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A Remaining Share or a New Part?
The Union's Role vis-à-vis Minorities After
the Enlargement Decade

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Abstract

This article attempts to identify the role of the Union *vis-à-vis* (its) minorities after enlargement. Does the Union simply continue to take care of the remaining share of the tasks it provided during the enlargement decade or does it play a new part? In the former case the Union would merely continue to apply the conditionality-policy *vis-à-vis* current and future candidate states. In the latter case the Union would, firstly, revamp its conditionality policy in its external relations, secondly, considerably strengthen cooperation with the other two European players in the area of minority protection and, thirdly, develop stronger internal engagement for minorities living on the EU-territory. The author argues that scenarios of “fading out” have so far not materialized. Rather the Union’s policy *vis-à-vis* the Western Balkans shows a revamped engagement for minority interests in the Union’s external relations (part 2). Moreover a new inter-organisational dialogue between the EU, the OSCE and Council of Europe is on its way and will presumably further develop in future (part 5). Last but not least the article shows that even in the internal sphere the Union is strengthening its minority momentum. In this context the author not only examines the Constitution of Europe (part 3) but focuses on new modes of governance in the areas of the European Employment Strategy, the Social Inclusion Process and the Immigration policy (part 4). The author notes that the internalization of the minority-issue goes hand in hand with a shift of interest from old minorities to new minorities. In conclusion he says that the enlarged Union is not only taking care of a remaining share of its former minority engagement but assuming a new part in the area of minority protection.

Keywords

diversity/homogeneity, minorities, multilevel governance, national autonomy, pluralism, positive action, multilevel governance, EU Charter of Fundamental Rights, fundamental/human rights, non-discrimination, subsidiarity, cohesion policy, employment policy, immigration policy, language policy, Roma

A remaining share or a new part?
The Union's role vis-à-vis minorities after the enlargement decade

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1. After Europe's E-Day: introducing the post-enlargement era

It is a commonplace that the process of Eastern enlargement can be regarded as the primordial catalyst moving the protection of minorities onto the European Union's (EU) agenda. However a comparable conclusion can also be reached with respect to the two other primary international organizations active on the European soil, namely the Council of Europe and the Organization for Security and Cooperation in Europe (OSCE). Admittedly, the latter two players have *traditionally* had a clear and outspoken interest in the protection of minorities. Nevertheless it seems rather obvious that only the fall of the Iron Curtain created the political *momentum* which finally allowed for the adoption and rather widespread ratification of the two prominent legal instruments, the European Charter for Regional or Minority Languages (Language Charter) and the Framework Convention for the Protection of National Minorities (FCNM) within the Council of Europe. Further, the remarkable establishment of a High Commissioner on National Minorities (HCNM) within the framework of the OSCE is in the end a fruit of the *annus mirabilis 1989*. However, with regard to minority related policies of the last decade a striking difference can be detected between the Council of Europe and the OSCE on the one hand and the EU on the other, in the sense that the former two organizations raised cheer with their revamped engagement whereas the fresh and perhaps unexpected engagement of the Union was partly confronted with highly critical remarks, the allegation of applying "double standards" being the most widespread one.¹

¹ See e.g. Gwendolyn Sasse, *Minority Rights and EU enlargement: Normative overstretch or effective conditionality?*, in Gabriel N. Toggenburg (ed.), *Minority protection and the enlarged European Union. The way forward*, LGI Books, Budapest 2004, pp. 59-84. The full text of the book is available online at http://lgi.osi.hu/publications_datasheet.php?id=261.

In fact the Union was behaving as if minority protection would be an export product which is not thought for domestic consumption.² However, legally speaking there is nothing entirely wrong with this. And even politically speaking, it is important not to ignore the fact that complete inaction from the Union's side would have been much more detrimental. In the end, one will have to recognize that the very different approaches of the EU, the Council of Europe and the OSCE to the issue of minority protection are to be explained (and justified) by the very different respective characters of the "big three". The OSCE - the remaining interface between the East and the West during the Cold war - disposes over a long tradition in diplomatic pacification and prevention of political conflicts. The Council of Europe has a long standing tradition in elaborating standards and codifying them in legally binding instruments of international law. Finally the Union has become the centre of the European gravitation field in the sense that it became, for a majority of European states, highly attractive to become a member of this exclusive and welfare-creating club. Consequently the OSCE created with the HCNM an institution which intervened silently but efficiently behind the diplomatic scenes for the protection of minorities. During the enlargement decade, the Council of Europe drafted the two prominent, legally binding Conventions, namely the Framework Convention (FCNM) and the Language Charter.³ Finally, the Union used its lever of conditionality in order to influence the performance of minority protection all states applying for EU membership.

The fact that the Union's minority engagement was - in contrast to the engagement of the Council of Europe and the OSCE - more or less limited to its external sphere made 1 May 2004 appear as a potential turning point in the EU's relationship towards minorities. With Europe's big E-Day the former (external) recipients of the Union's minority policy have become an integral part of that Union and the latter has lost its conditionality leverage. In literature the scenario of an enlarged Union silently fading from the area of minority protection is juxtaposed to the scenario of an enlarged Union developing a revamped engagement for its internal minorities.⁴ This article attempts to identify the role of the Union *vis-à-vis* (its) minorities after enlargement. The main question arising is whether the Union will simply continue to take care of the remaining share of the tasks it provided so far or whether it will play a new part by adopting new approaches and using new means. In the former case the Union would merely continue to apply the conditionality-policy *vis-à-vis* current and future candidate states. In the latter case the Union would revamp its conditionality policy in its external relations, considerably strengthen cooperation with the other two European players in the area of minority protection and develop stronger internal engagement for minorities living on the territory of EU-Member States. Important voices advocated this second scenario.⁵ Already with the entry into force of the Treaty of Amsterdam and the new Article 13 of the EC-Treaty (EC), commentators identified a

² See Bruno de Witte, Politics versus Law in the EU's Approach to Ethnic Minorities, in Jan Zielonka (ed.), Europe Unbound. Enlarging and Reshaping the Boundaries of the European Union, Routledge, London 2002, pp. 137-160 (appeared beforehand as Robert Schuman Centre Working Paper, 4(2000)).

³ Framework Convention for the protection of National Minorities (signed 1 February 1995, entered into force 1 February 1998) and Regional Charter for Regional or Minority Languages (signed 5 November 1992, entered into force 1 March 1998).

⁴ See e.g. Gwendolyn Sasse, Minority Rights and EU enlargement, loc.cit, at p. 79.

⁵ See e.g. Rolf Ekeus, From the Copenhagen Criteria to the Copenhagen Summit: The Protection of National Minorities in an Enlarging Europe, Speech given to the Conference "National Minorities in the Enlarged European Union," November 5, 2002, Copenhagen, online available at http://www.osce.org/documents/hcnm/2002/11/465_en.pdf.

tendency of “internalization” in the sense that the issue of minority protection was starting to move from the external agenda to the internal agenda of the European Union.⁶ Minority-minded politicians and NGOs active in the field lobbied for a minority clause to be inserted in the Charter of Fundamental Rights during the first Convention and in the Constitutional Treaty during the second Convention. This shows that despite obvious limitations, the role of the Union in the area of minority protection is on the move.⁷

At this point it seems appropriate to ask, firstly, how the Union has developed its conditionality policy *vis-à-vis* the Western Balkans (part 2); secondly, what kind of instruments the Union currently has and what instruments it could eventually gain through the European Constitution⁸ in the area of minority protection (part 3); thirdly, whether the Union is acquiring new leverage and channels through the increasing application of instruments of so called “new governance” (part 4); fourthly, how the issue of cooperation between the international organizations has recently gained momentum (part 5) and, fifthly, how the Union fits within an Integrated System of Minority Governance in Europe (part 6).

2. Third wave of enlargement: applying a fine-tuned conditionality policy

During recent years we were able to witness that the Union's policy *vis-à-vis* the Western Balkans is not only upholding the Copenhagen criterion of the “*respect for and protection of minorities*” but applying a revised conditionality policy. This ‘second generation’ conditionality was established by the Council's conclusions on the application of conditionality in the Western Balkans as of 29 April 1997 and it follows a so-called “*graduated approach*”.⁹ The conditions to be fulfilled by the third state depend on whether the Union is about to grant autonomous trade preferences, to implement PHARE or to enter into contractual relations. The first level of conditionality does not *expressis verbis* refer to minority protection. The second level of this graduated approach (PHARE) requires the country's “*credible commitment to democratic reforms and progress in compliance with the generally recognised standards of human and minority rights*”. At the third level of the graduated approach conditionality is explicitly described as an “*evolutionary process*”. The start of negotiations is only possible if the country at stake fulfills 10 general conditions. These include the “[*c*]redible offer to and a visible implementation of real opportunities for displaced persons (including so called “internal migrants”) and refugees to return to their places of origin, and absence of harassment initiated or tolerated by public authorities”; the “[*a*]bsence of generally discriminatory treatment and harassment of minorities by public authorities” and the “[*a*]bsence of discriminatory treatment and harassment of independent

⁶ See Gabriel N. Toggenburg, A Rough Orientation through a Delicate Relationship: The European Union's Endeavours for (its) Minorities, in European Integration online Papers, in 16(2000), online available at <http://www.wu-wien.ac.at/eiop/texte/2000-016.htm>, at p. 25.

⁷ For an assessment of the possibilities and limitations for the protection within the EU-framework see Gabriel N. Toggenburg, Minority protection in a supranational context: limits and opportunities, in Toggenburg (ed.), Minority protection and the enlarged European Union, loc.cit., pp. 1-36.

⁸ Treaty establishing a Constitution for Europe, in OJ C 310, 16 December 2004.

