provides for preferential treatment of so-called Ingrians with regard to issuing of permanent residence permits. Ingrians who can produce necessary evidence of (a certain amount of) Finnish ancestry and proficiency of either Finnish or Swedish language, may be granted, provided that certain additional criteria are met, permanent residence permits.

[53] Zákon _. 40/1993 Sb., o nab_vání a pozb_vání státního ob_anství _eské republiky, ve zn_ní pozd_j_ích p_edpis_ (Law No. 40/1993 Coll. of Laws, on Acquisition and Loss of the Nationality of the Czech Republic, as amended by later laws).

[54] CERD A/56/18 (2001), para. 134.

[55] Second report on Greece, 10 December 1999, *CRI (2000) 32*, para. 4-5. Third report on Greece, 5 December 2003, *CRI (2004) 24*, para. 8-11.

[56] Decision of 30 October 2003, http://www.nchr.gr

do not create a difference in treatment between nationals and non-nationals, but between different categories of foreigners, which makes those differentiations come under Directive 2000/43/EC. Consequently, where access to nationality conditions or facilitates access to employment, education or housing, as well as to the other social goods to which this Directive applies in accordance with its Article 3, it needs to be verified whether the rules governing access to nationality do not institute direct or indirect discrimination against certain persons defined according to their ethnic origin.

3.2. The affirmative dimension of the requirement of equality

3.2.1. Positive obligations implied in the principle of equal treatment

Beyond the mere prohibition of discrimination, the realisation of effective equality between persons belonging to an ethnic, cultural, religious or linguistic minority and the rest of the population requires the elimination of obstacles to the access of these persons to all domains of social, economic, cultural and political life. States have a number of positive obligations in this regard.[57] Under Article 4 of the Council of Europe Framework Convention for the Protection of National Minorities, States 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 »; such measures are specifically designated as not being discriminatory in character. They also have an obligation to promote equal opportunities for access to education at all levels for persons belonging to national minorities (Article 12 (3) FCNM) and 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 (Article 5 (1) FCNM).[58] This requirement should be seen as an implication of the requirement of non-discrimination itself. In the case of *Thlimmenos v. Greece*, which concerned a Jehovah's Witness who had been refused an appointment as a chartered accountant because of his past conviction for insubordination consisting in his refusal to wear the military uniform and was complaining « that in the application of the relevant law *no distinction is made* between persons convicted of offences committed exclusively because of their religious beliefs and persons convicted of other offences »[59], the European Court of Human Rights found a violation of Article 14 ECHR to result from the *failure to provide effective accommodation* to meet the specific needs of certain categories. It noted explicitly:[60]

> The Court has so far considered that the right under Article 14 [of the European Convention on Human Rights] not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification (…). However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different. [The Court therefore has to address the question] whether the failure to treat the applicant differently from other persons [subject to the same generally applicable regulation] convicted of a serious crime pursued a legitimate aim. If it did the Court will have to examine whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

---

[57] EU Network of Independent Experts on Fundamental Rights, *Report on the Situation of Fundamental Rights in the European Union in 2003*, p. 100. See also Article 2 (2) of the International Convention on the Elimination of All Forms of Racial Discrimination.
[58] See also Article 4 (1) and (2) of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992.
[59] Eur. Ct. HR (GC), *Thlimmenos v. Greece* (Appl. N° 34369/97), judgment of 6 April 2000, § 42.
[60] Ibid., §§ 44-47.

It shall also be noted that this judgment has been relied upon by the European Committee of Social Rights, in the framework of the Revised European Social Charter (Article E of which provides that the rights of the Charter shall be recognized without discrimination), allowing the Committee to consider that "Article E not only prohibits direct discrimination but also all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all"[61]. The importance of this decision resides in the fact that, as a consequence, indirect discrimination on the grounds of, *inter alia*, the membership of a minority, in the meaning given to this prohibition by the European Committee of Social Rights, is to be prohibited in all the fields covered by the Revised European Social Charter, including for instance in the fields of working conditions, health policies, social security and social and medical assistance, social welfare, the social, legal and economic protection of children, the social protection of the elderly, the protection against poverty and exclusion or housing.

In order to combat discrimination against minorities, therefore, it is necessary to identify situations where certain generally applicable – and apparently neutral – regulations or policies fail to take into account the specific situation of the members of certain groups defined by their ethnic origin, their religion, or their language. Indeed, this may be seen as implicitly recognized by the Council Directives 2000/43/EC and 2000/78/EC, although Articles 2(2)(b), of the both the 'Race' and the Framework Directives define indirect discrimination in a more narrow fashion, as a situation where apparently neutral regulations, criteria or practices appear to be particular disadvantageous to the members of a certain category, if the provision creating the disadvantage is not objectively and reasonably justified. Moreover, insofar as – without imposing on the Member States an obligation to allow for this mode of proving discrimination – these instruments allow for the possibility of using statistics before courts or other authorities in order to prove discrimination, they include in their understanding of discrimination situations where apparently neutral regulations, criteria or practices have a disproportionate impact on certain protected groups, and cannot be objectively and reasonably justified.

It is clear therefore that Article 13 EC, although it only allows for the adoption of measures which seek to "combat discrimination", may be relied upon to go beyond the existing instruments adopted on that legal basis not only in order to afford a protection from direct and indirect discrimination on the grounds of religion beyond the current scope of application of Council Directive 2000/78/EC,[62] but also in order to adopt a more extensive understanding of the notion of indirect discrimination. The prohibition of indirect discrimination should not be interpreted too narrowly, as imposing only a negative obligation not to adopt of maintain measures imposing a particular disadvantage on the members of certain protected categories, unless such measures are objectively and reasonably justified by the pursuance of a legitimate aim. This prohibition should be seen as also imposing positive obligations to ensure that the application of generally applicable and apparently neutral regulations, criteria or practices do not have a disproportionate impact on certain categories, which in turn requires an adequate monitoring of the situation of the members of these categories in the fields (employment, education, housing for instance) where this prohibition is imposed ; and to take into account the specific situation of the members of certain minorities by carving exceptions into generally applicable regulations, where in the absence of such exceptions they would be negatively affected by the application of such regulations, even in situations where the general rule is fully justified.

---

[61] European Committee of Social Rights, Collective Complaint n°13/2002, *Autisme-Europe v. France*, decision on the merits (4 November 2003), at § 52.

[62] The reference specifically to religion should not be construed to imply that such an extension would not be equally justified with respect to the other grounds of prohibited discrimination under Article 13 EC. Indeed, the Network of Independent Experts has consistently taken the view that such an extension would be fully justified – and indeed, might be seen as required – with respect to disability-based discrimination, as well as with respect to discrimination on the grounds of sexual orientation. The exclusive emphasis in this Thematic Comment on ethnic origin and religion among the grounds listed in Article 13 EC is to be attributed to the fact that that measures adopted against discrimination on these grounds may contribute to the protection of ethnic and religious minorities, which – with linguistic minorities – are the focus of the Thematic Comment.

The ACFC encourages the introduction of positive measures in favour of members of minorities, which are particularly disadvantaged.[63] In the view of the Network of Independent Experts, because of the specific situation of the Roma minority in the Union, positive action measures should be adopted in order to ensure their integration in the fields of employment, education and housing. This is the only adequate answer which may be given to the situation of structural discrimination – and, in many cases, segregation – which this minority is currently facing. This if further explained in the last section of this Thematic Comment. However, the question whether positive action measures should be adopted is to be distinguished from the question whether the impact of generally applicable regulations or policies on certain minorities, especially ethnic and religious minorities, should be monitored by statistical means, as well as from the question whether the specific situation of the members of certain minorities should be taken into account by carving exceptions into generally applicable regulations where in the absence of such exceptions, these minorities could be put at a disadvantage by the application of such regulations. The latter requirements should be treated as a consequence of the prohibition of indirect discrimination, and there is no reason to limit their application to certain groups, such as the Roma, who are facing a situation of structural discrimination.

3.2.2. Special measures and positive action measures

It is useful here to clarify the distinction between the adoption of special measures which promote substantive equality, on the one hand, and positive action measures *stricto sensu*, on the other hand, although the use of these terms is not fixed and may vary according to the instruments in which they appear. Special measures may be adopted as affirmative measures which seek to promote full and effective equality between persons belonging to a minority and persons belonging to the majority. But such measures do not necessarily entail the use of preferential measures in favour of the members of a minority group which create a risk of discrimination. In the field of education for example, in **Belgium** and **Luxemburg**, special classes are organized for children of immigrants in order to facilitate their integration in the educational system, in particular by assisting them in the acquisition of the official language. In the **Czech Republic**, special classes are organized for Roma children in order to accelerate their learning of the Czech language, and Roma assistants seek to improve the integration of these children. Similarly, in **Latvia**, bilingual (Russian-Latvian) classes have been set up, in order to facilitate the integration of the Russian-speaking minority, without obliging the children of that minority to renounce being taught in their own language. The training of officials in order to facilitate intercultural communication and to improve their understanding of the situation of minorities falls under this category of measures.

Such schemes are only to be encouraged only insofar as they seek to provide the members of minorities with an opportunity to seek integration in the mainstream of society. Indeed, such schemes may in certain instances be required as a form of accommodation of the specific situation of minorities. This is the case where, in the absence of such accommodation, minority groups would be suffering a form of indirect discrimination, being placed *de facto* in a disadvantageous situation because of the imposition of generally applicable regulations, criteria or practices, which although apparently neutral, are discriminatory in fact[64]. Such measures however, should neither lead to instances of segregation – for instance by confining children from certain minority groups to special classes –, nor impose a form of coercion on the members of minority groups, obliging them to assimilate and to abandon the specific traits, including language, which constitute them as a minority –

[63] See 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.

[64] For instance, the Advisory Committee of the Framework Convention for the Protection of National Minorities noted with regard to the United Kingdom, under Article 4 of the Framework Convention, that "from information it has received, the different health needs of the various ethnic minorities and that problems persist in accessing public health care, due in part to language difficulties and sometimes the hostile reaction of services. Furthermore there exists a lack of awareness of cultural needs, including dietary and religious needs. Also highlighted to the Advisory Committee are the problems ethnic minority health staff face to be promoted, in particular to senior positions, and that they often have to take up the least desired specialities". In such case affirmative action must be taken to remedy these obstacles to access of ethnic minorities to health services, which requires taking into account their specific needs, for instance in terms of dietary or religious needs or of language interpretation.

which could not be reconciled with Article 5 of the Framework Convention –. Article 1(1), c), of the Convention against Discrimination in Education adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 December 1960 defines as "discrimination", in the context of education, any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education in particular by "establishing or maintaining separate educational systems or institutions for persons or groups of persons", except where such separate consists in the establishment or maintenance of separate educational systems or institutions for pupils of the two sexes under conditions of equality (Article 2, a)); where the establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level (Article 2, b)); or where "the object of [the establishment or maintenance of private educational institutions] is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level" (Article 2, c) of the Convention).

Other special measures may seem to constitute an exception to the principle of equal treatment, insofar as, in order to achieve full and effective equality, they grant preferential treatment to the members of a group which has traditionally been subject to discrimination or whose members are placed in a situation of structural disadvantage. These are positive action measures, understood *stricto sensu*. Article 4(2) of the Framework Convention on the Protection of National Minorities confirms that special measures adopted in order to promote full and effective equality between persons belonging to a national minority and those belonging to the majority shall not be considered as an act of discrimination. As has already been recalled, in European Community law, Article 5 of Directive 2000/43/EC and Article 7(1) of Directive 2000/78/EC, which are applicable to ethnic and religious minorities respectively, also make it clear that such forms of positive action are not discriminatory. As measures granting preferential treatment to certain minorities in order to accelerate their integration into the mainstream of society constitute an exception to the prohibition of direct discrimination, they shall in principle be acceptable only if they are reasonably and objectively justified by the need to address a situation of structural discrimination which such measures seek to remedy, and remain proportionate to the discrimination to be addressed, and if they are temporary, i.e., do not lead to the maintenance of separate rights for different groups.[65]

3.3. A potential role for the Union in promoting further the inclusion of minorities

The Network would welcome a more active promotion of special measures by the institutions of the Union, and sees this as a potentially important contribution of the Union to the improvement of the position of minorities in the Union. In order to move in this direction, it is not necessary to immediately impose on the Member States an obligation to adopt positive action schemes, except perhaps where certain groups – such as the Roma – are entrenched in a situation of structural disadvantage in all areas of social life[66]. Because attracting more people to enter and remain on the

[65] See, e.g., Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification UNGA Res. 2106(XX) of 21 December 1965.

[66] See e.g. the Opinion of the Advisory Committee on the Slovak Republic, under Article 4 of the Framework Convention: "The Advisory Committee welcomes the fact that the Government has designed a range of initiatives aimed at promoting full and effective equality, notably in the above-mentioned Strategy concerning Roma, adopted in September 1999. Such initiatives are clearly needed since full and effective equality between persons belonging to Roma and those belonging to the majority has not yet been achieved in Slovakia and the socio-economic differences between the majority population and many of the Roma remain considerable (see also comments under Article 15). Areas where the Advisory Committee finds the current situation particularly alarming include employment, housing and education. Bearing in mind that earlier

labour market is already part of the European Employment Strategy, active employment policies based on the use of indicators relating to the employment of minorities and on positive action schemes could be further encouraged, as a first step in that direction. Indeed, in the framework of the Council of Europe, the Committee of Ministers of that organisation already has recommended that "Where they exist, national action plans for employment should pay particular attention to the labour market problems of Roma/Gypsies and include specific measures to improve their situation" (Recommendation No. (2001) 17 on improving the economic and employment situation of Roma/Gypsies and Travellers in Europe, adopted on 27 November 2001). In the spheres other than employment, the promotion of policies acting affirmatively in favour of the integration of certain underprivileged minorities first of all requires that more reliable information be collected on the situation of particularly vulnerable segments of the population, including minorities, in areas such as access to health care, education, or adequate housing.

An improved monitoring, at the level of each Member State, of the situation of minorities in specific fields most relevant to the integration of the members of these minorities (employment, education, and housing), could facilitate the launching of a process of collective learning between the Member States as to which measures promoting the integration of minorities are most successful, and which regulations or policies, on the contrary, should be avoided because of their potentially discriminatory effects. It could thus facilitate the identification of certain good practices in the field, and incentivize States to make progress in the direction of improved integration. However, the main objective of such monitoring should be seen in the context of an overall strategy to combat discrimination in each Member State. Therefore, however desirable it may be in the context of a collective learning process, the development at the level of the Union of commonly agreed indicators relating to the situation of minorities, and a harmonization of the means through which data are collected and analyzed within each State, should not be seen as a prerequisite. Indeed, each State may have to define the list of indicators most relevant in the national context, with regard especially to the existence of the territory of the State of certain minorities, and to the specific difficulties their integration may be facing under the circumstances existing in that State.

It is therefore essential that each Member State develops a set of indicators which makes it possible to identify, at regular intervals, the progress which has been made or, instead, the absence of such progress, and thus to improve our understanding of the factors which impede the achievement of full and effective equality. Only through the improvement of our understanding of such factors will it be possible for the debate to launched, at the level of each Member State, on the need for affirmative action in favour of certain underprivileged groups. There is little doubt that, for the moment, certain Member States lack even the most basic information on the position of minorities in areas such as health care, education, or housing.[67]

3.4. Recommendations

The preceding observations lead the Network to make the following proposals:

- There where access to nationality conditions or facilitates access to employment, education or housing, as well as to the other social goods to which Council Directive 2000/43/EC applies in accordance with its Article 3, it needs to be verified whether the rules governing access to nationality

---

governmental programmes for Roma, such as those adopted in 1991, 1996 and 1997, were not fully implemented in practice, the Advisory Committee considers it important that the Government ensure that adequate attention is paid to, and resources allocated for, the implementation of the new Strategy" (para. 20).

[67] The Draft Joint Report on Social Protection and Social Inclusion recently presented by the Commission acknowledges that : "Available statistical evidence at EU level on poverty and social exclusion still does not cover some of the most exposed groups. The NAPs/inclusion highlight that immigrants, ethnic minorities and the Roma, people with disabilities, the homeless, victims of people trafficking, people in or leaving care institutions and subsistence farmers face very particular risks. Also important is the concentration of disadvantage in particular communities and geographic areas, both urban and rural, where people are confronted with deep-seated factors of exclusion that tend to be transmitted across generations" (COM(2005)14 final of 27.01.2005, at 2.1.).

do not institute direct or indirect discrimination against certain persons defined according to their ethnic origin.

• The debate which the European Commission shall open on the need to expand Council Directive 2000/78/EC beyond its current scope of application which is limited to employment and occupation, should include the question whether the understanding of the notion of discrimination in the current Directives should not be clarified and further improved. In particular, it should be asked whether the prohibition of indirect discrimination should be seen as imposing an obligation on the Member States to monitor, by statistical means, the impact on ethnic and religious minorities of the measures they introduce or maintain in the fields to which the prohibition of discrimination applies. The imposition of such an obligation should be considered as inherent to the prohibition of discrimination. It should include both an obligation to develop impact assessments on an *ex ante* basis, when a new regulation or practice is introduced, in order to anticipate its potential impact, and an obligation to evaluate, *post hoc*, the effective impacts on ethnic or religious minorities of existing regulations or practices at regular intervals. As explained above, the protection of the right to respect for private life vis-à-vis the processing of personal data should not be seen as an obstacle to the introduction of such a form of statistical monitoring.

• The introduction within the practices of the Member States of an *ex ante* and *ex post* monitoring of the impact of regulations and policies on ethnic and religious minorities, in certain fields such as employment, education and housing, may be based on Article 13(1) EC, and form part of a revision of the Directives adopted on the basis of this provision, if and when these instruments are amended in the future. But in the field of employment, it could also be included as part of the renewed guidelines for the employment policies of the Member States, which would present the advantage of making it possible to go beyond the monitoring of the situation of ethnic and religious minorities in order to include the monitoring of the situation of linguistic minorities (including newly arrived immigrants). Finally, Article 13(2) EC, introduced by the Treaty of Nice, could provide an independent legal basis for the introduction of such monitoring processes. A combination of these possibilities should be considered. Indeed, only by locating the introduction of such monitoring of the situation of minorities elsewhere that under Article 13 EC may the situation of linguistic minorities be adequately addressed, except where, as with the Roma, the linguistic and ethnic categories intersect.

• If and when the existing Directives adopted on the basis of Article 13 EC will be re-examined with a view to their possible revision, that examination should include the question whether, in accordance with the understanding of the prohibition of discrimination in the case-law of the European Court of Justice,[68] the Member States should be made to allow the alleged victims of discrimination to prove discrimination by bringing forward statistics demonstrating the disparate impact on the members of the categories to which they belong of certain generally applicable, apparently neutral regulations or practices. This is turn requires that such statistics are collected and made available, and that they are updated on a regular basis.

• The European Commission could lead by example by including, in the impact assessments it prepares on its legislative proposals, an examination of the impact on the situation of minorities. The existence of Union-wide harmonized indicators, ensuring a comparability of the data collected within each Member State with respect to the situation of the minorities in that State, should not be seen as a prerequisite to such impact assessments of Union legislation and policies. Indeed, in assessing legislative or regulatory proposals at the level of the Union, the relevant question is whether the adoption of these proposals and their implementation by each Member State may lead, in certain or all

[68] ECJ, 27 October 1993, *Enderby*, C-127/92, *ECR*, p. I-5535, Recital 18 (by considering that “Where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory”, the Court has recognized that an effective protection from discrimination requires that statistics be collected in order to make it possible to identify situations where the application of certain apparently neutral regulations, criteria or practices, have a disproportionate impact on certain protected categories).

States, to a situation where certain minorities would be negatively and disproportionately affected, would be put at a particular disadvantage, or would not have their specific needs recognized. In order to answer adequately such a question, the reliance on the indicators defined at the level of each Member State should be seen as an advantage, rather than as an obstacle, insofar as this ensures the visibility in such assessments of minorities whose situation may be neglected in the context of less refined assessments conducted at the level of the Union.

4. Prohibition of incitement to national, racial or religious hatred or discrimination, in particular in the media, and the representation of minorities in the media

4.1 The prohibition of incitement to national, racial or religious hatred or discrimination

Article 29 of the Treaty of the European Union mentions the prevention and combating of racism as a way to fulfil the objective of the Union to provide citizens with a high level of safety within an area of freedom, security and justice. The Council adopted on 15 July 1996 a joint action on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia.[69] On 28 November 2001, the Commission adopted a proposal for a Council framework decision on combating racism and xenophobia, based on Articles 29(1) and 34 EU.[70] The objective of this proposal is the approximation of the laws and regulations of the Member States regarding racist and xenophobic offences by the definition of a minimum level of sanctions common to the member states. In its conclusions and recommendations on the situation of fundamental rights in the European Union and its member states in 2003, the EU network of independent experts on fundamental rights encouraged the Council to follow upon this proposal of the Commission.[71]

According to Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, the States parties undertake to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin" and "declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law". Article 20 ICCPR prescribes the prohibition of "[a]ny advocacy of national, racial or religious hatred tat constitutes incitement to discrimination, hostility or violence". Finally, Article 6 (2) FCNM imposes the obligation on states parties "to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural or religious identity." The ACFC has insisted on several occasions on the necessity to ensure this protection in an effective way, in particular through the criminal law.[72]

The level of the sanctions for incitement to national, racial or religious hatred varies between the different States. They comprise a fine and/or imprisonment up to one year (**Belgium, France, Slovak Republic**), two years (**Austria, Denmark, Finland, Lithuania, Luxemburg**, the **Netherlands, Slovenia**), three years (**Germany, Hungary, Italy, Latvia, Spain**), four years (**Sweden**), five years (**Cyprus, Slovenia**) or up to seven (the **United Kingdom**) or even ten years (**Ireland**)[73]. However, the

---

[69] *O.J.* L 185, 24 July 1996, p.5.
[70] COM(2001) 664/F. See also *Report on the Situation of Fundamental Rights in the European Union in 2003*, pp.22-24.
[71] Conclusions and Recommendations on the Situation of Fundamental Rights in the European Union and its Member States in 2003, p.64.
[72] 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".
[73] In **Ireland**, it is a criminal offence to incite to hatred against any group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, sexual orientation or membership of the Traveller

provision of these crimes with their sanctions does not mean that they are always effectively prosecuted and well enforced. On the contrary, in many States, the legal provisions criminalizing incitement to national, racial or religious hatred remain underutilized, either because of the passivity of the victims or – more frequently – because of the unwillingness of the prosecuting authorities or of the courts to use these provisions.[74] If and when the Framework Decision on combating racism and xenophobia is adopted, therefore, consideration should be given to the means through which the implementation of this instrument shall be ensured : such an evaluation should concern, not only the adoption of the legal measures required, but also their effective dissemination to the stakeholders, especially non-governmental organizations specialized in combating racism and xenophobia, who should ideally be implicated in the process of implementation. Moreover, by analogy to what has been accomplished with respect to Directives 2000/43/EC and 2000/78/EC,[75] a programme of accompanying measures ensuring this dissemination, including through the training of lawyers, the police, magistrates and civil society organisations, might be envisaged.

4.2 The representation of minorities in the media

In the field of the media, 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,[76] as amended by Directive 97/36/EC of the European Parliament and the Council of 30 June 1997,[77] obliges the member states to ensure that “broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality” (Article 22).

Article 6 (1) FCNM provides that states “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.”[78] The ACFC insists on the importance of the access of persons belonging to minorities to the media as a means to promote intercultural understanding.[79] On the other hand, the ACFC invites states to take action to train media professionals to make them more aware of the situation of minorities and multiculturalism so that they contribute to establishing a climate of tolerance and mutual understanding.[80] In the same way, ECRI has stressed the importance of the need to ensure that reporting does not perpetuate racist prejudice and stereotypes and also to the need to play a proactive role in countering such prejudice and stereotypes, in particular by adopting codes of self-regulation.[81]

The answers of the Member States to these recommendations have been varied. Whereas in some States, such as in **Luxemburg**, no measures are undertaken to combat the stereotyping of minorities in the media, many States provide for a legislative framework which prohibits racist portrayal of minorities in the media (**Belgium**, **Czech Republic, Hungary, Poland**). In certain States,

---

Community under the *Prohibition of Incitement to Hatred Act 1989*. The legislation however is currently under review, due mainly to disquiet that the threshold, that is intention to stir up hatred, is too high and means that few cases will result.

[74] This has been frequently remarked by monitoring bodies such as, especially, the UN Committee on the Elimination of Racial Discrimination (e.g., with respect to Sweden, CERD/C/64/CO/8, § 8) or the European Commission on Racism and Intolerance (see, e.g., again with respect to Sweden, CRI(2003)7, § 20).

[75] See Council Decision of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006), OJ L 303 of 2.12.2000, p. 23.

[76] *O.J.* L 298, 27 November 1989, pp.0023-0030.

[77] *O.J.* L 202, 30 July 1997, pp.0060-0070.

[78] See also Article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965.

[79] 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).

[80] See Opinion on Lithuania, 21 February 2003, ACFC/OP/I(2003)008, para. 45 and Opinion on Rumania, 14 September 2001, ACFC/OP/I(2002)005, para. 35. See also Article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965.

[81] See Third report on Germany, 5 December 2003, CRI (2004) 23, para. 78; or, with respect to Sweden, CRI(2003)7, § 69.

recommendations have been addressed to media professionals in the form of guidelines or codes of conduct (**Austria, Belgium, Finland, France, United Kingdom**). Ombudsman institutions and Equality bodies may have been involved in the preparation of such guidelines (**Sweden, United Kingdom**). Conferences, seminars and courses for journalists have been created (**Lithuania**), and informative programs about minorities have been prepared for the public (**Czech Republic**, **Lithuania**).

The Radio and Television Broadcasting Act[82] adopted in the **Czech Republic** offers a good example of what may be achieved through legislative measures in this area. The Act explicitly prohibits programmes inciting to hatred for or violence against a group of population on the grounds of race, sex, religion, etc. Section 17 of the Act defines as one of the criteria for the award of a broadcasting licence the applicant's ability to contribute to the development of the culture of national, ethnic and other minorities in the Czech Republic. Section 31 requires the broadcaster to offer a balanced range of programmes for all groups of the population, taking into account their age, sex, colour of their skin, faith, religion, political or other opinion, national, ethnic or social origin and belonging to a national minority. This is of course not an isolated example. In **Germany** – besides relevant provisions in the various Land Broadcasting Acts and State Treaties – according to Section 6 of the Deutsche-Welle-Law of 1997 revised in 2004, programmes are inadmissible which incite to hatred against a national, racial, religious or ethnic group, incite violent or arbitrary action against them, or violate the dignity of others by insulting, maliciously disdaining or disparaging parts of the population or any of the aforementioned groups. In **Hungary**, according to Article 3 of Act I of 1996 on Radio and Television, the broadcaster shall respect the constitutional order of the Republic of Hungary, its activity may not violate human rights and may not be suitable for inciting hatred against individuals**,** sexes, peoples, nations, national, ethnic, linguistic and other minorities, and church or religious groups. The Act further specifies that broadcasting may not aim, neither overtly nor covertly, at insulting or excluding against any minority or majority, or at presenting these and discriminating against them on the basis of racial considerations.[83] In **Ireland**, Radio Telifís Éireann (RTE), the state-owned television and radio broadcaster in its Programme Makers' Guidelines[84] states that "programmes should reflect in a non-judgmental sense the diversity of beliefs that exist in Ireland (including non-belief)." The broadcaster believes that as Ireland evolves into a multi-cultural and ethnically diverse nation it is important that these changes are recognised - "RTE is committed to serve all sections of society and will reflect the diversity of society in…programming and related activities, in attitudes portrayed on air and in …publications." Programme-makers are also encouraged in the Guidelines when making programmes to include members of marginalised groups rather than experts acting as spokespeople for these groups. Clause 10 of the National Union of Journalists of Ireland's Code of Ethics provides that journalists should only mention a person's "age, race, colour, creed…if this information is strictly relevant. A journalist shall neither originate nor process material which encourages discrimination, ridicule, prejudice or hatred on any of the above mentioned grounds." In **Poland**, Article 18 of the Law of 29 December 1992 on Radio and Television[85] provides that programmes and other broadcasts cannot propagate actions that are in conflict with the law or the Polish reasons of State, as well as attitudes and opinions discrepant to morality and social well being. They especially cannot include contents that are discriminatory on the basis of race, sex or nationality. In **Lithuania**, the Ethnic Minorities Staff within the Radio is a unit specifically dealing with the production of broadcasts aimed at national minorities and also broadcasts about national minorities aimed at the Lithuanian society in general. As a rule, at the National Radio and Television, programmes for the national minorities are being prepared by journalists representing a national minority concerned. Moreover, conferences and seminars on stereotypes related to national minorities in the mass media have been organised by the

---

[82] Zákon _. 231/2001 Sb., o provozování rozhlasového a televizního vysílání, ve zn_ní pozd_j_ích p_edpis_ (Law No. 231/2001 Coll. of Laws, on the Radio and Television Broadcasting, as amended by later laws).

[83] This is further emphasized for public (service) broadcasters: "The public service broadcasters, and the public broadcaster, in particular, are obliged to respect the dignity and basic interests of the nation, the national, ethnic, linguistic and other minorities, and may not offend the dignity of other nations." Article 23.1 of the Media Act.

[84] Radio Telifis Eireann, *Programme-Makers Guidelines,* 2002

[85] *The Journal of Laws* of 1993, no. 7, position 34, along with following amendments.

Department of National Minorities and Lithuanians Living Abroad together with the Council of National Communities, the Lithuanian Centre of Human Rights, the Open Society Fund – Lithuania, the Centre of Civic Institutions, the Information and Documentation Centre of the Council of Europe.[86]

Other States offer examples of good practices in this field. In **France,** the High Council for the Audiovisual Sector (CSA), the administrative authority charged with supervising the audiovisual media, has published several recommendations in order to raise awareness among radio and television networks of minority issues[87]. It has also issued a recommendation on the representation of "visible minorities", which has led to changes in the general conditions of the public channels and the agreements binding the private media to the CSA. For example, Article 9 of the agreement concluded between the CSA and the broadcasting company TF1 stipulates, "The company shall in its programmes […] respect the different political, cultural and religious sensitivities of the audience; […] promote the values of integration and solidarity that are those of the Republic; […] take into consideration, in its broadcasts, the diversity of ethnic origins and cultures of the national community". In the **United Kingdom**, the Commission for Racial Equality has issued guidance for the media on stereotypes in the coverage of race and ethnic issues (www.cre.gov.uk/media/). Such stereotypes may also be the basis of complaints to the Press Complaints Commission in respect of newspapers and magazines, the Advertising Standards Authority in respect of advertising other than through broadcasting – which are both self-regulatory bodies –, or Ofcom (Office of Communications) in respect of broadcasting. There is also an Internet Watch Foundation, funded by internet service providers, which traces potentially illegal material and requests the providers to remove it, as well as providing details to the police.

Council Directive 89/552/EEC shall be subject to an evaluation in 2005. It may be recommended in the course of such an evaluation to give special consideration 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. 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.[88]

5. Freedom of Religion

Freedom of religion is protected by Article 10 of the Charter of Fundamental Rights. Article 4 of the Charter on the right to education, guarantees the freedom to found educational institutions with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions. According to Article 8 FCNM, a person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organisations and associations. The ACFC insists on the fact that all religious communities should be able to practice their religion without discrimination.[89]

[86] See Report on the Implementation of the Framework Convention for the Protection of National Minorities in the Republic of Lithuania, ACFC/SR(2001)007,http://www.coe.int/T/e/human_rights/Minorities/2._FRAMEWORK_CONVENTION_(MONITORING)/2._Monitoring_mechanism/3._State_reports/1._First_cycle/1st_SR_Lithuania.asp#TopOfPage.

[87] See http://www.csa.fr.

[88] See Case 353/89, *Commission v. Netherlands*, [1991] ECR 4089 (Recital 30); Case 288/89, *Stichting Collectieve Antennevoorziening Gouda et al. v. Commissariaat voor de Media*, [1991] ECR 4007 (Recital 23); Case 148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, [1993] ECR 513 (Recitals 9 and 10).

[89] Opinion on Armenia, 16 May 2002, ACFC/OP/I(2003)003, para.43.

5.1 State churches

According to Declaration No.11 annexed to the Treaty of Amsterdam, "[t]he European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States".

Denmark, the **United Kingdom** and **Greece**, although their respective systems vary, have in common the fact that they grant a privileged status to one religion ; **Finland** recognizes a special position to the Lutheran and Greek Orthodox Churches. According to the case law of the European Court of Human Rights, a state church system is as such not contrary to Article 9 ECHR, which guarantees the freedom of religion. However, such a system should be coupled with specific guarantees in order to comply with this provision. In particular, where a state church system exists, particular attention should be given to the situation of religious minorities to ensure that their freedom of religion and their right to equality are respected.[90]Notably, "no one may be forced to enter, or be prohibited from leaving, a State Church."[91] And a person may not be "compelled to be involved directly in religious activities against his will without being a member of the religious community carrying out those activities."[92] More generally, the European Court of Human Rights insists on "the need to maintain true religious pluralism, which is inherent in the concept of a democratic society."[93] This requirement, combined with the non-discrimination requirement, may impose limits to the dominant character recognized to any particular religious faith in the national legal system. Indeed, under the International Covenant on Civil and Political Rights, the Human Rights Committee has taken the view that when a State chooses to provide public funding to schools of one religion, it should make this funding available to all religious schools without discrimination[94]. In **Denmark**, the Evangelical Lutheran Church is the Danish National Church. It is the sole religious community to benefit from financial support from the state, which currently accounts for 10.3% of its income. The balance of the income stems mainly from the church tax, which is only paid by members of the Danish National Church. The Advisory Committee has considered that, given the existence of other religions in Denmark, the fact that state support is made available only to the Evangelical Lutheran Church (both through direct funding and through the Church tax, from which persons not belonging to this Church can be exempted at their request), have to be reviewed, in the light of the right to equality before the law and equal protection of the law.[95] A similar problem may arise in **Finland**, where the Lutheran and Greek Orthodox Churches are in a privileged position as the State takes care of collecting church taxes from their members, whereas other religious communities depend on voluntary contributions by their members ;[96] moreover, juridical persons, such as business corporations, pay a certain percentage of their taxes to these two churches through the state tax authorities.

In **Greece**, Article 3 of the Constitution defines the Eastern Orthodox Church of Christ as the « prevailing religion ». Certain laws on religious matters have been criticized by several international bodies. This is particularly the case with the law prohibiting proselytism. Although the relevant legislation in this area applies to all, Orthodox and others, the old practice reveals a disproportion with respect to prosecution and sentencing for proselytism to the disadvantage of minority groups. Since the judgments in the cases of *Kokkinakis v. Greece* and *Larissis v. Greece* of the European Court of Human Rights, there have been virtually no more prosecutions for proselytism. Nevertheless, Acts 1363/1938 and 1672/1939, which penalize excessive proselytism, remain in force, despite calls to

[90] Opinion on Norway, 12 September 2002, ACFC/OP/I(2003)003, para.39; Opinion on Finland, 22 September 2000, ACFC/OP/I(2001)002, para.29; Opinion on Denmark, 22 September 2000, ACFC/OP/I(2001)005, para.29; Opinion on the United Kingdom, 30November 2001, ACFC/OP/I(2002)006, para.60.

[91] *Darby v. Sweden,* Report of the EurCommHR of 9 May 1989 (annex to the judgement of the ECtHR of 23 October 1990, Series A, n. 187, para.45).

[92] *Ibid*., para.51.

[93] Eur. Ct HR, 26 September 1996, *Manoussakis et al. v. Greece*, § 44;Eur. Ct HR, 13 December 2001, *Metropolitan Church of Bessarabia and others v. Moldova*, § 119; Eur. Ct HR, 24 June 2004, *Vergos v. Greece*, § 35 (only in French).

[94] Human Rights Committee, *Waldman v. Canada***,** Communication n°694/1996, 3 November 1999, CCPR/C/67/D/694/1996.

[95] Opinion on Denmark, 22 September 2000, ACFC/INF/OP/I(2001)005, para. 29.

