

# Lia (C.R.M.) Versteegh

## Minority Protection in the European Union: From Economic Rights to the Protection of European Human Values

### Abstract

*Minority protection did not receive attention in the original EC treaty of 1956. The concept of non-discrimination of laborers and later of EU citizens became the cornerstone for minority protection. Gradually the EU became familiar with the concept of human rights because of judgments of the European Court of Justice (ECJ). This concept has officially been introduced in the 2009 Lisbon Treaty, which includes the rights of persons belonging to minorities and has been elaborated in Article 21 of the EU Charter of Human Rights. If the Charter is not applicable, minorities have to address national legal instances where there is no say for the EU regarding minorities. In this paper, I will demonstrate that the complex European legal system is not easy to understand in terms of protection of minorities. Recently, the ECJ has decided in the CHEZ versus Nikolova case that it can empower lower national courts against measures of systematic discrimination against minorities based on EU equality directives and Article 21 of the Charter. This verdict together with the EU Commission's intention to give the Charter a broad practical legal context shown in the working areas of the Fundamental Rights Agency, should ensure national minorities that European institutions pay really attention to their problems.*

**Keywords:** minority policy, minority protection, EU Charter of Human Rights, EU equality law, Fundamental Rights Agency

## I. INTRODUCTION

Matters of European minorities, citizens and third country nationals received little attention in the original EC treaty of 1956. The 1956 EC Treaty was addressing EC Member States which were seen as the subjects of the EC legal order. The precursor of the European Union came together as a purely economic community. Freedom of movement in the European Union (EU) as part of labor market mobility became one of the foundations for migration of European laborers in the EU. The original treaty provided for the concept of non-discrimination on the grounds of nationality which was applicable to laborers working in a host country. In 1992 the concept of European citizenship was introduced. This automatically made each national of a European Union Member State a European citizen. National citizenship of a European Union Member state would guarantee European citizenship rights, also to nationals of EU Member States belonging to national minority groupings. The European equality principle – introduced by the 1997 Treaty of Amsterdam – would guarantee equal treatment of European Union citizens operating in cross-border situations to that of the citizens of the host-country.

Since 2009 a new treaty has been implemented in the European Union, the Lisbon Treaty—consisting of two parts, the treaty of the EU (TEU) and the treaty on the functioning of the EU (TFEU). This treaty claims that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. It gives the 2000 EU Charter of Human Rights legal force as primary law. The EU lawmaker has been promoting equal treatment for many years. At the same time, the European Commission has embarked on an ambitious action program<sup>1</sup> in the area of freedom, security and justice which aims at serving the interest of all European citizens and inhabitants of the EU. The European Parliament has taken several initiatives on behalf of EU citizens, also in the field of minority rights, which started with a Charter of Minority Rights that has never been voted upon.<sup>2</sup> It is the European Court of Justice that has recently given an interpretation of EU law regarding minorities in favor of the a Roma community in Bulgaria.

The aim of this article is to look at new elements in the aims of the Lisbon treaty with reference to the peoples of Europe and its individuals and to see in what way it can be useful in further establishing European values for minorities.

## 2. NO MINORITIES RIGHTS IN THE ORIGINAL EC TREATY

In the original 1957 EC treaty there were rights granted to workers and concerns related to employment conditions. Freedom of movement for workers implied the prohibition of discrimination based on nationality. The Court of Justice (ECJ) put the position of individuals in perspective in its famous judgment *Van Gend and Loos* in which the Court recognized the rights of individuals as subjects of Community law. These subjects “comprise not only the Member States but also their nationals”.<sup>3</sup> It became obvious that individuals confronted with unclear EC law could take a stance in proceedings on market issues. In further case law the ECJ took the position of individuals into consideration.<sup>4</sup> However, the EU was not competent to judge cases on discrimination of membership of a national minority.