⁹ See „*Council Conclusions on the Application of Conditionality with a view to developing a Coherent EU-Strategy for the Relations with the Countries in the Region*”, in Bulletin EU, 4 (1997), p. 137. In official documents this second generation conditionality is occasionally referred to as “*SAP conditionality*” or “*1997 conditionality*”.

media". The permission to begin negotiations requires "a lower level of compliance than the conclusion of the agreements. At each stage, including after the conclusion of agreements, the situation should be monitored and, in accordance with the relevant articles of the agreement, its application could be suspended in case of serious non-compliance". An Annex to this sort of Conditionality-Decalogue provides the European Union with "[e]lements for the examination of compliance" with the various criteria. With respect to the protection of minorities, three elements are explicitly listed, namely the "[r]ight to establish and maintain ... own educational, cultural and religious institutions, organisations or associations", "[a]dequate opportunities for ... minorities to use their own language before courts and public authorities" and "[a]dequate protection of refugees and displaced persons returning to areas where they represent an ethnic minority". In the framework of the Stabilisation and Association Process (SAP) this graduated approach is combined with a country-to-country approach which allows for flexibility to tailor conditionality to the specific situation in the respective countries. Most of the SAP instruments refer to the described elements of conditionality.¹⁰ This is especially true for the CARDS regulation.¹¹ The newly designed system of "European Partnerships" also refers to the CARDS regulation and second generation conditionality.¹²

When comparing first generation conditionality (*vis-à-vis* the former candidate countries in Central and Eastern Europe) with second generation conditionality (*vis-à-vis* the countries of the Western Balkans) one can observe that conditionality has been fine-tuned. The element of minority protection has become much more outspoken. Special emphasis is given herein to the return of refugees. Moreover it seems as if the experience of the terrible atrocities which have taken place in the Balkans contributed to the fact that second generation conditionality is more exposed not only from a normative perspective but also from a political view. It is interesting to note, for example, that the Council and the European Council - and hence the representatives of the national governments - have substantially contributed to the development of second generation conditionality. This might indicate that minority protection is no longer exclusively seen as a condition for *becoming* a member state of the Union but increasingly as an expression of *being* an EU member state. It seems as if the Council and the

¹⁰ Note however, that - just as in the case of the Europe agreements - the SAAs so far (the SAA with Macedonia entered into force on 1 April 2004 and the SAA with Croatia on 1 February 2005) do not explicitly establish minority protection as an "essential element" of the agreements (see Article 2 of the respective agreements). However, the agreements mention in their Art. 3 that they "come within the framework of the regional approach of the Community as defined in the Council conclusions of 29 April 1997, based on the merits of the individual countries of the region".

¹¹ See Art. 2 Par. 2 lit. b) of the Council Regulation (EC) No 2666/2000 of 5 December 2000 on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia, repealing Regulation (EC) No 1628/96 and amending Regulations (EEC) No 3906/89 and (EEC) No 1360/90 and Decisions 97/256/EC and 1999/311/EC, in OJ L 306, 7 December 2000, p. 1-6. Note that Art. 5 of the regulation establishes "minority rights" as an "essential element for the application of this Regulation and a precondition of eligibility for Community assistance. If these principles are not respected, the Council, acting by qualified majority on a proposal from the Commission, may take appropriate measures".

¹² This is not true for the basic Council Regulation (EC) No 533/2004 of 22 March 2004 on the establishment of European partnerships in the framework of the stabilisation and association process, in OJ L 086 as of 24 March 2004, pp. 1 and 2. However the Council decisions as of 14 June 2004 on the principles, priorities, and conditions contained in the European Partnerships with the respective countries which are based on that regulation do not only contain country-specific recommendations in the area of minority protection but refer also the second generation conditionality (see point 5 of the respective annexes).

Heads of State and Government are aligning themselves with the legal position of the European Commission, which regularly holds that minority protection is part of the founding principles of the Union as outlined in Article 6 TEU.¹³ In fact the Heads of States and Government declared in 2003 at the EU-Western Balkans Summit that they all share the value of respecting “*minority rights*”.¹⁴ The Council declared in a joint action that the Union is committed to encouraging, in all countries of the Balkans region, the promotion of the values and models on which it itself is “*founded*” and that amongst these values is the respect for minorities.¹⁵

This said, we can conclude that after Eastern enlargement the Union’s *minority momentum* has - with respect to the Union’s external sphere - not only been upheld but increased and improved. But how about the EU’s internal sphere?

3. *The Treaty establishing a Constitution for Europe: waiting for what?*

a. *Law as it stands*

To begin once more with the obvious: according to EU Primary Law the Union does not hold an explicit competence in the area of minority protection. Nevertheless the Union retains remarkable “*constitutional resources*” which can be used for the protection of minorities.¹⁶ This functional approach, developed in literature and the area of policy consulting, is increasingly gaining recognition in EU politics.¹⁷ This can also be seen from the most recent Parliament¹⁸ resolution on minority protection. The Moraes resolution clearly decouples questions of constitutional development from necessary (and possible) projects of legislation in the area of minority protection.¹⁹ The resolution suggests that various existing provisions in EU primary law such as Art. 13 EC (anti-discrimination policy), Art. 49 EC (freedom to provide services), Art. 95 EC (harmonization of the Common Market), Art. 151 EC (cultural

¹³ See e.g. the Commission’s reply to written question E-2538/01, in OJ 147 E, 20 June 2002, pp. 27-28: “*In the Commission's opinion, the rights of minorities are part of the principles common to the Member States, listed in the first paragraph of Article 6 of the Treaty on European Union*”.

¹⁴ See Council document Nr. 10229/03 (Press 163), Thessaloniki, 21 June 2003, Par. 1. Note that in the context of SAP one often finds references to the respect of minority “*rights*” as opposed to merely “*minorities*”.

¹⁵ Council Joint Action 2000/717/CFSP of 16 November 2000 on the holding of a meeting of Heads of State or of Government in Zagreb (Zagreb Summit), in OJ L 290, 17 November 2000, p. 54.

¹⁶ See Bruno de Witte, The constitutional resources for an EU minority policy, in Toggenburg (ed.), *Minority protection and the enlarged European Union*, loc.cit., pp. 109-124.

¹⁷ See e.g. the so called “*Package for Europe*”, a bundle of proposals developed by a team of experts convened by the European Academy Bolzano in 1997; see *Package for Europe*, Bolzano/Bozen 1998, at pp. 13-90. Compare in this context also the recent “*Bolzano/Bozen Declaration on the protection of minorities in the enlarged European Union*”, online available at <http://www.eurac.edu/pecede>.

¹⁸ The Parliament has a long standing tradition in being the most minority-minded EU-institution. Not only did it issue countless resolutions dealing with minority issues, it also disposes over an Intergroup dealing specifically with these issues (currently 45 Parliamentarians are making part in the “*Intergroup for Traditional National Minorities, Constitutional Regions and Regional Languages*”). See in more detail Toggenburg, *A rough orientation*, loc.cit., at pp. 3-8.

¹⁹ European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe, adopted on 8 June 2005 and based on the report A6-0140/2005 as of 10 May 2005 (so called Moraes report named after the responsible Rapporteur Claude Moraes).

policies), Art. 64 EC (cooperation in civil matters), Art. 31 EU (judicial cooperation in criminal matters), Art. 149 EC (educational policies), Art. 137 (employment, social exclusion) or Art. 163 EC (research policy) can be used in order to implement various provisions of the Council of Europe's FCNM within the sphere of the Union.²⁰ Also the “*Network of independent experts in fundamental rights*,” established in 2002, underlines the possibility and necessity to take minority issues into account when becoming active within the current EU framework. The network refers in this context to, for example, the regulation in the sector of television broadcasting or services of general interests.²¹

Apart from these scattered constitutional resources, Primary Law offers with Article 13 EC a prominent competence base which is central for protecting minorities in the context of EU law. Article 13 EC allows the Community to “*take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*”. It is still open to discussion whether and to what degree affirmative actions or even group rights could be based on Article 13 EC. The wording of Article 13 EC suggests - especially when compared to those provisions in Primary Law which deal with sex discrimination - that it follows a rather formal perception of equality. Article 13 does not, at first glance, aim for the establishment of de facto equality, but rather to fight discrimination.²² On the other hand the fact that Article 13 EC views anti-discrimination as a *process* without defining any result leaves the notion of equality open to interpretation. This shows that Article 13 EC is a double accessory provision. Firstly, it can only be applied “*within the limits of the powers conferred*” to the Community and, secondly, it does not lend itself to a self-standing interpretation of how far the legislative intervention can go in terms of equality. Therefore it might be appropriate to label Article 13 EC as a sort of container-provision since it is, with respect to the definition of equality, not self-sustaining. Its grasp depends on the notion of equality applied by the legislator and the Court. As is well known, the European Court of Justice appears to apply a rather individualistic and formal reading of equality. But this position is not necessarily carved in stone and will also depend on constitutional developments with respect to equality-perception at the national level.

So far Article 13 EC has been used as a basis for directives,²³ for action programmes,²⁴ the extension of such programmes to third countries²⁵ and a number of “European years” such as

²⁰ See Moraes resolution, par. 49 lit. a) - lit. h).

²¹ CFR-CDF, Report on the situation of fundamental rights in the European Union and its Member States in 2003, pp. 101-103, available online at http://europa.eu.int/comm/justice_home/cfr_cdf/doc/report_eu_2003_en.pdf.

²² Compare Art. 2 EC which obliges the Community to establish “*equality between men and women*” as an aim of the Community. Compare also Art. 141 Par. 4 EC.

²³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, in OJ L 180, 19 July 2000, pp. 22-26; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, in OJ L 303, 2 December 2000, pp. 16-22; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, in OJ L 373, 21 December 2004, pp. 37-43.

²⁴ Council Decision 2001/51/EC of 20 December 2000 establishing a Programme relating to the Community framework strategy on gender equality (2001-2005), in OJ L 017, 19 January 2001, pp. 22-29; Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006), in OJ L 303, 2 December 2000, pp. 23-28.

a European year of equal opportunities for all²⁶. Of all these measures based on Article 13 EC, the so-called race directive has the most far-reaching legal effects for persons belonging to minorities.²⁷ However, the potential of Article 13 EC is far from exhausted as can be seen from the discussion on a specific “Roma directive”.²⁸ It has been argued that Article 13 EC could even allow for the adoption of an instrument prohibiting the discriminatory application of rules relating to nationality in order to prevent certain minorities from being denied access to official documents.²⁹

b. Law as it might become

With the background of this potentially very strong provision, one might wonder what the Treaty establishing a Constitution for Europe (the Constitution, CE) could add if it should enter into force. It is in any case worthwhile to underline that with the constitution minority-minded groups succeeded for the first time in the history of European integration in inserting the dreaded word “minorities” into a text of primary EU law.³⁰ The beginning of the constitution lists in Article I-2 CE “*the respect for human rights, including the rights of persons belonging to minorities*” as one of the founding values of the Union. This amendment, which was agreed upon not in the drafting stage but at the Intergovernmental Conference under the Italian Presidency at end of 2003, remains ambiguous³¹ and rather modest. It does not refer explicitly to “*minority rights*”³² nor to minority “*groups*”³³. Most importantly it is

²⁵ See e.g. Council Decision 2002/179/EC of 17 December 2001 concerning the conclusion of a Framework Agreement between the European Community and the Republic of Turkey on the general principles for the participation of the Republic of Turkey in Community programmes, in OJ L 061, 2 March 2002, pp. 27-28.

²⁶ See Council Decision 2001/903/EC of 3 December 2001 on the European Year of People with Disabilities 2003, in OJ L 335, 19 December 2001, p. 15-20. 2007 is designated to become the European Year of Equal Opportunities for All; see Communication from the Commission containing a proposal for a respective decision of the Parliament and the Council, COM(2005) 225 final, 1 June 2005; 2008 is designated to become the European Year of Intercultural Dialogue, see the Commission's proposal for a respective decision of the Parliament and the Council, COM(2005) 467 final, 5 October 2005.