[96] See the Opinion of the Advisory Committee of the FCNM on Finland, 22 September 2000, ACFC/INF/OP/I(2001)002, para. 29.

repeal them[97]. A second question, revealed by the *Manoussakis* case before the European Court of Human Rights, concerns the legislation on places of worship. Under the same laws of 1939, the construction of any place of non-Orthodox worship is subject to the approval of the Ministry of Education and Religion. Before issuing its decision, this Ministry systematically asks for a (non-binding) opinion from the local Orthodox bishop. This procedure has often caused considerable delays, as the above-mentioned case shows. Following the judgment of the Court, the situation has improved. Nevertheless, despite calls to repeal it[98], the legislation of 1939 remains in force. It should be pointed out that in another judgment (no. 1411 of 2003), the fourth section of the Council of State decided to refer to the plenary assembly a case concerning the constitutionality of this legislation governing the establishment of places of worship.

5.2 The registration and recognition of religious organisations

A number of the Member States provide either for a system of *registration* of religious groups, which often is a condition for the recognition of their legal personality, or for the *recognition* of the most representative religious groups, which leads to recognize those groups certain advantages, for example fiscal advantages, or the right to teach the concerned religion in public schools and/or to organise chaplaincy in public institutions, such as the army, prisons, and hospitals. These two systems may be combined. Thus, **Austria**, the **Czech Republic**, **Hungary**, **Lithuania**, **Poland**, and **Slovakia** have a system of registration of religious groups.[99] A system of *recognition* can be found in **Belgium**,[100] **Lithuania** or in the **French** *départements* of Bas-Rhin, Haut-Rhin and Moselle, but also in **Austria**, which combines a system of registration with the recognition of certain religious groups. A combination of both systems may also be found in the **Czech Republic**, where registered churches may, under certain conditions, obtain the right to exercise the so-called "special rights", which include the right to teach religion at state schools, empower a person performing religious service to religiously work in the army, prisons, etc., found church schools, and be financially supported by the State if the church asks for it.[101] In certain States moreover, such as **Spain**, **Italy** or **Luxembourg**, the state may enter into *agreements* with religious communities to organise their relations.

The refusal to authorize a group of believers to create a religious organisation endowed with a legal personality constitutes an interference with the rights protected under Article 9 ECHR, both those of the individuals concerns and those of the group as such, insofar as religious communities traditionally exist in the form of organised structures and the acquisition of legal personality be a religious group makes it possible for that group, *inter alia*, to hold property or to conclude employment contracts,

[97] *Report by M. A. Gil-Robles, Commissioner for Human Rights, on his visit to the Republic of Greece from 2 to 5 June 2002, 17.7.2002*, CommDH(2002)5, par. 12-14, http://www.commissioner.coe.int See A. Amor, *Interim report of the Special Rapporteur on religious intolerance: visit to Greece*, A/51/542/Add.1 (7.11.1996), http://www.unhchr.ch, par. 20-22. See in the same sense the report of the National Human Rights Commission on religious freedom (Annual Report 2001), http://www.nchr.gr

[98] *Report by M. A. Gil-Robles*, op. cit., par. 15. See A. Amor, op. cit., par. 23-25. See also in the same sense the report of the National Human Rights Commission on religious freedom (Annual Report 2001), http://www.nchr.gr

[99] In **Poland**, **Slovakia**, or **Hungary**, only those religious associations which are officially registered benefit from tax discharges (Poland), or may receive subsidies from the State (Slovakia and Hungary). In Hungary, moreover, registered churches have the right to organise optional religious education classes at state schools. In Slovakia, registered churches and religious societies have the right, in accordance with conditions stipulated by the law of the Slovak Republic, to administer pastoral, clerical, and educational activities in all educational, social care, and health care establishments.

[100] In **Belgium,** recognition is granted by law. Belgian law does not specify the criteria on the basis of which this recognition is granted. The Members of Parliament therefore have discretionary power in this area. In practice, the governments consistently refer to four conditions: the religion must have a sufficiently high number of adherents, it must be structured, it must have been established in the country for a sufficiently long time, and must be of "social interest". The authorities also require that the religious community has one single representative body, called "religious body", which can represent the religious community with the State for the management of the material and financial aspects of the religion. This requirement sometimes creates problems for religions which, unlike the Catholic church (which inspired this model), do not have a centralized structure. This problem applies in particular to the Islam.

[101] See the Act No. 218/1949 Coll. of laws, on Economic Provision of Churches and Religious Societies, as amended by later laws, in Czech Zákon o hospodá_ském zabezpe_ení církví).

which may be conditions for the effective exercise of freedom of religion.[102] Therefore, it is important that the conditions imposed for the registration of any religious organisation be objective, relying for instance on the number of adherents, that they do not amount to a disproportionate interference with the freedom of religion,[103] that they are applied without discrimination,[104] and that an effective remedy be open to the individuals or groups which are denied the registration they have sought. Indeed, the purpose of registration should be to verify whether the religious group complies with certain formal requirements justified by administrative convenience, and whether it does not threaten the public order. It should be recalled in this regard that according to the European Court of Human Rights, the right to freedom of religion "excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate".[105] Moreover, the formal registration of a religious group should not be seen as a condition of the exercise of freedom of religion. Any religious faith, whether or not registered and thus recognized as a religious organization having a legal personality, may exercise this freedom, without the formal attribution by the State of legal personality being a precondition for this.[106]

5.3 Accommodation of religious practices

Religious freedom is not only to be respected. It should impose positive duties on the State, as recognized by the European Commission on Human Rights.[107] This can be derived as well from Article 5 (1) FCNM, according to which the states undertake to promote the conditions necessary for persons belonging to national minorities to practice their religion. Moreover, in its General Policy Recommendation No.5, ECRI recommends governments of the member states to ensure that public institutions are made aware of "the need to make provision in their everyday practice for legitimate cultural and other requirements arising from the multi-faith nature of society".[108]

Indeed, freedom of religion should be seen as imposing on both public and private parties an obligation to provide reasonable accommodation to all religious faiths, where the application of generally applicable and neutral might otherwise result in indirect discrimination on the grounds of religious belief. In the judgement *Vivien Prais v. Council* of 27 October 1976, the European Court of Justice has stated that for the organisation of a job competition for the European Communities, the appointing authority is "obliged to take to take reasonable steps to avoid fixing for a test a date which would make it impossible for a person of a particular religious persuasion to undergo the test", "if

---

[102] Eur. Ct. HR, *Metropolitan Church of Bessarabia and Others v. Moldova* (Appl. N° 45701/99) judgment of 13 December 2001, § 105 and § 118.

[103] It is in **Slovakia** that the conditions for registration of religious communities appear to be the most restrictive. According to the Act no. 192/1992 Coll. on registration of churches and religious societies, as amended, the church or religious society may submit proposal on registration to the Ministry of Culture only if it proves it has a support of at least 20,000 adult people with permanent residence on the territory of the Slovak Republic. However, on the basis of the Act on the freedom of religion and on the status of churches and religious societies, 14 churches and religious societies which had existed and been recognised at the time of adoption of this law, were registered *ex lege* and they did not have to meet the threshold of 20,000 supporters.

[104] In **Poland**, the application for registration must also be submitted by a group of at least 100 individuals, but they must be Polish citizens: see Art. 31 and 32 of the Act of 17 May 1989 on guarantees concerning freedom of conscience and denomination (*The Journal of Laws* of 2000, no. 26, position 319). This may be in violation of Article 12 EC. It should be recalled, moreover, that differences of treatment based exclusively on the formal ground of nationality are treated with a heightened suspicion in the case-law of the European Court of Human Rights.

[105] Eur. Ct. HR, *Manoussakis et al. v. Greece* judgment of 29 August 1996, § 47.

[106] We would otherwise arrive at the paradoxical situation that a State could deprive certain groups from the benefit of rights and freedoms of the Convention simply by denying them a legal personality (see Eur. Ct. HR, judgment *Canea Catholic Church v. Greece* of 16 December 1997, *Rep.* 1997-VIII, p. 2857).

[107] Eur. Comm. HR, 12 March 1981, *X. v. United Kingdom*, Application No.8160/78, D.R. 22, p. 3. See also ECtHR, 20 September 1994, *Otto-Preminger Institute v. Austria*, Series A-295, § 47 and Eur. Ct HR, 25 November 1996, *Wingrove v United Kingdom*, Series A 1996-V No.23, § 48.

[108] ECRI General Policy Recommendation No.5 on combating intolerance and discrimination against Muslims, adopted on 27 April l2000, CRI (2000) 21.

informed of the difficulty in good time".[109] In *Thlimmenos v. Greece*, as has been recalled, the European Court of Human Rights considered that the refusal to take into account the religious beliefs of the applicant could constitute a form of prohibited discrimination, resulting from a failure to recognize relevant differences in the application of generally applicable and neutral laws.

There appears to be a growing tendency, among the Member States of the Union, towards accepting certain accommodations within public institutions (schools, hospitals, prisons and army) to allow minority religions' adherents to practice their religion, at least with regard to adapting meals composition to religious dietary requirements and/or permitting to take leave for religious holidays. In some States, such accommodations are laid down by law or regulation. In other States, they are provided for in practice.

In the **United Kingdom**, for instance, specific provision is made for the possibility of receiving meals which respect one's religious prescriptions in respect of schools (Education Act 1996) and prisons (Prison Act 1952). A similar result is achieved for hospitals through a guidance issued by the Department of Health and it is achieved, subject to operational requirements, in the case of the armed forces. In the **Czech Republic**, the Act on performance of the sentence of "taking off freedom" and on amendments of several related acts[110], states that, in the organisation of the prison, cultural and religious traditions of the detained convict in respect of meals are taken into account as much as possible (§ 16).[111] Similarly, in **Hungary**, with respect to prisons, at the designation of meals the religious claims of the inmates have to be taken into consideration within the facilities of the penitentiary institution (Art. 147.5); and patients taken in charge under the social security system medical attendance may under certain conditions receive meals conforming to his/her religious beliefs[112]. In **Ireland**, as a matter of practice religious requirements are accommodated in public institutions such as schools, hospitals, the army, and prisons, on a non-statutory basis. In **Belgium**, there is a long-standing practice in the army of adapting meals to religious prescriptions. In the prisons, in accordance with Article 87 of the general regulations governing penitentiary establishments, amended in this sense by the Ministerial Decree of 15 April 2002, prisoners may ask for meals that meet the requirements of their religious faith if they do not need to be prepared according to certain rituals. They may also have their meals at other times than the regular times if their religious convictions so require. Finally, they may at their request receive meals from outside prison that have been prepared according to certain rituals, yet the financial contribution of the Treasury to the provision of such meals shall not exceed the day price fixed for prisoners' meals[113]. In practice, according to information obtained from the Ministry of Justice, the prison authorities offer pork-free meals to prisoners who so request. The prison canteens, however, do not supply "hallal" meat, since this service is considered too expensive. For kosher food, the authorities have concluded an agreement with the Chief Rabbinate: Jewish prisoners can have kosher meals supplied by the Jewish community, which bears the extra cost of this service. Religious dietary prohibitions are also taken into account in the public hospitals. In schools, this kind of decision depends on the principal of the establishment. In **France,** pupils at State educational establishments and people who use the public hospital services can in principle request a diet in accordance with the precepts of their religious faith. In **Cyprus**, no special provision has been taken regarding specific dietary needs of children due to their religion in schools, however, the Central Prison of Nicosia have special dietary provisions for Muslim individuals. In the **Slovak Republic**, the detainees have the right to obtain meals that respect

[109] ECJ, 27 October 1976, *Vivien Prais v. Council*, 130/75, *Reports 1976*, p. 01589, point 19. The European Court of Justice also affirms that "it is desirable that an appointing authority informs itself in a general way of dates which might be unsuitable for religious reasons, and seeks to avoid fixing such dates for tests" (point 18).

[110] Zákon _. 169/1999 Sb., o v_konu trestu odn_tí svobody a o zm_n_ n_kter_ch souvisejících zákon_ (Act No. 169/1999 Coll. of laws, as amended by later laws).

[111] No such provisions are included in the current School Act, however : see Zákon _. 29/1984 Sb, o soustav_ základních a st_edních _kol (_kolsk_ zákon) (Act No. 29/1984 Coll. of laws, on the system of primary and secondary schools (the School Act), as amended by later laws).

[112] Act No. LXXXIII of 1997 on the services of the compulsory health insurance.

[113] Article 12 of the Ministerial Decree of 15 April 2002 amending the Ministerial Decree of 12 July 1971 containing general instructions for the penitentiary establishments (*M.B.*, 11 May 2002).

their religion's food rules. In **Luxembourg,** no school provides special meals, although children can ask for vegetarian meals. In prison, there have been very rare special requests, and the prison authorities try to accommodate them, as in the schools, by providing meals that comply with the prohibitions. In **Sweden**, the composition of the meals served, for example the offering of a vegetarian option, at Swedish schools shows that in practice respect for various religions is observed. In **Finland**, members of religious minorities are allowed to follow their own dietary requirements in public institutions.

A similar tendency towards improving the accommodation of religious practice may be identified with respect to the right to religious holidays. In **Austria**, section 13 of the School Time Act (*Schulzeitgesetz*) allows that pupils be exempted from attendance for religious reasons in certain cases; similarly, Section 45 of the Military Act (*Wehrgesetz*) empowers the commander of the unit to grant special leave for personal reasons. In **Italy**, the right to take leave for religious holidays is often foreseen in collective agreements. In **Poland**, persons belonging to religious minorities have the right to leave of absence from work or school during the period necessary to celebrate their religious holidays. Leave of absence from work may be given under the condition that the time of leave will be made up for without the right to additional payment for work during days that are legally free from work or work in overtime[114]. In **Belgium,** a decree of the Flemish government authorizes pupils to be absent from school to celebrate their religious holidays recognized by the Constitution,[115] but the French and German-speaking communities have not adopted such a provision, thus leaving in those communities the decision to authorize certain pupils to be absent for a religious feast to the discretion of the principal of the educational establishment. In the army, it has been a long-standing custom to authorize the members of the armed forces to take leave for religious reasons insofar as the obligations of the service so permit. In **France,** in the State schools, leave of absence is granted on an exceptional basis and for certain days, insofar as they correspond to the religious feasts featuring on the calendar that has been drawn up at the national level and that they do not disrupt the regular schooling. In the public service, the principle of secularism does not prevent the departmental heads from granting exceptional leave of absence for religious feasts. Similarly, in **Luxembourg,** absence from school for religious feasts is normally allowed on a case-by-case basis by the schools. On the other hand, a general dispensation from compulsory school attendance on Saturdays for a Seventh Day Adventist pupil has been declared incompatible with the Luxembourg Constitution: the Constitutional Court considered that a child's right to education must not be threatened by consistent absence on Saturdays, even for religious reasons.[116]

In certain cases, although the accommodation of religious practices with respect to holidays is made possible by the existence of general clauses, which may be relied upon to that effect, there is no right to such holidays, and the risk of an arbitrary application of such clauses may be problematic. Thus in **Hungary**, a decree of the Minister of Culture and Public Education on the operation of educational institutions enables the excusal of the absence for the student if it had got a permission as prescribed by the rules and regulations of the school (Art. 20.2b) : this provision is general enough to be applied to absences connected to the practice of religion, however it does not constitute a safeguard for religious minorities, as it is highly dependent on the rules of the actual school and on the appreciation

---

[114] Based on Article 42 of the act of 17 May 1989 on guarantees concerning freedom of conscience and denomination (*The Journal of Laws* of 2000, no. 26, position 319). The rules concerning granting leave from work are regulated by the Ordinance of the ministers of labour and social policy, and national education of 11 March 1999. The Labour Code, in Article 11 no. 3, states that any kind of discrimination as part of labour relations, i.e. because of religious beliefs, is unacceptable. The Polish law does not acknowledge the possibility of refusing to excuse from work or school for the period of celebrating religious holidays, which are not legally free from work.

[115] Article 10c, 2° of the Decree of the Flemish government of 12 November 1997 on the supervision of the enrolment of pupils in primary education, as amended by the Decree of 21 March 2003.

[116] The judgment given on 20 November 1998 by the Constitutional Court subsequently gave rise to an application submitted to the European Court of Human Rights, in which the parents complained about the fact that they were unable to keep their child from school on Saturdays in accordance with the precepts of their faith. The Court, however, found the application inadmissible and manifestly ill-founded, thus endorsing the reasoning of the Constitutional Court: Eur. Ct. HR, *Martins Casimiro and Cerveira Ferreira v. Luxemburg*, decision (inadmissibility) of 27 April 1999 (Appl. N° 44888/98).

of the person entitled to give the permission, although the new Antidiscrimination Act should prevent discriminatory practices in this regard.

5.4 The wearing of religious signs in schools

In *Dahlab v. Switzerland*, the European Court of Human Rights took the view that a measure prohibiting a teacher converted to the Muslim religion from wearing a headscarf while teaching could be considered, in the circumstances of the case and having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, justified in principle and proportionate to the stated aim of protecting the rights and freedoms of others, public order and public safety[117]. In the *Leyla Sahin v. Turkey* case of 29 June 2004, a chamber of the Court then also confirmed a previous case-law from the European Commission of Human Rights that the prohibition of the wearing of a headscarf by students in public universities in Turkey could be deemed necessary in a democratic society to the protection of the rights and freedoms of others and to the protection of public order. However, to justify this conclusion, the Court strongly insisted on the specificity of the situation prevailing in Turkey: "In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practise that religion or on those who belong to another religion may be justified under Article 9 § 2 of the Convention. In that context, secular universities may regulate manifestation of the rites and symbols of the said religion by imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others."[118] Hence, it is far from clear that a similar measure adopted in another context would be deemed compatible with article 9 of the Convention. Moreover, the *Leyla Sahin* judgment of 29 June 2004 is not final yet, as it has been accepted for a referral to the Grand Chamber of the European Court of Human Rights.

The present case-law of the European Court of Human Rights does not support the view that the prohibition of the wearing of religious signs in public schools[119] constitutes either a violation of the freedom of religion, or discrimination in the exercise of one's religion, under Articles 9 and 14 of the European Convention of Human Rights. On the other hand, this case-law does stand for the proposition that no religious faith may be targeted by a regulation of vestimentary codes in public schools: any such regulation should be neutral between religious faiths and generally applied to all faiths. As to the approaches adopted by the Member States, on the other hand, with the notable exception of **France**, they are generally converging towards the recognition that religious insignia – such as, in particular, headscarves wore by Muslim girls – should be tolerated, unless there exist legitimate reasons, other than the desire to preserve the "neutrality" of the public sphere by excluding from that sphere the presentation of religious affiliations, to prohibit them in well-defined circumstances. The need to protect the value of equality between men and women may constitute such a legitimate reason. It should be recalled in this respect that, under Article 22 of the FCNM, nothing in that instrument should be construed as "limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party of under any other agreement to which it is a Party". However, a prohibition of particular religious signs without any justification should be considered arbitrary and a violation of the freedom of religion protected

[117] ECtHR, *Dahlab v. Switzerland*, decision of 15 February 2001.
[118] ECtHR, 29 June 2004, *Leyla Sahin v. Turkey*, para. 99.
[119] The issue is different with respect to private educational institutions, because these may seek to promote a particular religious belief or an ethos, and are not bound by the same requirement of neutrality between faiths as public institutions (in the case-law of the European Commission of Human Rights, see Eur. Commiss. HR, *Rommelfanger v. Federal Republic of Germany* (Appl. N° 12242/96), dec. of 6 September 1989, DR 62, p. 151). Thus, the Dutch *Commissie Gelijke Behandeling* [Equal Treatment Commission] adopted an opinion in 2003 about the case of a catholic secondary school which had prohibited its students to wear headscarves or any other clothing that reflected a non-catholic religious conviction. Although the Commission considered this to be unequal treatment, it was of the opinion that this treatment came within the scope of one of the exceptions on the general prohibition of discrimination: religious schools can apply admission requirements that are necessary to uphold their religious identity (CGB, 5 August 2003, *oordeel* 2003-122).

under Article 9 ECHR and Article 18 ICCPR. This has been confirmed by the Human Rights Committee in the final views it delivered on 5 November 2004 under Communication No. 931/2000 (*Hudoyberganova v. Uzbekistan*),[120] where it noted (at para. 6.2.):

> The Committee considers that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion. As reflected in the Committee's General Comment No. 22 (para.5), policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are inconsistent with article 18, paragraph 2, of the Covenant. It recalls, however, that the freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations, which are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others (article 18, paragraph 3, of the Covenant). In the present case, the author's [a student at the Persian Department of the Faculty of Languages of the State Institute for Oriental Languages of Tashkent] exclusion took place on 15 March 1998, and was based on the provisions of the Institute's new regulations [under which students were no longer allowed to wear religious attire]. The Committee notes that the State party has not invoked any specific ground for which the restriction imposed on the author would in its view be necessary in the meaning of article 18, paragraph 3. Instead, the State party has sought to justify the expulsion of the author from University because of her refusal to comply with the ban. Neither the author nor the State party have specified what precise kind of attire the author wore and which was referred to as "hijab" by both parties. In the particular circumstances of the present case, and without either prejudging the right of a State party to limit expressions of religion and belief in the context of article 18 of the Covenant and duly taking into account the specifics of the context, or prejudging the right of academic institutions to adopt specific regulations relating to their own functioning, the Committee is led to conclude, in the absence of any justification provided by the State party, that there has been a violation of article 18, paragraph 2 of the Covenant.

In **France,** the Act of 15 March 2004[121] prohibits "the wearing in public primary and secondary educational establishments of signs or clothing conspicuously demonstrating the pupils' adherence to a particular religion". The legislator wished to facilitate and accelerate the integration of the Muslim community in particular by combating the political and religious pressures that may be experienced by young Muslim girls not to remove their veils at school. Reference is also made to the need to ensure respect for the principle of equality between men and women insofar as the veil may be perceived as a sign of women's submission to men. Nevertheless, the law authorizes the wearing of discreet religious signs. Furthermore, it only concerns primary and secondary schools. Public institutions of higher education are excluded from the scope of application of the law since the universities cater to adults. Some fear that the law will lead to a marginalization of pupils who refuse to remove their veils at school. It is true that they may enrol at private establishments – within the limits of their capacity – or follow correspondence or distance learning courses. However, for some of those pupils it is to be feared that they will break with school altogether.

France is the only Member State to have adopted legislation prohibiting the wearing of conspicuous religious signs at State schools. In **Belgium,** however, although there is no such law, the educational establishments are authorized to include in their rules a prohibition to wear religious signs or headgear. A growing number of schools are introducing such provisions into their rules in order to prohibit the wearing of scarves by young Muslim girls. According to a survey conducted in 2002, the headscarf is

[120] CCPR/C/82/D/931/2000, 18 January 2005.

[121] Act of 15 March 2004 regulating, in implementation of the principle of secularism, the wearing of signs or clothing demonstrating adherence to a particular religion in public primary and secondary education (Act n°2004-228 of 15 March 2004, J.O. of 17.3.2004, p. 5190)

now banned in 41% of schools in the French-speaking Community, and in 78% of French-speaking State schools in the Brussels region. In the few cases that have been submitted to them, the courts have generally ruled that this prohibition is not contrary to the law[122]. Nevertheless, a draft resolution tabled by two senators in January 2004, seeking a general ban on wearing headscarves by pupils at school and by public officials, did not obtain the necessary support to be adopted[123].

In **Sweden,** the Swedish National Agency for Education (*Skolverket*) published on 24 October 2003 a decision[124], which allows schools a fairly wide margin of appreciation when it comes to ban students from wearing burqa/niqab. The decision implies that schools may enforce bans, both for educational reasons and as part of general school rules. Even if it becomes evident that the burqa is worn for religious reasons the school's educational mandate should be given priority according to this decision. In other words, the ban can be justified on the basis of the policy of maintaining religious neutrality in schools. However, in the view of the Agency a ban without a discussion of values, equality issues and democratic obligations and rights is not to be recommended.

In **Luxembourg**, the wearing of religious insignia at school has been the subject of debate, but has not led to prohibition measures. Disputes are settled by the school principals. The Ministry of Education has issued a circular on Muslim veils and/or headscarves worn by young Muslim girls, tolerating the wearing of a veil or headscarf, provided that it is removed during PE and workshops for reasons of hygiene and safety.

In **Austria** as well, the authorities have explicitly specified that the wearing of headscarves by pupils in schools was not prohibited. Following a case at a secondary school in Upper Austria, the Minister of Education, Science and Culture issued a binding decree on 23 June 2004 to all schools and subordinate authorities clarifying that any restrictions in rules of the school or other regulations on the wearing of headscarves by female Muslim students were unlawful[125]. Generally, the wearing of headscarves, turbans, kippas and similar religious headgears or religious symbols like the Christian cross may not be prohibited, unless compelling circumstances so require (e.g. provisions on special protective clothing (helmets) at dangerous workplaces for risks of injury). A same solution appears to be recommended in the **Netherlands** by the *Commissie Gelijke Behandeling* [Equal Treatment Commission], which found that educational institutions may prohibit the wearing of a *niquaab*, i.e. a veil that covers the entire face. The CGB accepted that the decision to wear a *niquaab* may well be an expression of religious beliefs, but it found that the prohibition was justified: *niquaabs* render communication between staff and students (and between the students themselves) more difficult. In addition identification of those visiting the school premises is impossible if *niquaabs* are allowed.[126] In a general opinion about the possibilities to prohibit these garments under the law on equal treatment, the CGB stated that exceptions on the prohibition of direct discrimination can only be sanctioned by law; exceptions on the prohibition of indirect discrimination are only allowed when an objective justification can be given. Examples of the latter are impediments to communication in the classroom and conflict with the religious identity of a school.[127]

Both the evolution of the case-law of the European Court of Human Rights under Articles 9 and 14 of the European Convention of Human Rights – which constitutes the minimum level of protection which should be afforded to the free exercise of religion in conditions of non-discrimination in the scope of

---

[122] See Court of First Instance, Liège, 26 September 1994 (*J.T.*, 1994, p. 831) and Court of Appeal, Liège, 23 February 1995 (*J.T.*, 1995, p. 720). Similarly, by a decision of 5 October 2004 (not published), the president of the Court of First Instance in Hasselt, ruling in interim injunction proceedings, rejected the appeal lodged by pupils of a business school following the introduction of new rules prohibiting the wearing of headscarves. Conversely, see Court of First Instance, Brussels (interim injunction proceedings), 1 December 1989, *Journal du droit des jeunes*, 1989, n°10, p. 28. The court considered that a general ban was contrary to the principle of neutrality and the freedom to demonstrate one's religious faith at school. Nevertheless, it pointed out that this freedom could be restricted for reasons connected with health, safety or public order.

[123] Draft resolution tabled on 6 January 2004 by the senators A. M. Lizin and A. Destexhe, *Doc. Parl.*, Senate, n°3-451/1.

[124] See www.skolverket.se

[125] Erlass des BMfBWK vom 23.6.2004, ZI 20.251/3-III/3/2004.

[126] CGB, 20 March 2003, *oordeel* 2003-40.

[127] *Advies inzake "gezichtssluiers en hoofddoeken op scholen",* 16 April 2003, *advies* 2003/01, www.cgb.nl

application of Union law – and the understanding of the Member States as to which regulation of the wearing of religious signs in certain settings, especially in public educational institutions, should be taken into account in the debate concerning the enlargement of the scope of application of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. If and when Community law shall prohibit direct and indirect discrimination on grounds of religion in the field of education, it shall have to take a position as to whether the prohibition of headscarves in public schools, as may be worn by Muslim girls, or the prohibition of religious signs in general, should be considered to fall under this prohibition. If the European Court of Human Rights were to arrive at this conclusion, taking into account, for instance, the differences it may see between the situation of a predominantly Muslim society such as Turkey and other societies, it would be advisable, if not obligatory, to interpret the prohibition of discrimination on grounds of religion accordingly in the context of Community law. If the European Court of Human Rights arrives at another conclusion or has not settled the issue in its case-law, there is no obstacle to Union law offering a higher level of protection to the freedom of religion, should this choice be made by the Council of the Union acting unanimously as required under Article 13 EC. This is confirmed by Article 53 of the Charter of Fundamental Rights. Indeed, this question is already present in the present context of the implementation and application of Council Directive 2000/43/EC, insofar as certain groups which may be defined as "ethnic", such as the Sikhs, have a vestimentary code, such as the wearing of turbans, which may be seen not only as a manifestation of their religion, but also as a mode of expression of their ethnic identity.

6. Linguistic rights

6.1. The Right to Use a Minority Language in Private

As shown in Appendix D to this Thematic Comment, in certain Member States, such as **Estonia**, **France**, **Latvia**, **Lithuania**, **Slovakia** and certain autonomous communities of **Spain**, the legislation imposes some restrictions on the private use of a language other than the official language, in areas such as posters and public signs, commercial relations, advertisement or information provided to consumers.

In the view of the UN Human Rights Committee,[128] the right to use the language of his or her choice in private, including in the context of commercial activities, follows from the right to freedom of expression (Article 11 (1) Charter of Fundamental Rights). Confirming this principle, Article 9 (1) FCNM obliges the states parties to recognise that the freedom of expression includes freedom "to receive and impart information and ideas in the minority language, without interference by public authorities and regardless of frontiers." In this sense, Articles 10 (1) and 11 (2) FCNM are but provisions clarifying some implications of the freedom of expression. Article 10 (1) FCNM protects "the right to use freely and without interference his or her minority language, in private and in public, orally and in writing". Article 11 (2) FCNM protects "the right to display in his or her minority language signs, inscriptions and other information of a private nature visible to the public.[129] The ACFC derives from these rights that measures taken to protect the official language may not impose unjustified limitations on the freedom to receive or to transmit information or ideas in the minority language.[130] Thus, a measure imposing the use of the official language in commercial relations between private persons, on a sign, poster or an advertisement of a private enterprise[131] or in

[128] See UN Human Rights Committee, *Ballantyne, Davidson and McIntyre v Canada*, Communication Nos. 359/1989 and 385/1989, 31 March 1993, CCCPR/C/47/D/359/1989 and CCCPR/C/47/D/385/1989/Rev.1.
[129] See also Article 7 (2) of the European Charter for Regional or Minority Languages; Article 2 (1) of the 1992 UN Declaration on Minorities and the HCNM's Oslo Recommendations Regarding the Linguistic Rights of National Minorities (1998) and Guidelines on the Use of Minority Languages in the Broadcast Media (2003), para.1.
[130] See Opinion on Estonia, 14 September 2001, ACFC/OP/I(2002)005, paras.33 and 39; Opinion on Slovakia, 22 September 2000, ACFC/OP/I(2001)001, para.34 and Opinion on Sweden, 20 February 2003, ACFC/OP/I(2003)006, para.47.
[131] Opinion on Estonia, 14 September 2001, ACFC/OP/I(2002)005, para.43. See also Article 13 (1) of the European Charter for Regional or Minority Languages.

documents of non-governmental organisations[132] is contrary to the obligations flowing from the FCNM.

These requirements should be taken into account, in particular, in the evaluation of measures adopted by the Member States which constitute a restriction to the freedom of movement of workers, freedom of provision of services or to the free movement of goods. In the case of *Groener*,[133] 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[134] which provides that national provisions or administrative practices of a Member State are not to apply where, “though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered”, but provides 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”. This interpretation 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” (point 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” (point 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” (point 21). The Court has thus recognized that a Member State policy designed to maintain and promote the national language should in principle be recognized as pursuing a legitimate objective in the Union. It is important to recognize, however, that any such measure which would impose a disproportionate restriction upon the right of a person belonging to a minority to use the language of his or her choice in private, including in the context of commercial activities, should be considered in violation of Union law. Indeed, the fundamental rights recognized in Union law, including the right of every individual not to be discriminated against on the basis of his or her membership of a minority, should be complied with by the Member States which rely upon an exception provided in EC/EU law, such a measure falling under the scope of application of Union law.

It should also be examined how these requirements may be taken into account in the implementation of the range of measures announced in the Communication of the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of Regions, “Promoting Language Learning and Linguistic Diversity: An Action Plan 2004 - 2006”.[135]

6.2. Use of Minority Languages in the Media

Article 11(2) of the Charter of Fundamental Rights, guarantees the respect for the freedom and pluralism of the media. This provision has to be interpreted in the light of Article 9 FCNM. Article 9 FCNM imposes on the states parties the obligation not to hinder “the creation and the use of printed

[132] Opinion on Azerbaijan, 22 May 2003, ACFC/OP/I(2004)001, paras.54-55.
[133] Case 379/87, *Groener*, ECR (1989) 3967 (judgment of 28 November 1989).
[134] OJ, English Special Edition, 1968(II), p. 475.
[135] COM(2003) 449 final, of 24.7.2003.

media by persons belonging to national minorities". Moreover, states parties shall 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)). Furthermore, the states parties shall adopt "measures in order to facilitate access to the media for persons belonging to national minorities" (Article 9(4)).[136]

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".[137] The European Court of Human Rights considers pluralism in the media to be of primordial importance in its case law regarding Article 10 ECHR (freedom of expression).[138] In the case *Verein Alternatives Lokalradio Bern and Verein Radio Dreyekland Basel v. Switzerland*, the European Commission of Human Rights observes that the rejection of an authorisation to broadcast would be problematic with regard to Article 10 ECHR (freedom of expression), combined with Article 14 ECHR (non-discrimination in the enjoyment of the rights recognized under the ECHR), if this rejection had as a direct consequence that a considerable part of the population of the region concerned would not be able to receive broadcasting in its mother tongue.[139]

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.[140] Restrictions to the freedom to broadcast in a minority language, such as the obligation to use the official language for at least 50% of the broadcasting time[141] or the obligation to translate all broadcasting in the minority language into the official language,[142] 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.[143]

These requirements should be taken into account in the evaluation of measures adopted by the Member States under 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,[144] the Preamble and Article 7 of which 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."[145] Moreover, these requirements should inform the evaluation of Directive 89/552/EEC and its possible revision, 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.

---

[136] 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).

[137] 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.

[138] See ECtHR, 24 November 1993, *Informationsverein Lentia et al. v. Austria*, para.39; ECtHR, 28 June 2001, *VGT Verein gegen Tierfabriken v. Switzerland*, para.73.

[139] EurCommHR, 16 October 1986, *Verein Alternatives Lokalradio Bern and Verein Radio Dreyekland Basel v. Switzerland,* Application No. 10746/84, p.133.

[140] 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.

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

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

[143] Ibid., para.37. See also the HCNM's Oslo Recommendations Regarding the Linguistic Rights of National Minorities (1998), para.9 and Guidelines on the Use of Minority Languages in the Broadcast Media (2003). Moreover, the ACFC considers it useful that minority language broadcasting on public TV is subtitled in the official language, in order to stimulate knowledge of the minority language by the whole of the population. See Opinion on Sweden, 20 February 2003, ACFC/OP/I(2003)006, para.45.

[144] O.J. L 298, 17 October 1989, pp.0023-0030, amended by Directive 97/36/CE of the European Parliament and the Council, O.J. L 202, 30 July 1997, pp.0060-0070.

[145] See the preamble and Article 7 of Directive 89/552/EEC.

6.3. Use of the Minority Language in Relations with the Administration, in the Context of Judicial Procedures and in Education

Article 6.3 (e) ECHR recognises the right of each person charged with a criminal offence "to have the free assistance of an interpreter if he cannot understand or speak the language used in the court." According to the case law of the ECtHR, this paragraph signifies that "a person 'charged with a criminal offence' who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial".[146] Moreover, Article 5 (2) ECHR and Article 6 (2) of the Charter of Fundamental Rights protect the right of each person who is arrested to "be informed promptly, in a language which he understands, of the reasons of his arrest and of any charge against him." Persons belonging to a linguistic minority can use these rights, when they do not understand or do not speak the official language.[147] Furthermore, the European Court of Justice has considered that when a state recognises to its nationals the right to obtain that a criminal procedure takes place in another language than the one in which it normally takes place, this right cannot be refused to nationals of other EU member states who circulate or reside on the territory of this state.[148]

In other contexts, neither the Charter of Fundamental Rights nor the ECHR guarantee to members of linguistic minorities the right to use a minority language in relation with public officials. This results in a difference of treatment between these persons and persons belonging to the linguistic majority. When persons belonging to linguistic minorities are numerically few or live dispersed over the territory of the country, this difference of treatment can be justified by and be considered proportionate to the legitimate purpose of avoiding the organisational difficulties and the excessive costs caused by the obligation for the administration to provide all services in the minority language.[149] However, the situation is different when the linguistic minority represents a substantial part of the population on national or local level. The state would in such case without excessive difficulty be able to include in the administration persons mastering the minority language. This measure would moreover promote the access to public services of persons belonging to minorities.