The EU had prepared the accession of candidate member states to the Union by the regional development of projects which required rules of management of structural funds to support minorities. Regionalization gained an ethnic-political dimension due to minority problems. This became obvious in the case of Slovakia and ethnic Hungarians. In spite of its policy of non-interference in this kind of matter, the EU intervened in order to avoid uproar

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1 Stockholm program, Council document 17024/09, adopted by the European Council at Stockholm in December 2009.

2 G. Toggenburg (2008) “The EU’s Evolving Policies vis-a-vis Minorities: A Play in Four Parts and an Open End”, Bozen/Bolzano: EUR.AC Research, pp. 3-5.

3 *Van Gend en Loos versus Nederlandse Administratie der Belastingen*, 1963 ECRI, zaak 26/62.

4 Although this position was never explicitly mentioned.

in the region.<sup>5</sup> It is not surprising that the EU posed explicit requirements on the applying candidate-countries from Central and Eastern Europe and any other candidate country. The European Council had made “the respect for and protection of minorities” one of the explicit requirements posed on the applying candidate-countries. This requirement became part of the so-called Copenhagen criteria at the council meeting of June 1993, which acknowledged the right to join the EU, stipulating however that “Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities...”<sup>6</sup> These requirements aim to stimulate the development of diversity in social cohesion. The promotion of diversity however, is not the same as social integration of minority groupings. A requirement of social integration of minority groupings was left out of the 1992 Maastricht treaty and the 2000 Charter of Human Rights.

Yet, in the pre-accession period, the EU has used several tools for candidate states that aim to improve the protection of minorities. In this respect we can think of the PHARE program, for local democracy and cross-border operation. This program included in its national components funding projects especially for the position of minorities.<sup>7</sup> Another illustration of this policy is the Integration Fund for the integration of third country nationals.<sup>8</sup> The EU program directed at strengthening civil society in candidate countries and the integration of minority groups, is the EQUAL program that was meant to promote new means of combating discrimination. This initiative was related to the labor market, and was connected to the European Employment Strategy.<sup>9</sup> A proposal of the European Parliament in the field of majority rights, by drafting a Charter of Minority Rights, was never voted upon. Instead of a legal document for specifically minority situations, the EP started to build ideas on culture and language which are applicable to minority groupings.<sup>10</sup> The European Parliament initiative to protect minorities in the EU resulted in the European Initiative for Democracy and Human Rights, with references to minority issues and financial projects.<sup>11</sup> In its Resolution on the role of regional and local authorities in European integration,<sup>12</sup> the European Parliament insisted on more attention from the European Community for minority problems and proposed the

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5 Attila Agh, “Regionalization and Europeanization in Central Europe”, Paper presented at the Pan European Conference, Bologna, 24-26, June 2005, available at: <http://www.jhubc.it/ecpr-bologna/416.pdf> (accessed 15 August 2013)

6 Conclusions of the Presidency, 21-22 June 1993, the European Council in Copenhagen.

7 Commission Regulation No 2760/98 of 19/12/98 concerning the implementation of a program for cross-border cooperation in the network of the PHARE program, 19/12/1998, pp. 19-52

8 European Funds for the integration of third-country national, 2007-2013. European Commission, Unit B/4, Financial Support, Immigration and Asylum.

9 For the program see: [http://employmnet\\_social/equal/about/key-doc\\_en.efm](http://employmnet_social/equal/about/key-doc_en.efm)

10 Toggenburg, (2008a) o.w., pp. 3-5.

11 European Initiative for Democracy and Human Rights (EIDHR), “Advancing equality, tolerance and peace”, deals with the promotion of human rights and Minority protection activities. See: [http://ec.europa.eu/eu/europaid/what/human-rights/documents/cidhr\\_annual\\_work\\_programme.2006\\_eu](http://ec.europa.eu/eu/europaid/what/human-rights/documents/cidhr_annual_work_programme.2006_eu).