²⁷ For a description see e.g. Gabriel N. Toggenburg, *The Race Directive: A New Dimension in the Fight against Ethnic Discrimination in Europe*, European Yearbook on Minority Issues, 1(2002), Kluwer Law International 2002, pp. 231-244.

²⁸ See CFR-CDF, Report on the situation of fundamental rights in the European Union and its Member States in 2003, at p. 103.

²⁹ Olivier De Schutter and Annelies Verstichel, *The Role of the Union in Integrating the Roma: Present and Possible Future*, in *European Diversity and Autonomy Papers*, 2(2005), S. 36, online at http://www.eurac.edu/documents/edap/2005_edap02.pdf, at p. 31.

³⁰ Balázs Vizi very rightly poses the question why the Presidency (the Italian one and not - as Vizi puts it - the Irish one) finally was able to create consensus on a minority-clause despite the opposition and indifference during the Convention (and all earlier IGCs). It is doubtful, whether the “*normative tension*” due to the double standards applied during Eastern enlargement really suffices as an explanation. See Vizi, *The unintended legal backlash of enlargement? The inclusion of the rights of minorities in the EU Constitution*, in *Regio*, 1(2005), pp. 87-108, at 90 and 91. An additional explanation could be that the Italian document proposing the minority-clause combined the latter with a clause referring to the “*principle of equality between women and men*” and a general reference to non-discrimination. Thus it would have been difficult for potential opponents of the minority clause to oppose a document which was also carrier of such broadly accepted amendments to Art. I-2 CE (I borrow this speculation from Jaques Ziller).

³¹ See De Witte, *The constitutional resources*, loc.cit., at p. 111.

³² This was a wording proposed also by the OSCE, see Krzysztof Drzewicki, *OSCE Magazine*, March 2005, pp. 19-21.

³³ Note however that the English version of the first proposal read as follows: “*human rights, including the rights of persons belonging to minority groups*”. The text can be found in CIG 52/03 ADD 1 PRESID 10 (Annex 1) or in Annex I of CIG 60/03 ADD1 PRESID 14 as of 9 December 2003.

not followed up by any policy provision or competence base in Part III of the Constitution. Therefore it is no wonder that the provision has been considered a “*foundation on which it would be difficult to build a solid edifice*“.³⁴ The provision does no more than confirm the legal opinion of the European Commission without clarifying what rights, what type of minorities could under which circumstances invoke. This is somehow unsatisfying since Article I-2 CE is a neuralgic provision which enshrines not only - in its external dimension³⁵ - a list of accession criteria but also - in its internal dimension³⁶ - a check list for constitutional homogeneity which can eventually trigger a sanctioning procedure against value-threatening Member States. In fact, it is for these reasons the explanations of the Presidium (of the European Convention drafting the constitution) advocated a very short value provision representing “*a hard core of values meeting two criteria at once: on the one hand, they must be so fundamental that they lie at the very heart of a peaceful society practicing tolerance, justice and solidarity; on the other hand, they must have a clear non-controversial legal basis so that the Member States can discern the obligations resulting therefrom which are subject to sanction*”.³⁷ Whether this second criterion is met by the value of minority protection as introduced by the Constitution might be open to doubt. Nevertheless, the new provision in Art. I-2 CE can be seen as another important container-provision which is the basic rock upon which a European notion of minority rights can gradually develop - both through the legislative triologue between the institutions as well as through the case law of the Court of Justice.

In the event that the constitution enters into force, Article 21 and 22 of the Charter of Fundamental Rights would finally become legally binding.³⁸ Article 81 CE states that “[*a*]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”. As opposed to Art. 13 EC, this provision contains a clear cut and directly applicable prohibition.³⁹ The catalogue of prohibited grounds for discrimination in Article 81 CE is open (“*any ground such as*”) whereas the catalogue of discriminations which the Union may combat with legislative means is closed.⁴⁰ Hence the enabling provision in Article III-124 CE takes up only 9 of the 17 forbidden grounds listed in the prohibitive provision of Article II-81 CE. This leads to the slightly disappointing situation that the Union would hold no competence to combat discriminations on the grounds of language or on the grounds of membership of a national minority despite the fact that discriminations on these grounds would be *expressis verbis* forbidden by EU-law. Furthermore it is interesting to note that Article II-81 CE speaks of “*national*” minorities whereas Article I-2 CE uses the very general notion of “*minorities*”. The usage of “*national minority*” in a treaty text transforms this notion into a term of EU law which can and will be interpreted by the Court of Justice. This again

³⁴ De Witte, The constitutional resources, loc.cit., at p. 111.

³⁵ See Art. I-58 CE.

³⁶ See Art. I-59 CE. Compare the current procedure in Art. 7 EU.

³⁷ See Annex 2 of CONV 528/03 as of 6 February 2003, p. 11.

³⁸ The Charter of Fundamental Rights has been integrated as part II in the draft constitution. Articles II-82 and II-83 of the Constitution correspond to Art. 21 and 22 of the Charter.

³⁹ However this provision does *not* offer a “*clear mandate*” for the Union “*to act*” against discrimination. In this sense misleading Kyriaki Topidi, European Union standards and mechanisms for the protection of minorities and the prevention of discrimination, in Council of Europe (ed.), Mechanisms for the implementation of minority rights, Council of Europe Publishing, Strassburg 2004, p. 183-202, at 197.

⁴⁰ See Article III-124 CE.

might lead to the long searched for (especially in the framework of the Council of Europe), but never commonly agreed definition of what is meant by “*national minority*” in Europe.⁴¹

Article II-82 of the Constitution which obliges the Union to “*respect cultural, religious and linguistic diversity*” is interesting due to the discrepancy between its strongly minority-related genesis and its weak legal relevance in this respect. Studying the drafting history of this provision it becomes obvious that Article II-82 CE was regarded as the constitutional space to be used for protecting minority interests during the drafting of the Charter.⁴² The network of independent experts on fundamental rights can base its interpretation of this Article as a sort of minority clause on this fact.⁴³ However, from a more formal perspective, Article II-82 remains a hopelessly vague provision. It does not provide any sort of right, neither of individual nor collective nature.⁴⁴ It enshrines a duty for the Union to respect diversity which - due to the vagueness of the wording - boils down to no more than a policy aim. Even the explanatory memorandum of the Charter fails to deliver any argument for identifying Article 81 CE as a clause of minority protection. The memorandum rather confirms the first impression that the main function of the provision at stake is to guarantee a sort of constitutional balance between centripetal and centrifugal forces in the constitutional asset of the Union. This does not, of course, do away with the fact that Article II-82 CE also comprises, to a certain degree, minorities and their cultures. As has been maintained elsewhere, the constitutionally diversity-*acquis* of the European Union generally oscillates between *international diversity* (diversity *between* the Member States) and *intranational diversity* (diversity *within* the Member States) but has a certain preference for the former notion.⁴⁵ This will make it rather difficult to hijack the notion of diversity in order to foster Member States to bring their minority policies in line with a supposed European notion of minority-related diversity. Such a notion might develop over the years to come, but in any case the latter will have to conform to the Union's obligation to respect the identities of the Member States. In that sense the janus-headed notion of European diversity can be referred to as a self-restrictive value.

From a practice oriented perspective the most important novelty of the constitution is probably Article III-118 CE. Herein the Union is obliged to “*combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*” not only when operating on the basis of the competence provision in Article III-124 CE (corresponding to the current Article 13 EC) but when “*defining and implementing the*

⁴¹ Note that the European Parliament (Morales resolution, loc.cit., in Par. 7) as well as the Network of independent experts in fundamental rights (Report 2002, loc.cit., at p. 173) are sustaining the definition used in the Council of Europe recommendation 1201 (1993).

⁴² See for the various submissions and comments in that process Sven Hölscheidt, Artikel 22, in Jürgen Meyer (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, Nomos, Baden-Baden 2003, pp. 290-298.

⁴³ See Network of independent experts in fundamental rights, Report 2002, loc.cit., at p. 174. Legal arguments against such a reading are given by De Witte, *Constitutional resources*, loc.cit., at p. 115.

⁴⁴ This makes Art. II-82 CE also seem rather misplaced in the title on equality. It goes without saying that Art. II-82 CE does neither provide any competence for the Union.

⁴⁵ See on this Gabriel N. Toggenburg, "Unity in diversity": searching for the regional dimension in the context of a somewhat foggy constitutional credo, in Roberto Toniatti et al. (eds.), *An ever more complex Union. The regional variable as missing link in the European Constitution*, Nomos, Baden-Baden 2004, pp. 27-56.

policies and activities” in all the various EU-policy areas.⁴⁶ What is at stake here is much more than a mere obligation of the Union to avoid discriminations within its different policy instruments.⁴⁷ Rather the Union has, due to the horizontal obligation in Article III-118 CE, not only to avoid discrimination but to actively combat discrimination in all its policies.⁴⁸ Here again (just as with Article III-124 CE) the problem arises that discrimination on the basis of language or on the basis of membership of a national minority are excluded. Nevertheless, the European Union’s new duty to actively combat *semper et ubique* all forms of discrimination based on racial or ethnic origin, religion or belief is of obvious and crucial relevance for Europe’s minorities.

c. Conclusion

From a minority perspective one can conclude that the constitution is characterized by a contradiction. The constitution astonishes in its strong symbolic pro-minority message but disappoints in its rather weak policy relevance. On the one hand the constitution represents a historic step which introduces for the first time the term of minorities in EU constitutional law, establishes the respect for “*rights of persons belonging to minorities*” as a founding value of the European Union and prohibits any discrimination on the basis of “*membership of a national minority*”. On the other hand these developments merely confirm a growing legal reality without adding any self standing policy instruments or clarifications in order to put these legal principles into daily practice.⁴⁹ This - in combination with the Constitution’s unsure future - tells us that it remains important to look for alternative channels within the EU system.

4. New modes of governance: changing policy preferences?

a. Mainstreaming, Impact Assessment and Open Method of Coordination

It would appear timely to check to what degree the new forms of governance are of relevance for the protection of minorities. This is especially true in our context since these forms of governance are special to the Union and can therefore contribute to a convincing division of

⁴⁶ Similar horizontal clauses can be found also in the current Treaty. See e.g. Art. 151 par. 4 EC (obligation of the Community to take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures), Art. 6 EC (environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities), Art. 153 par. 2 EC (consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities). However these clauses are weaker in their legal wording.

⁴⁷ If that would have been the aim of this provision, Article III-118 CE would refer to the 17 different forms of discrimination listed in the prohibitive provision in Article II-81 CE (including language and membership of a national minority) and not just to the 9 forms of discrimination listed in the enabling provision in Article III-124 CE.

⁴⁸ Of course the aim of combating discrimination in the framework of the respective instrument can only be of secondary nature. If it represents the primary aim of that measure, the latter has to be based on Article III-124 CE and not on the respective policy provision.