The FCNM imposes on states the obligation to take measures "in areas inhabited by persons belonging to national minorities traditionally or in substantial numbers" and to the extent there is sufficient demand to ensure the conditions which would make it possible to use the minority language in the relations with the administrative authorities (Article 10 (2) FCNM) and that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language (Article 14 (2) FCNM)[150]. Article 11 (3) FCNM provides moreover that "[i]n areas traditionally inhabited by substantial numbers of persons belonging to a national minority, the Parties shall endeavour (…) taking into account their specific conditions, to display traditional local names, street names and other topographical indications intended for the public also in the minority language when there is a sufficient demand for such indications." The FCNM does not offer indications concerning the threshold as from which states have to provide these rights. The ACFC has

---

[146] ECtHR, 19 December 1989, *Kamasinski v. Austria*, Series A No.168, para.74.

[147] See Article 10 (3) FCNM.

[148] ECJ, 11 July 1985, *Public Prosecutor's Office v. Mutsch*, 137/84, *Reports 1985*, p.2681; ECJ, 24 November 1998, *Criminal Proceedings against H.O. Bickel and U. Franz*, 274/96, *Reports*, p. I-7637.

[149] However, the UN Human Rights Committee considered the prohibition imposed on officials of the administration to respond to written or oral communications in the minority language, while they were capable of doing so, to constitute a discrimination vis-à-vis the speakers of this language. UN Human Rights Committee, 25 July 2000, *Diergaardt et al. v. Namibia*, Communication No. 760/1997, CCPR/C/69/D/760/1997, para.10

[150] With respect to education in a minority language, in its Judgment *Cyprus v. Turkey* of 10 May 2005, the European Court of Human Rights found a breach of Article 2 of Protocol No. 1 in respect of Greek Cypriots living in northern Cyprus in that no secondary school facilities in Greek were available to them. Such schools had existed in the past but had been abolished by the Turkish Cypriot authorities, although it was well known to them that Greek Cypriots preferred to be educated in their own language. (EurCtHR, 10 May 2001, *Cyprus v. Turkey*, para. 280. See also the report of the Commission, adopted on 4 June 1999, para. 478-479.)

stated that it is in each case excessive to require that persons belonging to minorities constitute at least half of the permanent residents of the local community.[151] The European Charter of Regional or Minority Languages entails comparable obligations regarding the use of a minority language in relation with the administrative authorities and in public services (Article 10), in the framework of judicial proceedings (Article 9) and in education (Article 8).[152]

The European Parliament has adopted several resolutions to call upon the Member States to promote regional and minority languages, in particular in the media, education and in public life.[153] It also invited States to sign and ratify the European Charter of Regional and Minority Languages.[154] Furthermore, the European Parliament has recommended the Commission to take measures "to reinforce the European dimension with a view to promoting and protecting regional and minority languages and cultures", taking account of the findings of the monitoring of the European Charter of Regional and Minority Languages and the FCNM.[155]

Although, for the most part, the regulation of the use of language and the relationship of the minority languages to the language of the majority is a matter to be regulated by the Member States, the institutions of the Union could usefully encourage the Member States to take the abovementioned requirements into account in the implementation of Union law and policies. A concern for the respect of linguistic diversity could be mainstreamed to that effect. In the immediate future, in the context of the discussion for a framework instrument on services of general economic interest in the Union, the specific needs of minorities, especially linguistic minorities, should be recognized, without this leading to impose a disproportionate burden on the service providers, whether public or private. Indeed, this would contribute to social cohesion and prevent the risk of discrimination in the organisation of services of general economic interest, in conformity which is in conformity with the general objectives pursued by the Union in this field. In the *Report on the situation of Fundamental Rights in the Union in 2003*, prepared within the EU Network of Independent Experts, it was noted that the Green Paper on services of general interest presented by the European Commission on 21 May 2003[156]

> presents the concept of *universal service* as implying, in particular, the adoption of specific measures concerning disability, age or education. This is to be welcomed. However, the requirement of non-discrimination on the ground of membership of a national minority seems not to have been fully integrated. Moreover, it is important to present this as constituting an obligation, linked to the requirement of non-discrimination, to effectively accommodate the specific needs of the service user, to the extent at least that this does not impose a disproportionate burden on the provider of services.[157]

Regrettably, the Commission White Paper on services of general interest[158] remains silent on this issue, although it defines the concept of universal service as implying "the right of everyone to access certain services considered as essential" (at para. 3.3.).

---

[151] See Opinion on Estonia, 14 September 2001, ACFC/OP/I(2002)005, para.40.

[152] Regarding education, see also Article 4 (3) of the 1992 UN Declaration on Minorities.

[153] Resolution of 16 October 1981 on a Community Charter of regional languages and cultures and on a Charter of rights of ethnic minorities (O.J. C 287, 9 November 1981, p.106); Resolution of 11 February 1983 on measures in favour of minority languages and cultures (O.J. C 68, 14 March 1983, p.103); Resolution of 30 October 1987 on the languages and cultures of regional and ethnic minorities in the European Community (O.J. C 318, 30 November 1987, p.160); Resolution of 9 February 1994 on linguistic and cultural minorities in the European Community (J.O. C 28 November 1994, p.110); Resolution of 13 December 2001 on regional and lesser-used European languages (O.J. C 177 E of 25 July 2002, p.334).

[154] See Resolution of 9 February 1994 on linguistic and cultural minorities in the European Community (J.O. C 28 November 1994, p.110).

[155] European Parliament Resolution of 4 September 2003 with recommendations to the Commission on European regional and lesser-used languages (A5-0271/2003).

[156] COM(2003)270 final.

[157] E.U. Network of Independent Experts on Fundamental Rights, *Report on the situation of Fundamental Rights in the Union in 2003*, March 2004, p. 126.

[158] COM(2004) 374 final, of 12.5.2004, p. 11.

7. The specific situation of the Roma/Gypsies

As exemplified in particular in the fields of education (7.1.) and housing (7.2.) – but the same findings have been made, in other reports, with respect to employment or the access to health care, as documented in previous reports by the Network of Independent Experts –, the Roma/Gypsy are in many respects, in a number of Member States, placed in situation of *de facto* segregation. This situation cannot be tolerated further. But it appears insufficient to rely on the tool of anti-discrimination law to effectively bring a change to the structural situation the Roma/Gypsies are currently facing. Affirmative action is required. This Thematic Comment recalls the proposal made by the Network of Independent Experts, since March 2003, for a Directive specifically aiming at the integration of the Roma/Gypsy minority (7.3.). In then examines, in more detail, whether an initiative could be adopted on the basis of Article 13(2) EC, and explains how such an initiative could rely on the framework of the European and international recommendations which concern the situation of the Roma (7.4.). Finally, the Member States should be reminded that any measure seeking to promote the integration of the Roma/Gypsy minority should be devised with the active participation of representatives of this group (7.5.).

7.1. Segregation in education

The examination of the situation of the Roma/Gypsies in the Member States confirms the need to act in order to achieve the desegregation of this community, which the simple tool of non-discrimination is incapable, by itself, to realize, although it still has an essential function to fulfil in an overall strategy for the inclusion of the Roma/Gypsies. The segregation concerns all sectors of society; and it affects the new Member States of the Union as well as the States who were Members of the Union prior to 1 May 2004. In the field of education for instance, there is a serious problem in **Belgium** of school absenteeism and dropout among the Roma, Sintis and Travellers communities, particularly in secondary education. A large number of children do not complete their secondary school. According to a survey carried out in 1994 in the Flemish Region among the Travelling People and Gypsies, the large majority of children (94.6% for the former category, 81% for the latter) were enrolled at school, yet absenteeism increased with age. Only 67.8% of Gypsy children attended secondary school[159]. The situation was particularly worrying among the Roma of Belgian nationality: only 18.8% of the children of this community attended primary school and none attended secondary school. A survey carried out in 2004 of the situation of the Brussels Roma who recently arrived from Eastern Europe also revealed a problem of school absenteeism and dropout among this population[160]. According to figures for 2001 from the Flemish Centre for Minorities (VMC), the majority of children from those communities were directed to technical and vocational education, in the same way as children from disadvantaged social backgrounds generally are. The European Roma Rights Centre (ERRC) carried out a research on the segregated school system in Central and Eastern European countries, including **Hungary**, the **Czech Republic** and **Slovakia**. According to this research, the segregation of the Roma children in these countries' educational system is pervasive. Segregated schooling of Roma/Gypsies is a result of the interplay of a number of factors such as deep-seated anti-Roma racism, the indifference of the educational systems to cultural diversity, and a lack of effective protections against discrimination and equal opportunity policies. In some places, segregated school facilities for Roma/Gypsies appeared as a result of patterns of residential segregation. Racial segregation has also arisen as a result of the exclusion of Roma/Gypsies by virtue of their specific language and culture. Finally, racial segregation has resulted from the conscious efforts of school and other officials to separate Roma children from non-Roma children for reasons ranging from their personal dislike of Roma/Gypsies to responding to pressure from non-Roma.[161] With respect to **Hungary**, a more recent

[159] T. Machiels, *Keeping the Distance or Taking the Chances, Roma and Travellers in Western Europe*, Brussels, ENAR, March 2002, (www.enar-eu.org/en/publication/Romaengl.pdf), p.17.
[160] *Les Roma de Bruxelles*, publication of the Regional Integration Centre, Foyer Bruxelles asbl, September 2004, pp. 36 et seq.
[161] Stigmata: Segregated Schooling of Roma in Central and Eastern Europe, a survey of patterns of segregated education of Roma in Bulgaria, the Czech Republic, Hungary, Romania, and Slovakia. Available at: http://www.errc.org/db/00/04/m00000004.pdf

study showed that 5.8 % of the students in primary schools study in such special schools. Every fifth Roma/Gypsy child is oriented to these institutions.[162] Official estimates are that approximately the half of the children in these schools is of Roma/Gypsy origin. The conditions in the special schools are much worse than in ordinary primary schools, and although they aim to provide special attention to pupils with special needs, they fail to employ teachers with the necessary qualifications. Classes are also bigger than the size prescribed by law. In principle, there are chances to be put back to normal schools, but statistics show that in the last five years only 173 students out of 308 schools were advised to be placed back in the ordinary education system.[163]

Another way to segregate Roma and non-Roma children is to place them in different classrooms, and to organize their social activities separately. In **Hungary**, this practice has been observed both in public and private schools. The Hungarian Examination and Evaluation Centre for Public Education, for example, presented its findings on a private school in Jászladány in February 2004. The school shares the building with a local municipality-run school. The establishment of the private school resulted in the polarisation of the two halves of the school in a way that students coming from standard families ended up in the private part, while those coming from disadvantaged background attend the municipal section. Recently, the Budapest Metropolitan City Court of Appeals upheld the first instance judgment awarding damages for Roma families because their children were taught separately in a primary school. The damages must be paid by the municipalities running the school.[164]

The practice of creating special « Roma classes » exists (or existed) in other countries, such as in **Latvia**, **Lithuania**, **Denmark** and **Sweden**. Even though such practices are, in certain cases, aimed at addressing the special educational needs of Roma/Gypsy children, they raise serious concern as they risk hampering the effective integration of Roma children in the society. In **Sweden**, some municipalities have established specific classes for Roma/Gypsy children. Even when that kind of initiatives have been undertaken to provide additional support for the pupils concerned, there is a great risk that classes devoted to one national minority as such might place these children at a disadvantage.[165] There is, in other words, a risk of being marginalised in the school setting. In **Latvia** and **Lithuania** as well, separate Roma/Gypsy classes have been established in mainstream schools. Besides, in **Latvia**, some towns have introduced the system of house visits and individual approach of teachers to the education of Roma/Gypsy children. These may be in itself good measures but they also raise issue of integration of Roma/Gypsy children into the society.

In **Denmark**, the municipality of Elsinore (Helsingør Kommune), where there are a considerable number of Roma/Gypsies (approximately 200 Roma/Gypsy families reside there), has established special so-called Roma-classes to deal with the highly unauthorized absence of pupils with a Roma background from classes. These pupils do not have any general learning difficulties. However, in a guiding statement from the Ministry of Education to The Supervisory Council (Tilsynet med kommuner) this initiative was assessed not to be in accordance with the Act on Public Schools. The Supervisory Council hereafter decided that the municipality of Elsinore had violated the Act on Public Schools by establishing special classes for pupils with a high absence rate. A memorandum of the Ministry of Education on this initiative concludes that the establishment of classes based solely on e.g. ethnicity, gender or religion is a violation of the basic principles of equal treatment.

---

[162] *A kisegít_ iskolák elkülönítenek* (Special schools segregate), HVG, 4 March 2004

[163] *Ibid.*

[164] On 7 October 2004, in a major test case, the Budapest Metropolitan City Court of Appeals (F_városi Ítél_tábla) upheld the first instance court decision, dated 1 June 2004, by which the Borsod-Abaúj-Zemplén County Court ordered the primary school in Tiszatarján and the local governments of Tiszatarján and Hej_kürt respectively to pay damages in the total amount of 3 650 000 Hungarian forints (approximately 14600 euro), with accrued interest, to nine families whose children have been unlawfully kept in a segregated class and taught based on a special (inferior) curriculum from 1994 to 1999, in the absence of any prior certification declaring them mentally deficient and unable to attend regular classes. All of the children affected, most of them Roma, came from families with low income and social standing in the community and have accordingly had difficulties in asserting their legal rights and interests in the education context. See http://www.errc.org

[165] ACFC/INF/OP/I(2003)006, § 53. See also CRI(2003)7, § 37.

In **Poland** and **Slovenia**, the establishment of Roma classes has recently been abandoned. In **Poland**, the creation of Roma classes was assumed to increase the level of the Roma children's knowledge of the Polish language and thereby force the children to start attending school. Currently, the Roma classes are carried out for older students, and the youngest children attend school along with the others. In **Slovenia**, the establishment of Roma classes is no longer foreseen as of the 2003/2004 school year. Classes attended by three or more Roma children usually consist of 21 pupils.

In **France,** in certain regions where a sizeable population of Roma, Sintis or Travelling People spends the winter period living in a semi-sedentary manner, the school inspectorates have sometimes tried to put up those children in special establishments in order to take account of their special characteristics. Several of those experiments were abandoned in order to avoid the risk of turning those schools into "ethnic schools". The travelling people living on the French territory are of different ethnic origin: some are gypsies from Central and Eastern Europe, while others are of Spanish origin, etc. In several cases, those in charge of such schools realized that, gradually, only the travelling people of a particular ethnic origin enrolled their children and that those of distinct origins left the school system. In order to halt this trend, which threatens to lead to a form of ghettoization, the pupils are now enrolled at the establishment of the area where they reside during the winter period.

Moreover, absenteeism, dropout and high failure rates in schools are widespread problems among Roma/Gypsies, Sintis and Travellers communities across Europe. Resolution 89/C 153/02 "On School Provision for Gypsy and Traveller Children",[166] adopted in 1989 by the Council of Ministers of Education, indicates that, in states which were member of the EU at that time, only 30 to 40 % of Roma or Traveller children attended school with any regularity, that half of them had never been to school, that a very small percentage attended secondary school, and that the illiteracy rate among adults was frequently over 50% and in some places 80 % or more. Despite the initiatives taken by some countries, the situation in this regard remains extremely preoccupying today, in both old and new EU countries. In **Lithuania**, according to the Programme on the Integration of Roma in the Lithuanian society for 2000 – 2004, only some 25 % of Roma children attend schools. In **Poland**, about 30% of the population of Roma children do not fulfil the school obligation at all.[167] In the **Czech Republic**, the education of Roma children often stops at the lowest level. In many other countries, such as the **Czech Republic**, **Belgium**, **France**, **Finland**,[168] **Italy** or **Spain**, a disproportionate number of Roma, Sintis and Travellers do not finish their schooling. This may be attributed to a variety of factors, among which primarily : the low social and economic status of these communities and the low level of instruction of the parents ; an insufficient knowledge of the national language (**Slovakia**, **Finland**, **Poland**, or, in Western European countries, in the case of Roma who have recently emigrated); insufficient pre-school education (**Slovakia**, **Poland**, **Belgium**) ; cultural factors, in particular the lack of positive model oriented towards education ; problems arising from the upheaval in cultural identity (**Finland**), insufficient inter-cultural skills of teachers (**Finland**), These factors point at the structural and self-perpetuating, rather than transitional character of the disadvantage of the Roma/Gypsy children in education, and therefore to the need to affirmatively act in order to break the cycle.

The Advisory Committee of the Framework Convention for the Protection of National Minorities has recalled, in an opinion on Ireland, that "Traveller children share the need for contact with children from different backgrounds and…the placing of Traveller children in separate educational facilities only on the basis of their Traveller background gives rise to deep concern form the point of view of Article 10 of the Framework Convention."[169] The Member States would particularly benefit from exchanging information with respect to addressing this issue, because of the need to identify ways to

[166] O.J. No. C 153/3, 21st June 1989.
[167] Programme for the Roma community in Poland, II. Description of the problems, 1. Education; available at the webpage http://www.mswia.gov.pl./spr_oby_mn_prog_romowie_txt.html (16.09.04)
[168] Finnish National Board of Education, Survey on the Status of Roma Children's Basic Education, School Year 2001-2002, English summary available at http://www.oph.fi/SubPage.asp?path=1,438,3449,29564.
[169] Advisory Committee on the Framework Convention for the Protection of national Minorities, *Opinion on Ireland,* 2004, p17

improve the access to education of Roma children, without coercing their families into sedentarization if they wish to preserve their traditional lifestyle. Indeed, in several states, including **Belgium**, **France**, **Ireland**, and the **United Kingdom**, part of the Roma/Gypsies, Sintis or Travellers retain a nomadic or semi-nomadic lifestyle. For children belonging to these communities, the absence of an educational system adapted to their way of life constitutes another obstacle to their access to education. Some countries have taken measures to address this problem, but their success in doing so has been variable. In **Ireland**, the policy of the Department of Education and Science is that children be fully integrated into mainstream classes whenever possible. However there are, in some areas, Education Centres which admit only members of the Traveller Community. The Government has expressed its desire in the near future to integrate such centres into the general system of education, and a number of measures have been adopted to that effect: Rule 10 of the *Rules for National Schools*[170] states that "No child may be refused admission to a national school on account of the social position of its parents, nor may any pupil be kept apart from the other pupils on the grounds of social distinction"; in order to ensure that Traveller children will be able to be integrated into mainstream education, funding is made available by the Department of Education and Science for early childhood care and education for Traveller children aged 3-5. Visiting teachers for Travellers are charged with the task of encouraging enrolment of children of Travellers into both primary and post-primary education. So far however, the aim of ensuring that all Traveller children receive a full primary and secondary education has had mixed results. Virtually all children complete primary school, but at secondary level the rate of participation by Traveller children in education decreases significantly so that very few complete this level and even fewer go on to third-level education.[171] Moreover, the current system in place for encouraging Traveller children to participate in the education system does not cater adequately to the needs of Traveller children who are members of itinerant or semi-itinerant communities.

Other States offer examples of good practices in the field. In **Greece,** in order to facilitate access to educational establishments for pupils who travel with their families, the authorities introduced the "school transit pass", which facilitates enrolment of the pupils at any time of the year, as well as the follow-up of the notes and files concerning them. In **France,** the situation varies from one region to another, yet certain school inspectorates have taken measures in conjunction with the associations, the CNED and the prefectures to promote access to education for children leading a nomadic or semi-nomadic lifestyle. This is primarily the case in regions that accommodate these population groups during the winter period, though not only so. In those regions, the schools teach those children during their semi-sedentary period, after which the CNED takes over. The schools often have a special teacher who oversees the proper functioning of that partnership. At certain schools, a special school report for educational guidance and supervision is distributed to those children. On the other hand, the associations have also instituted, in partnership with the school inspectorates, "school buses" that enable them to follow the nomads and semi-nomads and thus to monitor their children's education. In the **United Kingdom**, some local initiatives have been taken to favour the access of these children to education. These initiatives are primarily conducted by local authorities and prompted by guidance and/or financial support from central government. In particular, the Gypsy/Traveller Achievement Project has provided funding for efforts to engage parents, to interview pupils and to modify curricula or produce alternative curriculum materials. Most local authorities now have a Traveller Education Service as the focus for their efforts. There have been other initiatives such as one school initiating a flexible programme of out-of-school sessions covering literacy, maths, crafts and outdoor activities, an authority producing packs to facilitate transfer from primary to secondary schools and another school arranging a transfer to a college for courses such as blacksmithing where a pupil became disaffected with the curriculum. Material for teaching, particularly on literacy, has been produced in association with travellers and funding for this has come from charitable foundations. The government Office of Standards in Education has been generally very critical of the achievements in relation to education for travellers but it has been positive about those kinds of initiatives.

---

[170] http://www.education.ie/servlet/blobservlet/rules_for_national_schools_1_7.pdf, Rules for National Schools Under the Department of Education, 22/11/2004

[171] Advisory Committee on the Framework Convention for the Protection of national Minorities, *Opinion on Ireland,* 2004,, p16

7.2. Segregation in housing

A similar systemic discrimination, resulting into *de facto* segregation, exists in the field of housing. In a number of countries, *inter alia* **Cyprus**, **the Czech Republic, Greece**, **Hungary, Italy, Lithuania**, **Poland**, **Slovakia** or **Spain**, many of them live in deplorable housing conditions. They often find themselves in segregated neighbourhoods or in slums, characterised by inadequate infrastructure, uncertainty over the ownership of land, or lack of security of tenure, which entails a permanent threat of forced eviction.[172]

Thus, with respect to **Italy**, the Advisory Committee of the Framework Convention for the Protection of National Minorities emphasised in its 2001 Opinion that "the Roma have been isolated from the rest of the population by being assembled in camps where living conditions and standards of hygiene are very harsh. Numerous concurring reports suggest that problems of overcrowding persist: in several camps some huts have neither running water nor electricity and proper drainage is often lacking. While some Italian Roma/Gypsies do undeniably continue to lead an itinerant or semi-itinerant life, the fact remains that many of them aspire to live under housing conditions fully comparable to those enjoyed by the rest of the population. Far from effectively aiding integration of the Roma/Gypsies, the practice of placing them in camps is liable to aggravate the socio-economic inequalities affecting them, to heighten the risk of discriminatory acts, and to strengthen negative stereotypes concerning them (…)."[173] These findings remain valid today. Indeed, on 21 December 2004, the European Committee on Social Rights ruled admissible a collective complaint against Italy, lodged by the European Roma Rights Centre, alleging that by policy and practice, Italy racially segregates Roma/Gypsies in the field of housing. According to the ERRC, housing arrangements for Roma/Gypsies in Italy aim at separating Roma/Gypsies from mainstream Italian society. ERRC points out that in « a number of Roma settlements in Italy, very extremely inadequate housing conditions prevail, threatening the health and even the lives of their Roma inhabitants. In addition, Italian authorities regularly and systematically subject Roma to forced evictions from housing, calling seriously into question Italy's compliance with a number of international laws. During eviction raids, authorities arbitrarily destroy property belonging to Roma, use abusive language, and otherwise humiliate evictees. In many cases, persons expelled from housing have been rendered homeless as a result of actions by police and local authorities. »

In **Sweden**, the report 'Discrimination of Roma in Sweden' (*Diskriminering av romer i Sverige*)[174] has highlighted that a large part of the Roma community faces difficulties in areas such as housing. According to several Swedish NGOs discrimination of the Roma/Gypsies on the housing market has more than doubled during the last ten years.[175] In the **Slovak Republic**, Roma/Gypsies *de facto* do not have equal access to traditional housing. A large number of Roma/Gypsies in the Slovak Republic have no or very limited access to basic public services. The report approved and released in November 2003 by the Slovak Government on the state in drinking water supply in Roma settlements analyses the state in drinking water supply in Roma settlements, and arrives at the finding, for example, that there are 50 settlements without any supply of drinking water in Slovakia, the largest number is in the regions of Pre_ov (18 settlements), Banská Bystrica (17 settlements) and Ko_ice (7 settlements). Many Roma/Gypsies live in extremely substandard, racially segregated slum settlements. Most such slum settlements are characterised by substandard or extremely substandard housing, a prevalence of environmental hazards including toxic waste, rubbish tips, intermingling of waste and drinking water, etc. In general, Roma slums are partially or completely lacking in formal infrastructure such as paved roads, electricity, heating, sewage removal and the provision of adequate drinking water, and are frequently excluded from other public services, such as bus or postal services. The overarching

[172] See also *The Situation of Roma in an Enlarged European Union*, *op. cit.*, p. 25.
[173] Advisory Committee on the FCNM, Opinion on Italy, 14 September 2001, ACFC/INF/OP/I(2002)007, para. 25.
[174] See, L.Lindgren, in Dialog och delaktighet krävs för att minska diskriminering, http://www.do.se This report was presented by the Swedish Office of the Ombudsman against Ethnic Discrimination (DO) to the Government on 15 March 2004.
[175] Alternative Report, p. 11. Romerna diskrimineras, www.varbostad.se

concern permeating housing concerns with respect to Roma in Slovakia is racial segregation. Discrimination in the allocation of social and other public housing has been frequently reported in the Slovak Republic. Roma/Gypsies in the Slovak Republic frequently report being blocked by vigilante local action, sometimes carried out with the active or passive complicity of local authorities, when trying to rent or purchase property outside segregated settlements. In **Greece,** international bodies such as NGOs report forcible evictions of certain Roma communities. In 2003, a circular that was criticized by NGOs as leading to the segregation of Roma was amended. A new circular was adopted abolishing the restrictions in connection with the removal of Roma campsites and setting out to ensure decent living conditions at those sites[176].

In this field again, the Member States could benefit from comparing one another's experiences in reconciling the need to ensure that the Roma/Gypsies have access to adequate housing with the respect of their traditional lifestyle. Roma/Gypsies, Sintis and Travellers who lead a nomadic or semi-nomadic life face serious difficulties in finding places where they are allowed to stop with their caravans. Because of the shortage of official sites, they are frequently forced to camp on unauthorized land, where they are exposed to the risk of forced eviction. Moreover, existing sites are often inadequate in terms of infrastructural provisions (water, electricity and other basic services), and are sometimes built in potentially dangerous environments. Finally, some members of these communities, even when they are not travelling anymore, still prefer to live in a caravan rather than in a sedentary house, to remain close to their traditions. But in such cases as well, they often encounter problems in obtaining the required license from the local authority to place a residential caravan on a rented land or on their own property. The following examples illustrate certain representative national situations:

- In the **United Kingdom**, the provision of official sites is inadequate and people encounter problems in obtaining planning permission to use their own property as a caravan site. According to the Government's "Count of Gypsy Caravans", in July 2000, there were 3,316 families without a legal stopping place in July 2000.[177] In its 2001 opinion on the United Kingdom, the Advisory Committee of the Framework Convention stresses that « since the repeal in 1994 of Section 6 of the Caravan Sites Act (1968), local authorities are no longer under a duty to provide adequate accommodation for Roma / Gypsies and Irish Travellers. This change of Government policy has had the effect of shifting responsibility for providing sites from local authorities to private initiatives. (…) this policy has not led to any increase in the provision of sites, but has rather had the opposite effect. Furthermore, the Advisory Committee notes that Roma / Gypsies and Irish Travellers experience increasing problems to find places to stop and face the threat of criminal sanctions under Section 77 of the Criminal Justice and Public Order Act (1994) if they fail to move on when required to do so by the local authorities." In addition, members of this group encounter difficulties in securing permission to station their caravans on land owned by them, which has led to the examination of a number of cases on this issue by the European Court of Human Rights. The Committee concludes that the lack of available sites throughout the United Kingdom, combined with a range of legislative and administrative measures have the effect of inhibiting nomadism and effectively denying travellers the right to maintain and preserve or develop one of the important elements of their culture and identity, namely travelling.[178]

- In **Ireland**, The *Housing (Traveller Accommodation) Act 1998* incorporates the findings made in a report commissioned by the Minister for Justice, Equality and Law Reform in 1993 who established a Task Force on the Traveller Community to report to government on the needs of Travellers, specifically in relation to access to accommodation, education, health and also on discrimination and equality. It obliges local authorities to implement programmes for Traveller Accommodation and to liaise with Traveller representatives in their organisation. Nevertheless, the

[176] On 16 June 2003, the European Committee of Social Rights declared admissible a collective complaint of the ONG "European Roma Rights Centre" against Greece in which it is claimed that there is discrimination in law and in fact against Roma in the area of housing.
[177] Advisory Committee on the FCNM, Opinion on the United Kingdom, 30 November 2001, ACFC/INF/OP/I(2002)006, para. 40.
[178] Advisory Committee on the FCNM, Opinion on the United Kingdom, 30 November 2001, ACFC/INF/OP/I(2002)006, para. 41-42.

Advisory Committee of the Framework Convention for the Protection of National Minorities expressed its concern about "the lack of available accommodation and the standard of accommodation at the disposal of Travellers." Indeed, the Opinion highlights that a large number of Traveller families are living on the roadside without access to appropriate facilities.[179] This situation is exacerbated by the fact that there are only two official transient halting sites in Ireland, which in terms of numbers and facilities available does not effectively allow for Travellers to live in the traditional way if they so wish. A matter of particular concern to Travellers, which was raised in the Advisory Committee Report, concerns the introduction of the *Housing (Miscellaneous Provisions) Act 2002.* Under this Act criminal law provisions were introduced which are linked to unauthorised dwellings. The result of this is to criminalise the activities of Travellers seeking to practice their nomadic way of life, even though it is clear that there is a lack of suitable halting sites and this despite existing provisions in the law which prevented unauthorised dwellings, without the need for criminal sanctions.

- In **France,** an Act of 1990, called the "Besson Act", imposed for the first time on the local authorities the obligation to create campsites for Travellers. This Act was amended by that of 5 July 2000 on the reception and accommodation of Travellers[180] which reorganizes the system. A regional plan is worked out by the representatives of the State (the Prefect), the regional council, in partnership with the Regional Consultative Committee for Travellers and the associations. This plan determines the geographical areas for the establishment of permanent campsites and the municipalities where they are to be established. Municipalities of more than 5,000 inhabitants must be included. They have two years after the publication of the regional plan to establish those campsites. Failing this, and after notice has been given by the prefect, the State may acquire the necessary sites and carry out the development works, as well as manage the campsites in the name and on behalf of the municipality. Even though considerable efforts have been made by the municipalities, the number of campsites remains clearly insufficient.

- In **Belgium,** according to the *Vlaamse Minderheden Centrum*, there are about fifty Roma, gypsies (Sintis) and Travellers with Belgian nationality who lead a nomadic lifestyle, a few hundred lead a semi-nomadic lifestyle, and around 2,500 live in a residential caravan. In addition, several thousand Roma, gypsies or Travellers from neighbouring countries pass through the country every year. The available sites – residential or transit sites – are largely insufficient. Certain measures have been taken by the authorities to try and remedy this situation. In Flanders, in order to promote the construction of sites by the local authorities, the government has since 1990 paid 90% towards the cost of purchase, development, renovation and extension of "campsites for caravans"[181]. This measure made it possible to induce several municipalities to develop residential sites for mobile dwellings. Yet those remain insufficient. In Wallonia, the Walloon Housing Code provides that when a local authority develops a "site intended for mobile dwellings occupied by Travellers", the Region may assume the cost of providing roads, sewerage, public lighting, and water supply to the site (Art. 44(2)). Furthermore, local authorities can obtain subsidies of up to 60% from the French-speaking Community for the acquisition, development and extension of sites for mobile dwellings[182]. However, the efforts of the Walloon government to urge municipalities to develop such sites have remained in vain. In Flanders and in Wallonia, the main obstacle remains the reluctance of the local authorities to develop sites for Travellers, since this is considered an unpopular measure.

---

[179] Under the *Housing (Traveller Accommodation) Act 1998* each local authority was required to prepare a Traveller accommodation programme which covers a five-year period, 2000-2004. Although each of the local authorities has created a plan as required by the legislation, these have not been fully or satisfactorily implemented and there is a shortage of available housing for Traveller families who do not wish to live in a caravan. Some Traveller organisations have called for the implementation of the legislation to be performed by another agency and not the local authorities as it is felt that they are ineffective at completing the task.

[180] Act n° 2000-614 of 05/07/00, on the reception and accommodation of Travellers, O.J. n° 155 of 06/07/00, p. 10189.

[181] See the decree of 12 May 2000 on subsidizing the acquisition, development, renovation and extension of campsites for fairground stallholders (*M.B.*, 10 August 2000).

[182] Decree of the Executive of the French-speaking Community of 1 July 1982.

- In the **Netherlands**, an act adopted in 1968, the *Woonwagenwet* [Caravan Act], designated 50 regional camp sites, obliging Travellers to station their caravan on one of these, and prohibiting them from moving to another site unless a place became available. There was a great shortage of sites, though: some 3000 additional sites were said to be needed. Moreover many of the camp sites were situated at unattractive or even dangerous places. The Act was abolished in 1999. As a consequence the State authorities do no longer regard Travellers as a separate policy target group; municipalities are responsible for offering sites. The latter, however, also face problems in finding sufficient accommodation, also because local inhabitants invariably protest when the municipal authorities their intention to locate a camp site in the vicinity.

- In the **Slovak Republic**, the Roma communities living in the Slovak Republic do not maintain their traditional lifestyle in the sense of the nomadic or semi-nomadic mode of life. The change of their traditional lifestyle had been probably influenced by Act no. 74/1958 Coll. on permanent settlement of nomadic persons as amended. Pursuant to Section 2 of this Act, a person follows a nomadic way of life if "he or she individually or in groups wanders from place to place avoiding honest work or obtains food in an unscrupulous manner, and this remains the case even if he/she stays in some places as an official permanent resident". This law has been focused on the Roma people, thus clearly discriminating against this national minority living on the territory of the Slovak Republic. Section 3 of this Act, according to which a person following a nomadic way of life even though he/she has been provided an aid to obtain a permanent residence, shall be prosecuted for the criminal offence and sentenced to a term of imprisonment of 6 months up to 3 years, was abrogated in 1990. The Act on permanent settlement of nomadic persons has been only recently abrogated by Act. no. 346/2004 Coll.