12 European Parliament (2002), Resolution on the role of regional and local authorities and local authorities in European integration, 2002/141 (INI).

following article to be inserted in the EC Treaty; “The Community shall within its spheres of competence, respect and promote linguistic diversity in Europe, including regional or minority languages as an expression of that diversity, by encouraging cooperation between Member States and utilizing other appropriate instruments in the furtherance of this objective”. This proposal has not been accepted. Nevertheless, the European Community has taken initiatives to promote the regional and minority languages in Europe by funding projects for practical initiatives aiming at the promotion of regional and minority languages.<sup>13</sup> The lack of an appropriate legal basis restricted the European Community its actions. In the field of education the Community was able to support actions of Member States with the objective to add a European dimension to education.<sup>14</sup> Other initiatives were taken in the context of regional development and cooperation between governments and local authorities.<sup>15</sup> A mainstreaming approach toward minority interests promoting diversity, has been reflected in bilateral agreements between Member States, which could be the result of “European” pressure on CEECs.<sup>16</sup> It proved to be difficult to enforce the provisions of such agreements before domestic courts.

The need for a legal EU provision became evident due to interstate tensions between national minorities. Tensions may exist between two new EU members, e.g., Slovakia and Hungary or Romania and Hungary, or between old and new states as, for example, between Slovenia and Austria<sup>17</sup> or between Roma people from former East-European countries and France. Also, there was a danger of minority problems being brought to light by a new member state complaining about other third countries.<sup>18</sup> Although the EU took little initiative regarding national minority groupings, attention was drawn to human rights protection, and, since nothing had been stated about minority rights and obligations for the existing EU member states, individuals and states had to seek help from the EU equality law provisions in order to solve minority problems. In 2013 the Council made a recommendation on effective Roma integration in the Member States.<sup>19</sup>

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13 Olivier de Schutter (2006), the Framework Convention on the Protection of National Minorities and the Law of the European Union, CRIDHO Working Paper 2006/01, p. 13.

14 See Article 149 and 150 of the former EC Treaty on education and vocational training policy.

15 See: The European Commission Agenda 2000, [http://ec.europa.eu/agenda2000/index\\_en.htm](http://ec.europa.eu/agenda2000/index_en.htm) (accessed 14 August 2013)

16 Emil J. Kirchner (1998), Transnational Border Cooperation Between Germany and the Czech Republic: Implications for Decentralization and European Integration”. See: [www.eui.eu/RSCA/WP-Texts/98\\_50.html](http://www.eui.eu/RSCA/WP-Texts/98_50.html) (accessed 14 August 2013)

17 Examples from Krzysztof, Drzewicki, “National minority issues and the EU Reform Treaty, Security and Human Rights, 2008, nr. 2, p. 137-146, p. 145

18 G.B. Toggenburg, “A Remaining Share or a New Part? The Union’s Role vis-à-vis Minorities After the Enlargement Decade, EUI Working Papers, Law, No. 2006/15, pp. 1-5

19 Council Recommendation of 9 December 2013 on effective Roma integration measures in the Member States , OJ C 378, 14.12.2013.

### 3. INTERNATIONAL INITIATIVES TO PROTECT MINORITIES

The initiatives to protect minorities outside the European Union can be summarized as follows: The Committee of Ministers of the Council of Europe, adopted a Framework Convention for the Protection of National Minorities, in November 1994. The aim of this Convention, according to its explanatory report, is to specify legal principles, without the need for directly applicable provisions. Article 4 of this Framework Convention states that Member States should adopt “adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority”. Although Article 4(3) prohibits these measures to be discriminatory in character, the framework leaves room to the participating Member States for measures of discretion, which means that participating Member States of the Framework are committed to minimum standards of protection for minorities. However, the Framework Convention does not imply the expectation that positive measures should be taken by the Member States in favor of minorities, for instance in the area of employment and housing. Moreover, it does not impose obligations on the Member States regarding the integration of minorities. This makes clear that it does not offer a model for uniform standards of integration of minorities to all Member States. Nevertheless, an exclusion of the use of language of minorities in the nation-wide public service and private broadcasting sectors is not considered compatible with the Article 9 Framework Convention.<sup>20</sup>