⁴⁹ However it has to be stressed that the Constitution introduces several elements which are of indirect relevance for minorities. Besides the mentioned mainstreaming provision the newly designed procedures to protect the principle of subsidiarity or the new title on „*the democratic life of the Union*“ serve examples in this respect.

tasks between the three international players. In the following section we shall focus on the elements of mainstreaming, the assessment of impacts and the Open Method of Coordination.

The concept of mainstreaming has so far mainly been used in the context of gender equality. However there is nothing which would prevent the application of the mainstreaming concept to all the other grounds for discrimination covered under Article 13 EC.⁵⁰ So far minorities have profited from mainstreaming activities mainly in the framework of the fight against racism. The EU action plan against racism foresaw that the fight against racism and discrimination is integrated into all areas of activity which lend themselves to this.⁵¹ These areas include, in particular, employment, the European Structural Funds, the education, training and youth programmes, public procurement policy, research activities, external relations, information work and cultural and sports initiatives. Applying the concept of mainstreaming means that the fight against discrimination, if not the establishment of effective equality, is viewed as a transversal and integral part of all public intervention. Applying the technique of mainstreaming to the area of minority protection would mean that minority interests have to play a relevant role in the formulation and implementation of all EU policies. In order to ensure efficient mainstreaming, all actors - from the legislator, to the Commission's various units down to the national civil servant - have to apply a minority-perspective. This again requires adequate sensibility and sound competence which are currently, at least at this wide scale, still lacking. Another potential weakness of the concept of mainstreaming is that its scope, procedures or methods are not defined. An important point which has to be clarified in this respect is, for example, whether and to what degree mainstreaming should be open to a bottom-up approach, namely to the participation of citizens and NGOs specialised in the field. All of these questions which have not been defined at a normative level might gain in relevance under the perspective of the constitution which, as mentioned above, will put the Union under a legal obligation to mainstream in all areas currently mentioned in Article 13 EC. Moreover the Union's new impetus in the area of assessing impacts implies first a formalisation of a mainstreaming approach.

Impact assessment is meant to produce better law making. After the Treaty of Amsterdam entered into force it was mainly the area of environment where Impact Assessments (IAs) were applied. In 2002 the Commission fused these various IAs in a new form and extended it to the social sector. This so called Extended Impact Assessments (EIA) apply to all regulatory proposals, such as directives and regulations, but also other proposals such as white papers, expenditure programmes and negotiating guidelines for international agreements that have an economic, social or environmental impact.⁵² There have been doubts as to whether the social sector will not be overruled by interests of the economic and the environmental sector when it comes to assessing the relative impact on these three areas.⁵³ However recent developments show that the Commission also wants to place specific emphasis on the impact on the rights

⁵⁰ This is also the opinion of the Commission; see the Commission report on the implementation of the Action Plan against Racism Mainstreaming the fight against racism, January 2000, at p. 19, available online at http://europa.eu.int/comm/employment_social/fundamental_rights/public/arcr_de.htm.

⁵¹ See Communication from the Commission "An action plan against racism", COM(1998) 183 final, 25 March 1998.

⁵² See the Communication from the Commission on Impact Assessment, COM(2002) 276 final, 5 June 2002, at p. 5.

⁵³ See Jo Shaw, Mainstreaming equality in European law and policymaking, in European Network Against Racism (ENAR) Working Paper, April 2004, at p. 29, available online at <http://www.enar-eu.org/de/publication/index.shtml>.

as they are enshrined in the Charter of Fundamental Rights. This seems to be of special relevance for the relative standing of the social sector in the framework of the EIAs.

The Commission decided in March 2001 to check all of its proposals against the provisions of the Charter, despite the fact that the latter is not (yet) legally binding. In April 2005 this approach was further strengthened.⁵⁴ Human rights-sensible proposals have to refer to the Charter in their Explanatory Memorandum.⁵⁵ More importantly, every Impact Assessment has now to take fundamental rights into account. The Commission did not establish a fourth sector of potential impacts - next to the categories of economic, social and environmental impacts - but decided to treat fundamental rights as a transversal issue which has to be checked within the other three sectors of potential impacts.⁵⁶ Here it might be worthwhile to recall that Article 21 of the Charter forbids any discrimination on the basis of membership to a national minority and that Article 22 of the Charter has been read by the independent network of experts in fundamental rights as an obligation to protect minorities. At this background one is tempted to detect here a development which looks at minority protection as a transversal policy aim cutting across all EU-policies. It is in this context worthwhile to examine the new impact assessment guidelines.

According to the new guidelines, as of 15 June 2005, every EIA has to check nine subgroups of potential social impacts of a legislative proposal. One subgroup of potential effects has the heading "*Social inclusion and protection of particular groups*". Under this subheading the Commission has to control the proposal's potential impact according to following questions: "*Does the option affect access to the labour market or transitions into/out of the labour market? Does it lead directly or indirectly to greater in/equality? Does it affect equal access to services and goods? Does it affect access to placement services or to services of general economic interest? Does the option make the public better informed about a particular issue? Does the option affect specific groups of individuals, firms, localities, the most vulnerable, the most at risk of poverty, more than others? Does the option significantly affect third country nationals, children, women, disabled people, the unemployed, the elderly, political parties or civic organisations, churches, religious and non-confessional organisations, or ethnic, linguistic and religious minorities, asylum seekers?*" Another subgroup of potential social effects is headed "*Equality of treatment and opportunities, non-discrimination*". Under this subheading the Commission has to take a close look at the following questions: "*Does the option affect equal treatment and equal opportunities for all? Does the option affect gender equality? Does the option entail any different treatment of groups or individuals*

⁵⁴ See the Communication "*Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring*", COM(2005) 172 final, 27 April 2005. Note that this new approach is supposed to be supervised by the newly founded "*Group of Commissioners on Fundamental Rights, Anti-discrimination and Equal Opportunities*". One of the declared aims of this enhanced human rights monitoring of the legislative procedure is the promotion of an EU-"*fundamental rights culture*". See COM(2005) 172 final, at p. 3.

⁵⁵ This goes especially for proposals which include a *limitation* of a fundamental right or which lead to direct or indirect *difference* in treatment or are specifically aimed at *implementing* or *promoting* a particular fundamental right. Such proposals have to include in their explanatory memorandum a standard Charter recital and a statement summarizing the reasons pointing to the conclusion that fundamental rights have been respected. See COM(2005) 172 final, at pp. 5 and 6.

⁵⁶ In fact the Charter based rights cut across all three sectors. The Commission underlines that the creation of a sub-heading in the chapter on social impacts would "*not adequately reflect the variety of, and balance between, the social, economic and political rights in the Charter*". See COM(2005) 172 final, at p. 5.

*directly on grounds of e.g. gender, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation? Or could it lead to indirect discrimination?”*⁵⁷ From this one may conclude that the fact that minority interests figure in the frame of the EIAs as potential *social* impacts leads to a concentration on economic and social issues. In fact, from the above questions it is so far not conceivable that the mainstreaming of Article 21 and 22 of the Charter is meant to specifically enhance the *cultural*, let alone the *political*, dimension of minority issues.

Whereas mainstreaming and impact assessing are two ways of developing and implementing policies either at national or at European levels, another form of modern European governance, namely the Open Method of Coordination (OMC), is by definition linking the European and the national level of governance in a permanent dialogue. OMC is generally seen as a means of spreading best practice amongst the Member States and thereby achieving greater convergence towards main EU goals. OMC is hence designed to help Member States to progressively develop their own policies. This is done by fixing guidelines combined with specific timetables for achieving the goals which they set in the short, medium and long terms; establishing, where appropriate, quantitative and qualitative indicators and benchmarks as a means of comparing best practice; translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences. The performance of the states is then periodically monitored through a system of national reports and European evaluations. All of this together is supposed to induce mutual learning processes.⁵⁸ In fact, OMC allows for a great portion of flexibility. However, this form of governance can hardly be considered to be governed by legal rules. Consequently it might raise skepticism on the side of the Member States who could look at OMC as an instrument allowing the EU to encroach on policy domains which have traditionally been reserved to them. But OMC might also raise skepticism on the side of the Union which might fear that OMC is used to escape to watered-down engagement instead of using traditional hard law solutions at the EU level.⁵⁹ Proposals to “constitutionalize” the OMC in the constitution failed,⁶⁰ hence OMC will remain an exercise which takes place in a unregulated space. Despite these *caveats* OMC is an attractive tool to reconcile the ambition of the European Union to coordinate and inspire diverging national policies with the preoccupation of the single Member States to preserve their national autonomy and to prevent the Union from encroaching on policy areas which are considered, politically speaking, “sensible”. Consequently it is plausible to look at OMC as a *modus* for Member States to expose their treasured and highly divergent approaches to minority protection to a multilateral policy-shaping process. In fact minorities play a crucial role in three areas where OMC applies, namely the employment policy, social policy and migration policy.

⁵⁷ See Impact Assessment Guidelines, SEC(2005) 791, 15. June 2005, table 3 (social impacts), pp. 31 and 32, available online at http://europa.eu.int/comm/secretariat_general/impact/docs/SEC2005_791_IA%20guidelines_annexes.pdf.

⁵⁸ See e.g. the Presidency Conclusions of the Lisbon European Council, 23 and 24 March 2000, Par. 37.

⁵⁹ The Commission stated quite clearly that the OMC “*should not be used when legislative action under the Community method is possible*”. See the Commission’s White Paper on “*European Governance*”, COM(2001) 428 final, 25 July 2001, at p. 22.

⁶⁰ See e.g. the paper of the Convention Secretariat on “*Coordination of national policies: the Open Method of Coordination*”, WG VI WD 015, 26 September 2002.

b. Minorities and the European Employment Strategy

In the framework of the European Employment Strategy (EES) every Member State draws up a National Reform Programme (until 2005, National Action Plans) which describes how the Employment Guidelines (which are proposed by the Commission and approved by the Council) are put into practice at the national level. They present the progress achieved in the Member State over the previous 12 months and the measures planned for the coming 12 months and are hence both reporting and planning documents. Between 1998 and 2004, the Employment Guidelines were adopted on an annual basis. From 2005 onwards they are set for a three year period.⁶¹ From 1999 onwards the Guidelines have expressly referred to minorities.⁶² The policy performance of the Member States is assessed on an annual basis in the progress reports which are adopted by the Council together with the Commission (Joint Employment Report). The latter contain country-specific information as well as a comparison and synthesis of developments in the area of employment from a European point of view. With regard to minorities the reports state that the “*lack of comparable data describing the scale or nature of the needs of disabled people and ethnic minorities is a serious handicap for assessing policies addressed to these groups*”.⁶³ Moreover the reports complain about the fact that the term “ethnic minorities” has been interpreted in the various National Action Plans in a different way which leads to a lack of comparability between them.⁶⁴

The Joint Employment Report of 2004 states that the majority of Member States implement measures to support the integration of migrants and ethnic minorities such as literacy programmes, language courses, diversity plans to increase recruitment of migrants, training and vocational guidance etc. However, only very few set numeric national targets for improving the labor market position of non EU-nationals or ethnic minorities.⁶⁵ The Commission calls upon all the Member States to pay greater attention to “*minorities who have the citizenship of the Member State of residence*” and to determine whether they face additional barriers in accessing the labor market.⁶⁶ The 2005 Joint Employment Report says that the “*potential of migrants and disadvantaged people, such as minorities and the disabled, is still insufficiently recognised and exclusion from the labor market remains an issue*”. The report recognizes that some Member States have developed strategies to increase labor participation of all underrepresented groups in the labor market and that specific policies for the integration of migrants and minorities are being developed “*with a focus on assimilation and access to the labor market, including language training, literacy programmes or*

⁶¹ See Council decision of 12 July 2005 on Guidelines for the employment policies of the Member States, in OJ Nr. L 205, 6. August 2005, pp. 21-27.