7.3. A Directive aiming to achieve the integration of the Roma/Gypsies

What solutions could be envisaged in order to overcome the situation described, which is clearly unacceptable within the Union? In the Conclusions and Recommendations on the Situation of Fundamental Rights in the European Union and its Member States in 2003, the EU Network of Independent Experts on Fundamental Rights has taken the following position:

> "[c]onsidering the specificity of the situation of the Roma/Gypsies, whose socio-economic condition requires not only protection from discrimination but also affirmative desegregation in employment, housing, and education, the EU Network of Independent Experts on Fundamental Rights invites the European Commission to consider proposing a directive based on Article 13 EC and specifically aimed at improving the situation of the Roma/Gypsies population. This directive should be based on the studies documenting the situation of the Roma/Gypsies population, and take into account the relevant rules of the Council of Europe Framework Convention on the Protection of National Minorities as well as the interpretation of this instrument given by the Advisory Committee established under its Article 26. It should provide that effective accommodations will be made to ensure the Roma/Gypsies will be able to maintain their traditional lifestyle, when they have chosen the nomadic or semi-nomadic mode of life, without being forced into sedentarisation. It should take account the need to effectuate the desegregation of the Roma/Gypsy communities, where this is required, especially in employment, housing and education (…). It should address the question of the inaccessibility of certain social and economic rights due to the administrative situation of Roma/Gypsies to whom administrative documents are denied or who are considered stateless. The EU Network of Independent Experts on Fundamental Rights recalls in this respect that such an initiative may be called for by the European Parliament (Article 192, al. 2 EC)."[183]

In the *Report on the situation of Fundamental Rights in the Union in 2003* presented to the Network of Independent Experts on Fundamental Rights, the adoption of a Directive based on Article 13 EC

[183] Conclusions and Recommendations on the Situation of Fundamental Rights in the European Union and its Member States in 2003, p.64.

specifically seeking to ensure the integration of the Roma/Gypsies was made in the following terms:

> The Opinions of the Advisory Committee on the Framework Convention for the Protection of National Minorities leave no doubt as to the inadequacy of Directive 2000/43/EC of 29 June 2000, even though it protects the Roma/Gypsies against all discrimination on the ground of membership of an ethnic group. The urgent need to adopt a specific Directive based on Article 13 EC in order to encourage the integration of the Roma/Gypsy minority not only stems from the grave concerns that have been expressed in the evaluation reports on the situation of this minority in several Member States of the European Union, and not just in the acceding States where the question of integration of the Roma/Gypsies arises with particular acuteness. This urgency also stems from the inappropriateness in several respects of Directive 2000/43/EC, which was not specifically aimed at achieving the *integration* of groups that are traditionally excluded, such as the Roma/Gypsies. First, (…) the Directive does not give the Roma/Gypsies the guarantee of having access to reasonable accommodation matching their specific needs. However, the Roma/Gypsies should, for example, be able to have access to employment or obtain services without being prevented from doing so by the fact of them wearing traditional clothing[184], *even* where a justification may be given to support the prohibition of such clothing. What should require justification is the refusal to make an exception to a general prohibition measure, whereas this measure prevents the Roma/Gypsies from preserving an essential element of their identity. The Roma/Gypsies should be able to choose to lead an itinerant or semi-itinerant lifestyle, *even* there where there are good justifications for country planning legislation which in principle denies them the availability of stopping places for their caravans. Considering that the itinerant lifestyle is part of the Roma/Gypsy identity, non-discrimination in access to housing as in principle imposed by Directive 2000/43/EC (Article 3 § 1, h)) should be understood as obliging the authorities to provide sufficient stopping places for caravans[185]. The obligation to provide effective accommodation where it is reasonable should be imposed, too, in the sphere of education. The Committee of Ministers of the Council of Europe, for instance, has recommended to the Member States of the Organisation that « Educational policies for Roma/Gypsy children should be accompanied by adequate resources and the flexible structures necessary to meet the diversity of the Roma/Gypsy population in Europe and which take into account the existence of Roma/Gypsy groups which lead an itinerant or semi-itinerant lifestyle. In this respect, it might be envisaged having recourse to distance education, based on new communication technologies."[186] Similarly, Part IV of the report *Breaking the Barriers – Romani Women and Access to Public Health Care*, published by the Council of Europe in September 2003 (…) clearly highlights the mechanisms that would make it possible to take better account of the specific situation of the Roma, and particularly that of Romani women, in the access to health care services. The policy of "openness" advocated by this report implies that health care workers become more familiar with Roma practices relating to health care and thus are able to make the necessary accommodations for those practices in order to ensure a non-discriminatory access to health care for the Roma/Gypsies.

[184] Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Finland (ACFC/INF/OP/I(2001)002), par. 25; Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Sweden (ACFC/INF/OP/I(2003)006), par. 24.

[185] Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on the United Kingdom (ACFC/INF/OP/I(2002)006), 30 November 2001, par. 40-42. The Advisory Committee considers that the lack of available sites throughout the United Kingdom is problematic from the point of view of Article 5 of the Framework Convention, which recognizes for members of national minorities the right to preserve the essential elements of their identity, namely their traditions: "This combined with a range of legislative and administrative measures have the effect of inhibiting nomadism and effectively denying travellers the right to maintain and preserve or develop one of the important elements of their culture and identity, namely travelling. The Advisory Committee therefore considers that the Government and the devolved Executives should take further steps to ensure the availability of additional adequate stopping places for Roma / Gypsies and Irish Travellers".

[186] Recommendation No R (2000) 4 of the Committee of Ministers to member states on the education of Roma/Gypsy children in Europe (adopted by the Committee of Ministers on 3 February 2000 at the 696th meeting of the Ministers' Deputies). The passage cited is the first of the Guiding principles of an education policy for Roma/Gypsy children in Europe appended to the recommendation.

Second, with regard to the necessity of achieving the integration of the Roma/Gypsies, the mere prohibition of direct or indirect discrimination does not suffice. Equal treatment in this case involves taking into account a) the need to achieve *desegregation* of Roma/Gypsies in the area of housing and in particular of education, whether the situations of segregation that are encountered are the result of deliberate choices made by the public authorities[187] or of personal preferences[188]; b) the need to *compensate for past discrimination* which resulted in a particularly unfavourable situation for the Roma/Gypsies in social and economic life as a whole, by adopting a policy of *affirmative action* to integrate the Roma/Gypsies in the community[189]; c) the need to encourage the integration of the Roma/Gypsy minority while respecting the attachment to an itinerant life which some of its members may still have. This calls for a policy that effectively promotes the free choice of members of that minority to either pursue an itinerant or semi-itinerant lifestyle or to adopt a sedentary lifestyle which should be allowed to develop in reasonable conditions[190]. Directive 2000/43/EC of 29 June 2000 does not address the issue of segregation as such, that is to say, there where the separation of groups does not lead to one group being treated less favourably than another. It allows Member States to introduce measures of positive action (Article 5), yet without imposing this, that is to say, without making it an essential element of effective equal treatment. Furthermore, it does not answer the question of knowing how to allow members of a traditionally disadvantaged group to become integrated, without this resulting in a forced assimilation of the members of that group, to the detriment of their right to preserve the constituent elements of their identity. Finally, the scope *ratione materiae* of Directive 2000/43/EC is too limited for the needs of the Roma/Gypsies. Their exclusion from a number of public services and essential social goods is the result of their precarious administrative situation, their statelessness and, worst of all, the total lack of administrative documents attesting their legal status[191]. These documents are often expensive to obtain for a highly impoverished people. A specific obstacle to their obtaining these documents

---

[187] On the tendency to establish special classes for Roma children, *de facto* excluding them from normal classes, see Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Sweden (ACFC/INF/OP/I(2003)006), 20 February 2003, par. 87; Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Hungary, ACFC/INF/OP/I(2001)004, par. 22 and especially par. 40-43: Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Slovakia, ACFC/INF/OP/I(2001)001, 22 September 2000, par. 39; Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on the Czech Republic, ACFC/INF/OP/I(2002)002, 6 April 2001, par. 60-62. In principle, the Advisory Committee on the Framework Convention for the Protection of National Minorities considers that placing Roma children in such special schools should take place only when it is absolutely necessary and always on the basis of consistent, objective and comprehensive tests, avoiding culturally biased questions. On the other hand, the Advisory Committee approves of the establishment of so-called zero-classes, allowing the preparation of Roma children for basic school education, inter alia by improving their educational language skills. Furthermore the Advisory Committee considers the creation of posts of Roma pedagogical advisors in schools to be a most positive step (Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on the Czech Republic, ACFC/INF/OP/I(2002)002, 6 April 2001, par. 63). These measures should be regarded as forms of reasonable accommodation for the benefit of the members of this minority. They may be seen as implementing the abovementioned Guiding principles of an education policy for Roma/Gypsy children in Europe appended to Recommendation No R (2000) 4 of the Committee of Ministers to member states on the education of Roma/Gypsy children in Europe, which state in part that « Appropriate support structures should be set up in order to enable Roma/Gypsy children to benefit, in particular through positive action, from equal opportunities at school" (Guiding Principles, 6); and that "The member states are invited to provide the necessary means to implement the above-mentioned policies and arrangements in order to close the gap between Roma/Gypsy pupils and majority pupils" (Guiding Principles, 7).

[188] The Advisory Committee on the Framework Convention for the Protection of National Minorities has found, with regard to Hungary, that there appears to be a "*de facto* increasing separation of schools, (…) where parents withdraw their children from schools where Roma children go. Furthermore, the reluctance of Roma parents to send their children to kindergarten appears to express a lack of confidence in the educational system. Whereas the Hungarian authorities obviously should pay due respect to the principle of parental choice, they must at the same time not remain passive before these undesirable developments and take measures to counteract them" (Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Hungary, ACFC/INF/OP/I(2001)004, par. 43).

[189] See for example the report *Breaking the Barriers – Romani Women and Access to Public Health Care*.

[190] Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Italy, ACFC/INF/OP/I(2002)007, par. 25.

[191] This was also underlined in the contribution which the European Roma Rights Center presented at the hearing organized by the EU Network of Independent Experts on Fundamental Rights on 16 October 2003.

is also the requirement to furnish proof of a fixed address to which social benefits can be paid, which *de facto* has the effect of excluding Roma/Gypsies who lead an itinerant or semi-itinerant life. Among the key findings from the important report mentioned above, *Breaking the Barriers – Romani Women and Access to Public Health Care*, is this (p. 12):

> Many Roma lack identity cards, birth certificates and other official documentation of their legal status. Such documents are often required to access public services. Statelessness, and the lack of status within the State of residence, as well as problems with documentation impede access to a range of rights including access to health care. These situations are created by a variety of factors, including information and financial barriers, eligibility criteria that have a disproportionate impact on Roma, and discrimination by local authorities. There is need for greater awareness among authorities of the situation of Roma, and greater flexibility in application of legal status requirements for Roma (as for other discriminated groups) in order that they may enjoy equal access to public services.

Directive 2000/43/EC does not prohibit discrimination in the issuing of administrative documents. Such documents, however, are often required to access certain social benefits which constitute, particularly for marginalized peoples, an essential aid to integration. This is another reason why a Directive specifically aimed at Roma/Gypsies is indispensable. Article 13 EC forms the appropriate legal basis for such a Directive. This proposal has been considered also by the 2004 study *The situation of the Roma in an Enlarged European Union*,[192] although the authors of that study, because the proposal was made during the last stages of the preparation of their report, could not offer a detailed analysis of what such an instrument could achieve.[193]

7.4. The reliance on an open method of coordination in order to promote the inclusion of the Roma/Gypsies

If, because of the unanimity it requires within the Council of the Union, a directive specifically aiming at the integration of the Roma/Gypsies could not be adopted on the basis of Article 13(1) EC, a more open form of coordination of the measures adopted by the Member States in order to tackle the situation faced by the Roma/Gypsy minority should be envisaged as an alternative. Since the entry into force of the Treaty of Nice, Article 13(2) EC provides the possibility for the Council, acting by a qualified majority in co-decision with the European Parliament, to adopt Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to combat discrimination based, inter alia, on racial or ethnic origin or on religion. At the very least, this provision could be relied upon to ensure that the Member States will inform themselves mutually about the measures they are taking in order to ensure the desegregation of the Roma/Gypsies in the fields of employment, education and housing, to which health care and social security could be added, and about the reasons for their successes and failures in addressing this problem.

A first, but crucial, aspect of this strategy would be to oblige the Member States to collect the requisite information about the situation of the Rome under their jurisdiction, in order to arrive at a better understanding of the problem to be addressed. The Network takes note in this regard with interest of

[192] This study was commissioned by the European Commission (DG Employment and Social Affairs) to Focus Consultancy, the European Roma Rights Centre, and the European Roma Information Office.

[193] This study concludes in this regard: "There is a need to consider the adoption of EU rules prohibiting ethnic and racial segregation in the fields of, at minimum, education, housing and healthcare. The Union should investigate further the development of legal measures in this area, providing "inter alia" definitions and minimum measures to combat racial segregation, including formal monitoring inspections and sanctions. Some have proposed a "desegregation directive" comparable to the Article 13 Directives relating to race and employment. This idea merits closer scrutiny and should be the focus of further research and policy initiatives. In addition, the authors of this study believe that the proposed idea of legal measures binding the Member States to the integration of Roma deserves full consideration, and that the European public is owed a well-grounded debate on the subject. Such a debate should ideally be led by the European Union institutions, in particular the European Commission" (point 14 of the Conclusions and Recommendations summarized in part 6 of the report).

the project that has been carried out in the **Slovak Republic** by the Office of the Plenipotentiary of the Government for Roma Communities in cooperation with the Institute for Public Affairs (NGO) between August 2003 and February 2004. The objective of the project was to perform a complex mapping of all Roma/Gypsy communities in Slovakia, and to review the existing data and to collect and fill in the information that is necessary for proposing effective development strategies in individual Roma/Gypsy communities in the Slovak Republic. The research has not focused on individuals within the Roma minority or individual households, but the Roma/Gypsy community/settlement as a whole. The aim of the project was to collect data, such as the size and the demographic structure of the Roma/Gypsy community, their location in a given territory and availability of basic infrastructure. Furthermore, the project maps the accessibility of education and employment to members of Roma/Gypsy community and to what extent they have a say in public affairs. The output of the project, *inter alia*, is to set up a database of information about Roma communities in **Slovakia**, to be administered by the Office of Plenipotentiary of the Government of the Slovak Republic for Roma Communities. The database is to serve as a source of information for state institutions, donors and organisations involved in carrying out or supporting projects in Roma/Gypsy communities.

Under a decision to launch an open method of coordination between the Member States in order to achieve the integration of the Roma/Gypsies, an initiative for which Article 13(2) EC offers the adequate legal basis, each Member State would submit at regular intervals a report on the measures which have been adopted in order to make progress towards that goal, which should result in a process of mutual evaluation and contribute to collective learning. The information contained in the reports submitted by the Member States on these measures should be evaluated not only from the point of view of their success in achieving desegregation, but also, no less importantly, in their ability to do so while respecting the right of the Roma/Gypsies to maintain their traditional lifestyle, nomadic or semi-nomadic, where they choose to do so, and on the basis of the international and European standards applicable. It should be recalled in this regard that, according to the European Court of Human Rights, the traditional lifestyle of the Roma/Gypsies forms part of the right to respect for private life, family and home, which is protected under Article 8 of the European Convention on Human Rights. As explained in the judgment delivered in *Chapman v. the United Kingdom*, the occupation of a caravan by a Roma/Gypsy "is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies or by their own choice, many Gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children. Measures affecting the applicant's stationing of her caravans therefore have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition".[194]

Of particular relevance in defining the template according to which the performances of the Member States might be evaluated under a measure based on Article 13(2) EC and the open method of coordination it envisages are the Recommendation No. (2001) 17 on improving the economic and employment situation of Roma/Gypsies and Travellers in Europe addressed by the Committee of Ministers of the Council of Europe to the Member States of that organisation, and the General recommendation XXVII on discrimination against Roma adopted by the Committee on the Elimination of Racial Discrimination at its fifty-ninth session in 2000.

Indeed, these instruments may be seen to define the template according to which the measures adopted by the Member States, which they could be called upon to report on. With respect to education for instance, CERD General recommendation XXVII on discrimination against Roma recommends States to "support the inclusion in the school system of all children of Roma origin and to act to reduce drop-out rates, in particular among Roma girls, and, for these purposes, to cooperate actively with Roma parents, associations and local communities" (§ 17), as well as to "prevent and avoid as much as

[194] Eur. Ct. HR (GC), *Chapman v. the United Kingdom* (Application no. 27238/95) judgment of 18 January 2001, § 73.

possible the segregation of Roma students, while keeping open the possibility for bilingual or mother-tongue tuition; to this end, to endeavour to raise the quality of education in all schools and the level of achievement in schools by the minority community, to recruit school personnel from among members of Roma communities and to promote intercultural education" (§ 18).It also recommends to "take the necessary measures to ensure a process of basic education for Roma children of travelling communities, including by admitting them temporarily to local schools, by temporary classes in their places of encampment, or by using new technologies for distance education" (§ 21), which takes into account the need to accommodate the specific traditional lifestyle of the Roma/Gypsies who choose to preserve this lifestyle. In the field of employment, CERD General recommendation XXVII on discrimination against Roma recommends to "take special measures to promote the employment of Roma in the public administration and institutions, as well as in private companies" (§ 28) and to " adopt and implement, whenever possible, at the central or local level, special measures in favor 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" (§ 29). In the field of housing, the Recommendation demands that States "develop and implement policies and projects aimed at avoiding segregation of Roma communities in housing; (...) involve Roma communities and associations as partners together with other persons in housing project construction, rehabilitation and maintenance" (§ 30) and that they "act firmly against any discriminatory practices affecting Roma, mainly by local authorities and private owners, with regard to taking up residence and access to housing; (...) act firmly against local measures denying residence to and unlawful expulsion of Roma, and to refrain from placing Roma in camps outside populated areas that are isolated and without access to health care and other facilities" (§ 31), but also, again in order to ensure respect for the traditional lifestyle of the Roma/Gypsies, that they "take the necessary measures, as appropriate, for offering Roma nomadic groups or Travellers camping places for their caravans, with all necessary facilities" (§ 32). If, as may be desirable, full integration of the Roma/Gypsies is to be achieved also through combating their exclusion from healthcare and social security services, inspiration again may be sought from CERD General recommendation XXVII on discrimination against Roma, which not only insists that any discriminatory practices against the Roma/Gypsies in this field should be eliminated (§ 33), but also recommends that States "initiate and implement programmes and projects in the field of health for Roma, mainly women and children, having in mind their disadvantaged situation due to extreme poverty and low level of education, as well as to cultural differences; (...) involve Roma associations and communities and their representatives, mainly women, in designing and implementing health programmes and projects concerning Roma groups" (§ 34). All these recommendations may serve to identify the indicators which the States should use in order to monitor their progress at regular intervals, and the targets which the national action plans they should adopt for this purpose should define.

7.5. The requirement of an active participation of the Roma/Gypsies in the identification of measures which seek to promote their integration

While the Member States are encouraged to develop action plans in order to ensure the desegregation of the Roma/Gypsies, they should be reminded that any measure seeking to promote the integration of the Roma/Gypsy minority should be devised with the active participation of representatives of this group. In its Opinion on Spain, the Advisory Committee of the Framework Convention noted that, although the disparities faced by the Roma/Gypsy population of Spain have received priority attention from the authorities,

> in many cases the measures taken have proved unsuited to the Roma lifestyle and traditions, and consequently ineffective. It should also be stressed that, despite a strong sense of identity and a common ethnic origin, the Roma population of Spain is very heterogeneous in terms of level of education, vocational skills, way of life and beliefs. For this reason it is essential that the authorities at every level (central, regional and especially local) consult Roma representatives in order to take their lifestyles and socio-economic circumstances fully into account.[195]

[195] At para. 37.

Similarly, in its Recommendation No. (2001) 17 on improving the economic and employment situation of Roma/Gypsies and Travellers in Europe addressed to the Member States, the Committee of Ministers of the Council of Europe insisted that “Roma/Gypsy communities and organisations should participate fully in the processes of designing, implementing and monitoring programmes and policies aimed at improving their economic and employment situation”. And CERD General Recommendation XXVII on discrimination against Roma, requires to “involve Roma communities and associations and their representatives at the earliest stages in the development and implementation of policies and programmes affecting them and to ensure sufficient transparency about such policies and programmes” (§ 43). The following frame illustrates certain institutional mechanisms which have been set up in the Member States and might facilitate such consultative processes.

Consultative bodies of Roma/Gypsies

Many states have set up various mechanisms of consultation of Roma/Gypsy, Sintis or Travellers organisations. Some of them, in particular, have established specific bodies representing these communities, which are to be consulted on matters affecting them:

- In the **Czech Republic**, the most important consultative body relating to the Roma/Gypsy community is the Council for the Roma Community Affairs. It is a permanent advisory and initiative body of the Government on issues related to Roma community. The Roma community is represented further in the Minorities Council. As consulting bodies at the level of regions and in the capital city of Prague, there are Roma co-ordinators[196]. There are Roma consultants and terrain social workers. Each competent ministry has its own commission or working group concerning the Roma/Gypsy problematic. And at the local level, there are national minority committees.

- In **Germany** it is the Central Council of German Sinti and Roma – which is an umbrella organisation for 9 Land associations as well as for several regional and local associations and institutions – that represents the interests of this community.

- In **Finland**, there is a nationwide Advisory Board on Roma Affairs and four regional advisory boards. At least a half of their members shall represent the Roma population.

- In **Ireland**, the National Traveller Accommodation Consultative Committee (NTACC) was established to oversee the implementation of the National Strategy. In 1999 this group was placed on a statutory footing under Section 19(1) of the *Housing (Traveller Accommodation) Act 1998.* The function of this Committee is to advise the Minister with responsibility regarding matters concerning accommodation for Travellers or any other matter referred to it by the Minister.

- In **France,** a National Consultative Committee for Travellers was set up for the purpose of consultation on draft laws and regulations concerning this community. Its members are appointed by decree. The Committee is charged with studying the problems encountered by Travellers and working out proposals to improve their integration in the national community. It draws up an annual report and may be consulted on draft laws and regulations concerning their integration in the national community. The Travellers are also consulted through their associations, which are often involved by the public authorities in the elaboration of the regional plan or with a view to the schooling of their children.

- In **Hungary**, the 1140/2002 Government Order established the Council for Roma Affairs aimed at the social integration and more effective representation of the Roma/Gypsy communities. The Council is a consultative body working with the government. Its competencies are similar to the

[196] Zákon _. 129/2000 Sb., o krajích (krajské z_ízení), ve zn_ní pozd_j_ích p_edpis_ (Law No. 129/2000 Coll. of Laws, on Regions, as amended by later laws).

Office for National and Ethnic Minorities in relation to the Roma population: it is entitled to state its opinion on bills and measures targeted at the improvement of the social situation of Roma; to participate in developing the government strategy; to maintain the dialogue with Roma organizations. The members of the Council are the following: the Prime Minister (president of the Council), the Minister leading the Prime Minister's Office (vice-president of the Council), twenty-one acclaimed persons appointed by the Prime Minister.

- In **Slovenia**, pursuant to the Self-Governing National Communities Act (Art. 15, para. 2), when the Government, the ministries or other state bodies take a decision affecting a national community, they are obliged to acquire a preliminary opinion of the governing bodies of that community. According to instruction No. 034-12/2001 of 3 March 2003 on the integration of national communities into the decision-making procedures related to the status of their members, issued by the Secretary General of the Government, in matters involving the Roma national community, it is the Roma community's highest body, i.e. the Union of the Roma of Slovenia, which must be consulted.

- In **Austria**, Roma have their own Ethnic Group Advisory Council, but the real representation of interests is done through their private (cultural) associations and other informal channels.

With regard to other Member States, the following structures may be mentioned:

- In **Spain,** a Consultative Committee on the Gypsy development programme has been set up. It is composed of representatives of the government and of the Gypsy associations. There is also a Gypsy Secretariat-General Foundation which develops projects in the area of training and employment, health and support to the advisory committees of gypsies in Spain. The city council of Barcelona has set up the Municipal Council of the Gypsy Community in Barcelona, a consultative body which offers a stable platform for debates on the well-being and quality of life of the Roma/Gypsies of that city.

- In **Greece,** the representatives of the Roma are consulted more and more often when measures are adopted that affect their situation. They are also involved in the implementation of the "General Action Programme for the Social Integration of the Greek Roma (2002-2008)", initiated in 2002 by the government. On 1 July 2004, a Commission for the Integration of the Greek Roma was set up by ministerial decision, chaired by the Secretary-General of the Ministry of the Interior and with representatives of the Roma/Gypsies. Since 2003, a representative of the Roma/Gypsies is on the National Human Rights Commission.

- In **Belgium,** there is no representative body of Roma/Gypsies, Sintis or Travellers. Nevertheless, in Flanders, in accordance with the decree on the Flemish policy towards ethnic and cultural minorities, which numbers the Roma and Travellers among its target groups, five "Traveller units" have been set up at the regional integration centres. Those units are charged with analyzing, evaluating and stimulating the policy conducted in their sector towards minorities and stimulating close involvement of the target groups and their organizations in the policies of the public authorities. In Wallonia, the *Centre de Médiation des Gens du Voyage de la Région wallonne* (Travellers Mediation Centre of the Walloon Region) was set up in 2001 at the suggestion of the Centre for Equality of Opportunity and the Fight against Racism. It is charged with supervising all projects concerning Travellers and playing the role of mediator between the Travellers and the public authorities. In 1997, the Flemish government set up a Flemish Commission for Mobile Dwellings (*Vlaamse Woonwagencommissie*), which is composed of representatives of the Ministers of Welfare, Town and Country Planning and Housing, the association of Flemish towns and municipalities, as well

as persons living in caravans. Its purpose is to formulate concrete proposals to address problems connected with housing and the development of sites for Travellers[197].

- **Lithuania** and the **Slovak Republic** have one consultative body for all the ethnic and national minorities together. Thus, in Lithuania, along side with other ethnic minorities, the Roma are represented in the Council of Ethnic (National) Minorities, which is a consultative body under the Department on the National Minorities and Lithuanians living abroad. There are also 15 non–governmental organisations of Roma acting in the country. In the Slovak Republic, the Council of the Government of the Slovak Republic for national minorities and ethnic groups is the advisory, and coordinative organ of the Slovak government for areas of state policy concerning national minorities. It cooperates with ministries, administrative organs, municipal and regional authorities, organisations and associations of national minorities and ethnic groups, NGOs, scientific institutions, etc.. Besides, the Deputy Prime Minister of the **Slovak Republic** for the European Affairs, Human Rights and Minorities has a advisory body for areas concerning Roma, namely the Plenipotentiary of the Slovak Government for Roma Communities.

[197] See D. Beersmans, *Evaluatie Vlaams standplaatsenbeleid*, Vlaams Minderhedencentrum, May 2003, p. 19

LIST OF RECOMMENDATIONS

The main recommendations based on the Thematic Comment prepared within the Network of Independent Experts are the following. The Thematic Comment also makes other, more minor, recommendations. In the following list, reference is made to the developments contained in the main body of the Thematic Comment. The list of recommendations in this summary does not necessarily follow the order in which these recommendations appear in the body of the document:

Affirming a commitment to the rights of minorities

At the present stage of the development of the Union, the institutions of the Union should send a clear message that they will take into account the rights of minorities in the exercise of their competences. Such a declared commitment to upholding the rights of minorities should refer to the Copenhagen Document adopted on 29 June 1990 in the framework of the Conference on Security and Cooperation in Europe, as well as to the Council of Europe Framework Convention for the Protection of National Minorities of 1 February 1995. Such a clarification could take the form of an inter-institutional declaration, or even of a communication by the Commission, affirming a willingness to respect, protect and promote the rights of minorities and the understanding the institution intends to give to this term as it appears in Union law. Such an initiative would not only send a powerful message to the general public, that the rights of minorities shall be taken into consideration in the development of the law of the Union. It could also offer an important contribution to legal certainty.

Monitoring the situation of minorities while fully respecting the applicable legal safeguards

Certain Member States justify their resistance to ethnic or religious monitoring – although recommended the Protection of National Minorities and by the European Commission on Racism and Intolerance – by the requirements of the protection of private life with regard to the processing of personal data. A clarification of the scope of these requirements would therefore be welcome. Such a clarification would concern, in particular, the distinction to be made between the processing of personal data (as may be required for the implementation of positive action programmes) and the statistical use of data, whether these are personal data which have been anonymized, or whether these have been collected by means which exclude that they may be linked to particular individuals. An opinion from the Data Protection Working Party established under Article 29 of 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 could be requested by the European Commission, or the Data Protection Working Party could formulate in this respect a recommendation on its own initiative (see 2.5).

The introduction within the practices of the Member States of an *ex ante* and *ex post* monitoring of the impact of regulations and policies on ethnic and religious minorities, in certain fields such as employment, education and housing, may be based on Article 13(1) EC, and it could form part of a revision of the Directives adopted on the basis of this provision, if and when these Directives will be revised in the future. But in the field of employment, it could also be included as part of the renewed guidelines for the employment policies of the Member States, which would present the advantage of making it possible to go beyond the monitoring of the situation of ethnic and religious minorities in order to include the monitoring of the situation of linguistic minorities (including newly arrived immigrants). Finally, Article 13(2) EC, introduced by the Treaty of Nice, could provide an independent legal basis for the introduction of such monitoring processes. A combination of these possibilities should be considered. Indeed, only by locating the introduction of such monitoring of the situation of minorities elsewhere that under Article 13 EC may the situation of linguistic minorities be adequately addressed, except where, as with the Roma, the linguistic and ethnic categories intersect (see 3.3 and 3.4).

The European Commission could lead by example by including, in the impact assessments it prepares on its legislative proposals, an examination of the impact on the situation of minorities. The existence of Union-wide harmonized indicators, ensuring a comparability of the data collected within each Member State with respect to the situation of the minorities in that State, should not be seen as a prerequisite to such impact assessments of Union legislation and policies. Indeed, in assessing legislative or regulatory proposals at the level of the Union, the relevant question is whether the adoption of these proposals and their implementation by each Member State may lead, in certain or all States, to a situation where certain minorities would be negatively and disproportionately affected, would be put at a particular disadvantage, or would not have their specific needs recognized. In order to answer adequately such a question, the reliance on the indicators defined at the level of each Member State should be seen as an advantage, rather than as an obstacle, insofar as this ensures the visibility in such assessments of minorities whose situation may be neglected in the context of less refined assessments conducted at the level of the Union (see 3.4).

Developing the potential of Directive 2000/43/EC as an instrument for the protection of the rights of minorities

The potential of the Council Directive 2000/43/CE of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin could be further explored in two directions:

- The use of language requirements in the areas covered by Council Directive 2000/43/CE of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin should be carefully scrutinized, in order to ensure that they are not unreasonable or disproportionate, thus potentially leading to a form of indirect discrimination on the grounds of ethnic origin as prohibited under this Directive (see 3.1.1).

- Where the conditions for granting nationality themselves constitute direct or indirect discrimination on grounds of racial or ethnic origin, they may be prohibited from the viewpoint of Directive 2000/43/EC, insofar as access to nationality conditions or facilitates access to employment, education and housing, as well as to the other social goods to which this Directive applies in accordance with its Article 3. It therefore needs to be verified whether the rules governing access to nationality do not institute direct or indirect discrimination against certain persons defined according to their ethnic origin (see 3.1.2).

If and when the European Commission decides to launch a debate on the need to expand Council Directive 2000/78/EC beyond its current scope of application which is limited to employment and occupation, this debate should include the question whether the understanding of the notion of discrimination in the current Directives should not be clarified and further improved. In particular:

- It should be asked whether the prohibition of indirect discrimination should be seen as imposing an obligation on the Member States to monitor, by statistical means, the impact on ethnic and religious minorities of the measures they introduce or maintain in the fields to which the prohibition of discrimination applies. The imposition of such an obligation should be considered as inherent to the prohibition of discrimination. It should include both an obligation to develop impact assessments on an *ex ante* basis, when a new regulation or practice is introduced, in order to anticipate its potential impact, and an obligation to evaluate, *post hoc*, the effective impacts on ethnic or religious minorities of existing regulations or practices at regular intervals. The protection of the right to respect for private life vis-à-vis the processing of personal data should not be seen as an obstacle to the introduction of such a form of statistical monitoring (see 3.4).

- The definition of discrimination under Directives 2000/43/EC and 2000/78/EC, especially in the context of any future revision of the latter directive, should include the refusal to provide reasonable accommodation in order to meet the specific situation of ethnic and religious minorities, in accordance with a growing recognition both in national laws and in the international law of human

rights that a refusal to provide reasonable accommodation to meet the requirements of any particular religion or the traditions of any particular ethnic group might constitute a form of indirect discrimination (see 5.3).

• In the context of any future debate on the revision of the existing Directives adopted on the basis of Article 13 EC, it should also be examined whether, in accordance with the understanding of the prohibition of discrimination in the case-law of the European Court of Justice, the Member States should be made to allow the alleged victims of discrimination to prove discrimination by bringing forward statistics demonstrating the disparate impact on the members of the categories to which they belong of certain generally applicable, apparently neutral regulations or practices. This is turn requires that such statistics are collected and made available, and that they are updated on a regular basis (see 3.4).

Combating Racism and Xenophobia

As already emphasized by the Network of Independent Experts, the Council should give renewed attention to the proposal submitted by the Commission on 28 November 2001 for a Council framework decision on combating racism and xenophobia, based on Articles 29(1) and 34 EU, aiming at the approximation of the laws and regulations of the Member States regarding racist and xenophobic offences by the definition of a minimum level of sanctions common to the member states. If and when the framework decision on combating racism and xenophobia is adopted, consideration should be given to the means through which the implementation of this instrument shall be ensured : such an evaluation should concern, not only the adoption of the legal measures required, but also their effective dissemination to the stakeholders, especially non-governmental organizations specialized in combating racism and xenophobia, who should ideally be implicated in the process of implementation. Moreover, a programme of accompanying measures ensuring this dissemination, including through the training of lawyers, the police, magistrates and civil society organisations, might be envisaged (see 4.1).

Improving the representation of minorities in the media

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 shall be subject to an evaluation in 2005. In that respect:

• Special consideration should be given in the course of such an evaluation 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. 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 write into European legislation the existing case-law of the European Court of Justice on this question (see 4.2).

• The requirements identified by the Advisory Committee established under the Framework Convention for the Protection of National Minorities, which concern the rights of linguistic minorities in the media should already be taken into account in the evaluation of measures adopted by the Member States under 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 Preamble and Article 7 of which 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." These requirements could moreover be taken into account in the future revision of Directive 89/552/EEC, in order to ensure that television broadcasting within the Union will fully respect the rights of linguistic minorities (see 6.2).

Addressing the Situation of the Roma

The socio-economic condition of the Roma, and especially the situation of segregation they are facing in the fields of education and housing, but also to a certain extent employment and access to health care, requires not only protection from discrimination but also affirmative desegregation in these different fields. Therefore:

- The European Commission to consider proposing a directive based on Article 13(1) EC and specifically aimed at improving the situation of the Roma/Gypsies population. This directive should be based on the studies documenting the situation of the Roma/Gypsies population, and take into account the relevant rules of the Council of Europe Framework Convention on the Protection of National Minorities as well as the interpretation of this instrument given by the Advisory Committee established under its Article 26. It should provide that effective accommodations will be made to ensure the Roma/Gypsies will be able to maintain their traditional lifestyle, when they have chosen the nomadic or semi-nomadic mode of life, without being forced into sedentarisation. It should take account the need to effectuate the desegregation of the Romani/Gypsy communities, where this is required, especially in employment, housing and education. It should address the question of the inaccessibility of certain social and economic rights due to the administrative situation of Roma/Gypsies to whom administrative documents are denied or who are considered stateless (see 7.3).

- Alternatively, a more open form of coordination of the measures adopted by the Member States in order to tackle the situation faced by the Roma/Gypsy minority could be envisaged. Article 13(2) EC could be relied upon to ensure that the Member States will inform themselves mutually about the measures they are taking in order to ensure the desegregation of the Roma/Gypsies in the fields of employment, education and housing, to which health care and social security could be added, and about the reasons for their successes and failures in addressing this problem. This strategy would oblige the Member States to collect the requisite information about the situation of the Rome under their jurisdiction, in order to arrive at a better understanding of the problem to be addressed. Under this strategy, each Member State would submit at regular intervals a report on the measures which have been adopted in order to make progress towards the goal of ensuring the integration of the Roma/Gypsy minority, which should result in a process of mutual evaluation and contribute to collective learning. The information contained in the reports submitted by the Member States on these measures should be evaluated not only from the point of view of their success in achieving desegregation, but also, no less importantly, in their ability to do so while respecting the right of the Roma/Gypsies to maintain their traditional lifestyle, nomadic or semi-nomadic, where they choose to do so, and on the basis of the international and European standards applicable. Of particular relevance in defining the template according to which the performances of the Member States might be evaluated under a measure based on Article 13(2) EC and the open method of coordination it envisages are the Recommendation No. (2001) 17 on improving the economic and employment situation of Roma/Gypsies and Travellers in Europe which, in the framework of the Council of Europe, the Committee of Ministers of that organisation has addressed to its Member States, and the General recommendation XXVII on discrimination against Roma adopted by the Committee on the Elimination of Racial Discrimination at its fifty-ninth session in 2000.

- As confirmed by these two instruments, any measure seeking to promote the integration of the Roma/Gypsy minority should be devised with the active participation of representatives of this group.

APPENDIX: The Protection of Minorities in the European Union

APPENDIX A: The definition of a minority and its status in domestic law

APPENDIX B: Affiliation with a minority

APPENDIX C: The obstacles facing the Muslim community

APPENDIX D: The rights of Linguistic Minorities: An Overview

APPENDIX A: The definition of a minority and its status in domestic law

With regard to the legal status of minorities in their domestic law, the EU member States may be classified in two broad groups: those whose law explicitly recognizes the existence of national, ethnic, religious or linguistic minorities; and those whose legal order ignores the concept of "minority" in the international law sense of the term. Among the latter, however, a further distinction can be made between States which admit, at the international level, the existence of minorities in their territory, although their internal law does not use this term, and those States which deny that any minority exist in their population. Furthermore, while not using the language of "minority rights", the legal system of certain states do provide for a special status for certain cultural or linguistic groups, which, in certain cases, could qualify as minorities in the sense of international law.