For the countries that were part of the Conference on Security and Cooperation in Europe (CSCE) the 1990 Document of the Copenhagen Meeting of the Conference of the Human Dimension offered minority rights. The positive influence of this document is that it received widespread recognition in national legislation, and international documents, and minority rights became legally binding in the area of security cooperation.<sup>21</sup>

At the global level the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities is equally binding for its member states. In addition, the UN Committee for the Elimination of Racial Discrimination encourages Member States to “take special measures to promote the employment of Roma in the public administration and institutions, as well as in private communities”, and to “adopt and implement, at the central or local level, special measures in favor of Roma in public employment such as public contracting and other activities undertaken or funded by the Government, or training Roma in various skills and professions.”<sup>22</sup> These recommendations can require “States to take affirmative actions in order to prevent continuation of discrimination.” In this respect De Schutter is referring to the Committee on Economic, Social and Cultural Rights and its

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20 O. De Schutter, o.w., p. 16

21 Anders Rönquist, (1995). “The Council of Europe Framework Convention for the Protection of National Minorities”, Helsinki Monitor 1995 no.1, see: <http://heinonline.org/HOL/Page?handle=hein.journals/helsnkl6&div>.

22 Committee for the Elimination of Racial Discrimination, General recommendation XXVII on discrimination against Roma adopted at the fifth-seventh session (2000), UN doc. HRI/GEN/1/Rev.7, 12 May 2004, p. 219.

plea for temporary special measures “to bring about de facto equality ... for disadvantaged groups.” Regarding possible positive actions of Member States he refers to the broad margin of appreciation of Member States and the number of possible measures they have at their disposal.<sup>23</sup>

There are some common features in the provisions on minorities adopted by the UN, the CSCE and the Council of Europe: they all mention minority rights as “individual rights”, “rights of persons belonging to minorities”, in other words there is no recognition of “collective rights”; minority rights are seen as part of the general concept of fundamental rights with the accent on non-discrimination. So, there is no minority right per se; the different legal instruments do not contain a definition of national minority, nor is it clear whether the individual should be a citizen of the state concerned. This brings us to the question of how the concept of minority should be understood. From the above mentioned documents it is not obvious that the term should be understood as it stands, neither that there should be a combination of terms such as national minority, ethnic minority, religious minority, linguistic minority or any combination of these words with the word minority. At least members of minorities groups within the European Union can hold the citizenship status of an EU country. Then, they can claim protection based on national laws from the national government, for instance the right to equal treatment according to national law. What protection can the individual belonging to a national minority expect from the European Union?

#### 4. EUROPEAN CITIZENSHIP

Free movement was the original privilege of EU citizens active in the European market. In 1992 the Treaty of Maastricht introduced an overall right “to move and to reside freely within the territory of the Member States” for all European citizens. European citizenship status is automatically acquired by everyone holding a national citizenship status of an EU Member State. Article 20 TEU of the Lisbon Treaty has adopted the European citizenship paragraph. It has added European citizenship to national citizenship; both are considered of equal value. At the same time, the treaty text states that European citizenship is seen as a fundamental status. Obviously, the European legislator had the will to “enable those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality.”<sup>24</sup> To get an insight into the development of the concept of European citizenship it is interesting to look at the secondary legislation, such as regulations and case law of the ECJ. European citizenship was formed by the 2004/38 directive “on the right of the citizens of the Union and their family members to move and reside freely within the territory of the member states.” This directive consolidated the various pieces of EU secondary law on free movement and residence and integrated the vast amount of ECJ jurisprudence into one single legal text.<sup>25</sup> The right to free

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23 O. De Schutter, o.w. , p. 9.

24 See ECJ, 20 September 2001, Grzelczyk case, C-184/99, para 31

25 Directive 2004/38/EC of 29 April 2004 on J L 158 of 30 April 2004.

movement is subjected to limitations and conditions, such as economic conditions and sickness assurances according to Article 18, – they should “not become a burden on the social assistance system” of the host state<sup>26</sup> – and the restrictions on the ground of “public policy, public security or public health should according to Article 27 of the Directive, only comply with the proportionality principle and should be based exclusively on the personal conduct of the individual concerned.” Articles 16-21 deal with the right of European citizens to acquire a right to permanent residence after a legal residence of five years in the host state, irrespective of any economic conditions. Consequently, EU citizens, members of minorities groups, can claim the right to permanent residence under the same conditions.