⁶² 1999 and 2000 the reference can be found in Guideline number 9, from 2001 onwards a reference was included in Guideline number 7.

⁶³ 1999 Joint Employment Report, Part I: the European Union, as adopted by the Joint Council (Labour and Social Affairs/ECOFIN) at its session on 29 November 1999, pp. 29 and 46.

⁶⁴ 1999 Joint Employment Report, loc.cit., at p. 47: “*Member States have interpreted the reference to ethnic minorities in different ways, with some (UK, Netherlands) using a broad definition to encompass “visible minorities” (i.e. people who appear to be of foreign origin, irrespective of their nationality), while others restrict the scope either to non-nationals or non-EU nationals (Germany, Sweden) or to national minorities (Ireland, Finland, Austria).*”

⁶⁵ See Joint Employment Report 2003/2004, as adopted by the Council and the Commission on 4 March 2004, pp. 49, 135 and 136.

⁶⁶ See Background document for the Joint Employment Report 2004/2005 based on the staff working paper COM(2005) 13 final.

vocational guidance". The report does, however, continue that the "*burden, however, is often placed on individuals to adapt. The Roma or migrants for example often seem to be portrayed largely responsible for their own situation*".⁶⁷ In conclusion one might say that the Employment Strategy not only helps to throw light on the special problems that minorities and migrants face but initiates a transnational thinking which compares various policy approaches to the overall problem of enhancing the living-standard of minorities. However, it also becomes quite clear from the reports mentioned that the minority issue is in this context not focused on as a cultural phenomenon or a question of political participation but as an issue of inclusion in the employment market. Consequently, belonging to an ethnic minority is seen primarily as a "*particular risk factor*" which enhances exclusion.⁶⁸

c. Minorities and the Process of Social Inclusion

Similar can be said for the Process of Social Inclusion. The European Council of Lisbon (March 2000) agreed on the need to take decisive steps in order to help eradicate poverty by 2010. This policy area also applies the OMC. The European Council agreed in Nice (December 2000) on four main aims and confirmed that one of them is to help "*the most vulnerable*". The first round of National Action Plans for Social Inclusion in 2001 demonstrated the need to address the issue of integration of immigrants in a more comprehensive, integrated and strategic manner. In the revised common objectives for the second round of the Social Inclusion Process (Copenhagen European Council December 2002), the emphasis to be given to the situation of ethnic minorities and immigrants was, therefore, reinforced, with Member States agreeing to "*highlight more clearly the high risk of poverty and social exclusion faced by some men and women as a result of immigration*". Finally in the 2004 Joint Report on Social Inclusion the Commission prescribed six priorities on which the Member States are expected to focus in their social policies in the two years to follow. The report established "*[m]aking a drive to reduce poverty and social exclusion of immigrants and ethnic minorities*" as priority number six.⁶⁹ The issue of exclusion amongst immigrants and ethnic minorities was recognized as an "*increasingly significant issue*".⁷⁰

With respect to the Member States performance the Joint Report 2004 states that in many National Action Plans only a brief reference is made to migrant and ethnic groups being at risk, "*with little attempt to analyse their situation or factors which lead to exclusion and poverty. Only a few countries attempt to identify trends, negative or positive, in the living and working conditions of these groups.*"⁷¹ Moreover the report finds that only very few Member States make a direct link between discrimination and social cohesion issues. Few countries link fighting discrimination and legislative measures.⁷² In conclusion the report states that too little attention is paid "*to promoting the access of immigrants and ethnic minorities to resources, rights, goods and services, in particular to social protection schemes, to decent and sanitary housing, to appropriate healthcare and to education*". The report finds it particularly astonishing that there is so little emphasis on a rights-based approach in the

⁶⁷ Joint Employment Report 2004/2005, as adopted by the Council and the Commission on 3 March 2005, at p. 16.

⁶⁸ See Communication from the Commission "*Strengthening the implementation of the European Employment Strategy*", 7 March 2004, COM(2004) 239 final, at p. 27.

⁶⁹ Joint Report on Social Inclusion 2004, at p. 8.

⁷⁰ Joint Report on Social Inclusion 2004, at p. 9.

⁷¹ Joint Report on Social Inclusion 2004, at p. 95.

⁷² The Commission is referring to UK, S, FIN, B, IRL, F, see Joint Report on Social Inclusion 2004, at p. 95.

Member States.⁷³ Moreover it repeats that the lack of detailed data and indicators, let alone common indicators, hinders any thorough analysis of the situation facing these vulnerable groups. The report concludes that the specific situation of immigrants and ethnic minorities faced with poverty and exclusion will require greater effort and analysis “*if we are to increase their labour market participation to the same levels as the majority population, and to promote their participation in social, cultural and political life*”.⁷⁴ In fact the most recent report of 2005 puts in its “*key policy priority*” number seven, explicit emphasis on the aspect of “*overcoming anti-discrimination*” of these groups and underlines that the fight against high levels of exclusion involves “*a mixture of increasing access to mainline services and opportunities, enforcing legislation to overcoming discrimination and developing targeted approaches*”. Special reference is made to Roma.⁷⁵

Similar to the Employment Strategy, the Social Inclusion Process seems primarily concerned with migrants and therefore new minorities as opposed to so called old minorities. The “*impact of increased migration and growing ethnic diversity*” is identified as one of six core structural changes which are impacting on poverty and social exclusion.⁷⁶ In the context of the new Member States a certain emphasis is also placed on the Russophone minorities and Roma, whereas - due to the considerably lower levels of immigration - migrants play a lesser role.⁷⁷ In general however, the integration of third country nationals seems to gain more and more attention in the concerns of the European Union. The general belief of the Commission is that the failure to develop an “*inclusive and tolerant society which enables different ethnic minorities to live in harmony with the local population of which they form a part*” would lead to “*discrimination, social exclusion and the rise of racism and xenophobia*”.⁷⁸

d. Minorities and Migration/Integration policy

This position of the Commission is also reflected in the fact that the question of integration is becoming an essential pillar within the Union’s migration policy. It might be worthwhile to recall that the European Council of Tampere (October 1999) postulated a “*more vigorous integration policy*” aiming at granting migrants “*rights and obligations comparable to those of EU citizens*”.⁷⁹ This would indicate that the Union was heading for an integration policy through provisions of hard EU law. In fact the Commission was thinking of a proper “*concept*

⁷³ Note that this remark is to be found only in the German version of the Report, see Gemeinsamer Bericht über die soziale Eingliederung 2004, at p. 120. However the Report on the 10 new Member States contains a similar remark: „*Little attention is paid to a right-based approach, which can provide a useful framework for the further development of integration policies. Further emphasis must be given to enforcing legislation, notably the laws transposing the Article 13 Directives. The role of the civil society as well as impact of the recent decentralization towards regions has been largely underestimated in this process*“. See Report on social inclusion 2005. An analysis of the National Action Plans on Social Inclusion (2004-2006) submitted by the 10 new Member States, at p. 86.

⁷⁴ Joint Report on Social Inclusion 2004, at p. 102.

⁷⁵ See Joint Report on Social Inclusion 2004, p. 8.

⁷⁶ Joint Report on Social Inclusion 2004, p. 32.

⁷⁷ However this is a situation which is expected to change after enlargement. See the Report on the new Member States, loc.cit., p. 80.

⁷⁸ See Communication of the Commission on an Open Method of Coordination for Community Immigration policy, COM(2001) 387 final, at p. 11.

⁷⁹ European Council in Tampere, Council Conclusions, 16 October 1999, Par. 18.

of civic citizenship".⁸⁰ However so far there has only been a scattered extension of selected rights to third country nationals.⁸¹ Even the far reaching directive on long term residents falls far short of providing proper civic citizenship.⁸² Contrary to the calls of the Parliament, the directive does not offer any sort of political participation. Moreover the access of third country nationals to the public service of the Member States remains more restricted when compared to the legal situation of EU-citizens.⁸³ The issue of integration does not seem to be an issue for *hard* EU-law.⁸⁴ The directive explicitly leaves vast leeway to the states for the implementation of integration measures.⁸⁵ This reluctant stance is also present in the constitution which calls for the development of a common European immigration policy but states that in the area of integration of third country nationals the Union's role is limited to providing incentives and support for the action of Member States excluding any harmonization of the laws and regulations of the latter.⁸⁶ At this background it is interesting to note that there seems to be a quickly growing engagement of the Union in the area of integrating new minorities by means of *soft* law and by using the Open Method of Coordination.

In mid-2003 the Commission handed down its report on immigration, integration and employment.⁸⁷ There the Commission admitted that the characteristics of the host societies and their organizational structures differ "*and there are, therefore, no single or simple answers*". Nevertheless it stresses that "*much can be learned from the experiences of others*". The Commission identified a need for "*greater convergence*" and proposes therefore to develop co-operation and exchange of information within the newly established group of national contact points on integration. As the main field of this necessary co-ordination exercise between the states, the Commission proposes the exchange of experience and ideas regarding introduction programmes for newly arrived immigrants, language training and the participation of immigrants in civic, cultural and political life.⁸⁸ The use of OMC conforms with the fact that migration is on the one hand international in nature but raises, on the other hand "*many sensitive and far-reaching issues which directly affect civil society which need to be discussed openly, at both national and European levels, in order to reach a consensus on*

⁸⁰ See e.g. the Communication of the Commission on a Community immigration policy, COM(2000) 757 final, 22 November 2000, at p. 19.

⁸¹ See Directive 2003/109/EC and Council Regulation 859/2003/EC extending the provisions of regulations (EEC) No 1408/71 and regulation (EEC) 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, in OJ L 124, 20 May 2003, pp. 1-3.

⁸² Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents of 25 November 2003, in OJ L 16, 23 January 2004, pp. 44-53. The directive had to be transposed by 23 January 2006.

⁸³ Compare Art. 11 Par. 1 li. A) of directive 2003/109 with the relevant case law of the ECJ.