1. States whose internal law formally recognises the existence of minorities

States whose domestic law explicitly recognises the existence of minorities are the following: **Austria, the Czech Republic, Denmark (with some reservations), Estonia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Slovakia, Slovenia** and **Sweden**. However, the modalities and scope of this recognition vary from State to State.

1.1 The definition of the notion of minority

Only part of these States provide for a legal definition of the notion of minority: **Austria** (whose law defines the notion of "ethnic minority"), the **Czech Republic** ("national minority"), **Estonia** ("national minority"), **Hungary** ("national or ethnic minority"). In **Poland**, the new Law on National and Ethnic Minorities in the Republic of Poland, approved by the *Sejm* in January 2005, gives a definition of both the "national minority" and the "ethnic minority". Such a definition is also included in the Lithuanian Draft Law on National Minorities announced in 2003. Certain States combine a definition of the « minority » with an identification of which groups are considered to form a minority under the definition put forward: this is the case, for instance, in **Hungary** and in **Poland**.

Other States' legal systems, while recognising the existence of minorities, do not define the concept. In certain cases, the government has nevertheless relied on a definition for practical purposes. For instance, in its first report submitted to the Council of Ministers under Article 25, para. 1, of the Framework Convention for the Protection of National Minorities, **Germany** stated that: "In Germany, national minorities are those groups of German citizens who are traditionally resident in the Federal Republic of Germany and live in their traditional/ancestral settlement areas, but who differ from the majority population through their own language, culture and history – i.e. an identity of their own – and who wish to preserve that identity" (p. 17)[198]. Similarly, although the notion of minority is not defined in **Sweden**, a Government Bill (see Government Bill 1998/99:143 *National Minorities in Sweden*) states that the following criteria should be fulfilled in order for a group to be recognised as a national minority: "1. Groups with a distinct affinity which, in terms of number and in relation to the rest of the population, do not have a dominant position in society. 2. Groups with a religious, traditional and/or cultural affinity. Just one of these characteristics is sufficient. 3. Self-identification. Both the individual and the group should have a desire and an aim to maintain their identity. 4. The group should have historical or long-established ties with Sweden. The only minority groups that are considered to fulfil this last criterion are those that have been established in Sweden since before the turn of the last century (before 1900)"[199]. In the **Netherlands**, the authorities consider only those groups of *allochtonen* (foreigners, and Dutch citizens of a foreign background) to be minorities who have a disadvantaged position in society *and* for the presence of whom the Government feels a certain

[198] According to the Declaration of the Federal Republic of Germany at the time of signature of the FCNM on 11 May 1995 Germany determined the groups to which the FCNM should apply: "National Minorities in the Federal Republic of Germany are the Danes of German citizenship and the members of the Sorbian people with German citizenship. The framework Convention will also be applied to members of the ethnic groups traditionally resident in Germany, the Frisians of German citizenship and the Sinti and Roma of German citizenship.

[199] Ministry of Justice, Sweden, National minorities and minority languages, Ju 03.10e, June 2003, p. 1.

responsibility[200]. There is however no single definition of the concept of minorities in Dutch law : while some legal instruments grant specific rights to the *Friezen* [Frisians], a minority that has traditionally lived in the north of the country, other legal instruments adopt a much broader approach, including newly arrived immigrants in the notion of minorities[201]; but when accepting the Framework Convention for the Protection of National Minorities, on 16 February 2005, the Netherlands only referred to the *Friezen* [Frisians] as falling within the scope of the Convention.

The definitions contained in domestic laws usually include the requirement that the members of the group concerned be citizens of the state in order to constitute a minority. In many cases, it is also required that the group has long-established or historical ties with the country. The **Hungarian** and **Polish** Laws on Minorities, in particular, both state that the group must be living in the country for at least one hundred years to qualify as a minority, and this, we have seen, is also a requirement the Swedish authorities seem to rely on. Such conditions on the other hand are not always present: thus, although **Estonia** made a declaration when joining the Council of Europe Framework Convention, stating that it considers only persons who are citizens of Estonia to enjoy the rights foreseen in the Convention, the definition laid down in the Estonian *National Minority Cultural Autonomy Act* does not require that the groups' members be citizens of the state to be considered as a national minority, and Estonia has not differentiated in fact between e.g. minority rights of Russian-speaking individuals holding the Estonian citizenship and those not holding it. Moreover, the Advisory Committee, in its opinion on Estonia, notes that the Estonian Government has agreed to examine the protection of persons not covered by its declaration, including non-citizens[202].

In yet other States, the inclusion or not of the condition of citizenship remains unsettled. For instance, the draft Lithuanian law does not include either the citizenship criteria, and the public statements made by the Government of the Republic of **Lithuania** show an inclusive approach towards the existence of ethnic or national minorities in the country : the first report by Lithuania on the implementation of the FCNM, while explicitly recognising the existence of the Russian, Polish, Byelorussian, Jewish, Karaite, Tatar, Roma, German and Ukrainian minorities, also refers to "other national minorities", who have established themselves in Lithuania during the period after the World War II. However, the relevant laws in force do not allow to clearly conclude if non-citizens shall be also considered as belonging to the national minorities and, therefore, entitled to the protection afforded to minorities, and the new arrivals of migrants and refugees raise an issue whether the newly established ethnic groups in the country, particularly Afghans and Chechens might effectively require protection under the relevant Lithuanian laws.

It can also be noted that **Latvia** (where national legislation does not contain a specific definition of minority) has not restricted the enjoyment of the rights of minorities based on any particular criteria. The Constitution (*Satversme*) does not limit membership in a national minority to any specific category of individuals residing in Latvia. Persons with the status of non-citizens or stateless persons in Latvia were provided with relevant rights to preserve culture, language or identity. The 1995 *Law on Status of citizens of the former USSR who are not citizens of Latvia or any other country* and the 1999 *Law on Stateless Persons*, until it ceased to be in force on 2 March 2004, provided for the right to preserve the mother tongue to non-citizens and stateless persons, thus, it can be argued, recognizing linguistic minorities among these groups of individuals. Since 2004 such an approach remains in force in relation to persons having a status of non-citizens. It remains uncertain whether the wide approach

---

[200] The overall integration policies distinguish between the following main categories: persons coming from the former *wervingslanden* [countries where foreign workers were recruited], notably Turkey, Morocco, former Yugoslavia, and Cabo Verde; persons coming from the former overseas territories: Aruba, the Netherlands Antilles, Suriname; Moluccans; refugees and protected persons, notably from Iraq, Afghanistan, Somalia and Iran; special groups, such as Chinese.

[201] Thus, for the purposes of the *Wet stimulering arbeidsdeelname minderheden* [Employment of Minorities Act 1998] – an act that aimed to increase the professional participation of ethnic minorities – the following were regarded as minorities: persons born in Turkey, Morocco, Suriname, the Dutch Antilles, Aruba, former Yugoslavia, as well as other countries in South and Central America, Africa and Asia (with the exception of Japan and former Netherlands Indies), as well as their children.

[202] Opinion on Estonia, 14 September 2001, ACFC/INF/OP/I(2002)005, para. 17.

that has so far emerged in Latvian law embracing citizens and non-citizens alike for the purposes of rights to preserve culture, language and identity will carry over to the future in view of the political discussions concerning the definition of a 'minority' in Latvia. Contradictory statements are made in this regard. The Foreign Minister has announced that he proposes to extend the definition of a national minority to those citizens who lived in Latvia before 1940 and their descendants. The Prime Minister has announced that the rights of national minorities will not be extended to immigrants who arrived in Latvia after 1940.

Finally, it must be emphasized that, in practice, a growing number of states, in their report on the implementation of the FCNM, do not restrict the information provided to people who are citizens: apart from Estonia, other countries, such as Sweden,[203] Ireland,[204] the United Kingdom,[205] or Finland,[206] thus provide information on certain groups, regardless of whether their members are citizens or not. This may or may include information on groups of recently arrived immigrants. It may or may not be interpreted as a recognition that the concept of "minorities", as benefiting the rights stipulated under the Framework Convention on the Protection of National Minorities, may extend to non-nationals, whether or not they have strong links to the national territory.

1.2 Legal instruments laying down the rights of the members of minorities

In most of the states which explicitly recognize the presence of minorities, the regime of minority protection finds its foundation in the Constitution. **Austria**,[207] the **Czech Republic**,[208] **Estonia**,[209] **Hungary**,[210] **Italy**,[211] **Latvia**,[212] **Lithuania**,[213] **Poland**,[214] **Slovenia**,[215] and **Slovakia**,[216] all have constitutional provision(s) referring to the protection of minorities although, in some of these States, the Constitution does not use the term "minority", but another expression such as "national community" or "ethnic group".

Besides, in **Austria**[217], in the **Czech Republic**[218], in **Estonia**[219], in **Hungary**[220], in **Latvia**[221], in **Lithuania**[222] and in **Sweden**[223], there is a general legislation laying down the rights of all persons

---

[203] Opinion on Sweden, 20 February 2003, ACFC/INF/OP/I(2003)006, para. 16.
[204] Opinion on Ireland, 22 may 2003, ACFC/INF/OP/I(2004)003, para. 24.
[205] Opinion on the United Kingdom, 30 November 2001, ACFC/INF/OP/I(2002)006, para. 14.
[206] Second Report submitted by Finland pursuant to Article 25, paragraph 1 of the Framework Convention, ACFC/SR/II(2004)012.
[207] Article 8 of the Austrian Constitution, as amended in 2000, contains a political commitment of the Republic to its linguistic and cultural pluralism that is expressed by the old-established ethnic groups. Austria further commits itself to respect, protect and promote those groups without however establishing directly enforceable rights.
[208] Article 25 of the constitutional Charter of Fundamental Rights and Freedoms provides the basic framework for the protection of "national or ethnic minorities". (Const. Law No. 2/1993 Coll. Of Laws).
[209] Articles 49, 50 and 51 of the Estonian Constitution.
[210] Article 68 of the Hungarian Constitution provides a general framework for the protection of "national and ethnic minorities."
[211] Italian Constitution states in art. 6, that "The Republic protects linguistic minorities with special laws."
[212] Article 114 of the *Satversme* (Constitution)
[213] Articles 37 and 45 of the Lithuanian Constitution refer to « ethnic communities ».
[214] Article 35 of the Polish Constitution guarantees that Polish citizens, who belong to national and ethnic minorities, have the right to preserve and promote their own language, maintain their customs and traditions, and develop their own culture.
[215] Articles 61, 64 and 65 of the Slovenian Constitution.
[216] Article 12 paragraph 3, and Articles 33 and 34 of the Constitution of the Slovak Republic. Members of national minorities and ethnic groups are also mentioned in the Constitution's preamble.
[217] Rights of members of minorities lie scattered in a variety of laws, however, the Ethnic Groups Act 1976 (*Volksgruppengesetz*, *BGBl. 396/1976*) and its derivative statutory regulations constitute the main legal references in this respect. The St. Germain Peace Treaty of 1919 (*Staatsvertrag von St. Germain, StGBl. Nr. 303/1920*), which forms part of today's constitutional law as well, guarantees every member of a minority the free use of their language and the free exercise of their religion; eventually, the state is under a duty to ensure that in districts with a proportionally remarkable number of non-German speakers the children of these Austrian citizens can be educated at primary school in their own language.
[218] Law No. 273/2001 Coll., on the Rights of Persons Belonging to National Minorities.
[219] The National Minority Cultural Autonomy Act, adopted on 26.10.1993, *State Gazette* I 1993, 71, 1001.
[220] The Act LXXVII. of 1993 on the Rights of National and Ethnic Minorities gives a detailed regulation concerning the individual and collective rights of minorities.

belonging to national or ethnic, religious or linguistic minorities. In **Poland**, the Law on National and Ethnic Minorities in the Republic of Poland has been approved by *Sejm* on 6 January 2005. In Lithuania, a new Law on National minorities has been drafted but its adoption has been delayed due to the lack of political consensus in the *Seimas* (Parliament) on the content and scope of the rights to be set out by the law. In Slovakia, there is no general legal act stating the rights of persons belonging to minorities, but there are several statutory regulations which regulate in detail some of their rights. A draft general law has been in the process of preparation in co-operation between the Office of Deputy Prime Minister for Human Rights, National Minorities and European Affairs and the Ministry of Culture of the **Slovak Republic**. The draft law was expected to be approved by the Slovak Government in December 2004.

In **Germany**, no general laws exist but some laws take expressly into account the special situation of « national minorities ». In addition, the laws of several *Länder* give special attention to certain specific minorities. For instance, the Constitution of the Free State of Saxony (1992), guarantees that the citizens of Sorbian ethnic origin living in the Land enjoy equal rights. By virtue of the Constitution of the Land of the Land of Schleswig-Holstein (1949), the « national Danish minority and the Frisian ethnic group » are entitled to protection and promotion. One can also mention the Act on the Sorb's Rights in the Free State of Saxony (1999) and the Act to Regulate the Development of the Sorbs (Wends) Rights in the Land of Brandenburg (1994).

In **Italy**, the law recognizes explicitly only linguistic minorities. The Italian Constitution states in article 6 that "[t]he Republic protects linguistic minorities with special laws." The *Law on the protection of Linguistic and Historic Minorities* No. 482 of 15 December 1999, which entered into force in January 2000, aims at promoting the linguistic and cultural heritage other than Italian, according to general principles set by European and international bodies. It recognizes the existence of and guarantees the language and culture protection of the following populations: Albanian, Catalan, German, Greek, Slovenian, Croatian, and those French speaking, French-Provençal speaking, Friulian speaking, Ladino speaking, Occitan and Sardinian speaking.[224] Furthermore, the Statutes of the regions of Valle d'Aosta/Vallée d'Aoste, Trentino Alto Adige/ Trentino Südtirol or Friuli Venezia Giulia, which all enjoy a special autonomy status, guarantee the protection of the minorities traditionally settled there, i.e. the German-speaking, Ladin, French-speaking and Slovene populations. The Senate adopted in 2001 Law No. 38/01 governing protection of the Slovene linguistic minority in the Friuli-Venezia Giulia region. This new law grants equal protection to the Slovenes living in the three provinces of Trieste, Gorizia and Udine.[225] This protection, however, only applies within the territory of the regions or provinces concerned. Individuals belonging to these linguistics minorities do not benefit from it outside these zones.

In other states, relevant legal provisions concern exclusively one or two specific minority groups:

- In **Slovenia**, while article 61 of the Constitution guarantees everyone's right « to freely express affiliation with his nation or national community, to foster and give expression to his culture and to use his language and script », article 64 enumerates the special rights conferred on the Italian and Hungarian so-called « *autochthonous national communities* ». The *Self-*

[221] The 1991 *Law on Free Development and Right to Cultural Autonomy of National and Ethnic Groups* could be seen as such a law but it is clearly outdated and there are discussions that a new general law needs to be drafted.
[222] The Law of the Republic of Lithuania on Ethnic Minorities (Lietuvos Respublikos tautini_ ma_um_ _statymas, *Official Gazette*, 1989, Nr. 34-485). In addition, references to ethnic minorities might be found in the Law Amending the Law on Education (Lietuvos Respublikos _vietimo _statymo pakeitimo _statymas, *Official Gazette*, 2003, Nr. 63-2853), the Law on the Amendment of the Law on Provision of Information to the Public (Lietuvos Respublikos visuomen_s informavimo _statymo pakeitimo _statymas, *Official Gazette*, 2000, Nr. 75-2272) and the Law on the Official Language (Lietuvos Respublikos valstybin_s kalbos _statymas, *Official Gazette*, 1995, No 15-344).
[223] The basis for minority policies constitutes the Government Bill 1998/99:143 *National Minorities in Sweden*.
[224] Art. 2 of law no. 482 of 1999 *Norme in materia di tutela delle minoranze linguistiche storiche*, [Provisions on the Protection of Linguistic and Historic Minorities].
[225] Advisory Committee of the Framework Convention, Opinion on Italy, 14 September 2001, ACFC/INF/OP/I(2002)007, para. 28.

Governing Ethnic Communities Act regulates the organization of self-governing ethnic communities, through which the special rights, guaranteed by the Constitution to the Italian and Hungarian minorities, can be realized. Article 65 of the Constitution provides that the status of special rights of the Roma community living in Slovenia shall be regulated by law. However, in spite of the efforts and cooperation between the Government and the Roma community, no law has been passed.

- In **Greece,** the only officially recognized minority is the Muslim minority of Thrace. It is composed of three distinct groups (persons of Turkish origin, Pomaks and Roma) that have the Muslim religion in common. The protection of this minority is based on the Lausanne Peace Treaty of 1923. Special legislation grants the members of this minority a special status in a number of areas, in particular education and religion. Under the Peace Treaty and Agreement of Lausanne of 1923, the application of those measures is limited to the Thrace region[226].

- According to the declaration made by **Denmark** when ratifying the Framework Convention and its first report on the implementation of the Framework-Convention**,** the German-speaking minority located in the Southern part of Jutland (close to the Danish-German border) is the only existing minority in Denmark. Its protection is based on the Copenhagen-Bonn Declarations of 1955, which concern the rights of the minorities on both sides of the Danish-German border. The Copenhagen Declaration deals with the South Jutland German minority in Denmark and the Bonn Declaration deals with the Danish minority in Germany. The Copenhagen Declaration is not legally binding.

  It must be noted that Danish law confers a special status to two territories: the Faeroe Islands and Greenland. As stipulated in the Home Rule Act of 23 March 1948, the Faeroe Islands enjoy in many aspects autonomy in their internal affairs. The principal language of the Islands is Faeroese. Greenland is governed by the Greenland Home Rule Act of 29 November 1978. The majority population in Greenland speaks Greenlandic, a language of the Eskimo-Aleut family. According to the Home Rule Act Section 9 Greenlandic shall be the principal language. The Danish authorities, however, consider that neither the Faeroese population nor the Greenlanders do constitute minorities.

1.3 Controversies about the non-recognition of certain groups as minorities

However, in several of these States which do in principle recognize the concept of minorities on their territory, the recognition of certain groups as a minority has been the subject of controversy, for a variety of reasons. In many cases, the problem is related to the state's claim that in order to constitute a minority, the group's members must be citizens and have long-established ties with the country. Specific controversies also exist about the following situations.[227]

Denmark denies that Roma constitute a national minority. According to them, the Roma who took up residence in Denmark prior to the 1960s have been completely integrated and do not emerge as an identifiable group, while those who arrived at the end of the 1960s or from the mid-1990s onwards could not qualify as a national minority because they do not have a long-term and unbroken association with Denmark and most of them are immigrants or refugees. This stance is contested by the Advisory Committee on the Protection of National Minorities: in its view, given the historic presence of Roma in Denmark, persons belonging to the Roma community cannot *a priori* be

---

[226] Cependant, selon une jurisprudence (qui n'a pas été confirmée par les hautes juridictions du pays), la possibilité de choisir de s'adresser au Mufti est également reconnue à des musulmans grecs vivant dans d'autres parties du territoire. Voir l'arrêt no 405/2000 de la Cour de première instance de Thèbes.

[227] Concerning the non-recognition as a 'minority' in the meaning of the Council of Europe Framework Convention for the Protection of National Minorities in Latvia, see above, note 18.

excluded from the personal scope of application of the Framework Convention[228]. However, as noted by the report of the Council of Europe's Commissioner for Human Rights on the situation of the Roma in Denmark, there is a dialogue entered into by the Government concerning the application of provisions of the Framework Convention for the Protection of National Minorities to the Roma.[229]

For different reasons, the Danish Government claims that the *Faeroese people* and the *Greenlanders* do not constitute national minorities either. In its report on the implementation of the Framework Convention, the Government argues that given the existence of territorial Home rule arrangements for Greenland and the Faeroese Islands, the population of these territories does not fall within the scope of application of the Framework Convention, whether they live in these territories or in mainland Denmark. It adds that, according to its information, these persons have not asked for such protection and do not consider themselves as national minorities because they are entitled to another form of protection as an *indigenous people* (for the Greenlanders) or a *people* (in the case of the Faeroese). The Advisory Committee notes two problems with respect to this approach. First, the recognition of a group as constituting an indigenous people or a people does not exclude the possibility of benefiting at the same time from protection as a national minority. Second, the Danish Government's reasoning implies that the Greenlanders and Faeroese persons would be entitled to effective protection of their identity (language, education, culture, etc.) only within the respective home rule areas, but not outside these areas, when they take up residence in mainland Denmark – neither, it should be added, does the Danish government consider that persons of ethnic Danish origin who take up residence in the Faeroe Islands or in Greenland should be considered either as a national minority in these territories.. Most provisions of the Framework Convention, however, are designed to apply throughout the territory of the state concerned, taking into account all relevant circumstances. The Advisory Committee thus considers that the *a priori* exclusion of Greenlanders and Faroese persons from the implementation of the Framework Convention is not compatible with the Framework Convention[230].

When depositing its instrument of ratification of the Framework Convention, **Austria** made the following declaration: "The Republic of Austria declares that, for itself, the term "national minorities" within the meaning of the Framework Convention for the Protection of National Minorities is understood to designate those groups which come within the scope of application of the Law on Ethnic Groups (*Volksgruppengesetz*, Federal Law Gazette No. 396/1976) and which live and traditionally have had their home in parts of the territory of the Republic of Austria and which are composed of Austrian citizens with non-German mother tongues and with their own ethnic cultures." However, Austria has a small community of Polish-speaking Austrian citizens residing predominantly in Vienna whose roots as a group date back to the times of the Austro-Hungarian Empire. The Government does not recognise them as a minority despite repeated efforts of their representing organisation "Strzecha" and a personal pledge of the then Chancellor Franz Vranitzky, arguing that most part of the Polish-speaking citizens came to Austria in the 1980s, which would break the principle of a three-generation continuity. Secondly, given the comparatively large communities of Turkish and ex-Yugoslavian (Serbian, Bosnian, Croatian, etc.) people that settled in Austria after the more recent migration waves (1960-1990), it is conceivable in the future that second and third generation members of these migrants will raise claims to be recognised as ethnic groups on equal terms. In **Slovenia**, following the dissolution of the former Yugoslavia, the ethnic communities of persons originating from other parts of the former Yugoslavia became *de facto* minorities in Slovenia, but they have not been recognized as such, and do not enjoy equal minority protection. The so-called "new minorities" – ethnic Serbs, Croats, Bosnians, Kosovo Albanians and Roma from Kosovo and Albania and other former Yugoslav residents –, who greatly outnumber the traditional Italian and Hungarian national communities, are not

[228] Opinion on Denmark, 22 September 2000, ACFC/INF/OP/I(2001)005, para. 22. Similarly, Danish authorities argued that in the absence of a historical or long-term connection of the Romany language with Denmark – the Romany speakers having arrived in Denmark in the late 1960s - the European Charter of Minority and Regional Languages does not apply to Romany. The Committee of Experts of the European Charter did not find this explanation sufficient and asked the Danish authorities to provide more information on the speakers of Romany in the next periodical report. (para. 29).

[229] Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Denmark 13th -16th April 2004. (CommDH(2004)12, Council of Europe, Office of the Commissioner for Human Rights.

[230] Opinion on Denmark, 22 September 2000, ACFC/INF/OP/I(2001)005, para. 16-17.

protected by the constitutional provisions and have reported some governmental and social discrimination. According to the Ombudsman, it is the condition of "autochthony" that prevents the due protection of other national communities living in Slovenia. In **Sweden**, there are large ethnic groups who have immigrated to Sweden in recent times as well as some linguistic groups that are not regarded as national minorities as they do not satisfy the criteria laid down by the Government. Representatives of organisations from Gotland and Scania have requested a fuller recognition of and support for the specific linguistic and other concerns of the population residing in these parts of Sweden. The authorities have, however, taken the view that the persons residing in these regions do not constitute a national minority since they only speak dialects of the Swedish language.[231]

Poland does not recognise the existence of a Silesian minority, despite the fact that during the 2002 census 173.200 people declared to be of Silesian national descent. This group was not acknowledged as a national or ethnic minority. In 1996 the Polish authorities refused to register the Silesian People's Association, adjudging that such a minority does not exist in Poland. In the case of *Gorzelik v. Poland*, the European Court of Human Rights considered that, although this may have constituted an interference with the freedom of association guaranteed in Article 11 ECHR, the lack of a precise definition of "minorities" under Polish legislation did not imply that the concept of "registered associations of national minorities" underlying section 5 of the 1993 Elections Act would necessarily lead to arbitrariness and potential discrimination, and that the restriction imposed on the rights of the members of the association was not « prescribed by law » as required by Article 11(2) ECHR. The Court noted in this regard in §§ 67-68 of its judgment of 17 February 2004:

> With regard to the applicants' argument that Polish law did not provide any definition of a "national minority", the Court observes firstly, that (…) such a definition would be very difficult to formulate. In particular, the notion is not defined in any international treaty, including the Council of Europe's Framework Convention ((…) and, for example, Article 27 of the UN International Covenant on Civil and Political Rights; Article 39 of the UN Convention on the Rights of the Child; the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities).
>
> Likewise, practice regarding official recognition by States of national, ethnic or other minorities within their population varies from country to country or even within countries. The choice as to what form such recognition should take and whether it should be implemented through international treaties or bilateral agreements or incorporated into the constitution or a special statute must, by the nature of things, be left largely to the State concerned, as it will depend on particular national circumstances.
>
> While it appears to be a commonly shared European view that, as laid down in the Preamble to the Framework Convention, "the upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace on this continent" and that respect for them is a condition sine qua non for democratic society, it cannot be said that the Contracting States are obliged by international law to adopt a particular concept of "national minority" in their legislation or to introduce a procedure for the official recognition of minority groups.[232]

In **Greece,** the National Human Rights Commission considers that the categorical assertion that there is no other minority in Greece than the Muslim minority of Thrace is not borne out by the facts. It would therefore be desirable that the State starts a sincere and constructive dialogue with the groups that seek recognition as minorities, based on the international conventions for the protection of human rights and minorities. The Committee on Economic, Social and Cultural Rights appears to share the view of the Commission. The Greek government, however, continues to maintain that the status of minority cannot be granted to other groups on the grounds that they do not satisfy the objective criteria

[231] ACFC/INF/OP/I(2003)006, p. 7.
[232] Eur. Ct. HR (GC), *Gorzelik v. Poland* (Appl. N° 44158/98) of 17 February 2004, §§ 67-68.

required by international law in this area. On the other hand, the Greek government objects to the members of the Muslim minority of Thrace calling themselves "Turks", claiming that such a description fails to take account of the provisions of the Lausanne Treaty as well as the actual composition of this minority.

In **Italy**, although the initial draft of Law No. 482 on protection of historical linguistic minorities included the Roma, this group was later excluded during parliamentary deliberation, chiefly on the ground that it had no connection with a given territory[233].

2. States whose domestic law ignores the notion of "minority"

A second group of states is characterised by the fact that their internal legal order does not use the notion of "minority." Nevertheless, some of the States falling into this category do recognise in their law the existence of distinct ethnic, cultural, linguistic or religious groups and provide them with a special status, although it is not expressed in the language of "minority protection". Moreover, most of them have joined the Framework Convention for the Protection of National Minorities and have admitted the existence of national minorities in the sense of this Convention.

In **Finland**, the Constitution (1999), uses the notion of "groups" in order to afford what is generally perceived as core minority rights on the basis of a broad and open-ended understanding of the category of persons entitled to such protection: "The Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture." (Section 17, subsection 3). The term "group" is not defined. The Åland Islands are treated as an autonomous territorial entity with its own regional citizenship. De facto, this arrangement operates as a specific minority protection device. The Swedish-speaking part of the population is not technically defined as a minority but as Swedish-speaking members of a bilingual nation, Swedish being one of the two national (official) languages. Thus, Finland's first report under article 25 of the Framework Convention states that the Convention is considered to apply to the following groups, considered as minorities for the purposes of the implementation of that Convention: the Sami, the Roma, the Jews, the Tatars, the so-called "Old Russians" and *de facto* also to the Swedish-speaking Finns. Moreover, it considers that the Finnish-speaking population living in the autonomous province of Åland can be considered a "minority in a minority."[234] The Government Bill to the Parliament on the adoption of the Framework Convention adds, however, that the purpose is not to restrict exclusively the group of the minorities coming under the Convention the way some States have done when signing or ratifying the Convention. « *In this respect it has to be remembered also that the formation of minorities is a fact which includes, as a central element, the right of those belonging to a minority to identify themselves.* » (Government Bill to Parliament on the adoption of certain provisions of the Framework Convention for the Protection of National Minorities (HE 107/1997 vp.).

In **Cyprus**, the Constitution refers to the existence of "Communities" and "Religious Groups". By virtue of Article 2 of the Constitution, all Cypriot citizens are deemed to belong to either the Greek or Turkish community depending on their origin, cultural traditions and religion. The Constitution also recognises three religious groups, defined as the Maronites, the Armenians and the Latins. Thus, in its first report submitted under article 25 of the Framework Convention, the Cypriot Government takes the view that the Convention applies to persons belonging to the Latin, Maronite and Armenian communities, as well as to Turkish Cypriots living within the Government controlled areas.[235]

Domestic law in **Ireland** does not provide a definition of minorities nor is there any enumeration in law of groups which are recognised as minorities. The "special position of the Traveller Community"

[233] Opinion on Italy, 14 September 2001, ACFC/INF/OP/I(2002)007, para. 16.
[234] Opinion on Finland, 22 September 2000, ACFC/INF/OP/I(2001)002, para. 14 et 17.
[235] Opinion on Cyprus, para. 17.

has been however noted by the Government;[236] moreover, equality legislation (Employment Equality Acts 1998-2004 and Equal Status Acts 2000-2004) prohibits discrimination on nine grounds[237] some of which grounds could be premised on the minority status of the group involved – indeed, equality legislation also makes specific provision for non-discrimination on the basis of membership of the Traveller Community[238]. The claim by members of the Traveller Community to distinct ethnicity is denied by the Government in its First Report under CERD.[239] This has been a cause of some controversy with organisations representing the interests of Travellers. There is no specific statute in Irish law which focuses on the Traveller Community although they are defined in the *Housing Act 1988* and in the *Housing (Travellers Accommodation) Act 1998* as "persons who traditionally pursue or have pursued a nomadic way of life[240].

The **Spanish** Constitution's preamble protects all Spaniards and peoples of Spain in the exercise of human rights, their cultures and traditions, languages, and institutions. Within the territory of the respective Autonomous Communities, the language of the Community is recognised as co-official in accordance with their Statutes (article 3(2) of the Constitution). Three languages benefit from this status: Catalan, Basque, and Galician. There are also languages that are not co-official, but which are legally protected: Bable or Asturian, the various linguistic variants spoken in Aragon, and Aranian in the Aran Valley. The first report submitted by Spain under Article 25(1) of the Framework Convention does not specify which groups are considered minorities by the Spanish state. Since the report is devoted exclusively to the situation of the Roma, the authorities consider the Framework Convention as in any case applicable to that community. The Muslim, Jewish and Protestant communities may be considered as religious minorities. The presence of particularly vulnerable groups of immigrants should also be noted: persons of Latin American, North African and South Saharan origin, as well as Philippinos, Pakistanis and Chinese. The Advisory Committee, in its opinion on Spain, cites the case of the Basques, Catalonians, Galicians or Valencians who live outside the territory of the Autonomous Communities, as well as of the Spanish speakers who live in the Autonomous Communities that have a special linguistic regime. Besides the linguistic groups, the Committee notes the existence of other groups that qualify for minority status: the Jews, the population of Berber origin (with Muslim religion and Tamazight language) living in the autonomous cities of Ceuta and Melilla, two Spanish enclaves in North Africa (par. 22-24).

In the **United Kingdom**, some implicit recognition of minorities might be derived from the devolution arrangements adopted in respect of Northern Ireland, Scotland and Wales (Northern Ireland Act 1998, Scotland Act 1998 and Government of Wales Act 1998) and various measures to enable or facilitate the use of languages other than English, as well as various efforts to promote the achievement of a situation in which employment in the public service reflects, particularly as regards colour, race and ethnic or national origin, the composition of the population as a whole. In its report under article 25 of the Framework Convention, the United Kingdom based itself on the definition of racial group as set out in the Race Relations Act 1976, which defines "racial group" as "a group of persons defined by colour, race, nationality (including citizenship) or ethnic or national origin". This includes the ethnic minority communities, the Scots, Irish and Welsh, Gypsies (and Travellers in Northern Ireland).[241]

---

[236] Ireland, *Report Submitted Pursuant To Article 25, Paragraph 1 Of The Framework Convention For The Protection Of National Minorities* (ACFC/SR[2001]006)

[237] The nine prohibited grounds of discrimination are: gender, marital status, family status, religion, sexual orientation, age, disability, race and membership of the Traveller Community.

[238] Equal Status Act, 2000, s.3(2)I, Employment Equality Act, 1998, s. 6(2)i. Section 2 of the Equal Status Act 2000 defines the Traveller Community as: "The community of people who are commonly called travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland" (Equal Status Act, 2000, s.2).

[239] *CERD Report* – full text available at Department of Justice, Equality & Law Reform website via www.gov.ie/

[240] Housing Act, 1988, s.13, Housing (Traveller Accommodation) Act, 1998, s.2

[241] Report Submitted by the United Kingdom pursuant to Article 25, para. 1 of the Framework Convention for the protection of national minorities, 26 July 1999, ACFC/SR(1999)013, para. 2. The United Kingdom has also recognised Cornish, Irish, Scottish Gaelic and Welsh as languages to be promoted and protected for the purpose of the European Charter for Regional or Minority Languages.

Belgium is organized along federal lines, based on the recognition of three linguistic groups: French-speaking, Dutch-speaking and German-speaking. The Belgian state is composed of six federated entities – three communities (Flemish, French and German-speaking) and three regions (Flemish, Walloon and Brussels-Capital). Furthermore, in certain municipalities enumerated by law, persons belonging to a linguistic minority group at regional level are granted linguistic facilities. If the term *minority* is mentioned in Article 11 of the Constitution ("Enjoyment of the rights and freedoms granted to the Belgians must be ensured without discrimination. To this end, laws and decrees guarantee the rights and freedoms of the ideological and philosophical minorities"), it is in a provision that sets out to protect the ideological and philosophical minorities and not the national or ethnic, religious or linguistic minorities within the meaning of international law. Moreover, in 1998 the Flemish Regional Council adopted a decree on the Flemish policy towards *ethnic and cultural minorities*[242]. Here, too, this concept is not the same as that of national or ethnic, religious or linguistic minority as is understood in international law: under Article 2(4) of the Decree, "ethnic and cultural minority" should, for the purposes of the Decree, be taken to mean "all foreigners, refugees and nomads, as well as foreigners not belonging to the aforementioned groups who are residing illegally in Belgium and who are seeking aid or accommodation on account of their precarious situation". At the signature of the Framework Convention for the Protection of National Minorities on 31 July 2001, Belgium declared that the concept of "national minority" shall be defined by the interministerial conference on foreign policy and also formulated a reservation about the linguistic regime. So far, this definition has not been established and the Belgian state has not ratified the Framework Convention.

Other States, namely **Malta**, **Luxembourg** and **France**, have taken the official stance that no minorities exist in their country. Thus, when signing the Framework Convention, **Luxemburg** declared that it understood "by 'national minority' in the meaning of the Framework Convention, a group of people settled for numerous generations on its territory, having the Luxembourg nationality and having kept distinctive characteristics in an ethnic and linguistic way" and that, on the basis of this definition, it was "induced to establish that there is no 'national minority' on its territory." Similarly, at the time of ratification, the Government of **Malta** asserted that « no national minorities in the sense of the Framework Convention exist in the territory of the Government of Malta. »

France is the only EU member state which has not signed the Framework Convention on the Protection of National Minorities. It may be recalled that France, when joining the International Covenant on Civil and Political Rights, declared that, in light of article 2 of its Constitution, article 27 was not applicable in its territory, because it does not recognize the existence of minorities on its territory. The fact of not recognizing minorities is based on the founding principles of the Republic. Under Article 1 of the Constitution, France is an *"indivisible"* Republic which *"ensures the equality of all citizens before the law, without distinction of origin, race or religion"*. One of the consequences of this principle is the unicity of the French people, which is a principle of constitutional value. This has led the Constitutional Council to declare a reference in a particular law to the *"Corsican people, a constituent of the French people"* inconsistent with the Constitution, since the Constitution *"only knows the French people, composed of all French citizens, without distinction of origin, race or religion*[243]*"*. It is also the equality and indivisibility of the Republic and the unicity of the French people that underlie the prohibition of the granting of *"collective rights to any group whatsoever, defined by a community of origin, culture, language or belief*[244]*"*.