Directive 2004/38 brings us to the conclusion that there is no space left for national policies toward EU citizens and family members residing in other EU Member States. Member States are in the position to grant or withdraw nationality to its nationals and by doing so they decide on the enabling status of EU citizenship. If they decide to allow nationality to third country nationals residing in their country, they decide on the status of European citizenship, also for their citizens belonging to minorities.<sup>27</sup> The ECJ has given judgments in cases on equal treatment and European citizenship. The value of equal treatment has become a legal norm in the EU, designed in Article 13 of the Treaty of Amsterdam. The first case in which the ECJ had to deal with these two notions, was the 1993 case of *Martinez Sala* in which Sala, a Spanish national residing in Germany, applied for a child-raising allowance. Germany rejected her application on the ground that she did not have German nationality, a residence entitlement, nor a residence permit.<sup>28</sup> The ECJ stated that the legality of Sala’s residence in Germany was not questioned and putting her legal position of European citizen to the fore, she could rely on the prohibition of discrimination laid down in the EC Treaty and the national allowance she had applied for.<sup>29</sup> Criticism of the judgment speaks of the danger of social tourism and to the financial interests of the Member States,<sup>30</sup> which was not the view of the ECJ. In many more cases the ECJ has given judgments allowing for social security benefits for EU citizens residing in another EU member state, in the light of non-discrimination.<sup>31</sup> The famous Court saying in its case law is that member states are held to respect the principle of proportionality.<sup>32</sup> The approach on non-discrimination has also been taken in relation to third country nationals legally residing in the EU. The inhabitants of the European Union are European citizens or nationals of third countries. From the perspective of European Union law, the first group will be considered as a group with homogeneous rights, whereas the second group will not be considered as

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26 See last note, o.w., Article 7 Directive 2004/38

27 G. N. Togenburg (2005), “Who is Managing Ethnic and Cultural Diversity in the European Condominium? The Moment of Entry, Integration and Preservation”, *Journal of Common Market Studies*, Vol. 43, nr. 4, p. 724.

28 *Maria Martinez Sala versus Freistaat Bayern*, 12 May 1998, Case C-85/96, para 16.

29 ECJ, C-85/96, *Martinez Sala v Freistaat Bayern*, (1988) ECR I 2691.

30 C. Tomuschat (2000), “Radical Equality under Article 12 of the EC Treaty? The case of *Martinez Sal*” *Common Market Law Review*, p. 449.

31 See Directive 2004/38 of 29 April 2004 on the right of EU citizens and their families to move freely on the territory of Member States.

32 *Baumbast*, ECJ 17 September 2002, ECR I – 7091, Case C-413/99, paras 90-93.

such. For different types of immigrants of the last group the EU has issued directives that grant rights to move and reside in EU member states. Members of minority groups who are European citizens or third country nationals have rights dependent on the group to which they belong. This has to do with the concept of equality and equal treatment that the EU introduced in its 1997 Treaty of Amsterdam.