⁸⁴ However it has to be stressed that there is also no EU-law on the integration of EU-citizens and old minorities. Rather EU-law offers effects of integration through the prohibition of discrimination. See on this Gabriel N. Toggenburg, Who is managing Ethnic and Cultural Diversity in the European Condominium? The Moments of Entry, Integration and Preservation, in Journal for Common Market Studies, Volume 43, Number 4, pp. 717-737.

⁸⁵ See Art. 5 par. 2 and Art. 15 Par. 3 Directive 2003/109/EC. This has been considered as a permission to "*insist on assimilation*" and as a possible violation of international minority rights standards. See Steve Peers, 'New' minorities: what status for third-country nationals in the EU system?, in Toggenburg (ed.), Minority protection and the enlarged European Union, loc.cit., pp. 149-162, at 160.

⁸⁶ See Art. II-267 Par. 4 CE.

⁸⁷ Communication on immigration, integration and employment, COM(2003) 336 final of 3 June 2003.

⁸⁸ COM(2003) 336 final, pp. 28-30.

policy positions".⁸⁹ Moreover the application of OMC is supposed to guarantee that immigration policy is complementary and consistent with other policies such as the employment strategy and social policies such as social inclusion and the Community's anti-discrimination strategy.⁹⁰

Moreover it is becoming more and more evident that also the Member States recognize the role of the European Union in the development of integration policies *vis-à-vis* migrants. The European Council stated at the end of 2004 in its *The Hague Programme*, that for the successful integration of legally resident third-country nationals a "*comprehensive approach involving stakeholders at the local, regional, national, and EU level*" is essential in order to prevent isolation of certain groups and in order to create equal opportunities to participate fully in society. The European Council "*underlines the need for greater coordination of national integration policies and EU initiatives in this field*". Most importantly, it calls for the establishment of "*common basic principles underlying a coherent European framework on integration*". The European Council made clear that an European reading of integration "*includes, but goes beyond, anti-discrimination policy*".⁹¹ Two weeks later the JHA (Justice and Home Affairs) Council elaborated on the findings of the European Council and presented eleven "*common basic principles for immigrant integration policy in the European Union*" (CBPs).⁹² The first of these principles is the definition of "*integration*" as a "*dynamic, two-way process of mutual accommodation by all immigrants and residents of Member States*". Nevertheless, the main emphasis is clearly on the integration of the migrants into the respective societies and *not* on the preservation or protection of the migrants' identity. However, immigration is described as "*enrichment*", and it is affirmed that "*full respect for the immigrants' language and culture ... should be also an important element of integration policy*" (in principle 4).⁹³ Moreover, with regard to political participation, the Council recommends that, "*wherever possible*", immigrants "*could even be involved in elections*" (in principle 9). Finally, the Council does not limit itself to nice ideas but hints also to necessary and costly measures. In the context of principle 7, which calls for frequent interaction between immigrants and EU-citizens, shared forums and a functioning inter-cultural dialogue, the Council makes clear that this is only possible if the "*image of the people*" is changed which requires improving their living environment "*in terms of decent housing, good health care, neighbourhood safety, and the availability of opportunities for education, voluntary work and job training*".

In autumn 2005 the Commission reacted to these eleven principles and presented a "*Common Agenda for Integration*" which aims to put the eleven CBPs into practice by providing indicative lists of concrete measures to be taken at national and at European levels for every

⁸⁹ COM(2001) 387 final, at p. 5. It is possible that in the future parts of this regular dialogue will be regulated in a more formal way, see in this respect the Communication of the Commission for a Council decision on the establishment of a mutual information procedure concerning Member States' measures in the areas of asylum and immigration, COM(2005) 480 final, 10 October 2005.

⁹⁰ COM(2001) 387 final, at p. 13.

⁹¹ European Council Conclusions, 8 December 2004, Annex 1 (The Hague Programme), point II.1.5.

⁹² Annex attached to the press release regarding the 2618th Council meeting of 19 November 2004.

⁹³ It seems as if the Spanish government has pushed for including a reference to the promotion of the migrants' cultures and languages but did not reach consensus. See Migration und Bevölkerung, 9(2004), available online at http://www.migration-info.de/migration_und_bevoelkerung/artikel/040907.htm

CBP.⁹⁴ In this respect it might be important to stress that it will be important to put sufficient emphasis on the regional dimension of integration policies in Europe.⁹⁵ In 2006 the Commission will present its second Handbook on integration. As regards the funding opportunities, the Commission designated 2007 as the European Year of Opportunities for all and 2008 as European Year of Intercultural Dialogue.⁹⁶ Moreover for the period 2007-2013 the Commission proposed the establishment of a European Fund for the integration of third-country nationals.⁹⁷

d. Conclusion

It seems as if the process of “internalization” of the minority topic after enlargement went hand in hand with shifting the policy focus from old towards new minorities. This is not to say that old minorities would be excluded from the various dialogues taking place between the European and the national level in the area of employment, social or migration policy and even less from crucial hard law instruments such as the Race Directive. Rather the Commission states in its Framework strategy for Non-discrimination that the Union “*needs to develop responses to the different needs of new migrants, established minorities of immigrant origin and other minority groups*”.⁹⁸ However, it seems as if most of the Union’s more recent policies and funding instruments are primarily directed at new minorities rather than old minorities. Especially areas where new forms of governance apply such as employment policies, social policy and migration policy are characterized by the desire to include potentially segregated, disadvantaged, poor and discriminated groups into society. These features typically characterize migrants and new minorities. New minorities want to *prevent* their “being different” from becoming a basis for exclusion and discrimination. In contrast, old minorities typically want to actively *preserve* their “being different” in order to avoid tendencies of assimilation. With other words one could say that the Union is more and more concerned with issues of integration, whereas issues of preservation are left to the discretion of the Member States.⁹⁹ In fact the Commission identified social and labour market integration as one of the “*key challenges*” the Union has to face. The major task for the Union is to “*promote concerted effort by all of the relevant stakeholders in order to maximize the impact and effectiveness*” of the various instruments. The described means of modern governance might help to look at anti-discrimination legislation, employment strategies, social policies and financial *stimuli* in an inclusive and interconnecting way. The new “*High-Level Advisory Group on Social and Labour Market Integration of Disadvantaged Ethnic Minorities*” might prove helpful in this respect and represents in any case a *novum* of

⁹⁴ See Communication from the Commission, “*A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union*”, COM(2005) 389 final, 1 September 2005.

⁹⁵ Note that the Committee of the Regions has recently drafted an opinion in this regard. See draft opinion of the Commission for Constitutional Affairs and European Governance as of 15 February 2006, CdR 53/2006 EN.

⁹⁶ Compare the Communication of the Commission “*Non-discrimination and equal opportunities for all - A framework strategy*” as of 1 June 2005, COM(2005) 224 final.

⁹⁷ See the Communication of the Commission establishing a framework programme on Solidarity and the Management of Migration Flows for the period 2007-2013, COM(2005) 123 final, 6 April 2005 containing also a proposal for a Council decision establishing the European Fund for the Integration of Third-country nationals for the period 2007-2013 as part of the General programme “*Solidarity and Management of Migration Flows*”.

⁹⁸ See COM(2005) 224 final, at p. 10.

⁹⁹ See on this in more detail Toggenburg, Who is managing Ethnic and Cultural Diversity in the European Condominium?, loc.cit.

considerable symbolic importance, since it will be - next to the traditional Intergroup of the Parliament¹⁰⁰ - the only semi-official EU-forum dealing specifically with minority issues.¹⁰¹

5. *EU, OSCE, Council of Europe: creating an “inter-organisational dialogue”*

a. Introduction

After World War II, nation states underwent a process of internationalization meaning that they started to cooperate amongst each other, shifting tasks (and partly also sovereignty) to various international (if not supranational) organizations. With the beginning of the new century it seems timely to ask whether international organizations themselves have not reached a level of consolidation which allows and calls for a comparable process. In fact it has been criticized that the EU, OSCE, Council of Europe and NATO are not only geographically expanding but also steadily extending their tasks and responsibilities and thereby mutually interpenetrating their traditional areas of competence. This “*imperialism of tasks*” calls for efficient modes of cooperation and a convincing division of labour between the organizations in order to avoid reduplications, resulting in loss of synergy, opacity and public misspending.¹⁰² In fact, on the European soil a tendency of a sort of inter-organisational cooperation becomes more and more visible. The considerable territorial overlap between the three big players (EU, OSCE and Council of Europe) makes this cooperation easier. The Union - holding a dominant share of the 46 Member States of the Council of Europe and the 55 participating States of the OSCE - seems adapted for playing a considerable role in this growing inter-organisational dialogue. In the following section a brief overall view on the developing EU/OSCE cooperation and the developing EU/Council of Europe cooperation is provided.¹⁰³

¹⁰⁰ Just as every Intergroup it has to be refounded at the beginning of every legislative period. The current „*Intergroup for traditional national minorities, constitutional regions and regional languages*“ lists the following three as its „*targeted groups*“: national minorities, nations without a state and regional languages. It considers as its major tasks issues such as the examination of concrete cases, the elaboration of recommendations or the work on creating a legal basis for minority protection in the EU (see minutes of the meeting on 16 December 2004).

¹⁰¹ See COM(2005) 224 final, at p. 10. The Group - presided by Rita Süssmuth - consist of 10 experts from different fields. It is supposed to deliver a report with recommendations on how the EU can develop a coherent and effective approach to the problems of social and labour market exclusion for disadvantaged minorities by the end of 2007.

¹⁰² Tudyka speaks of „*Zuständigkeits-Imperialismus*“ and is of the opinion that the Secretariats of the international players are more characterised by jealousy, competition and dominance than by co-operation. See Kurt P. Tudyka, *Das OSZE-Handbuch*, Chapter on „*Die Vernetzung der europäischen Institutionen*“, Leske +Budrich, Opladen 2002, pp. 87-97, at 89.