Certain territories of the French republic have a special status, linked to their geographical, historical or cultural characteristics. The status of the French overseas departments and regions Guyana, Martinique, Guadeloupe and Réunion, is governed by Article 73(1) of the Constitution of 4 October 1958, amended by the Constitutional Act of 28 March 2003[245]. Under this Article, statutes and

[242] 28 April 1998, *M.B.*, 19 June 1998.
[243] Decision n° 91-290 DC of 9 May 1991, § 13 (Rec. P.50).
[244] Decision n° 99-412 DC of 15 June 1999, which prevents the ratification by France of the European Charter for Regional or Minority Languages.
[245] Constitutional Act n° 2003-276 of 28 March 2003.

regulations may, in the overseas departments and regions, *"be adapted in the light of the specific characteristics and constraints of those units"*. Those adaptations may be decided by the units in the areas where they exercise their competences if they have been empowered by law. In addition, those units, with the exception of Réunion Island, may be empowered by law to establish the rules that apply on their territory in a limited number of areas that may fall within the scope of the law. Those provisions may allow the adoption of measures to protect the culture of the local population, in particular the Creole language. So far, no empowerment act has been voted by the French parliament. Moreover, the territorial unit of Corsica has, besides the conventional powers of the French regions, powers that have been extended by the Act of 22 January 2002[246]. Thus it can take more extensive action than the other regions in particularly important areas from the viewpoint of the protection of minorities such as education, Corsican language tuition and culture.

3. Bilateral and multilateral agreements – trans-frontier cooperation

Many States have concluded, with their neighbouring countries, bilateral agreements with the purpose of protecting certain minorities in the meaning of Article 18(1) of the FCNM.

In certain countries, the protection of specific minorities is based on international treaties dating back to several decades ago. In **Italy**, the protection of the German-speaking minority in Alto Adige / South Tyrol finds its origin in the international agreement concluded with Austria on 5 September 1946, subsequently annexed as exhibit IV to the Paris Peace Treaty of 10 February 1947 between Italy and the Allied Countries. The 1975 Treaty of Osimo, concluded between Italy and Yugoslavia, is still of importance for the protection of the Italian minority in Slovenia and the Slovenian minority in Italy. In **Denmark**, the protection of the German minority is based on the Copenhagen-Bonn Declaration of 29 March 1955. In **Germany** vice versa, the protection of the Danish minority is based on the Bonn-Copenhagen Declaration of 29 March 1955. Although non legally binding documents, both Declarations serve as bases for the protection of the rights of minorities on both sides of the Danish-German border. The Prime Ministers of Germany and Denmark have reiterated their support to these Declarations on 29 March 2005.

During the 1990s, Central and Eastern European countries have concluded many bilateral treaties on friendly relations and good neighbourly co-operation, which cover, *inter alia*, the protection of the rights of persons belonging to national minorities. **Austria,** the **Czech Republic, Germany, Hungary, Latvia, Lithuania, Poland, Slovenia,** the **Slovak Republic** have entered into such agreements. In addition, some countries have concluded agreements more specifically designed to ensure the protection of particular minorities. **Slovenia** and **Hungary**, for instance, signed and ratified the Agreement on Ensuring the Special Rights of the Slovene National Minority in the Republic of Hungary and of the Hungarian National Community in the Republic of Slovenia in 1992.

There exist certain arrangements between **Greece** and Turkey in connection with the education of members of the Muslim minority of Thrace, for example the exchange of textbooks. In 1996, Greece concluded a Treaty on Friendship, Cooperation, Good Neighbourliness and Security with Albania, in which the two parties undertook to apply the provisions of the OSCE instruments concerning the human dimension. The Republic of **Cyprus** has signed and ratified a Bilateral Agreement with Armenia, namely the "Agreement on Cooperation in the Fields of Culture, Education and Science" signed in Yerevan on the 11th of September of 1998, and a Bilateral Agreement with Lebanon, namely the "Agreement on Cultural, Educational and Scientific Cooperation, signed in Nicosia, on the 19th of July 2002, and ratified by Law No. 27 (III)/2003.

In **Ireland**, although no bilateral or multilateral agreements in the meaning of Article 18(2) of the Framework Convention on the Protection of National Minorities have been concluded, the Good Friday Agreement[247] was signed on 10 April 1998 by all the parties to the negotiations which led to its

[246] Act n° 2002-92 of 22 January 2002 on Corsica, J.O n° 19 of 23 January 2002, p. 1509 s.
[247] Agreement Reached In The Multi-Party Negotiations, 10 April 1998

conclusion[248], and certain of its provisions relate to the protection of minorities[249]. This Agreement contains a number of provisions relevant to the protection of minorities in both the UK and Ireland. All participants "affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community"[250] Also the Irish Government recognised the importance of respect, understanding and tolerance in relation to linguistic diversity including the Irish language, Ulster-Scots and the languages of the various ethnic communities, all of which are part of the cultural wealth of the island of Ireland.[251] A joint language body has been established under the Agreement dealing with the promotion of Irish and Ulster-Scots in both jurisdictions. The parties to the Agreement also affirm the "right to freedom and expression of religion."[252]

Certain countries, moreover, have established bilateral cooperation structures. For example, **Lithuania** and **Poland**, have established in 1997 joint cooperation structures, to *inter alia* address problems faced by national minorities in both countries.

Nordic countries, including **Finland**, **Sweden** and **Denmark**, are involved in cross-border cooperation based on the 1962 Helsinki Agreement, which concerns, *inter alia*, culture and education. They have also concluded a treaty on the right to use one's own language in dealings with the authorities of another Nordic country. Sweden and Finland co-operate furthermore with Norway and Russia through the Barents Sea Council and Regional Council on issues of relevance for minority and indigenous peoples' issues. Work is in progress towards an international treaty between Finland, Norway and Sweden on the rights of the Saami people.

In the framework of the Baltic Council - a transfrontier cooperation structure created by the three Baltic States, composed of the Baltic Assembly, which consist of Members of Parliaments from all tree Baltic countries, and the Baltic Council of Ministries, established in 1994 to coordinate the cooperation among countries –, issues dealing with education, language, cultural and ethnic identity and other topical issues for national minorities are being discussed.

[248] This included the Irish and UK governments as well as all the major political parties in Northern Ireland.
[249] Indeed, the ratification of the Framework Convention on the Protection of National Minorities was part of the undertaking given by the Irish Government under the Agreement.
[250] *Ibid.*
[251] *Ibid.*
[252] *Ibid.*

APPENDIX B : Affiliation with a minority

1. Collection of data concerning the affiliation with a minority in the context of population census

1.1 The practices of the Member States

The practices of Member States as to the collection of data concerning the affiliation with national or ethnic, religious or linguistic groups, through censuses vary. In most of them, the questionnaire on which censuses are based contains questions on at least some of these features:

- In the **Czech Republic**, **Estonia, Hungary**, **Latvia, Lithuania**, **Poland, Slovakia**, and **Slovenia**, the last census carried out included a question about affiliation with a nationality (meaning national/ethnic minority) or about ethnic background. In the Czech Republic, Hungary, Lithuania, Slovakia, and Slovenia, people were, in addition, also questioned about their language – either their mother tongue or the language they spoke at home and with friends – and about their religion or belief. In Poland, there was a question on the language used at home, but not on religion.

- In the **United Kingdom**, the 2001 Census recorded data on both the ethnicity_and religious composition of the population. In addition, the census for Scotland, Wales and Northern Ireland recorded the number of persons who spoke Gaelic, Welsh and Scottish respectively.

- **Austria, Finland**, **Spain** and **Italy** included a question on language in their census. In Finland, the question is about mother tongue, in Austria, the language spoken at home, in Spain about the language spoken, in Italy about affiliation with one of the main linguistic minorities (French, German, Ladin and Slovenian).

- The census in **Austria** included a question about religion. In **Finland**, data on religion are partly obtained through census, as for historical reasons the population records are partly maintained by the Lutheran and Orthodox Churches. In respect of other religions, however, the census does not result in official data. Ethnicity may be indirectly assessed through census data that does include questions both on the country of birth and on present citizenship Moreover, separate data exist on Sami ethnicity, due to the existence of an elected Sami Parliament and, consequently, a list of persons registered as having the right to vote. The criteria in the law as to the right to vote in the elections of the Sami Parliament are based on the subjective criterion of the person considering oneself as a Sami and certain additional objective criteria.

- In **Ireland**, information relating to membership of the Traveller Community was collected at the last Census in 2002, revealing that 23,681 people considered themselves at the time of the Census as belonging to this community. Indeed, the census contained questions relating to religious affiliation[253], membership of the Traveller community[254] and also ability to speak the Irish language[255]. This revealed that the largest religious minority group were those who were not affiliated with any religion, followed by those of the various Protestant religions and a

---

[253] Persons completing the Census form were asked to choose from the following religions: Roman Catholic, Church of Ireland, Presbyterian, Methodist, Islam, Other or no religious affiliation.
[254] Question 13 on the Census form asked if the person was a member of the Irish Traveller Community. One could simply answer 'Yes' or 'No' to this question.
[255] With regard to minority languages, there was a question which asked if the person spoke Irish and if so was it spoken daily, weekly, less often or never.

significant Muslim minority as well as a small Jewish group and some others. A reviewed proposal for the 2006 census is now awaiting governmental approval.[256]

The collection of such data through census raises several problems which are examined below.

	Affiliation with a national/ethnic minority or ethnicity	**Language**	**Religion**
Austria		Language spoken	Religion
Czech Republic	Affiliation with a national/ethnic minority	Native language	Religion
Estonia	Ethnic origin		
Finland		Native language	
Hungary	Affiliation with a national/ethnic minority	Language spoken	Religion
Ireland	Membership of the Traveller community (proposal for 2006 census: enlarges to other ethnicity)	Language spoken	Religion
Italy		Affiliation with a linguistic minority	
Latvia	Ethnic origin		

[256] The CSO has published a *Census Pilot 2004* which sets out the proposed Census form for the 2006 Census. This document is currently before government awaiting approval. It contains a question on ethnicity which provides a number of options from which a person can choose. These are as follows:

A. **White**:

Irish
Irish Traveller
Any other White background

B. **Black or Black Irish**:

African
Any other Black background

C. **Asian or Asian Irish**:

Chinese
Any other Asian background

D. **Other including mixed background**

The pilot document also contains a question on ability to understand, read, write or speak Irish with the following options available:

No Knowledge of Irish, Understand, Read, Write, Speak.

A second question on the Irish language asks if the person speaks Irish how often this occurs. The following options are available to the person:

Daily within the Education System, Daily outside the Education System, Weekly, Less Often, Never.

There is no proposed question on religious affiliation in the pilot Census document.

Lithuania	Ethnicity	Native language	Religion
Poland	Affiliation with a national/ethnic minority	Language spoken	
Slovak Republic	Nationality	Native language	Religion
Slovenia	Affiliation with a national/ethnic minority	Native language	Religion
Spain		Language spoken	
United Kingdom	Ethnicity	Only for Gaelic, Welsh and Scottish in the corresponding regions	Religion

By contrast, **Belgium**, **France**, **Denmark**, **Germany**, **Greece**, **Luxembourg**, the **Netherlands** and **Sweden** do not collect data on the ethnic, religious or linguistic composition of their population in national census. In certain of these countries however, partial information on minority members' numbers may be obtained indirectly. Thus, in **Germany**, if a religious minority has the status of as corporation under public law the number of its affiliates is known. In **Sweden**, some data is available on the number of pupils receiving minority language education. In **Denmark**, the Central Population Register contains information on whether a person is a member of the Danish National Church, of a congregation or whether the person concerned has no association with the Danish National Church. In both Denmark and France, questions relating to nationality or the country of origin may give indirect indications on the ethnic origin of the individuals answering. In the **Netherlands**, there are various official statistics on the number of individuals who consider themselves to be Frisians and, with respect to newly arrived immigrants, there are many statistics available, such as the yearly overview *Allochtonen in Nederland* compiled by the *Centraal Bureau voor de Statistiek (CBS)* which cover, for instance, their position on the labour market, or crime rates.

In **France**, the authorities consider that collecting data on ethnicity would be contrary to the principles of equality, indivisibility of the Republic and unicity of the French people[257]. In **Germany**, official statistical data on the ethnic and linguistic breakdown of the population have not been collected since the Second World War and there seem to be a large consensus in the country against the processing of ethnic data[258]. In **Sweden**, registration of individuals on ethnic, religious or linguistic grounds is not allowed. The officially given reasons for that are historical as well as considerations with regard to the integrity of the persons concerned.[259] Several states consider that gathering such information would be incompatible with their law on personal data protection. In **Greece,** according to the National Statistical Office (*Ethniki Statistiki Ipiressia*), a declaration concerning membership of a particular ethnic, religious or linguistic group before officials of the Greek state would be contrary to the protection of individuals with regard to the automated processing of personal data. Likewise in **Spain**, the authorities expressed the view that collecting data related to ethnic origin or religion (by contrast with linguistic practice) would be contrary to Article 16.2 of the Constitution and Organic law 15/1999 on the protection of private data[260]. Under the Spanish Constitution and Organic Law 15/1999 of 13 December 1999 on the protection of personal data, data concerning racial or ethnic origin or religion are specially protected data, which cannot be used without the express consent of the persons concerned. Article 7(3) of this law provides that data concerning racial origin can only be obtained, processed or transferred for reasons of general interest, by virtue of a legal obligation or with the consent of the person concerned. Article 7(4) prohibits the creation of files for the sole purpose of storing personal data in connection with religion or racial or ethnic origin. The Spanish authorities

[257] See *inter alia* ECRI, 2d report on France, adopted on 10 December 1999, CRI (2000)31, para. 28.
[258] Opinion on Germany, 1 March 2002, ACFC/INF/OP/I(2002)008, para. 23. See also ECRI, 3d report on Germany, 5 December 2003, CRI(2004)23, para. 89.
[259] CERD/C/452/Add.4, para. 7 and 52.
[260] Advisory Committee on the Framework Convention, Opinion on Spain, 27 November 2003, ACFC/INF/OP/I(2004)004, para. 40. See also ECRI, 2d Report on Spain, 13 December 2002, CRI (2003) 40, para. 41.

state that this is the reason why they are unable to collect exact data or statistics on Roma or certain groups of migrants. In its report on **Spain** (CRI (2003) 40, 13 December 2002, made public on 8 July 2003), the European Commission against Racism and Intolerance observed, however, that the Spanish Constitution does not appear to prohibit the processing of data concerning ethnic origin, although Organic Law 15/1999 on the protection of privacy subjects the processing of those data to certain safeguards (par. 41). The ECRI continued by recalling that, in its view, "more accurate information on the real position of different groups in society across a number of fields of social and economic life would be desirable, as it would help uncover the presence of direct and indirect discrimination or situations of disadvantage". It therefore encouraged the Spanish authorities to "improve their monitoring systems by collecting information broken down according to categories such as race, religion, and ethnic origin, with due respect to the principles of confidentiality and the voluntary self-identification of persons as belonging to a particular group".

In this respect, it must be emphasised that, as pointed by the Advisory Committee on the FCNM, other methods than exhaustive statistical data based on census may be used to gather this type of information, such as *inter alia* "estimates based on *ad hoc* studies, special surveys, polls or any other scientifically sound method".[261] In its Opinion on Spain, the Advisory Committee welcomed the fact that, « without prejudice to the existence of the above-mentioned constitutional principles, such data are gathered at local level, particularly on the Roma population, on the basis of Municipal Registers and *estimates derived from sociological studies*. » (para. 42).

1.2 Problems raised by the collection of data related to ethnic origin, language or religion

Where data are collected on the ethnic origin, language or religion of individuals, each individual must have the choice either to answer or to refuse to answer; moreover, the individual should be given the possibility to choose how the group to which he/she wishes to be considered a member is described; and he/she should be able to choose multiple affiliations. Finally, the data collected by the authorities should be as precise as possible in order to provide a sound informational basis for the development of adequate policies taking into account the specific situation of minorities. The factors which could bias the data should be controlled as far as possible.

1.2.1. Obligatory character of the answer

It appears that in **Estonia, Poland, Slovakia,** and the **United Kingdom**, the answer to the question on affiliation with a "nationality", on ethnic origin or on ethnicity is mandatory. Persons who refuse to answer are liable to receive a fine. In certain countries, it is mandatory to answer questions in the census relating to language used at home (Poland) or relating to native language (Slovakia, Austria). In the view of the Advisory Committee on the FCNM, such an obligation is not compatible with article 3(1) of the Framework Convention on National Minorities, which protects the right not to be treated as a person belonging to a minority.[262] The Advisory Committee has taken the view that replying to such a question should be fully optional, and that this is a suitable way to reconcile the need to have quality data in this field with the right to be treated or not to be treated as a person belonging to a national minority.

The **Italian** system of "declaration of linguistic affiliation" (*dichiarazione di appartenenza linguistica*), in use in Bolzano province, deserves particular attention. National census contain a special section, applicable to residents of Bolzano province only, in which they are required to declare whether they belong to the Italian, Ladin or German-speaking community. This enables public authorities to establish statistics on the three linguistic communities in the province, which serve to ensure equitable distribution of political mandates or employment in public sector, between the three

[261] Advisory Committee on the Framework Convention, Opinion on Germany, 1 March 2002, ACFC/INF/OP/I(2002)008, para. 23.
[262] Opinion on Estonia, 14 September 2001, ACFC/INF/OP/I(2002)005, para. 19; Opinion on Poland, 27 November 2003, ACFC/INF/OP/I(2004)005, para. 24.

communities, in proportion of their size. Although this system is aimed at guaranteeing the protection of linguistic minorities, this procedure poses several problems, as underlined by the Advisory Committee on the FCNM. First, because of the compulsory character of the affiliation declaration. A failure to reply to this question entails serious disadvantages, since it hampers the person's access to public service posts and his/her ability to stand as a candidate in municipal, provincial and regional elections. Even though people are allowed to declare that they belong to a category labelled "other," rather than to the Italian, Ladin or German-speaking group, they must be affiliated to one of these three communities in order to be eligible for a public sector post or to stand as a candidate in elections. Second, the declaration cannot be made anonymously and is retained by the district courts until the next census, which implies that each individual's choice is fixed and cannot be changed for a period of 10 years. The Advisory Committee also notes that this procedure does not contain sufficient guarantee of its confidentiality.[263] Indeed, the Italian *Garante* for the respect of privacy has repeatedly suggested revising the declaration of affiliation's system. The district of Trento has a different system: the "declaration of linguistic affiliation" is established by regional legislation on the basis of territorial belonging. Provincial law No. 4 of 1999 singles out geographic areas in which linguistic minorities are set: all those who live in the said areas are presumed to belong to a certain minority (cimbri, mocheni, ladini). Although the Advisory Committee of the Framework Convention on the Protection of National Minorities has not taken a view on this issue, this method may present its own problems, as it seems difficult to reconcile with the individual's right not to be treated as a member of a minority.

In **Austria**, the Census Act makes it compulsory for everyone to reply the questionnaire completely and truthfully. While to the question on religion, it is possible to reply "no confession," everyone is obliged to declare the language(s) one speaks at home or with friends. In practice, however, this does not amount to a determination of the size of ethnic minorities due to the indirect nature of the questions (individuals are not explicitly required to declare their affiliation with a minority) and although there is a legal possibility of being fined, this is not seen as truly coercive and fines have not been applied in the course of the census 2001; instead missing information is regularly added with the help of known data from relatives or statistical estimation methods.

In **Lithuania**, the Law provides for an obligation to furnish the information required on the census blank. People are required to state their native language (although they may indicate a different language than those listed in the form). Regarding the affiliation with an ethnic group, the relevant section of the questionnaire leaves the possibility to choose, apart from the groups mentioned, the option "other" or the option "not indicated," which, in fact allows a person to refrain from answering to the question. In **Ireland**, answering the Census document is compulsory for all people resident in the state on the night in question. However, if the form is not completed this will not lead to discriminatory or negative consequences, but rather 'Not Stated' is simply provided as the answer to a specific question for a person. It is important, however, that the persons be clearly informed about their right not to answer to such question. In this respect, the approach adopted by the **Czech Republic, Hungary**, and **Slovenia**, appears more adequate, since they make explicit that replying to the question on affiliation with a minority is not compulsory. In Hungary, under article 7 section 1 of the Minorities Act "[n]o-one is obliged to make a statement concerning the issue of which minority one belongs to", while article 8 emphasises that "[i]t is the right of the citizen belonging to a national or ethnic minority to state in secret and anonymously during a census to which minority group s/he belongs." In the sections of the form which relate to nationality, language and religion, people have the possibility to choose a box "do not wish to answer". In the **Czech Republic**, the explanatory note attached to the 2001 census stated that information about nationality is to be filled according to each individual's own decision, and that those who did not affiliated themselves with any nationality, should write it down. In **Slovenia**, the census blank leaves the possibility open, when answering the question on national or ethnic affiliation, to opt to be "ethnically unaffiliated" or not to answer to this question.

[263] Opinion on Italy, 14 September 2001, ACFC/INF/OP/I(2002)007, para. 19-21.

Regarding religious affiliation, all states in which the census contain a question on this issue, guarantee the possibility to declare oneself without confession and, when the form includes a list of confessions, to add a religion not listed on the form. In addition, some countries, like Hungary and Slovenia, explicitly offer the possibility not to answer to the question.

1.2.2. Scope of the freedom of the individual to choose his or her affiliation(s)

Another important issue is the extent to which individuals are free to choose the groups they consider themselves to be affiliated with. Most States in which people are questioned about their national or ethnic affiliation, offer the possibility to declare affiliation with a group not mentioned in the census form. Usually, the form contains a list of national/ethnic minorities and leaves space for indicating a different affiliation. This is the case in **Hungary,** in **Lithuania,** in **Slovakia, Slovenia**. It is also the case in Austria, with respect to the question relating to language used in private. In the **Czech Republic** and in **Poland**, the questionnaire does not include any list: there is only a blank box in which each person can write the "nationality" of his or her choice.

The use of closed lists of possible affiliations among which the individual is requested to choose his/her affiliation is generally not advisable. Thus, the **United Kingdom** does not provide for the possibility to specify another "ethnicity" than those mentioned in the list. The Advisory Committee noted in this respect "that some persons concerned in the 2001 census regretted not having the possibility to declare their affiliation with a particular group (including the Welsh, Cornish, Ulster-Scots and Roma / Gypsies). While the possibility of writing in an affiliation to an 'other' group existed for certain census categories to mitigate the problem (…) [this would appear to concern the identification of one's religion, where the individual may designate another religion than those religious faiths listed], the Advisory Committee considers that in the future there should be greater clarity on the possibilities for affiliating to other particular groups. »[264]

However, the individual's freedom of choice can be restricted in another way, namely by the prohibition to declare multiple affiliations. Indeed, **Lithuania**, **Poland** and **Slovenia** do not allow people to name more than one affiliation. This can be problematic for those who feel they have ties with several communities, in particular those whose parents belong to different groups. In Lithuania, the rules provide that in case of disagreement between parents on the ethnicity or the native language of a minor child, the priority shall be given to the mother's ethnicity or mother tongue. By contrast, other countries allow individuals to declare affiliation with several groups. In **Czech Republic**, this possibility is guaranteed without restriction. It is a constitutionally enshrined principle that everyone can decide on his or her nationality completely freely (Article 3 par. 2 of the Charter of Fundamental Rights and Freedoms). In **Hungary**, people may select maximum three options from the list of nationalities and used languages. In **Austria**, according to the explanation attached to the census, it is possible to tick more than one language. In **Poland**, while people are required to mention only one nationality (see above), they may declare more than one language. In **Slovakia**, the explanatory notes attached to the form did not contain specific instruction in this respect, thus, theoretically, one could declare itself affiliated with several nationalities, native languages, as well as religions and churches.

1.2.3. Accuracy of the data

In several countries, statistics based on census do not accurately reflect the number of people belonging to minorities. This can be due to various factors.

In **Poland**, a number of irregularities were observed during the census: the interviewers skipped the question about nationality, automatically entering "Polish"; the interviewers entered data on nationality with a pencil; following the interview, the interviewers used correction fluid to change the previously entered data on nationality; the interviewers refused to enter the nationality declared by the respondent, explaining in some cases that the nationality does not exist (and quoting instructions they

[264] Opinion on the United Kingdom, 30 November 2001, ACFC/INF/OP/I(2002)006, para. 18.

had allegedly received during the training); the interviewers tried to persuade respondents, who declared a nationality other than Polish, to accept the entry of Polish nationality. Such were the experiences of persons, who declared Ukrainian, Silesian, Kaszebe, Lemks, Slovakian, or Belarusian nationality; the above situations took place all over the country, in large cities and small villages alike. This makes the reliability of census data rather doubtful. It can be feared that the Polish Government might want to use the incorrect data e.g. on the size of specific minority groups, when developing policies or distributing subsidies for minority activities[265].

In **Austria**, the official numbers resulting from the last census, published by the former Austrian Central Office for Statistics, do not reflect exactly the number of persons that would consider themselves as belonging to one of the recognised Austrian minorities because they are based on the colloquial language declared: on the one hand, they are too large, as they also include recently migrated people that speak the same language, on the other hand, they are too small as affiliated of the recognised minorities generally speak the German language and sometimes prefer not to indicate their minority affiliation. Own estimates of interest groups and representing organisations of the official minorities have different figures.

Another problem lies in the reluctance of certain people to reveal their affiliation with a minority to State agents, especially when they belong to a vulnerable minority. In **Hungary**, the Parliamentary Commissioner for the National and Ethnic Minorities Rights (hereinafter referred to as: Ombudsman for Minorities) pointed out that it is a sad historical fact that after the horrors of World War II people identify data collection concerning affiliation with a minority as an act by which they might put their families and themselves at risk. In order to ease this anxiety the Hungarian Central Statistical Office (HCSO) involved the representatives of all minority local governments into the conduct of the census. In those regions where people belonging to some national minorities live, census interviewers were required to speak the language of that or these minorities. This requirement has however not been met and the Minorities Ombudsman received many complaints in this regard. The minority local governments have not been contacted or when they approached the town clerk, it turned out that the interviewers had already been appointed. Based on these deficiencies and the negative attitude of majority clerks responsible for the census to comply with the requirements of the HCSO's Guidelines the Minorities Ombudsman held that the rights of minorities guaranteed by the Minorities Act had been endangered.

The census' outcome with respect to the Roma population is especially problematic. In many countries, their real number is estimated to be much higher than the results of the census appear to indicate. In **Austria**, the accuracy of the census-based numbers is questionable for two reasons. On the one hand, some Romanian-speaking persons were apparently confused by the term Romanes/Romany used in the questionnaire, identifying themselves as Roma where in fact they meant to indicate that they spoke Romanian. On the other hand there is traditionally a low rate of confession due to general fears about disadvantages being inflicted upon persons declaring themselves as Roma. Therefore, while according to the 2001 census, there are 6,273 Roma living in Austria, other estimates of the size of this group vary between 10,000 and 20,000 persons. Even much greater discrepancies between census based statistics and other estimations are observed in other states. In the **Czech Republic**, in the 2001 census, less than 12,000 people affiliated themselves with the Roma "nationality." Other sources evaluate the number of the Roma population as between 150,000 and 300,000 people.[266] The same phenomenon can be observed in **Slovenia**: the 2002 census states that there are 3246 Roma in Slovenia, whereas the Government Office for Nationality holds a record of 6200 members of the

[265] Helsinki Foundation for Human Rights, Program on Minority Rights, "Some remarks in reference to fifteenth and sixteenth reports on the implementation by Poland of the provisions of the International Convention on Elimination of All Forms of Racial Discrimination for the period from August 1997 to December 1999" available on the webpage: http://www.hfhrpol.waw.pl

[266] Report on the Situation of National Minorities in the Czech Republic in 2001, made by the Council of the Government for National Minorities. In 2003, the Report estimated about 200 000 people belonging to the Roma community (http://wtd.vlada.cz/files/rvk/rnm/zprava_mensiny_2003.pdf). The oft-quoted book "Roma/Gypsies: A European Minority" from Nicolae Gheorghe and Jean-Pierre Liégeois (1993) states 250, 000 as minimum and 300, 000 as maximum.

Roma community. The Roma community itself claims between 8000 and 10,000 members. In **Slovakia**, according to the official census, there are 89 920 Roma living in the Slovak Republic. But a research carried out by the Office of Plenipotentiary of the Slovak Government for Roma Communities in co-operation with the Institute for Public Affairs (NGO), on the socio-graphic mapping of Roma communities living in the Slovak Republic, indicates that over 320 000 Roma are residing in the Slovak Republic. This discrepancy can apparently be explained by the different methods used for determination of affiliation with the Roma nationality in the census realised in 2001 and the research carried out in 2004. While in the census people could freely decide about their affiliation with the nationality, the methods for determination of the number of Roma population living on the territory of the Slovak Republic used in the research have been based on anthropological signs, cultural affiliation, and a way of living (e.g., style of life, living-space). In the research, the Roma community has been defined as a group of people, which has been affiliated with Roma nationality by majority population on the basis of mentioned external and noticeable criteria. In the census carried out in **Hungary** in 2001, there were four questions related to the person's national affiliation, although answering these questions was not mandatory: 48,685 people named the "Gypsy language" as their mother tongue; 190,046 people declared themselves as members of the Gypsy minority; 129,259 people indicated that they felt affinity with Gypsy cultural values and traditions. Finally, 53,323 people declared using Gypsy language in their family and friendly relations. However, the real proportion of Roma in the Hungarian population is considered much higher. The official government sites estimate the number of Roma between 400,000 and 600,000.

2. Other situations in which affiliation with a minority is recorded by state's agents

Apart from population census, there are various situations in which persons are required to declare their affiliation with a national or ethnic, linguistic or religious minority. In some countries, moreover, practices of registering a person as belonging to a certain group on the basis of physical appearance have been observed in certain contexts.

Although constituting in many respects a special case, the constitutional system of **Cyprus** is the source of some concern in this respect. By virtue of Article 2 of the Constitution, all Cypriot citizens are deemed to belong to either the Greek or Turkish community depending on their origin, cultural traditions and religion. The three religious groups recognised as such in the Constitution, the Maronites, the Armenians and the Latins were given three months from the date the Constitution entered into force to exercise as a group, once and for all, the option of becoming a member of the Greek or Turkish community. In exercising this option the said religious groups elected to belong to the Greek Community. This system is severely criticised by the Advisory Committee of the Framework Convention. Each member of a religious group is individually entitled to opt out, but if one does so, he or she may only choose to belong to the other community, namely the Turkish community. In the Advisory Committee's view, such arrangement is not compatible with Article 3 of the Framework Convention, according to which every person belonging to a national minority shall have the right freely to choose to be treated, or not to be treated, as such.[267]

Apart from the affiliation to either the Greek or the Turkish communities under the constitutional system of Cyprus, the situations where individuals are registered by the public authorities are the following.

2.1 Registration of affiliation with a minority for the purpose of positive action programmes

The collection of data regarding certain people's affiliation with a minority sometimes occur in the context of programmes designed to promote the access of persons belonging to a specific minority to employment, education, or other sectors of socio-economic life.

[267] Opinion on Cyprus, 6 April 2001, ACFC/OP/I(2002)004, para. 18.

In **Poland**, a declaration of affiliation with the Roma minority is one of the conditions for implementing the Programme in support of the Roma community in Poland, which provides *inter alia* scholarships for students of Roma origin. Candidates have to attach such a declaration to their application. These documents have to be lodged with the Polish Roma Association. Since the application is voluntary, the requirement for declaration about the Roma origin is compatible with the Law on data protection.

In the **United Kingdom**, ethnic origin is the subject of monitoring in the course of recruitment to the public service (as well as with regard to the composition of the workforce). Such monitoring is also undertaken in Northern Ireland in respect of religion.

In **Hungary**, the collection of special data, like Roma origin, is impermissible on the basis of both the Data Protection Act and the Minorities Act. Therefore, for the implementation of measures designed at improving Roma's economic integration, the authorities have decided to rely on Roma associations to determine whether a person belongs to the target group. The state budget expressly allocates money for the integration of Roma in employment. The so-called Labour Centres thus enter into contracts with Roma organizations and Roma minority self-governments. These bodies, that are assumed to be the representatives of Roma, gather information about Roma unemployed persons and about their education, qualifications. The Roma organizations then hand over the collected data to the Labour Centres that must not disclose the ethnicity of the persons seeking for a job. In 2003, the Ministry of Economy and Transport launched an initiative aimed at supporting Roma entrepreneurs and those non-Roma employers who employ mostly Roma employees. According to the Ministry spokesperson, it was up to the Roma community to decide who is Roma and who is not: in order to be able to participate at the tender, the recommendation of the local Gipsy minority government or other Roma interest groups had to be obtained. Through a monitoring procedure, the Ministry investigates whether the financial support has been used for the aims that the Ministry intended to promote, but it does not extend to the control of employees' and entrepreneurs' affiliation with a minority. Thus, the Ministry does not check the affiliation of employers and employees at all, but relies solely on the recommendations issued by the above bodies. According to the Ministry spokesperson, it is impossible to investigate the Roma identity of the target group, since it is illegal to collect and process data in this respect. It has been pointed out by several authors, however, that this mechanism generates a risk of abuses. In order to register an association, a minimum of ten persons is needed. They only have to acknowledge that they are Roma, and nobody may question whether it is a true Roma interest group. Their affiliation with a minority cannot be investigated either. Moreover, they might be driven by ill will and recommend entrepreneurs who have no connection whatsoever to the Roma community. Others might employ a number of Roma workers and fire them after they had won the tender. The monitoring by the Ministry does not cover such negative practices.

In **Belgium,** the Decree of the Flemish Council of 28 June 2002 on equality of opportunity in education[268] allocates extra funds to certain schools on the basis of the number of pupils belonging to one of the disadvantaged groups enumerated in the decree. One of those groups are the Travelling People (*trekkende bevolking*), which includes the Roma, regardless of whether or not they are nomadic. Under this Decree, a pupil's membership of one of the groups concerned is attested by a sworn statement by the parents (Article 6.2(2)). According to information supplied by the Flemish Minorities Centre (*Vlaamse Minderheden Centrum*), in the case of the Roma, the Flemish government has provided that a pupil's status as Roma, Gypsy or Manouche can also be proved by a certificate issued by one of the associations recognized by the Flemish government, the Flemish Minorities Centre or one of the local units. The decree also provides that the documents or statements proving that a pupil meets one or several indicators of equality of opportunity should be kept at the school for a period of at least five years. This system is strongly criticized by members of the Flemish Minorities Centre, for two reasons. Firstly, they criticize the fact that this registration of "membership of an ethnic group" of the pupils concerned and their parents is not linked to positive measures that specifically benefit the Roma, since the measures provided by the decree consist in the allocation of

[268] *M.B.*, 14 September 2002.

extra funds to the school as a whole. Secondly, they believe that the storing of those data by the school authorities is not accompanied by sufficient safeguards in terms of privacy.

2.2 Registration for the purpose of elections

In **Cyprus**, the form used to register on the electoral list includes a question on whether an individual is a member of one of the three religious group recognised by the Constitution, namely the Maronites, the Armenians and the Latins. The right to registration to the Electoral list as a member of a religious group is regulated by internal rules of the particular group in question. For example in the case of the Armenian community, that right can be exercised by persons of Armenian origin, the children of an Armenian father as well as the wives of Armenians. Answering to this question is not compulsory, and the absence of a declaration of affiliation does not entail any negative or discriminatory consequences for the person concerned. An individual is entitled at any subsequent point, to request to be registered to the list as a member of a particular religious group. If someone does not declare affiliation with a particular group, he is considered to belong to the national, ethnic, religious or linguistic majority. The registered members of a religious group for the purposes of the Electoral List is the main method of registration of the numbers of people affiliated with one of the religious groups, kept by the Government. According to information received by the Ministry of Interior, as in 2/7/2004 there are 516 Latins, 1846 Armenians and 3242 Maronites registered in the Electoral List. The Maronite Representative at the House of Representatives has informed us that the Maronites in Cyprus are estimated to be 5600, a figure which includes the under-aged population as well. As to the number of the Armenian minority, a list is preserved at the Armenian Metropolis with the members of the Orthodox Armenian Church. Inclusion into this list occurs with the baptism of a child, with the permanent residence in Cyprus of persons of Armenian origin, or through a mixed marriage, when the heterodox member wishes to become a member of the Armenian Church. According to this list, the number of the Cypriot Armenians comes up to 2000, while there are around 1000 not Cypriot Armenians.