## 5. EQUALITY LAW FOR EU CITIZENS AND THIRD COUNTRY NATIONALS

The value of equality, designed in Article 13 TEU gave the EU the legal competence to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”, through diverse appropriate actions. It has been characterized as “a sort of ‘container-provision’ whose concrete reach is dependent on the reading of equality applied.”<sup>33</sup> The EU has issued several directives on equality such as the employment directive<sup>34</sup> and the race equality directive.<sup>35</sup> Both directives are applicable to EU citizens but are at the same time important for minorities, since non-discrimination clauses provide for the prohibition of discrimination in the private sector and as regards the access to and supply of goods and services. The aim of these directives is also to place third country nationals on an equal footing with the nationals of the host state. This includes “access to employment and self-employment activities, but also other areas relevant to their integration”.<sup>36</sup> These instruments restrict themselves to a traditional non-discriminatory approach, and could be less effective in strengthening the position of minorities than by promotion of an effective integration system for ethnic and religious minorities within the European Union. A way to indicate discrimination of minorities could be the legal measure of “shifting the burden of proof in discrimination cases”, as has been introduced in both treaties. However, since the forwarding of statistical data is dependent on the cooperation of the Member state and since the facts regarding discrimination are left to the national judges and authorities, it is difficult to feel confident about the potential of these directives in respect to discrimination of members belonging to minorities. Another critical point is the freedom of choice for Member States to introduce obligatory positive action measures in order to combat discrimination against members of minorities. These measures will not be sufficient. Actions should at least be taken in other societal areas, such as education, housing and access to public transportation. As De Schutter stated: “More is required in order to achieve effective equality than to outlaw direct and indirect discrimination.”<sup>37</sup> Socio-economic disad-

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33 G.N. Toggenburg, (2008a), o.w., p. 11.

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

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

36 Article II of 2003/109 Directive.

37 O. de Schutter (2006), CRIDHO Working Paper 2006/01, “The Framework Convention on the Protection of National Minorities and the Law of the European Union, o.w., p.7-8.

vantages will be difficult to overcome for minorities. In judging questions on equal treatment the ECJ emphasized the link between European citizenship and European values.

Article 13 of the Treaty of Amsterdam has been labeled as the core norm to combat discrimination against minorities. At least, the importance of this article for minority protection becomes clear from these directives. The broad scope of the provision makes it a useful instrument in combating discrimination toward minorities, especially ethnic minorities. Religious minorities can seek protection from the Framework Employment Directive, while the protection of groups other than minorities is best guaranteed by the Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. However, these directives do not foresee an obligation for a Member State to find equal prospects in practical situations.<sup>38</sup> The cosmopolitan approach of the European Union to foreigners legally residing in the EU is obvious. But what about the nationals/ foreigners who are part of a national minority grouping in the EU? Is there any European guarantee that national minorities will be protected against national discriminatory measures or individual discriminating behavior?

## 6. EU SOFT-LAW AND MINORITIES

The EU article on equality in the 1997 Treaty of Amsterdam 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”. So the EU, acting unanimously, can take measures to protect ethnic and religious minorities from discrimination. However, this article did not encourage the EU to take specific measures to protect minorities, nor did any other Article in the treaty. It did include Article 49 that could inspire the EU to encourage cooperation between Member States and supplement their actions “while fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity”,<sup>39</sup> but this provision does not contain any obligation for Member States to implement the principles of the Council of Europe’s Framework Convention for the Protection of National Minorities. The lack of a legal basis for action has led the EU to other mechanisms to encourage Member States to improve the situation for their national minorities. In this respect we can think of the so-called Open Method of Coordination which is considered as a soft law mechanism and officially recognized in the treaty to provide a means to encourage Member States to improve the situation for their nationals, including their minorities. For this reason this method is said to demonstrate the flexibility of European multi-

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38 G.N. Toggenburg (2008a), o.w., p. 12

39 O. de Schutter (2006), *The Framework Convention on the Protection of National Minorities and the Law of the European Union*, CRIDHO Working Papers, p. 6 mentions also other EC provisions which empower the Community to take measures, such as the provisions of the internal market and harmonization of national rules, which could be of use to develop a national minority protection system.