¹⁰³ It is however important to stress that there is also a growing co-operation between the OSCE and the Council of Europe which is of crucial interest for minorities. See in this context e.g. the so called Common Catalogue („*Relations between the Organization for Security and Co-operation in Europe and the Council of Europe, Common Catalogue of Co-operation Modalities*“, 12. April 2000). See in detail Hans-Peter Furrer, *OSCE-Council of Europe Relations: Past, Present and Future*, in Victor-Yves Ghébal, Daniel Warner und Barbara Gimelli (eds.), *The Future of the OSCE in the Perspectives of the Enlargements of NATO and the EU*, Geneva 2004, pp. 91-121.

b. The Dialogue between EU and OSCE

Javier Solana recently called the OSCE the “*natural born partner*” of the Union.¹⁰⁴ This seems to be an exaggeration. The mere fact that both organisations were born out of the Cold War and aimed at defusing post-war tensions is hardly enough to speak of natural born partners. Rather what might be considered “natural” is a certain degree of distance between the two players which is now fading away. Politically speaking this distance derives from the fact that the OSCE was born as a forum open to the former communist “East” whereas the EC/EU was an entirely Western organization. Legally speaking the two institutions differ crucially in structure and essence. Whereas the CSCE was (and the OSCE still is) a loose forum offering a diplomatic platform for leaders of various states, the Community was and still is an increasingly supranational organization, equipped with a Parliament and independent organs such as a Court and a Commission, which deal with and intervene in innerstate-realities. With this background it can hardly be astonishing that the EC-Treaty traditionally calls on the Community to “*establish all appropriate forms of cooperation with the Council of Europe*” but remains silent with respect to the OSCE.¹⁰⁵ Nevertheless it has to be underlined that the political commitments the states assumed in the framework of the CSCE are not explicitly limited to the CSCE framework itself but bind (even if not in a legal sense) the respective states in all the other international forums, the EU-framework included.¹⁰⁶ Therefore, the various CSCE minority commitments reflect shared values which should guide the policies of the EU states both “*individually and collectively*”. Moreover it is underlined that the EC participated - next to its Member States - from the beginning in the Helsinki process which developed in the framework of the CSCE.¹⁰⁷ However, only the *annus mirabilis* brought the two organisations in evident and direct contact. With the fall of the Iron Curtain both players realized that their aims were converging more and more.

This process of rapprochement also resulted in an institutionally visible cooperation. Since 1989 the President of the Commission and the EU-Presidency participate in the OSCE Summits. Since 2003 there has been a formal exchange between the OSCE Secretariat in Vienna and the EU-Commission and the General Secretariat of the Council of the EU. In 2002 a specific working party within the Council of the European Union was entrusted with the relations to the Council of Europe and the OSCE.¹⁰⁸ Within the European Commission a specific unit within the DG External Relations is responsible for the relations to OSCE and Council of Europe. In November 2003 the Council of the EU made further proposals. Building on the 2003 practice, the Council announced that during each Presidency, a meeting should take place between the EU troika, the OSCE troika and the OSCE Secretary General. Briefings by the Secretary-General/High Representative for the Common Foreign and

¹⁰⁴ Javier Solana, The EU and the OSCE: The shape of future cooperation, address to the Permanent Council of the OSCE, 25. September 2002.

¹⁰⁵ See Art. 301 EC. The draft Constitution changes this picture and makes in its Art. III-327 explicit reference also to the OSCE.

¹⁰⁶ This can be seen from „*Towards a Genuine Partnership in a New Era*“, CSCE Budapest Summit 1994, Par. 2.

¹⁰⁷ This can be seen already from the Moro-Declaration attached as Annex 1 to the Helsinki Final Act. Therein Aldo Moro declared: „*En ce qui concerne ces matières, l'expression "Etats participants", qui figure dans l'acte final, se comprendra donc comme s'appliquant aussi aux Communautés européennes.*” Note that documents like the Charter of Paris or the Charter for European Security have been signed also by the President of the European Commission.

¹⁰⁸ COREPER decision of 19 May 2002, see Progress Report on Joint Cooperation between the European Commission and the Council of Europe, June 2001-May 2003, 19 May 2003, at p. 5 (footnote 7).

Security Policy (CFSP) and the European Commissioner for external relations to the Permanent OSCE Council in Vienna should be arranged when deemed necessary. As appropriate, representatives of the OSCE Secretary General and Chairmanship in Office, Heads of Mission and Heads of OSCE institutions shall be invited to informal meetings with relevant EU working groups. In fact these aims are becoming standard practice.¹⁰⁹ Moreover, the Council proposed to post a Council Secretariat liaison officer to Vienna, so as to facilitate communication between the Council Secretariat and the OSCE and further enhance cooperation and synergy between the EU and the OSCE.¹¹⁰ In the OSCE's view, the Union is already "*a permanent participant in day-to-day OSCE business in Vienna and elsewhere*" especially through the EU-Presidency and the Commission's representation.¹¹¹ Regular meetings at staff-level¹¹² and countless examples of cooperation at project level especially, at the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) and missions in Southeastern Europe, Southern Caucasus and Eastern Europe as well as Central Asia complete this picture.¹¹³

With regard to the protection of minorities - an area where the OSCE holds considerable experience - some voices within the OSCE (but also within the Council of Europe) saw and see the growing engagement of the Union with skepticism.¹¹⁴ It is therefore important to keep the position of the Council of the EU in mind which underlines that cooperation between EU and OSCE has to "*be based on the principle of avoiding duplication and identifying comparative advantages and added value, leading to effective complementarity*".¹¹⁵ So far cooperation in the area of minority protection concentrates on the funding of projects and field missions.¹¹⁶ A part from this functional cooperation, the Union is also making regular reference to the standards developed by the OSCE - a fact which was especially evident in the framework of the process of Eastern enlargement, where the High Commissioner on National Minorities was frequently approached by the Commission in order to give an opinion on legal developments in the candidate states. Moreover, the Council also declared in general terms that it will "*take account of OSCE acquis with respect to standards, notably on democracy and human rights*".¹¹⁷ In institutional terms, cooperation has been especially close between the Commission and the High Commissioner on National Minorities who "*maintains close contacts with various parts of the European Commission, including its Legal Service and the Directorate General for Enlargement*".¹¹⁸ A formalization of these contacts could help to prevent the dilution of these links after enlargement.

¹⁰⁹ See e.g. the Annual Report on OSCE Activities 2003, pp. 171-173 and Annual Report on OSCE Activities 2003, pp. 137-139.

¹¹⁰ See Council Conclusions of 17 November 2003, "*EU-OSCE cooperation in conflict prevention, crisis management and post-conflict rehabilitation*".

¹¹¹ OSCE report 2003, p. 171.

¹¹² On 28 May 2003 the first formal staff level meeting between the OSCE Secretariat and the European Commission and the General Secretariat of the Council of the European Union took place. The second meeting took place in November 2004.

¹¹³ For an overall view on this co-operation at project level see the OSCE report 2004, pp. 137-139.

¹¹⁴ For a similar position in literature see Heike Borchert und Daniel Maurer, *Kooperation, Rivalität oder Bedeutungslosigkeit? Fünf Szenarien zur Zukunft der Beziehungen zwischen OSZE und EU*, OSZE Jahrbuch 2003, Nomos, Baden-Baden 2003, pp. 441-455, at 453.

¹¹⁵ Council Conclusions of 17 November 2003, Par. 4.

¹¹⁶ See for a list the OSCE Annual Report 2003, pp. 171-173.

¹¹⁷ Council Conclusions of 17 November 2003, Par. 8.

¹¹⁸ Annual Report on OSCE Activities 2003, at p. 172.

c. The Dialogue between EU and Council of Europe

If the OSCE is described as a natural born partner of the Union, one might talk of the Council of Europe as the Union's natural born twin. A closely related history and the increasingly shared legal interest in the protection of human rights (symbolized by the judicial dialogue between the two Courts in Strasbourg and Luxembourg)¹¹⁹ led to the fact that the cooperation between the European Union and the Council of Europe has more facets and is closer than the one between the Union and the OSCE. Already in 1959 the two organizations decided to exchange annual reports. In 1987 President Delors and General Secretary Oreja signed an "Arrangement" between the Council of Europe and the European Community which provided for contacts at various levels. Since 1989 the so called 2+2 meetings have been held. In the latter, the EU-Presidency, the EU-Commission, the Chair in Office and the General Secretary of the Council of Europe come together twice a year in quadripartite meetings. These meetings are complemented by regular meetings between members of the EU-Commission with the General Secretary or the Human Rights Commissioner of the Council of Europe. Moreover, at the technical level, the Legal Service and the DG Justice and Home Affairs of the Commission are cooperating with the corresponding services in the Council of Europe.¹²⁰ The Council of Europe has a liaison office in Brussels. Consultation takes place but is not "systematic". There are plans that the Commission opens an office at the Council of Europe. However the Council decided "not to participate in this operation".¹²¹

As regards the substance of the cooperation between EU and Council of Europe, the 2001 Joint Declaration on Co-operation and Partnership makes clear that the respect for human rights, including the protection of national minorities, forms a prominent part.¹²² On 16-17 May 2005 the Heads of State and Government of the Member States of the Council of Europe gathered in Warsaw where they bore "witness to unprecedented pan-European unity". They attached to their "Warsaw Declaration" an action plan which deals in its part IV with the cooperation between the Council of Europe and the two other organizations. With respect to the European Union it is underscored that the two organizations should take the Council of Europe's and the Union's achievements and future standard-setting work into account in each other's activities.¹²³ Appendix number 2 of this action plan lists 10 "Guidelines on the Relations between the Council of Europe and the European Union". Therein one reads that the promotion and protection of pluralist democracy, the respect for human rights and social cohesion are all matters of common interest which form the base of the relationship between the two organizations.¹²⁴ Enhanced partnership and complementarity should govern the future relationship between them. It is underlined that the "common objective of a Europe without

¹¹⁹ Note that Claude Juncker proposes in his recent report on the future relationship between the EU and the Council of Europe that the EU Member States should *immediately* change the treaties in order to allow for an accession of the EU to the ECHR. See Jean Claude Juncker, Council of Europe-European Union: "A sole ambition for the European continent", 2006, at p. 5 (compare Art. I-9 of the currently blocked Constitution which would provide such a competence). Juncker even goes so far to call for EU membership of the Council by 2010 (see Juncker report, at p. 29).

¹²⁰ See Progress report, loc.cit., p. 5. It has been argued that the quadripartite meetings should take place only once a year and focus on aspects of co-operation *per se* whereas various ad-hoc meetings of various mixed bodies should deal with concrete matters. See the report by Jean Claude Juncker at p. 25.

¹²¹ This is criticised by Juncker who calls for „official diplomatic status and maximum access to information“ for the Head of the Council of Europe's Liaison Office in Brussels. See Juncker report, at p. 28.

¹²² See Joint Declaration on cooperation and partnership between the Council of Europe and the European Commission, signed on 3 April 2001.

¹²³ See the Ministers' Deputies Document "Action Plan", CM(2005) final 17 May 2005.

¹²⁴ See Guideline 1.

new dividing lines can best be served by making appropriate use of the norms and standards, as well as the experience and expertise developed in the Council of Europe over half a century".¹²⁵ Not only should the Union accede to the ECHR but accession to other Council of Europe conventions should also be taken into consideration.¹²⁶ This might bring up the question, whether the Community can and should accede to the FCNM.¹²⁷ Another remarkable provision deals with "*legal cooperation*" between the two organizations. It is submitted that greater complementarity between the European Union and Council of Europe legal texts can be achieved by striving to transpose those aspects of Council of Europe Conventions into European Union Law where the Union holds respective competences.¹²⁸ This fits well with the above described functional approach of the Parliament with respect to minority issues.