In **Finland**, as stated above, due to the existence of an elected Sami Parliament, there is a list of persons registered as having the right to vote. The criteria in the law as to the right to vote in the elections of the Sami Parliament are based on the subjective criterion of the person considering oneself as a Sami and certain additional objective criteria.

In **Hungary**, the present system allows any person who declares to be affiliated with a specific minority to run as a candidate for minority local government elections. During the last minority local governmental elections in 2002, some people have been elected as representatives of the local minority government without being member of the given minority. They only affiliated themselves with the minority in order to be able to run at the elections. In certain occasions, as it happened in the local elections in Jászladány, members of a community abused the individual acknowledgment of affiliation with a minority not only in order to gain power or receive funds, but in order to cut the rights of the minority. Thus, candidates driven by ill will might declare themselves to be Roma, run for elections and be elected by the majority (whose members in the current Hungarian system are also casting ballots on minority candidates) in order to push the truly Roma candidates out of office.

On the initiative of the Ombudsman for Minorities, the Government proposed a new legislation on the election of minority local governments, in order to prevent misuse of the right to affiliate with a minority. The legislative proposal focuses on the introduction of a voluntary voting register, with strong procedural and technical safeguards. Under the new system, only those who are registered could have active and passive voting rights. Furthermore, in order to avoid abuses (in some cases when some 'false minority' candidates lost, they ran for elections as members of another minority), one can affiliate him- or herself with only one minority. If introduced, it would have the unfortunate consequence that someone whose parents belong to two different groups would be a legally nonexistent creature. Some lawyers pointed out that this solution also carries the unfortunate message, although it is not expressly stated, that someone cannot have a Hungarian and a minority identity at the

same time. The constitutional rationale behind the proposal is that in order to protect minorities the right to the protection of personal data might be restricted. At the time of writing, the proposal is still under general debate in the Hungarian Parliament, mainly due to the fact that the enactment of the law requires a two third majority of the MPs present.

2.3 Passports and Identity Cards

In **Latvia**, when receiving a passport, a person has a choice whether to state his/her ethnic or national origin and request its entry into the appropriate section of the passport. The affiliation with a particular ethnic or national group is asked for in migration documents and other documents but there is a right to refuse to answer the question. In **Greece,** until 2000, a person's religious persuasion was mentioned on his identity card. By a decision of 15 May 2000, the Authority for the Protection of Personal Data considered that reference to certain elements, such as religion, on the identity card constituted a form of processing of personal data contrary to Act no. 2472/1997 on the protection of the individual with regard to the processing of personal data. It also considered that the consent of the individual did not make the processing of those data lawful. By a joint decision of 17 July 2000, the ministers of Economic Affairs and Public Order specified which data the new type of identity card should contain, and these no longer include a person's religious persuasion.

2.4 Other situations in which people may be required to declare affiliation with a minority

In **Cyprus**, apart from the already mentioned instances, there are several other occasions in which a person may be requested to declare affiliation with a minority to a government official. During the procedure for an application for an appointment at the civil service a person is requested to fill in a form which explicitly requests a declaration of religion. Such declaration is indicative of affiliation with a minority. Steps are being taken in order to amend this form so that it does not contain this question; it would appear, moreover, that no negative consequences ensue for the individual who does not answer. Still in Cyprus, it has also been reported that the police, in the process of an investigation, regularly ask whether a person is a member of a minority. In such cases a person retains the right not to answer. In the **Slovak Republic**, since the end of 1998, the Ministry of Interior of the Slovak Republic has abolished the processing of evidence and the publication of committed criminal offences concerning offender's affiliation with any national minority or ethnic group. In spite of this fact, police officials, when verifying an identity of suspect, victim, or witness, generally use standard forms containing a question about the affiliation with a nationality. In **Luxembourg,** questions about membership of a minority are not systematically asked by the police forces, yet there have been cases where such questions were put to a person who has been arrested, even where there was no apparent link with the offence.

In **Cyprus**, a question on affiliation with a minority is also contained in the procedure for an asylum application. Similarly, in **Luxembourg,** asylum-seekers are questioned about their membership of a particular religious, ethnic or linguistic group. Although such information is often necessary for the purpose of evaluating the asylum application, it is striking that the question of religious persuasion is systematically asked, even where this is not relevant to the case.

It may also occur that authorities in charge of processing complaints relating to certain forms of discrimination will seek to establish the membership of the individual victim of certain ethnic or religious groups, in order to decide whether the complaint is indeed admissible. This is the case, for instance, in **Finland**, where the Non-Discrimination Board, operating under the Non-Discrimination Act, deals with complaints related to ethnic discrimination, and seeks to establish the ethnicity of the complainant in order to deal with a case.

2.5 Practice consisting of registering people as belonging to an ethnic group on the basis of their physical appearance

In several countries, practices of registering certain people as belonging to a minority on the basis of their physical appearance have been observed, within the police or in other public institutions.

In **Slovakia**, the police continue to gather information about affiliation of examined persons with the Roma minority and it is quite likely that such data are based on the physical appearance of persons concerned, rather than on their free affiliation with Roma minority. Ministry of Justice has published on its web site the statistical data concerning the ratio of convicted Roma offenders on the crimes committed in the Slovak Republic during the period of 1999 – 2003. These statistics were later removed from the website. The statistics do not contain ratio of convicted offenders affiliated with national minorities and ethnic groups other than Roma minority.[269] In addition, in its opinion dated 2000, the Advisory Committee on the FCNM expresses its concern about the reports suggesting that such non-voluntary collection of ethnicity data is carried out, to a varying degree, in other areas, including governmental employment offices, the military forces, without any clear legal basis[270].

In the **United Kingdom**, the police categorises persons on an ethnic or racial basis for operational purposes (i.e., indicating that a suspect is 'White', 'Asian', etc.) and this will be recorded in their databanks.

In its opinion on **Germany**, adopted in March 2002, the Advisory Committee noted that until recently, the Bavarian police continued to use a personal description form for of the suspect containing, *inter alia*, a heading "Sinti/Rom." This form was filled on the basis of the suspect's physical appearance, without the suspect's consent being requested. The Committee observes, however, that the Bavarian authorities decided to replace this form[271]. In **Finland** as well, in the late 1990s it was disclosed that the police had in practice included in their register on crimes committed an entry that the perpetrator was Roma, under the heading "particular characteristics". To our knowledge, this practice has been discontinued. In the **Czech Republic**, some years ago, a practice of registering people on the basis of their physical appearance, appeared at labour offices (*ú_ady práce*) that made a sign "R" at the materials of employment seekers who were Roma people. This practice was widely criticised and has also been discontinued. Similar practices were used in the **Slovak Republic**. And in **Hungary**, until 1993, schools of primary and secondary education registered pupils who were of Roma origin. Often Roma students were misplaced to schools designed for the mentally retarded, but even if they were not, they were evaluated separately. These statistics were processed centrally and they were made public. After the entry into force of the Data Protection Act such practices became impermissible.

3. Guarantees ensuring the protection of the confidentiality of the data relating to the affiliation with a national or ethnic, religious or linguistic minority

All the Member States have a general legislation on the protection of personal data, based on Directive 95/46/EC of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data[272]. Certain states have, in addition, more specific provisions on the protection of the confidentiality of data relating to the affiliation with a minority or data collected through census.

In **Hungary**, Article 7 of the Minorities Act lays down the right of the individual to admission and acknowledgement of the fact that s/he belongs to a national or ethnic group or minority, thereby ensuring that the processing of the data relating to the affiliation with a minority is only possible when it is based on the acknowledgement of the individual. Moreover, according to Article 2 of the Data Protection Act, data relating to the affiliation with a national or ethnic, religious or linguistic minority has to be regarded as "special data", and their processing, therefore, falls under a more stringent

[269] See also, Advisory Committee on the FCNM, Opinion on Slovakia, 22 September 2000, ACFC/INF/OP/I(2001)001, para. 15.
[270] *Id.*, para. 16.
[271] Opinion on Germany, 1 March 2002, ACFC/INF/OP/I(2002)008, para. 19.
[272] OJ L 281 of 23.11.1994, p. 31.

regulatory regime than personal data in general. As to the confidentiality of the "special data" collected through the 2001 census, it was through what was presented as a guarantee of the anonymity of the responses. Whether this anonymity was fully guaranteed may be questioned, however, insofar as on page 1 of the personal questionnaire the individual was to state his or her gender, date of birth, permanent address, registered temporary address, information on the basis of which individuals can be easily identified by reasonable efforts.

In **Lithuania**, the Law on Legal Protection of Personal Data, the Law on Statistics, and the Law on the Total Population and Dwelling Census 2001 set out the relevant legal framework on the protection of the data relating to the affiliation with a national or ethnic, religious or linguistic minority. Although none of these laws explicitly refers to the ethnic, religious or linguistic identity of the person, the relevant provisions on the protection of personal data should be interpreted as protecting the data relating to the affiliation with the ethnic, religious or linguistic minority. Article 2 (1) of the Law on Legal Protection of Personal Data describes personal data as "any information relating to a natural person - the data subject - who is identified or who can be identified directly or indirectly by reference to such data as a personal identification number or one or more factors specific to his physical, physiological, mental, economic, *cultural or social identity*."[21] Article 7 of the Law On The Total Population And Dwelling Census 2001 provides that census information regarding a resident and his dwelling, shall be confidential and may only be used to obtain aggregated data[22]. Alongside with the above-mentioned legal safeguards on the protection of data, there are also technical (organisational), physical and electronic data protection measures, which have been particularly used to protect the data collected during the population census in 2001. These measures include police clearness of the officials or employees having access to the personal data; their familiarisation with the Lithuanian laws on the data protection as well as relevant legal sanctions, security measures to ensure physical protection of the premises being used for keeping census blank (questionnaires) as well as regulation (limitation) of access to the personal data within the institution concerned.

In **Latvia**, the *Law on Population Register*[273] provides that any person or institution may request the data stored in the Population Register, which include data on ethnic or national origin of persons residing in the country. Institutions of public administration can do so only within the limits of their competence provided for in relevant laws and regulations. The Law prohibits collection of any data concerning religious or political, etc., convictions or affiliations. The *Law on Protection of Personal Data* does not address the issue of data of ethnic or national origin that might be collected in the public administration system. Article 21 of the Law states that databases of religious organisations are not subject to the application of this Law, which is in line with the constitutional principle of separation of Church from State, but may make it more difficult for aggrieved individuals to seek redress for possible abuses by religious institutions.

In **Austria**, with regard to data collected by Statistik Austria and their agents in the municipalities, there are specific stipulations in section 4 of the Census Act 1981 and section 17 of the Federal Statistics Act 2000 (*Bundesstatistikgesetz*, BGBl. I 163/1999). On the basis of these regulations, it is prohibited for an infinite period of time to disseminate information or data to unauthorised persons or non-competent authorities, especially the tax authorities, or to use such information or data for other purposes than prescribed by law. Finally, the analysed and evaluated data are exclusively stored in anonymous form so that they remain available for possible further statistical processing.

According to the **Czech Republic**'s Personal Data Protection Act, the affiliation with a national, ethnic or religious group (be it minority or majority) is a "sensitive data" and requires stricter conditions of its processing than in the case of other personal data. The protection of personal data, including the sensitive ones, is weaker in situations of performing special duties imposed by

---

21 Asmens duomen_ teisin_s apsaugos _statymo pakeitimo _statymas [the Law of the Republic of Lithuania on the Legal Protection of Personal Data], Official Gazette, 2003, Nr. 15-597, emphasis added.

22 Gyventoj_ ir b_st_ 2001 met_ visuotinio sura_ymo _statymas, [Law On The Total Population And Dwelling Census 2001], Official Gazette, 1997, Nr. 117-3013

273 Iedz_vot_ju re_istra likums, *Latvijas V_stnesis*, Nr. 261/264, 10.09.1998.

specialised acts in the interest of, *inter alia*, the security of the Czech Republic, its defence, public order and internal security, prevention and investigation of crimes. However, the special acts contain their own rules of the protection of the data and, therefore, security of the information in question should be safeguarded. Pursuant to the Police Act[274], the police have the right to process sensitive data if the character of the criminal activity makes it necessary for performing their work connected to criminal procedure. This right does not require the consent of the person to who the information relates. The Police Act contains detailed duties as to how to handle personal data and respect their privileged character (§ 42g par. 3 of the Police Act). In the course of criminal proceedings, criminal prosecution authorities may, when necessary for the investigation of the alleged crime, require persons to provide information that relates to the investigated crime. Should the affiliation with a minority be relevant in this way, e.g. in case of racially motivated offences, etc., the interrogated person would be required to provide this information, unless such information would be self-incriminatory.

In **Slovakia**, according to the Section 8 paragraph 1 of the Act no. 428/2002 Coll. on personal data protection as amended, processing of personal data revealing racial or ethnic origin and religious or philosophical beliefs, is in principle prohibited. However, pursuant to the Section 69a of the Act no. 171/1993 Coll. on Police force as amended, the Police Force is authorised, when processing personal data during the performance of Police Force tasks in connection with the criminal proceeding, to process special categories of the personal data revealing, *inter alia*, racial or ethnic origin, religious or philosophical beliefs, depending on the gravity of the criminal act required.

[274] Zákon _. 283/1991 Sb., o Policii _eské republiky, ve zn_ní pozd_j_ích p_edpis_ (Act No. 283/1991 Coll. of laws, on the Police of the Czech Republic, as amended by later laws).

APPENDIX C : The obstacles facing the muslim community

In several countries, Muslim communities have faced obstacles in obtaining the recognition of their faith on a par with other religions more traditionally present in Europe, or in other aspects of their religious practice. In **France,** the Muslim places of worship – which are the property of the State or of other public authorities, as provided by Article 12 of the Act of 9 December 1905 on the separation of Church and State – are very few in number in relation to the number of Muslim believers. In **Denmark**, the Muslim minority has been able to purchase a burial ground only in 2004, due to bureaucratic and financial difficulties. In **Finland**, Muslim communities have faced opposition from other people living in the neighbourhood, in trying to find suitable places of worship. In **Greece,** there is no official mosque in Athens where several thousand Muslims live. The practitioners meet in inadequate places, such as flats, basements, garages and other private premises. Furthermore, there is no cemetery that is reserved for Athens Muslims who wish to bury their dead in accordance with their religious tradition. As a result, those who insist on giving their relatives a religious burial are obliged to transport the body of the deceased to Thrace where the Muslim minority is concentrated[275].

On the other hand, still in **Greece,** there is a persistent conflict between the Greek authorities and part of the Muslim community in Thrace on the subject of the appointment of the muftis. Some of the Muslims consider the Decree of 1990 as an interference in the choice by the Muslim community of its religious representatives, interprets it as an appointment by the authorities and demands an election by indirect universal suffrage with the intervention of Muslim personalities and officials. Another section of the Muslim community and the authorities maintain that the appointment by the State of the head of the religious hierarchy is common practice in the countries where the Islam is the dominant religion (for example in Egypt, Saudi Arabia and Turkey). Furthermore, since in Greece the mufti has judicial authority extending to family law and inheritance law, the appointment of the mufti by an election would compromise compliance with the obligation set forth in the Constitution (Article 88) to appoint judges in accordance with the law, as well as the principle of the independence of judges as individuals and in the exercise of their office, since it would create a situation of political patronage[276]. The choice of the members of the *waqfs* is also a problem: the mufti appointed in accordance with the Decree of 25 December 1990 is assisted by a committee that administers the property (*waqfs*) belonging to the religious communities and the charitable institutions within its district. In accordance with Act no. 1091/1980, the members of this committee must be chosen through elections held within the Muslim community. However, those rules concerning the elections have still not been brought into effect (see Article 1 of Presidential Decree no. 280/2002). To this day, the members of the *waqfs* are still appointed[277].

Besides, in the countries in which either a system of recognition of certain religious faiths or State agreements exist, Muslim communities experience, in certain cases, difficulties in obtaining a status similar to that granted to other important religious minorities. In **Italy**, while Muslims are presently the second largest and fastest growing religious community among immigrants, they haven't yet succeeded in concluding an agreement with the state. In several regions, however, Muslim workers have succeeded in negotiating special agreements with employers in order to ensure the observance of religious holidays and rituals, such as prayers and meals. In **France,** in the three areas where a system of recognition exists, Islam does not have the status of recognized religion (unlike Catholicism, Judaism and the Reformed and Lutheran Protestant churches): although the report submitted by the Think Tank on the application of the principle of secularism in the Republic on 11 December 2003 suggested including the Islam among the recognized religions, this proposal was not endorsed by the

---

[275] *Report by M. A. Gil-Robles*, op. cit., para. 16.

[276] See A. Amor, *Interim report of the Special Rapporteur on religious intolerance: visit to Greece*, A/51/542/Add.1 (7.11.1996), http://www.unhchr.ch, para. 45-47. In a judgment no 466 of 2003, the Council of State considered that the appointment of a mufti by the State is not contrary to Article 13 of the Constitution or Articles 9 and 14 of the European Convention on Human Rights. The Council of State emphasized that the muftis hold important judicial functions in Greece and that judges cannot be elected by the people.

[277] See A. Amor, op. cit., para. 48-49.

political decision-makers. In **Luxembourg,** the State has not concluded any agreement with the Muslim community as it has done with other religious communities, on the grounds that, until recently, the Muslims did not have one single representative body due to the different movements that exist within that community, while the Luxembourg government had made the official recognition of the Muslim religion conditional upon the existence of a single representative body.[278]

In other Member States, the reception of Islam has been less problematic: in **Austria**, the "Community of the Islamic Confession" has the status of a recognised religious community ; in **Lithuania**, the "Sunni Muslim" are listed in the Law on Religious Communities and Associations among the 'traditional religious communities' existing in the country, which may obtain a financial assistance from the State[35] ; in **Spain,** the Muslim Commission is one of the communities that have concluded a cooperation agreement with the Spanish state.

In **Belgium,** the Muslim religion was recognized by an Act of 1974[279]. Nevertheless, it still does not have all the benefits that are granted to the recognized religions. In particular, the imams are not paid by the State. This situation is largely due to the lack until the 1990s of a representative body of this community (the "head of religion" body), which may act as negotiator with the State for the administration of the material and financial aspects of the religion. An arrangement was found in 1975 to organize the tuition of Muslim religion in the state schools[280]. Nevertheless, it was not until 1998 that elections were organized for the establishment of a "Constituent Assembly", charged with appointing among its number the members of a representative body, called the "Muslim Executive of Belgium"[281]. The setting up of this body has allowed substantial progress to be made towards regularizing the status of the Muslim religion. For instance, the Executive has negotiated with the relevant ministers on regularizing the status of teachers of Muslim religion[282]. Nevertheless, the developments that this Muslim Executive has seen in 2003-2004 as well as the controversies concerning the election of a new Constituent Assembly have also highlighted the difficulties that can face the State in connection with the identification of a representative institutional negotiator of a recognized religion, while the State must in principle refrain from any interference in the internal affairs of a religion in accordance with Articles 9 and 11 of the European Convention on Human Rights.[283]

---

[278] Nevertheless, the constitution of a representative body of Muslims is under way. An unincorporated association, the Shoura, was set up in July 2003 by 4 Muslim organizations in Luxembourg and is to be constituted as a non-profit association. Talks are currently under way between the Shoura and the Ministry of Religious Affairs.

[35] Article 5, Lietuvos Respublikos religini_ bendruomeni_ ir bendrij_ _statymas [The Law of the Republic of Lithuania on the Religious Communities and Associations], Official Gazette, 1995, Nr. 89-1985.

[279] Act of 19 July 1974 amending the Act of 4 March 1870 concerning the temporal affairs of the religions (M.B., 23 August 1974).

[280] These courses were organized by a circular of 31 July 1975. The organization of this tuition was confirmed by the Act of 20 February 1978 (*M.B.*, 11 March 1978).

[281] Royal Decree of 24 June 1998 amending the Royal Decree of 3 July 1996 concerning the Muslim Executive of Belgium (M.B. 23 July 1998).

[282] The relevant provisions were adopted by the Flemish Community and the French-speaking Community: Decree of 5 October 2001 of the Flemish Government, amending the Decree of the Flemish Government of 15 December 1993 adopted in pursuance of the Decree of 1 December 1993 on the inspection and regulation of philosophy courses (M.B., 12 December 2001); Decree of the French-speaking Community of 27 March 2002 on teachers of religion in primary and secondary school (M.B., 18 May 2002). The remuneration by the State of ministers of the Muslim religion is provided for in the Programme Act voted in December 2004 and a budget has been allocated by the Federal government for the remuneration of the imams. Nevertheless, the practical implementation of this measure requires the prior recognition of the local mosques, something that the Regions are empowered to do. So far, however, only the Flemish Region has voted such a degree (Decree of the Flemish Council of 7 May 2004 on the material organization and functioning of the recognized religions (*M.B.*, 6 Sept. 2004, effective on 1 March 2005)).

[283] The European Court of Human Rights has reiterated that "The right to freedom of religion under Article 9, interpreted in the light of Article 11, the provision which safeguards associations against unjustified State interference, encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention (see Hasan and Chaush v. Bulgaria [GC], no. 30985/96, § 62, ECHR 2000-XI)" (Eur. Ct. HR (prev. 1st sect.), *Supreme Holy Council of the Muslim Community v. Bulgaria* (Appl. N° 39023/97), § 73).

APPENDIX D: The Rights of Linguistic Minorities : An Overview

1. Private use of minority languages

Some countries impose restrictions of various kinds on the use of languages other than the official one in areas such as posters and public signs, commercial relations, advertisement or information provided to consumers (*on language restrictions in private media, see below 2.2*) :

- In **Estonia**, the Language Act provides that public signs must be in the official language, i.e. Estonian. *De facto* this stipulation has been interpreted as implying that such signs, when not displayed in Estonian, must be accompanied by Estonian translation. Such translations are usually required during election campaigns (but partly unsuccessfully enforced). Although, technically speaking, the Language Act foresees differently, the State does not seem to have neither interest nor resources to care about commercial and cultural posters that in Tallinn and in North-Eastern part of the country are often displayed solely in Russian and without translation.

- In **Latvia**, the 1999 *Language Law* requires that information provided to the public be in Latvian. The reason for this legal requirement lies with the fact that even fourteen years after the restoration of the independence of Latvia, one cannot always count on receiving services in Latvian. There might be some exceptions to the rule on provision of information in Latvian, for example in communications with foreign partners. Commercial activities of the companies are not regulated but if there is a legitimate public interest, the activities shall be carried out in Latvian. For example, a Latvian-speaking customer in a shop should be served in Latvian or at least he/she has the right to demand that; which may not always be possible.

- In **Lithuania**, the relevant legislative provisions lack legal clarity with respect to the linguistic regime of public signs. According to the general rule laid down in Article 17 of the Law on the Official Language, public signs shall be in the state language. Seals, stamps, letterheads, plaques, signs in offices and other places of enterprises, institution and organizations of the Republic of Lithuania, as well as names of goods and services provided in Lithuania and their descriptions, shall be in the state language. An exception to this rule is provided by Article 18 of the law, which authorizes ethnic minorities' organizations to render their names and information in other languages along with the state language.[44] Besides, the Law on Ethnic Minorities allows displaying public signs in a minority language in areas serving substantial numbers of the minority concerned (Article 5).[45] The scope of the right of private persons to use a minority language in posters, commerce etc. appears therefore to be limited to the areas populated by substantial numbers of the minority concerned. Outside these areas, the use of signs and publicly visible information in a minority language is guaranteed for the organizations of ethnic minorities only. Moreover, in practice, the law on Official Language often has a priority *vis-à-vis* the Law on Ethnic Minorities.

- In certain Autonomous Communities in **Spain,** in particular in Catalonia, the use of the Catalan language is compulsory for billposting in public places or commercial activities, on pain of administrative sanctions (with in practice are rarely applied).

- **Slovakian** law provides that in the interest of the consumer, the use of the state language is obligatory in marking the content of domestic or imported goods, in instructions for usage of goods, especially groceries and medicaments, in guarantee conditions and other information for consumers.[284] Likewise, all signs, advertisements and announcements designed to inform the public, especially in shops, at sport centres, in pubs, in streets, along roads, at airports, in bus stations and in railway

---

[44] Lietuvos Respublikos valstybin_s kalbos _statymas [The Law of the Republic of Lithuania on the Official Language], Official Gazette, 1995, Nr. 15-344.
[45] Lietuvos Respublikos tautini_ ma_um_ _statymas [The Law of the Republic of Lithuania on Ethnic MInorities], Official Gazette, 1989, Nr. 34-485.
[284] Section 8 paragraph 1 of the Act no. 270/1995 Coll. on state language of the Slovak Republic as amended.

stations must be in the state language. They may be translated into other languages, but the translation should follow after the equally large text in the state language.[285]

- In **France,** the law on the use of the French language[286] makes the use of French compulsory in the designation, offer, presentation, directions for use, description of the extent and the warranty conditions of a good, product or service, as well as in the invoices and receipts (Article 2). The same provisions apply to all written, spoken or audiovisual advertising. Those provisions are intended, on the one hand, to protect the French language against the excessive use in everyday language of foreign words, in particular English words, where equivalent terms exist in French, and on the other hand to protect consumers. In non-advertising publications, French law has until recently provided for certain exceptions, more particularly publications of foreign origin. The Statutory Order of 6 May 1939 authorized the Minister for the Interior to prohibit the circulation, distribution or sale in France of newspapers or writings in a foreign language or of foreign origin. Since non-regional minority languages are considered foreign languages, publications in those languages were governed by the same regulations. Following the judgment of the European Court of Human Rights in the case of Association Ekin v. France of 17 July 2001, the Council of State reconsidered its earlier case-law and declared, in a *GISTI* ruling of 7 February 2003[287], that Article 14 of the Act of 29 July 1881 in its wording as stemming from the Statutory Order of 1939 was contrary to the requirements of Article 10 of the European Convention on Human Rights.

- In **Belgium,** Article 52 of the Act on the use of languages in administrative matters obliges industrial, commercial or financial enterprises to use the language of the region where they have their principal place of business for all acts and documents required by law and regulations as well as for all acts and documents intended for their staff. In the Brussels-Capital Region, documents intended for the staff must be drawn up in Dutch or in French, depending on the language of the person to whom they are addressed. Those enterprises may add a translation in one or several languages where this is justified by the composition of the staff.

2.Access of linguistic minorities to the media

2.1. Use of minority languages in public media

In the vast majority of member states public television and radio broadcast at least some programmes in a minority language. However, the duration of these broadcasts, the number of languages concerned and the way the use of these languages is ensured vary greatly. The following situations are representative:

- In the **United Kingdom**, the Communications Act 2003 provides for the continued operation of a Welsh television broadcasting service. The Welsh television channel is committed to providing at least 30 minutes of daily news, one hour a week of factual programmes, 100 hours per year of original drama and 110 hours per year of children's programmes.

- In **Spain,** public radio and television broadcast in each Autonomous Community a special programme in the co-official language of the respective Autonomous Communities of a duration determined each year[288]. Furthermore, each Autonomous Community has set up its own public radio and television channels in the co-official language.

- In **Italy**, Law no. 482 of 1999 determines that RAI, the national public broadcasting channel, has to broadcast radio and television programmes in the language of minority groups (Art. 12) on the basis of agreements concluded with the Ministry of Communication and the Regions. The 1997

[285] Section 8 paragraph 6 of the cited law.
[286] Act of 4 August 1994 on the use of the French language, O.J. of 5/08/1994.
[287] CE, 07/02/2003, *GISTI.*
[288] Art. 13 of Act no. 4/1980, Status of Radio and Television.

agreement for Trentino Alto Adige/ Trentino Südtirol specifies the time period that has to be devoted to programmes in the minority language. Since the 1990s a sort of "Terza rete Rai bis" has being created in Trentino Alto Adige/ Trentino Südtirol. In Friuli a joint television project between Italy and Slovenia is at study.

- In the **Czech Republic**, Section 31 of the Radio and Television Broadcasting Act[289] demands the broadcaster to offer a balanced range of programmes for all groups of the population, taking into account, *inter alia*, their national or ethnic origin and belonging to a minority. A major role is played in this respect by the public Czech Radio, which broadcasts news and current affairs programmes prepared by national minority departments (programmes for the German, Polish, Roma, Slovak and other minorities). The Czech Radio programming director is assisted by an advisory team for national minority radio broadcasting, which is composed of national minorities representatives appointed at the suggestion of the Council for National Minorities of the Czech Government. The public Czech Television is assisted by a similar advisory team for national minority television broadcasting. Since 2003, the Czech Television, Ostrava Studio, has been broadcasting weekly current affairs programmes for the Polish minority, prepared by editors belonging to this minority. The Polish minority expressed satisfaction with this broadcasting. In 2004, the same studio launched Babylon, a current affairs and documentary review covering all national minorities in the Czech Republic**.** These programmes serve the national minorities as well as the broader society, which receives information about the life and activities of national minorities.

- In **Slovenia**, Article 64 of the Constitution guarantees the right of the Italian and the Hungarian national communities to activities in the field of public media and publishing. The Media Act of the Republic of Slovenia declares a public interest in the realization of the constitutional rights of the Italian, the Hungarian and the Roma community to disseminate information and to be informed. The Radio-Television of Slovenia Act (*Radiotelevizija Slovenija Act*) provides that RTV Slovenia must broadcast one programme for each of the two national communities (one programme for Hungarian and one programme for Italian. These programmes must cover at least 90% of the area, where the national communities live. National programmes are partly funded from the state budget and partly from subscriptions.

- In **Hungary**, Article 26 of the Media Act lays down "the obligation of public service broadcasters to foster the culture and mother tongue of the national and ethnic minorities living in Hungary, and to provide information in their mother tongues on a regular basis. This responsibility shall be fulfilled in nation-wide broadcasting or, with regard to the geographical location of the minority, in regional or local broadcasting, by broadcasting programmes satisfying the needs of the minority, by providing subtitles in the television as required, or by multi-lingual broadcasting. The duration of the national minority programmes may not be less than at the date of the coming into force of the Act, either on a national, or regional aggregate per national minority." The Hungarian Radio also broadcasts minority programs. The representatives of the minority self-governments proposed the foundation of an "etno radio" dedicated to these programs and separate from the mainstream Radio. This solution was rejected by the National Television and Radio Commission, as it would be contrary to the Act regulating the Hungarian Radio: it is the task of the public radio to preserve the diversity, and to further the preservation of the culture, language and tradition of minorities living in the territory of Hungary.

- In **Lithuania**, Article 4 of the Law provides that Lithuanian radio and television's broadcasts must be oriented towards the various strata of society and people of different ages, *various nationalities* and *convictions.*[46] The law does not explicitly set out the minimum time of broadcasting in the national (ethnic) minority languages. In practice, the time allocated to each minority depends on

[289] Zákon _. 231/2001 Sb., o provozování rozhlasového a televizního vysílání, ve zn_ní pozd_j_ích p_edpis_ (Law No. 231/2001 Coll. of Laws, on the Radio and Television Broadcasting, as amended by later laws).
[46] Lietuvos nacionalinio radijo ir televizijos _statymo pakeitimo _statymas [Law of the Republic of Lithuania on Amendment of Republic of Lithuania Law on the National Radio and Television], Official Gazette, 2000, Nr. 58-1712.

its size (i.e. for Russian, 10 min. daily; for Russian, Polish, Ukrainian, Belarussian, 15 min. each weekly). Additionally, the Lithuanian National Television broadcasts a programme for the Jewish minority (twice a month) and a programme for numerously small minorities (once a month).[47] The total broadcasting time of the programmes for national minorities including religious programmes make 3 percents of the total broadcasting time of the Lithuanian national Television.[48] The Lithuanian National Radio also broadcasts programmes aimed at different national minorities on both its channels. There is also a daily 1 hour 30 minutes programme aimed at promoting culture, language and education of all Lithuania's national groups, and special programmes for Ukrainians and Jews (twice a month).[49]

- In **Slovakia**, according to the Act no. 308/2000 Coll. on broadcasting and retransmission as amended, one of the basic duties of the broadcaster is to secure the use of state language *and minority languages* in broadcasted programmes in accordance with the special laws and regulations. One of the main functions of the Slovak Television ("STV") as well as the Slovak Radio ("SRo") as public institutions is to secure broadcasting of regionally balanced programmes in languages of national minorities and ethnic groups living on the territory of the Slovak Republic.

- In **Sweden**, the broadcasting licences for the public service undertakings, such as the Swedish Television, the Swedish Radio and the Swedish Education Radio include an obligation to take into account the needs of linguistic and ethnic minorities. Saami, Finnish, Meänkieli and Romani Chib enjoy a particular position in programme activities. In the Government Bill 2000/2001:94 (*Radio and TV in the Service of the Public 2002-2005*) it has been underlined that programme undertakings should also take into account the fact that Yiddish has the status of a minority language in Sweden.

- In **France,** the general conditions and missions of the public radio and television channels make reference to the regional languages. Article 3 of the general conditions and missions of France 3 specifies that "the company contributes to the expression of the main regional languages spoken on the metropolitan territory". Article 19 of the general conditions and missions of RFO (Radio France Outre-Mer) provides that "the company contributes to the expression of the main regional languages spoken in each region, territory or community[290]". Here, too, the use of the expression "regional language" excludes languages that have no territorial links.

- In **Finland**, in the operation of the state-owned Finnish Broadcasting Corporation, a proportion of radio and television time is reserved for programs in Swedish, and a small one for programs in Sami. In practice, there are two nationwide radio channels in Swedish. A Swedish-language TV channel will come true in the context of digital TV broadcasting.

- In **Greece,** the public radio station of Komotini in Thrace broadcasts programmes in Turkish that are prepared by journalists belonging to the Muslim minority in Thrace.

- **Latvia'** and **Estonia**'s public televisions broadcast programmes in Russian. The Latvian radio also broadcast programmes in Russian and in other minority languages.

---

[47] See Lietuvos Respublikos Vyriausyb_s nutarimas D_l prane_imo pagal Tarptautin_ konvencij_ d_l vis_ form_ rasin_s diskriminacijos panaikinimo patvirtinimo [The Decree of the Government of the Republic of Lithuania on the Approval of the report of the Republic of Lithuania under the International Convention on the Elimination of all Forms of Racial Discrimination], Official Gazette, 2004, Nr. 76-2628, *para 235-237.*

[48] See www.lrt.lt

[49] See Lietuvos Respublikos Vyriausyb_s nutarimas D_l prane_imo pagal Tarptautin_ konvencij_ d_l vis_ form_ rasin_s diskriminacijos panaikinimo patvirtinimo [The Decree of the Government of the Republic of Lithuania on the Approval of the report of the Republic of Lithuania under the International Convention on the Elimination of all Forms of Racial Discrimination], Official Gazette, 2004, Nr. 76-2628, *para 235*

[290] These general conditions and missions are available at the Internet site of the CSA http://www.csa.fr, under the heading « textes juridiques ».

In some countries, however, minority representatives complain about insufficient availability of programmes in their language:

• In **Austria**, section 5 of the Public Broadcasting Act 1984 (*ORF-Gesetz, BGBl. Nr. 379/1984 idgF*), as amended in 2001, require the public broadcasting corporation ORF to ensure that an appropriate share of its programmes be furnished in the languages of the recognised ethnic groups. Until recently, however, minority programmes were available only for three of the recognised ethnic group, namely the Slovenian, Croatian, and Hungarian, ignoring Vienna altogether. After severe criticism and pending complaints with the Constitutional Court, the ORF finally changed its attitude. Since 2 January 2004 it provides three hours of weekly radio programmes for the Slovak and Czech communities in Vienna, as well as a half-hour magazine in Romany, which can be listened to in Vienna and the Burgenland.

• In **Poland**, although Article 21 of 29 December 1992 Law on radio and television[291] creates an obligation for public radio and television to take into account the needs of national minorities and ethnic groups, there are no legal regulations defining the principles of implementation of this law. Minority representatives are complaining about difficulties in gaining access to the media[292]. In practice, minorities are guaranteed access to public radio and television on channel TVP 3 – at regional centres, where programmes in national languages are prepared. Nine of the 12 regional centres broadcast programme for minorities prepared by journalists belonging to these minorities.