level governance.<sup>40</sup> It is seen as an additional means of lawmaking, consisting of “recommendations, guidelines, or even self-regulation within a commonly agreed framework.”<sup>41</sup> This method has not been given legally binding force. What is of importance is that this method realizes a method of multilevel governance since it provides the Council and the Commission with the competence to influence national and sub-national policies “even when they have no formal competences. The method has been introduced as a means to stimulate policy change in the Member States and policy making happens inside a very small part of society. It aims at “generating and spreading best practices and achieving a better convergence toward the EU’s policy”,<sup>42</sup> which could also be a EU policy regarding the protection of minorities. Indeed, the working of this method is visible in various other areas of society and, due to the absence of competences for the Council, this method has proved useful. In this respect we can think of the 1997 European Employment Strategy that deals with the tackling of discrimination in employment with the promotion of access to employment of minorities as part of the strategy. This method forms an integral part of EU policy “... and is a tool in deciding whether or not particular action should be taken by the EU.”<sup>43</sup> At least, it puts emphasis on policy change by States. Change of national policies toward minorities could be integrated into EU policy, for instance: “... when systematic discrimination of certain groups of the population may justify special measures.”<sup>44</sup>

## 7. TREATY OF LISBON: ATTENTION FOR MINORITIES

In general the attention of the EU is directed toward protection of its citizens. But does this also implicate protection for EU minority groupings? The question is: “What will be the legal position of EU citizens who belong to national minorities and don’t receive protection from their national governments against discrimination?” Should the European Union feel obliged to take up the task of protecting citizens belonging to national minorities or should the EU only be charged with the task of interference in cross-border situations just like the situation of moving EU citizens? In order to be able to answer these questions we have to look more closely at the characteristics of the Lisbon Treaty.

The Lisbon treaty does not take a general applicable model for the acceptance of minority rights. Even the EU, in its 2009 Lisbon Treaty, does not mention minority rights as a specific group of rights. The omission of a provision on minority protection would be corrected in the

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40 A. Benz (2007), “Accountable Multilevel Governance by the Open Method of Coordination?” *European Law Journal*, Vol. 13., No. 4, July 2007, p. 505.

41 White Paper on European Governance (2001), COM (2001), 428, pp. 4 and 20-22.

42 Arthur Benz, o.w., p. 8

43 Dermot Hodson, (2001), *The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination*, *Journal of Common Market Studies*, Vol. 39, No. 4, p.726.

44 Olivier de Schutte, o.w. p. 9.

draft Constitution<sup>45</sup> but change came with the entry into force of the 2009 Lisbon Treaty and its formulation on minority protection. Article 2 of the TEU states that “respect for human rights, including the rights of persons belonging to minorities is one of the values of the EU”. The mention of ‘persons’ refers to the individual dimension of minorities in a human rights context. Minorities as collective entities are not understood as objects of human rights treatment. The term ‘minority’ in Article 2 is formulated in a neutral way without reference to a special type of minority, such as ‘ethnic’, ‘religious’, ‘linguistic’ or any other qualification. Since minorities can consist of diverse existing national groups or incoming immigrant groups, definitions of minorities will lead to the classification of minorities. As yet no definition has been given of the word “minority”.<sup>46</sup> What is clear is that the term as it is, could be the subject to interpretation by the ECJ. According to Drzewicki, the term should be construed in its double meaning: “Respect for human rights implies also respect for minority rights and minority rights in itself is part of European values.” The ‘double meaning’ on minority issues refers to the accession procedure, and to the obligation for actual member states.<sup>47</sup> In this way there is no double standard in judging applicant Member States and existing Member States. The rights of individuals belonging to minority groupings are indicated as part of human rights. The question is whether fundamental rights could include minority rights in the EU context. The Equality principle has been repeated in Article 19 TFEU since the Union “shall aim to combat discrimination.... becoming active as legislator or as an executive organ.” This obligation of Article 19 as such is not embedded in the EU Charter and so it will not cover two forms of discrimination that are explicitly enumerated in it, namely discrimination on the basis of language and discrimination on the basis of membership of a national minority. As a consequence, the EU has no competence to combat these forms of discrimination.

The EU network of independent experts on fundamental rights is of the opinion that the EU can take EU minority interests into account from different positions.<sup>48</sup> At the moment, the EU minority related interventions are fed by cultural and regional policies.<sup>49</sup> The European Union does not have an independent competence regarding the protection of minorities.<sup>50</sup> The addition of respect for “the rights of persons belonging to minorities” in the Lisbon Treaty does not provide the EU with new competences, since Member States remain sovereign regarding the protection of national minorities. If there is an obligation for Member States to respect minority rights, this implies individual rights, and not group rights. At least, the member state

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45 Article 1-2 of the draft Constitution for Europe, dealing with European values, deals with respect for human right “including the rights of persons belonging to minorities”.