Special emphasis is finally given in the Guidelines to a reinforced cooperation between the specialized Council of Europe bodies and the European Union.¹²⁹ However, with respect to institutional cooperation the only concrete proposal of the Guidelines is to establish as soon as possible a permanent EU office to the Council of Europe.¹³⁰ As regards the area of minority protection one could think of an institutionalized participation of members of the Parliament and the Commission in the respective debates in the Committee of Ministers and the Advisory Board of the FCNM. One guideline refers to the future Human Rights Agency of the European Union as an opportunity "*to further increase cooperation with the Council of Europe, and contribute to greater coherence and enhanced complementarity*".¹³¹ In fact, the current proposal for the establishment of that EU agency states in its considerations that close cooperation between the two organizations will avoid any overlaps. However, when it comes to concrete mechanisms guaranteeing this strict cooperation the proposal does not offer anything which would go beyond the current mechanisms existing in the legal structure of the European Monitoring Centre on Racism and Xenophobia (i.e. a cooperation agreement between the Agency and the Council of Europe and the participation of the Council of Europe to the boards of the Agency).¹³²

In this context it might prove useful to think of the establishment of revamped, permanent and institutionalized channels of communication and participation between the various monitoring bodies such as the network of independent experts in fundamental rights (in case it is continued), the Advisory Board of the FCNM, the Committee of Independent Experts of the Language Charter, the European Commission Against Racism and Intolerance, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or

¹²⁵ Guideline 3.

¹²⁶ Guideline 4. Note that Art. I-9 Par. 2 CE provides a mandate (if not an obligation) for the Union to accede to the ECHR. Compare in this context also Art. 17 of the new ECHR protocol no. 14 .

¹²⁷ See critical in this respect Toggenburg, *Minority protection in a supranational context: limits and opportunities*, in Toggenburg (ed.), *Minority protection and the enlarged European Union*, loc.cit., at pp. 15 and 16.

¹²⁸ Guideline 5.

¹²⁹ Guidelines 6 and 7.

¹³⁰ Guideline 10.

¹³¹ Guideline 8.

¹³² See consideration number 16, Art. 6 Par. 2 lit. c), Art. 9, Art. 11 Par. 1 lit. c), Art. 11 Par. 6 of the proposed regulation establishing a European Union Agency for Fundamental Rights, COM(2005) 280 final as of 30 June 2005. Also Juncker says in this context: „*It seems to me that some clarification is necessary*“. See Juncker report, at p. 8.

Punishment of the respective Anti-Torture Convention and the Parliamentary Assembly of the Council of Europe.¹³³ It will be important that the Fundamental Rights Agency is able to function as a central switching centre which brings all the other EU institutions in direct contact with persons, knowledge or documentation generated by the relevant Council of Europe-institutions. So far the interaction between Council of Europe and the European Union in the area of minority protection concentrates on an ongoing transfer of standards (especially in the context of the Commission's monitoring exercise in the course of the enlargement process)¹³⁴ and the Joint Programming (several of the joint Council of Europe and EU projects deal with minority issues)¹³⁵. It might be timely to complement these two fields of interaction with an institutionalized inter-organizational dialogue on human rights issues which puts special emphasis also on minority issues.

6. Conclusion: The Union within an Integrated European System of Minority Governance

In the late eighties and the early nineties there were certain tendencies in the European Parliament to establish a supranational EC-Charter of group rights. These proposals tabled first by Count Stauffenberg and then by Mr. Alber (both members of the European Parliament) had no realistic chance of gaining consensus and were consequently not even voted upon in the respective Committees. However, the arguments used at that time are still heard. People who favour a supranational regime of minority protection in Europe point to the fact that the Union could offer a stringent legal system equipped with direct effect and supremacy and a convincing Court system. The Union is seen in this context as a post-national entity which could manage the minorities' cause in a neutral and efficient way. On the other hand, it was Count Stauffenberg himself who clearly identified the fact that the resistance of the states against engagement in a system of international minority protection is more persistent the more stringent the law applied is.¹³⁶ In fact it is the big advantage of international law that participating states can escape to watered down solutions, pick and choose approaches and forms of geographic flexibility and *still* establish a net of legal obligations. Consequently it will remain the task of the Council of Europe to respond to possible future *avantgardes* in the area of minority protection and offer tailored solutions for these states. It can hardly be the task of the Union to provide one-size-fits-all solutions in the area of special minority rights.¹³⁷ This is not only due to legal arguments but seems also due to obvious reasons of political

¹³³ Note that on 1 September 2005 the EUMC, the ECRI, the ODIHR, the CERD and the Anti-Discrimination Unit at the OHCHR convened in Paris for an inter-agency meeting.

¹³⁴ See on this Rainer Hofmann and Erik Friberg, The enlarged EU and the Council of Europe: Transfer of standards and the quest for future cooperation in minority protection, in Toggenburg (ed.), *Minority protection and the enlarged European Union*, loc.cit., pp.125-147.

¹³⁵ See DSP(2004)21, European Commission / Council of Europe Joint Programmes, Scoreboard report as of 1 October 2004, pp. 6, 7, 12, 13 and 54.

¹³⁶ See Franz Ludwig Graf von Stauffenberg, Der Entwurf einer Volksgruppen-Charta der EG, in Felix Ermacora et al. (eds.), *Volksgruppen im Spannungsfeld von Recht und Souveränität in Mittel- und Osteuropa*, Braumüller, Wien 1993, pp. 245-254, at p. 173 (contribution to discussion).

¹³⁷ Even if one shares the opinion of the Hungarian Parliament (which attached to its resolution on the ratification of the Treaty establishing a Constitution for Europe an interpretation of Art. I-2 stating that the latter covers also community rights of minorities) this does not imply that the Union holds a competence to establish such group rights through means of European legislation.

legitimacy. Systems providing for group rights intervene in sensitive issues of redistribution and equality perceptions. Such public interventions have to be legitimized by a strong and locally rooted consensus and can hardly be imposed by a supranational top-down approach which would not conform with the spirit of the principle of subsidiarity.¹³⁸

Thus with respect to group rights the challenge for the Union in an integrated system of minority governance is rather to accommodate far-reaching systems of minority protection at the Member State level in a way which avoids inner-EU frictions. As is well known, the Common Market aims at the unlimited mobility and unrestricted access to goods and services whereas highly developed systems of minority protection tend to restrict the access to rare goods such as work places, social housing and the like to certain groups.¹³⁹ Consequently there is a certain tension between the mechanisms of the European Common Market and strong regimes of minority protection at the national level. It is in this respect of no relevance whether these regimes are anchored in constitutional law or not. The case law on the supremacy of EC law led to the insight that “*even the most minor piece of technical Community legislation ranks above the most cherished constitutional norm*“.¹⁴⁰ There is consequently no reason to believe that in the case of a conflict between the Common Market principles and a constitutionally anchored system of minority protection, the latter “*will stand*” only due to its constitutional rank.¹⁴¹ Rather such provisions have to be based on a specific exemption in Primary EU-Law¹⁴² as is the case for the Aaland Islands or the specific rights of the Saami.¹⁴³ Likewise, the special provisions enshrined in the draft Annan plan which were designed to guarantee the ethnic balance on Cyprus would have had to be anchored as exceptions in EU-Primary Law in order to be compatible with the Common market principles.¹⁴⁴ If such an exemption is not available it is up to the perception and specific application of the EU-notions of equality and proportionality to establish a convincing balance between economic mobility and cultural diversity.¹⁴⁵

Apart from this delicate challenge, the Union will, within the future integrated system of minority governance in Europe, not so much be confronted with questions of *preservation* but rather with questions of *integration*. As has been shown above, the Union is becoming more and more involved in questions of social inclusion. With the methods of modern governance

¹³⁸ See on this problem in more detail Toggenburg, *Minority protection in a supranational context*, at pp. 9-16.

¹³⁹ See on this problem in more detail Toggenburg, *Minority protection in a supranational context*, at pp. 21-31.

¹⁴⁰ Stephen Weatherill, *Law and Integration in the European Union*, Oxford University Press, Oxford 1995, at p. 106.

¹⁴¹ This is however the opinion of Tove H. Malloy, *National minority rights in Europe*, Oxford University Press, Oxford 2005, at p. 271.

¹⁴² An exemption in Secondary Law would stand under the Damocles sword of possibly infringing itself Common Market principles. Compare however Art. 15 of directive 2000/78/EG which states for Northern Ireland e.g. that „[i]n order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland, differences in treatment regarding recruitment into that service, including its support staff, shall not constitute discrimination“.

¹⁴³ See the so called „Aaland protocol“ and the „Sami protocol“ in OJ C 241, August 29, 1994.

¹⁴⁴ In fact this was the function of the so called “*Draft act of adaptation to the terms of accession of the united Cyprus republic to the European Union*“.

¹⁴⁵ For an examination of the system of South Tyrol see in detail Gabriel N. Toggenburg, *Europas Integration und Südtirols Autonomie: Konfrontation - Kohabitation - Kooperation?*, in Joseph Marko et al. (eds.), *Die Verfassung der Südtiroler Autonomie*, Nomos 2005, pp. 451-494.

such as the Open Method of Coordination, the Union has at its disposal, as the first international organization ever, means to put its Member States in a situation of competition for best ideas and practices in areas such as social policy, employment policies and migration policies without exerting legal pressure. Even the area of human rights may follow this example. Apart from this politically strong but legally soft integration of the Union into the national policies of its Member States, the Union has at its disposal astonishingly far reaching hard law instruments in the field of anti-discrimination. This is an area where the Union is co-designing the Member States legal reality. Both the hard engagement in the area of anti-discrimination and the soft engagement in the area of integration showed an astonishingly fast development from 2000 until now and current dynamics indicate that the Union continues to gain momentum in these areas. All of this clearly demonstrates that the Union internalized its minority engagement. The enlargement experience did not only lead to an even more outspoken engagement of the Union in its relations towards current and potential candidate states but provoked a new EU-engagement for minorities within the EU territory. This new internal engagement of the European Union went hand in hand with a shift of interest from old to new minorities. This, however, corresponds to the fact that for questions of preservation the Member States will remain the primary responsible entities.¹⁴⁶ Finally, the enlargement experience has induced the factual need and the growing political readiness to revamp the cooperation between the three international players – the OSCE, Council of Europe and the Union. Since the means the Union holds at its disposal in the area of minority protection are rather unique in the international arena it will be possible to design a symbiotic and efficient division of tasks between the EU, the Council of Europe and the OSCE. In conclusion one can say that the Union is, after E-day, not only taking care of a remaining share of its former minority engagement but assuming a new part in the area of minority protection.

¹⁴⁶ For the wider picture of “diversity management“ in the EU and the distribution of tasks between the Member States and the Union when it comes to access to the territory, integration into society and provision of group rights see Toggenburg, Who is managing Ethnic and Cultural Diversity in the European Condominium?, loc.cit.