• In **Cyprus**, in the opinion of the Maronite Representative to the Parliament, the Maronite community does not have sufficient access to the media. There is one 35 minutes programme at the national radio station per week, which is conducted in the Greek Language, since only 30% of the Maronite community speaks the special language of their community (a mixture of Aramaic and Arabic). The Government is now funding this programme by £70 for each programme. As far as the Armenian community is concerned, there is a daily one-hour programme at the CYBC radio station in Armenian dealing with Armenian culture, one hour programme every year on the Armenian Christmas Day, as well as a short broadcasting of the Christmas and Easter mass.

• As regards **Belgium,** rapporteur D. Columberg of the Committee on Legal Affairs and Human Rights of the Council of Europe, in his report on the situation of the French-speaking population living in the Brussels periphery, notes that the broadcasting of French-language television channels in the municipalities with facilities has become a source of conflict[293].

2.2. Obligation to use the official language in private media

A few countries impose restrictions on the use of languages other than the official one in private broadcasting. Thus in **Slovakia** the law on State Language provides that, as a rule, broadcasting on radio and television is performed in the state language on the whole territory of the Slovak Republic.[294] There are several exceptions to this rule[295]. Broadcasting in the languages of national minorities and ethnic groups, however, are treated by special regulations. In **France,** the private

[291] *The Journal of Laws* of 1993, no. 7, position 34, along with following amendments.
[292] S_awomir _odzi_ski, The Problem of Discriminating Persons Belonging to National and Ethnic Minorities in Poland, The Chancellery of the Sejm, The Office of Studies and Expertise, The Department of Economic and Social Analysis, December 2003, Report no. 219, p. 35
[293] Council of Europe, Committee on Legal Affairs and Human Rights, Report on the situation of the French-speaking population living in the Brussels periphery, 4 September 1998, Doc. 8182. Following this report, Resolution 1172 (1998) on the situation of the French-speaking population living in the Brussels periphery was adopted by the Parliamentary Assembly of Europe.
[294] Section 5 paragraph 1-4 of the Act no. 270/1995 Coll. on state language of the Slovak Republic as amended.
[295] The exceptions are: a) other language radio programmes and foreign language television programmes consisting of audiovisual works and other sound and pictorial recordings with subtitles in the state language or otherwise fulfilling the requirement of basic comprehensibility from the point of view of the state language; b) foreign language broadcasting of Slovak radio for foreign countries, television and radio language courses and programmes with similar orientation; c) music programmes with original texts.

media, like the public media, must comply with the requirements of the law of 1994 on the use of the French language[296]. The obligation to use the French language in the media does not apply to media that are targeted at a particular community. In **Estonia**, TV channels established by the Russian speaking minority are required by law to provide for Estonian subtitles in movies. The Advisory Committee of the Framework Convention has observed in this respect that although it is often advisable to accompany minority language broadcasting with sub-titles in the state language, « as far as private broadcasting is concerned, this goal should be principally pursued through incentive-based, voluntary methods ». In the Committee's view, « the imposition of a rigid translation requirement mars the implementation of Article 9 of the Framework Convention by causing undue difficulties for persons belonging to a national minority in their efforts to create their own media. »[297] In Lithuania, by contrast, the Law on Public Information exempts TV programmes aimed at national minorities from a mandatory translation into Lithuanian[51]. In **Latvia**, legal provisions restricting the use of foreign languages in private broadcasting media[298] were challenged before the Constitutional Court. The Court found the restrictions to be in violation with freedom of expression.

2.3 Measures aimed at enhancing the use of minority languages in private media

Several countries have taken measures to foster the use of minority languages in private media. Some of them take this concern into account in the issuing of licenses for private broadcasters. In the **Czech Republic**, one of the criteria for the award of a broadcasting license is the ability of the applicant to contribute to the development of the culture of national, ethnic and other minorities in the Czech Republic[299]. In **Lithuania**, the Commission of the National Radio and Television may make the licences issued for private broadcasters subject to certain conditions indicating what proportion of the programmes should be transmitted in the languages of national minorities[53]. In **Spain,** all private television channels that use the ether are governed by the administrative licence regulations. The three existing private television channels are subject to the obligation of providing minimum broadcasts in the co-official language (Act no. 10/1988 on Private Television, Art. 4.2). **Ireland** is in a somewhat peculiar situation, insofar as, although the Irish language is the national and first official language of the state (Article 8 of the Irish Constitution) – the English language being recognised as the second official language –, Irish is used only by a minority of the population; indeed, the *Official Languages Act 2003* has the primary aim of ensuring better availability and a higher standard of public services through Irish. This specific situation of the Irish language also has an impact on the criteria for the issuing of licenses for private broadcasters. Applications may be made to the Broadcasting Commission of Ireland under the *Radio Television Act, 1988* for access to radio services or the *Broadcasting Act 2001* for access to digital television services. The Broadcasting Commission is obliged under the *Broadcasting Act 2001* and the *Radio and Television Act 1988* to: "…endeavour to ensure that the number and categories of broadcasting services made available in the state…best serve the needs of the people of the island of Ireland, bearing in mind their languages and traditions and their religious, ethnic and cultural diversity."[300]

Furthermore, in the **Czech Republic** and in **Italy**, either central or local authorities provide financial aid for periodicals or for radio and television broadcasting in minority languages. In **France,** a number of territorial authorities, in particular the general and regional councils, lend moral and/or financial

[296] Act of 4 August 1994 on the use of the French language, O.J. of 5/08/1994.
[297] Opinion on Estonia, 14 September 2001, ACFC/INF/OP/I(2002)005, para. 38.
[51] Lietuvos Respublikos visuomen_s informavimo _statymo pakeitimo _statymas [The Law of the Republic of Lithuania on the Amendment of the Law on Provisionof Information to the Public], Official Gazette, 2000, Nr. 75-2272
[298] In accordance with the 1999 *Language Law* all other languages used in Latvia, except for Latvian and Liv, are foreign languages. (Article 5)
[299] Zákon _. 231/2001 Sb., o provozování rozhlasového a televizního vysílání, ve zn_ní pozd_j_ích p_edpis_ (Law No. 231/2001 Coll. of Laws, on the Radio and Television Broadcasting, as amended by later laws).
[53] Lietuvos Respublikos visuomen_s informavimo _statymo pakeitimo _statymas [The Law of the Republic of Lithuania on the Amendment of the Law on Provision of Information to the Public], Official Gazette, 2000, Nr. 75-2272, Article 31.
[300] Ireland, *Report Submitted Pursuant To Article 25, Paragraph 1 Of The Framework Convention For The Protection Of National Minorities* (ACFC/SR[2001]006)

support to the broadcasting by private media of programmes intended for the linguistic minorities. In **Austria**, if fulfilling the general terms and conditions daily newspapers and weekly magazines of a minority may be eligible for press funding according to the Press Funding Act 2004.[301] A sort of positive discrimination can be found in section 2(2) which holds that the general requirements of a certain minimum circulation do not apply in respect of newspapers and magazines published in a recognized minority language. Nonetheless, many existing magazines or other publications in minority languages struggle with economic constraints or even find themselves on the brink of closing down.

3. Use of a minority language in relations with public authorities

3.1. Right of the arrested or accused person to obtain the assistance of an interpreter

All the Member States are bound by Articles 5(3) and 6(3), a) of the European Convention on Human Rights. In principle, they guarantee the right of the person arrested to be informed in a language which he or she understands, about the reasons of his or her arrest[302] ; and they ensure the right of a person not understanding the language of judicial proceedings to obtain the assistance of an interpreter in criminal proceedings.

Certain problems have been identified in the review of the Member States. In **Hungary**, the Code of Criminal Procedure states that the fee of the interpreter is included in the costs of the criminal procedure, which have to be paid, generally, by the defendant. If he or she cannot afford it, he or she can be exempted and the costs are covered by the state (Article 74). In **Finland**, the right to be informed in a language one understands of the reasons for arrest and the right to be assisted by an interpreted in criminal proceedings are guaranteed, but in practice there is a tendency of presuming that any foreigner understands English to a sufficient degree. In **Poland**, the lack of Roma language interpreters might possibly limit the rights of Roma during court proceedings, for those among them who poorly speak the Polish language.

3.2. Right to use a minority language in relations with public authorities

A majority of member states guarantee either in determinate areas or in the whole territory the right to use certain minority languages when dealing with administrative authorities and/or in the context of judicial proceedings.

States which ensure such a right in the whole territory are rare. In the **Czech Republic**, the right of national and ethnic minorities to use their languages when dealing with the administrative authorities is guaranteed by the Charter of Fundamental Rights and Freedoms (article 25, paragraph 2 (b))[303]. The question of languages used in contacts with the administrative authorities falls within the scope of the Administrative Procedure Act.[304] This new Act provides, *inter alia*, that a Czech citizen belonging to a national minority that has traditionally and for a long time lived in the Czech Republic has the right to submit documents and communicate with the administrative authorities in the language of his/her national minority. If the administrative authority' staff does not speak the language, the citizen will be assured an official interpreter at the costs of the administrative authority. The use of mother language in judicial procedure is governed by the Civil Procedure Act[305] (Section 18), and Criminal Procedure Act (Section 2, paragraph 14, Section 28). In **Hungary**, while the official language is Hungarian, the Act on administrative procedure (Article 2, Section 5) and the Code of Civil Procedure (Article 6), as

---

[301] Presseförderungsgesetz, BGBl. Nr. I 136/2003.

[302] In **Ireland**, Article 38.1 of the Constitution provides: 'No person shall be tried on any criminal charge save in due course of law'. This has been interpreted by the courts to mean that a person has the right to be given details of any charge against him *(State (Gleeson) v. Minister for Defence)* ([1976]I.R.280) and that this is to be carried out in a language which the person understands *(State (Buchan) v. Coyne) (*(1936)ILTR70).

[303] Listina základních práv a svobod, úst. zákon _. 2/1993 Sb. (Charter of Fundamental Rights and Freedoms, Const. Law No. 2/1993 Coll. of Laws).

[304] Zákon _. 500/2004 Sb., správní _ád (Law No. 500/2004 Coll. of Laws, Administrative Procedure Act,).

[305] Zákon _. 99/1963 Sb., ob_ansk_ soudní _ád, ve zn_ní pozd_j_ích p_edpis_ (Law No. 99/1963 Coll. of Laws, Civil Procedure Act, as amended by later laws).

well as the Code of Criminal Procedure, recognize the right to use one's mother tongue both in administrative and civil procedures. In **Ireland**, where the official language – Irish – is spoken by a minority, the *Official Languages Act 2003* provides a number of measures which ensure the right of the Irish speaking minority to communicate with public bodies and their servants through the medium of Irish. This includes the right to use Irish before either house of Parliament[306], the right to be heard in and to use the Irish language in court[307] and a duty on public bodies to ensure that communications providing information to the public - in writing or by electronic mail - is in the Irish language only or in the Irish and English languages.[308] In **Germany** there are special provisions governing the use of the Sorbian language before the courts. The Unification treaty of 1990 explicitly provides that the Sorbs shall – continue to – have the right to speak Sorbian in courts in their home counties. **Finland**, **Denmark** and **Sweden** are party to the Nordic Language Convention (1981), which creates an obligation for contracting states to ensure that citizens from other contracting state will be able to use their own language if necessary in their contacts with the authorities of the country.

Usually, the right to use a minority language when dealing with public institutions is limited to specific territorial areas. Two situations may be distinguished: in some countries, minority languages have been granted a status equal to that of the official language within a specific region; in other instances, the state recognizes to members of certain minorities the right to use their own language when dealing with the administration or before courts in local areas where they represent a minimal proportion of the population.

- In **Spain,** under Article 3 of the Constitution, Castilian is the official language of the State, but the other Spanish languages are co-official in the Autonomous Communities in accordance with the Statutes of Autonomy. Catalan, Basque and Galician have the status of co-official languages in the corresponding Autonomous Communities. They are used in education, public administration and the judicial institutions. Moreover, certain languages, without being co-official, are legally protected: Bable or Asturian, the various linguistic variants spoken in Aragon, and Aranian in the Aran Valley.

- In **United Kingdom**, English is the language of the State and administration in England, Northern Ireland and Scotland but in Wales, the English and Welsh languages are to be treated on a basis of equality in the conduct of public business and the administration of justice. Proposals for the use of Irish and Gaelic in Northern Ireland and Scotland are under consideration.

- **Belgium** is a special case. The country has three official languages: French, Dutch and German. In accordance with the co-ordinated laws of 18 July 1966 on the use of languages in administrative matters[309], Belgium is divided into four linguistic regions: three unilingual regions – the Dutch-language region, the French-language region and the German-language region – and one bilingual region, the Brussels-Capital Region. As regards the use of languages in judicial matters, in accordance with the Act of 15 June 1935[310], the defendant may choose the language of the legal proceedings from among the three national languages (Dutch, French, German). If he is in a linguistic region that does not correspond to the chosen language, his case will be removed from the court and transferred to the court of another linguistic region that is situated closest to the defendant's domicile. On the other hand, in certain municipalities that are situated in the unilingual regions, linguistic facilities are granted to French-speakers, Dutch-speakers or German-speakers, as the case may be. There are six such municipalities "with facilities" in the Flemish-speaking region in the periphery of the Brussels-Capital Region, where facilities are granted to French-speakers, who are particularly numerous in those areas[311]. In accordance with the coordinated laws of 18 July 1966, those French-

[306] Official Languages Act, 2003, s.6
[307] *Ibid., s.8*
[308] *Ibid., s.9(3)*
[309] *M.B.*, 2 August 1966, p. 7798.
[310] Act of 15 June 1935 on the use of languages in judicial matters, *M.B.*, 22 June 1935.
[311] The other municipalities with linguistic facilities are the nine municipalities of the German-speaking Community (where facilities are granted to French-speakers); two border municipalities of the Walloon Region (where facilities are granted to

speakers have the right to maintain relations with the public authorities in French. Until recently, administrative practice was established in such a way that, from the moment the public services had knowledge of the linguistic affiliation of individuals, they were obliged to use the language of those individuals, i.e. either French or Dutch. However, several circulars issued by the Flemish government imposed a restrictive interpretation on this arrangement. According to those circulars, any act or document addressed by the public services to an individual has to be drawn up in Dutch; the citizen can obtain a French translation on express request case by case. The lawfulness of those circulars has been challenged. According to the Standing Committee for Linguistic Supervision, which is composed of an equal number of French-speaking and Dutch-speaking members, individuals who have been granted linguistic facilities should not be obliged to remind the public services each time of their linguistic affiliation. However, by its rulings of 23 December 2004, the Council of State dismissed the actions for annulment that were filed against those circulars.

- In **Italy**, the statutes of some of the regions “a statuto speciale” confer to minority languages – German and French – a status equal to that of Italian (see law no. 574 of 1988). Within the Trentino Alto Adige/Trentino Südtirol region, in particular, the German language is made equal to the Italian language. Besides, the Law No. 482 of 1999 provides special protection to the following minority languages: Albanian, Catalan, German, Greek, Slovenian, Croatian, French, French-Provençal, Friulian, Ladino, Occitan and Sardinian. The law foresees *inter alia* that in certain areas and under certain conditions, these languages may be used in collegial public bodies and in the administration, with the exception of the armed and police force (arts 7 and 9).

- In **Slovenia**, according to article 11 of the Constitution, Slovene is the official language in Slovenia but in those municipalities where Italian or Hungarian national communities reside, Italian or Hungarian shall also be official languages.

- In **Denmark**, within their respective home rule areas, Greenlandic and Faeroese languages are legally protected. In the Faeroe Islands, Danish as well as the Faeroese language can be used in public affairs. In Greenland, Greenlandic shall be the principal language and Danish must be thoroughly taught.[312] Either language may be used for official purposes.

- In the **Netherlands**, the law determines that anyone may use the Frisian language when communicating with administrative organs that are established in the province of *Friesland*[313]; the Frisian language may be used during debates in representative organs that are established in the province of *Friesland*[314], and so on. The 1956 *Wet gebruik Friese taal in het rechtsverkeer* [Use of Frisian in judicial proceedings Act] provides that the Frisian language can be used in all forms of judicial proceedings taking place in the province of *Friesland.*

- In **Sweden**, special laws have been adopted entitling individuals to use Saami, Finnish and Meänkieli (Tornedal Finnish) in dealing with administrative authorities and before courts of law in the geographical area in which these languages have traditionally been used and are still widely used today.

- In **Finland**, Finnish and Swedish are defined as national languages by the Constitution (Section 17), entailing their equal use in matters such as the publication of laws and ordinances and parliamentary proceedings. The constitutional rights of everyone to use his or her own language, either Finnish or Swedish, before courts of law and other authorities, and to receive official documents in that language (Section 17, subsection 2), is in practice implemented through the Language Act (2003), which divides the country into Finnish-speaking, Swedish-speaking and bilingual municipalities. This

---

German-speakers) and certain municipalities that are situated along the “linguistic border”, where facilities are granted to Dutch-speakers or French-speakers, as the case may be.

[312] Section 9 of Act No. 577 of 29 November 1978 on Greenland Home Rule.

[313] Article 2:7 of the *Algemene Wet Bestuursrecht (AWB)* [General Administrative Act].

[314] Article 2:12 AWB.

division is based on the absolute number or percentage of speakers of the two national languages within a municipality. Regional or national bodies are bilingual when at least one Swedish-speaking or bilingual municipality is located within their jurisdiction. A person suspected or accused of a crime enjoys broader linguistic rights also on monolingual municipalities. Through a separate Sami Language Act, the Sami have been guaranteed the right to use the Sami language in their dealings with administrative and judicial authorities in matters that emanate from within the so-called Sami homeland. In addition, the Act on the Status and Rights of a Patient [laki potilaan asemasta ja oikeuksista (785/1992)], in sections 3 and 5, provides that the specific language needs of a patient have to be taken into account “as far as possible”.

- In **Austria**, the right to use their language for official purposes is granted to the Slovene, Croatian and Hungarian minorities. The governing statutory regulations confine this right to certain administrative authorities, police and courts that are situated in districts with a significant minority population (including appellate courts that have their seat in the concerned provinces) but do not cover providers of public services. Pursuant to section 13 paragraph 4 of the Ethnic Groups Act, municipalities may issue general announcements also in the language of the minority, but are not obliged to do so. In practice this right cannot be truly used because civil servants do not have the necessary language qualifications and using interpreters is not practical. Often not even all official forms are available in the minority language.

- In **Poland**, until recently, there was no regulation permitting the minorities to use their own languages in relations with the authorities and providers of public services. This had been criticised by the Human Rights Committee[315]. Article 9 of the Law on National and Ethnic Minorities in the Republic of Poland, approved by the Sejm, provides for the possibility to use language of minorities as an auxiliary language in written and oral communication with the local authorities in the communities in which the number of persons belonging to minorities amount at least to 20% of the population.

- In **Estonia**, officials have the obligation to communicate in a minority language only when the minority makes up at least 50 % of the local population and/or guarantees of translation are foreseen, e.g. in court or criminal proceedings. In practice, however, officials in the whole country usually know the Russian language and are able to communicate in this language.

- In **Lithuania**, the legal situation is ambiguous. Article 4 of the Law on Ethnic Minorities provides that in administrative-territorial units with a compact national minority residing therein, the language of that national minority shall be used in local bodies alongside the official language.[58] But Article 7 of the Law on Official language instructs heads of public authorities and self-government institutions, agencies and organisations, as well as all institutions providing services to the population to ensure that residents receive *services in the official language”.* These two provisions definitely contradict each other. The Law on Ethnic Minorities, moreover, does not define clearly the criteria to be used to identify areas entitled to benefit from the provisions. Although in practice languages of ethnic minorities, mostly Russian and Polish have been indeed used in the local governance institutions in Eastern Lithuania, the lack of legal clarity hampers effective implementation of the relevant international standards in Lithuania.

- In **Latvia**, the law does not guarantee the right to use a minority language in any part of the country. In communications with the authorities, written submissions in another language than the State language are received only with the attached notary-certified translation. In daily practice the implementation of the Law might be more flexible. There is information that some municipalities opened their own translators’ services. General services, such as hospitals, etc., are available in law and practice in Russian. Staff in the hospitals is bilingual, often multilingual.

---

[315] Concluding Obsevation of Human Rights Committee: Poland of 5 November 2004, No. CCPR/CO/82/POL/Rev. 1. Para. 20

[58] Lietuvos Respublikos tautini_ ma_um_ _statymas [The Law of the Republic of Lithuania on Ethnic MInorities], Official Gazette, 1989, Nr. 34-485

4. Use of minority language for topographical indications

Many countries provide that in areas where a linguistic minority constitutes a significant proportion of the population, topographical indications shall also be displayed in its language. In the **Czech Republic**, for instance, according to the Municipalities Act,[316] the names of the municipality, its parts, streets and other public areas, as well as inscriptions identifying the buildings of the administrative authorities and local government bodies, are to be displayed in the language of the national minority if at least 10% of inhabitants belongs to it according to the latest census results, on the basis of a petition signed by at least 40% of adult inhabitants belonging to the minority. In the **Slovak Republic**, the Act no. 191/1994 Coll. on the markings of municipalities in language of national minorities as amended provides, *inter alia*, that municipalities in which members of national minority represent at least 20% of its total population, may, besides the official Slovak language, use also the language of national minority for marking the name of the municipality as well as the road signs used on the territory of the municipality. In **Germany** the Land Laws (*Act on the Saxon Sorbs, Act on the Specification of the Rights of the Sorbs (Wends) in the Land of Brandenburg*) provides that in the Sorbian settlement areas, signs for places, towns, counties, public buildings, institutions, streets, lanes and roads, squares and bridges shall be bilingual. Moreover in the Land of Schleswig-Holstein, road signs in Danish indicate the institutions of the Danish minority. In **Finland**, topographic signs are in Swedish and Finnish in bilingual municipalities and in most major cities. Within the Sami homeland, topographic signs are in Finnish and Sami language. *A fortiori*, when a minority language enjoys official status at the regional level, topographical indications are displayed in this language within this region. Thus, in **Spain**, Autonomous Communities which have a co-official language display all topographical indications in this language.

In relation with this issue, the following problems have been reported:

In **Austria**, the question of topographic indications is still unsettled. Currently bilingual topographic indications exist for the Slovene, Croatian and Hungarian minorities in municipalities that are determined by the corresponding statutory regulation. In 2001, however, the Constitutional Court gave a judgement (*VfGH, 13.12.2001 G213/01 und B 2075/99*) annulling provisions in the Ethnic Groups Act and in the implementing statutory regulations that provided for the mounting of bilingual topographic signs only in municipalities with at least 25% of minority population. According to the Court this figure was much too high with a view to the minority friendly tenor of the State Treaty and conceived a new figure of about 10% of the population. Due to continuing protests from the Carinthian Government and traditional organisations of the German-speaking majority the one-year time limit set by the Constitutional Court for the Federal Government to bring the law in accordance with international obligations expired and up to date no consensus could be reached between the parties despite several round tables on this topic. In **Lithuania** the Law on Ethnic Minorities (art. 5) stipulates that in administrative-territorial units populated in sufficient numbers by persons belonging to a national minority, informational signs may be displayed in the language of that minority in addition to the Lithuanian language. But the provisions of the Law on the Official Language, which contrarily provides for mandatory use of all public signs in the Lithuanian language, hampers the implementation of this provision.

5. Use of minority languages in education

5.1. Access to total or partial education in a minority language at public schools

Most states guarantee the possibility to receive total or partial education in a minority language at public schools. Such a possibility, however, is usually limited to certain minorities, to specific areas or

[316] Zákon _. 128/2000 Sb., o obcích (obecní z_ízení), ve zn_ní pozd_j_ích p_edpis_ (Law No. 128/2000 Coll. of Laws, on Municipalities, as amended by later laws).

to a certain level of education. Interestingly, some states have set up bilingual schools. The following situations are representative:

- In **Austria**, only the Slovene and Croatian ethnic groups enjoy the enforceable and constitutionally guaranteed right to receive education in their language at primary school level and in a proportionate number of secondary schools (Vienna State Treaty 1955). As a consequence Parliament passed the Minority School Act 1959 for the Slovene minority in Carinthia[317] and – finally – the Minority School Act 1994 for the Croatian and the Hungarian minority in the Burgenland.[318] The minority school acts allow for different options in order to comply with the prerogative of minority protection: primary and lower secondary schools with education purely in the minority language, bilingual schools, and additionally German schools having compulsory minority language courses. In practice, the first option was not realised because of lacking demand as graduates from such schools without proper education in German would have had serious disadvantages in their later professional lives. In 1989 the Constitutional Court ruled that in the traditional areas of residence the right to education in the minority language was enforceable without further conditions whereas in the rest of the province the right was subject to a "sustainable local demand" (*VfSlg. 12245/1989*). A different trend can recently be noticed in regular schools, since the knowledge of eastern languages has become a desirable asset in many job descriptions. So more and more schools adapt their optional language courses to satisfy the increasing demand of German-speaking students to learn eastern languages, notably Slovenian and Hungarian. The experience in Austria has shown that only truly bilingual education can help to ensure that the language and culture of the minorities is preserved.

- In **Hungary**, children belonging to a minority community can receive pre-school and primary school education in the language of their choice. They can choose bilingual education as well, in Hungarian and in their mother tongue. The language of higher education is Hungarian, but any national or ethnic minority can maintain a college or university, where the teaching language is partly or completely their mother tongue.

- In **the Netherlands**, education in the province *Friesland* takes place in Frisian and Dutch[319]. Outside the province, Dutch will be used – but Frisian and other regional languages may also be used in places where these languages are actually used[320]. In addition there exist quite extensive programmes for language education in the languages of ethnic minorities. In 2004, however, the Government announced that it intends to cut subsidies for the latter programmes. The Government believes that it is of vital interest to the children's future integration into Dutch society that they learn Dutch. Since all efforts should be geared towards that goal, education in the languages of ethnic minorities will no longer be supported[321].

- In **Greece,** there are more than 200 primary schools in Thrace where pupils belonging to the Muslim minority can learn Turkish and be educated partly in Turkish and partly in Greek. In secondary education, there are four private educational establishments using accommodation made available by the State, where tuition is given in Greek and in Turkish. In the mountainous areas where the Pomaks live, the State has set up and provides funding for secondary schools using the Greek language, where religious education is given in Turkish and the Koran is taught in Arabic.

- In **Cyprus**, the Armenian community is the only minority having its own language. There are kindergartens and elementary schools in Armenian which are funded by the state but are autonomous since they are governed by the Armenian School Board. With regard to secondary education, there is one private Armenian school, the Melkonian but the State supports Cypriot Armenian students

[317] *Kärntner Minderheitenschulgesetz, BGBl. Nr. 101/1959 idgF.*
[318] *Burgenländisches Minderheitenschulgesetz, BGBl. Nr. 641/1994.*
[319] Article 9 (4) of the *Wet op het primair onderwijs* [Primary Education Act].
[320] Article 9 (8) of the *Wet op het primair onderwijs.*
[321] *Nationaal Actieplan Kinderen [National Plan of Action for Children], Kamerstukken II* 2003-2004, 29284, No. 3 Add., p. 18).

attending the Melkonian by paying their fees. However, the Melkonian institute is closing down. Alternative arrangements will thus need to be taken for the secondary education of Armenian children.

- In **Spain,** the laws governing state education allow the Autonomous Communities to include in the curriculum the study of their official languages along with aspects of their own history and culture. The Autonomous Communities are also empowered to regulate the use and tuition of their languages at university. The universities situated in the Autonomous Communities that have a language of their own may therefore provide tuition in that language. However, it is for each university to decide on the extent of this right.[322]

- In **Finland**, education in Swedish is guaranteed by law as part of public education, based on certain conditions. Sami language is available as a language of instruction in the Sami homeland. There is a programme of providing education in the Romani language. Besides, in many municipalities, immigrants receive education in their own language, in order to facilitate their participation in general education.

- In **Lithuania**, article 28 of the Law on Education provides that in localities where a national minority traditionally constitutes a substantial part of the population, upon that community's request, the municipality ensures the possibility of learning in the language of the national minority.[59] The subject of the Lithuanian state language is a constituent part of the curriculum at schools providing for teaching in a minority language.[60] According to the Law, other state-run and municipal schools shall provide opportunities for pupils belonging to ethnic minorities to learn their mother tongue, subject to the existence of a real need and the availability of teachers of that language.

- In **Slovenia**, Article 64 of the Constitution guarantees to members of the Italian and Hungarian autochthonous national communities the right to education and schooling in their own languages and provides that "[t]he geographic areas in which bilingual schools are compulsory shall be established by law."

- In the **Slovak Republic**, according to Article 34 of the Slovak Constitution, persons belonging to national minorities and ethnic groups, in addition to their right to learn the official language, they also have the right, under the conditions laid down by a law, to be educated in their language. Pursuant to the Act no. 270/1995 Coll. on state language, the education of state language is compulsory on all primary and secondary schools. Other than the state language may be used for education and examination to the extent determined by the law. Textbooks and other educational materials for the purpose of education in schools of national minorities are published in the language of respective national minority. According to the Act no. 29/1984 Coll. on system of primary and secondary schools, as amended, training and education are carried out in the state language. Citizens of Czech Republic, Hungarian, German, Polish and Ukrainian (Ruthenian) nationality are ensured the right to education in their own language to an extent proportional to the interests of their national development. School reports for students of primary schools and students of secondary schools are issued in the state language. Students of primary schools and students of secondary schools in which a national minority language is the language of instruction are issued bilingual school reports, in the state language and in the language of the relevant national minority. Pedagogical documentation at primary and secondary schools is kept in the state language. At schools where a national minority language is the language of instruction, the pedagogical documentation is bilingual, in the state language and in the language of the respective national minority.

---

[322] See initial periodical report presented by Spain to the Secretary - General of the Council of Europe in accordance with Article 15 of the Charter, Report on the Application in Spain of the European Charter for Regional or Minority Languages of 23 September 2002.

[59] Lietuvos Respublikos _vietimo _statymo pakeitimo _statymas [The Law of the Republic of Lithuania on the Amendment of the Law on Education], Official Gazette, 2003, Nr. 63-2853

[60] Lietuvos Respublikos _vietimo _statymo pakeitimo _statymas [The Law of the Republic of Lithuania on the Amendment of the Law on Education], Official Gazette, 2003, Nr. 63-2853

- In **Sweden**, despite the demand amongst persons belonging to national minorities to receive bilingual education, legal guarantees exist so far only with regard to the Saami language. In addition, municipalities are, under certain conditions, obliged to provide education of any mother-tongue as a subject if it is requested by at least five pupils or, as regards Saami, Meänkeli and Romani Chib, by one or more pupils. The above mentioned obligation is conditioned on the availability of teachers and in practice this has had negative impact on the scope of the legal guarantee. Moreover, the volume of the mother-tongue education is generally limited to one to two hours per week. Swedish NGOs have pointed out that during recent years only about 52 per cent of the pupils entitled to mother-tongue teaching have participated in these classes.

- In the **United Kingdom**, schooling in Welsh has been provided since the enactment of the Education Act 1944 and some 25% of children in school are so taught. There is also provision for further and higher education in Welsh and Welsh is taught in other schools as part of the national curriculum. There are Irish and Gaelic medium schools in Northern Ireland and Scotland but not all are publicly funded.

Some countries have recently taken measures reducing the availability of education in a minority language at state schools. In **Latvia**, the legal reform requires public schools providing instruction in a minority language to implement a bilingual education model[323]. In September 2004, secondary schools providing instruction in other than the State language began bilingual education programmes at the 10th grade of studies. 60% of subjects must be taught in Latvian and 40% of subjects can be taught in a minority language. The choice of subjects for one or another language is left to each school. It is still too early to evaluate the effects of this transition, which begun in 1998. On the one hand, this measure was necessary to enable non-Latvian speaking population to be better prepared for the competition on the labour market and in higher educational establishments. On the other hand, there is a danger that these measures may affect the quality of education. In **Estonia**, by contrast, whereas at present persons belonging to linguistic minorities enjoy the possibility of receiving education in their language, the legally enshrined State policy foresees that all State-financed gymnasiums will in 2007 go over to the instruction in Estonian. It remains a domestically debated issue in Estonia whether and to what extent it is legitimate to compel Russian pupils to study (almost) exclusively in Estonian at the gymnasium level. Since the higher education in Estonia is largely in Estonian, some consider that the State should not support disadvantaging some of its pupils by not providing them proper instruction in the state language. However, a careful balance must be drawn in that regard and minority educational interests and needs should be properly taken into account.

The situation in **Belgium** deserves special attention. In accordance with the Act of 30 June 1963 on the use of languages in education[324], state education is, as a rule, given only in the language of the region (in the two languages in the case of the Brussels-Capital Region). Exceptionally, in the municipalities with linguistic facilities, state education in another language than that of the region may be organized on certain conditions. In the six municipalities with facilities in the Brussels periphery, however, access to French-speaking state schools is limited: only children may be enrolled who have French as their native or everyday language and on condition that the head of the family lives in the municipality concerned. Verification of compliance with those conditions is entrusted to the school principals and to the language inspectorate. At the moment of enrolment, the parents must complete a linguistic declaration concerning the native or usual language of their child, the correctness of which may be challenged by the language inspectorate. In its judgment of 23 July 1968, the European Court of Human rights declared that the fact of preventing children whose parents do not live on the territory of one of those municipalities from attending French-language schools constitutes discrimination in the enjoyment of the right to education[325]. The Parliamentary Assembly of the Council of Europe has

---

[323] "Valodas inspekcija soda skolot_ju", 08.12.2004.
[324] *M.B.*, 22 August 1963.
[325] Eur. Ct. H.R., *Case relating to certain aspects of the laws on the use of languages in education in Belgium,* judgment of 23 July 1968.

repeatedly called upon Belgium to bring its legislation into line with this judgment[326]. On the other hand, in his report on the situation of the French-speaking population living in the Brussels periphery, rapporteur D. Columberg of the Committee on Legal Affairs and Human Rights of the Council of Europe said that in his view this procedure of linguistic verification should be abolished, a procedure which he considers “undignified and unnecessary”.

Finally, some States limit themselves to offering in public schools the possibility to learn certain minority languages (by contrast with offering instruction *in* the minority language). In **France,** under certain regional education authorities[327], the regional languages may be taught at primary and secondary educational establishments. There are also optional regional language tests for the general certificate of education. Only the regional language spoken in the geographical area where the establishment is situated can be taught. Since there are relatively few pupils who want to learn a regional language, it would be materially impossible to provide tuition at each educational establishment in all the regional languages that are spoken on the French territory. In **Poland**, pursuant to Article 13 of the law of 7 September 1991 on the educational system[328], schools and public institutions shall provide students with an opportunity to maintain the sense of national, ethnic, linguistic and religious identity, especially by learning their language. The provision of minority language courses is compulsory when a minimal number of students’ parents or students themselves submit a written declaration to this effect. The most developed educational system is that of the Lithuanian minority. Minority representatives complain that the actions carried out by the authorities in this domain are insufficient.[329] They often encounter problems related to lack of appropriate educational programmes, insufficient number of updated handbooks, lack of qualified staff and insufficient funding. The Bill on National and Ethnic Minorities and Regional Language, recently approved by the Sejm, establishes the right of the minorities to be instructed in their mother tongue.

5.2. State financial support for private schools offering education in a minority language

In the vast majority of member states, private schools offering education in a minority language are eligible for financial aid from the state under the same conditions as any other private schools.

There are some exceptions however. In **Latvia**, the *Education Law* allows for State aid only to those private schools that teach in Latvian. Similarly, in **Belgium,** the State only subsidizes private education if it is provided in the language of the region or in accordance with the conditions laid down for the Brussels-Capital Region and the municipalities with special arrangements.

In **France**, only the private schools that have a contract with the State are recognized by the authorities. The problem of non-recognition by the State of private schools offering education in a minority language is a long-standing one, in particular for the so-called “diwan” schools, where education involves total immersion in the Breton language. After having long refused to conclude a contract with those schools, the Ministry of Education on 28 May 2001 signed a protocol agreement with the Diwan association to which those schools belong.

---

[326] See Resolution 1172 (1998) on the situation of the French-speaking population living in the Brussels periphery (para. 7) and Resolution 1301 (2002) on the protection of minorities in Belgium (para. 23).
[327] The Regional Education Authority is the regional subdivision of the Ministry of Education.
[328] *The Journal of Laws* of 1996 No. 67, position 329, with following amendments.
[329] The Right to Education, Monitoring Report, HFHR, Warsaw 2002 p. 150-153.