46 K. Drzewicki, “National Minority Issues and the EU Reform Treaty, A perspective of the OSCE High Commissioner on National Minorities”, Security and Human Rights 2008, nr. 2, p. 142.

47 Krzysztof Drzewicki, o.w., p. 141.

48 EU Network of Independent Experts on Fundamental Rights, Report on the situation of fundamental rights in the European Union in 2003, pp. 101-103.

49 The EU changes its language regime in order to allow Member State to provide minority languages with a pseudo-official status. See: Council Conclusions of 13 Jun 2005, OJ C 181, 18 June 2005.

50 G. N. Toggenburg (2005), “Who is Managing Ethnic and Cultural Diversity in the European Condominium? The Moments of Entry, Integration and Preservation. JCMS Vol. 43, nr. 4, pp. 717-738, p. 730.

should be aware of the “fact that such a system has to conform to the EU’s norms, most importantly the common market principles and the principle of proportionality.”<sup>51</sup> Member States are supposed to take EU anti-discrimination measures, which take the form of affirmative action, requiring employers to comply with equal treatment. The question is whether affirmative actions are being applied to ethnic minorities.<sup>52</sup> Nevertheless, not only the EU equality rights but also the general fundamental rights framework of the EU will be of importance in revealing the controversies in the EU relating to EU minority rights. Lack of legal competence of the EU will not be a valid argument not to take a stance. The Open Method of Coordination described above will form an alternative to EU competences, encouraging special attention to be given to the position of minorities and to indicate to national authorities the need to apply affirmative actions to ethnic minorities.

Victims of discrimination through belonging to a national minority could claim protection under the EU Charter. In its Article 21 on Equality rights, it refers to lists of grounds on which discrimination is forbidden with “membership of a national minority” as one of these grounds. Discrimination against a member of a national minority does not have to be specially qualified, such as in discrimination on ‘ethnic’ or ‘social origin’ or ‘language’. The pure fact of being a European citizen and a member of a national minority, taken together with discrimination could make Article 21 Charter applicable in legal proceedings. Another important article for minorities is Article 22 that speaks of respect of cultural, religious and linguistic diversity. Although this last provision belongs to principles, and does not afford rights to individuals, it can still be of importance for minorities. This article refers to cultures of member states and to respect for their national and regional diversity. The indication of regional diversity implies the right to preserve regional characteristics which takes a different approach from a national approach. Article 3 (3) TEU that refers to the cultural and linguistic diversity of the EU should be understood in the same sense. Taken together, the two Charter Articles could be useful for minorities claiming to maintain their regional or local habits, when attacked or discriminated for these. In view of that, the applicability of the Charter in each individual case will matter.

## 8. APPLICABILITY OF THE CHARTER ON EU POLICY ON MINORITY PROTECTION

The human rights and minority clauses can be placed against the background of other values described in the Lisbon Treaty, such as human dignity, liberty, democracy, equality and the rule of law. Those values are also expressed as being European values in the 2000 EU Charter on Fundamental Rights that gained a binding status with the entry into force of the Lisbon Treaty.<sup>53</sup> Jointly, they create a legal framework of human rights and minority issues. In that respect

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51 G.N. Toggenburg (2005), o.w., p. 734.

52 Sacha Prechal (2004), “Equality of treatment, non-discrimination and social policy: Achievements in three times”, *Common Market Law Review*, p. 538 states that affirmative action operate as an exception rather than a justified treatment of minority protection.

53 See also the accompanying Explanations governing the interpretation of the Charter.

it is important that the Charter of Fundamental Rights has achieved the legal value of a treaty in Article 6 (1) TEU and that Article 6 (3) TEU refers to fundamental rights as they emanate from the ECHR. Moreover, the preamble in the Charter states the EU's references to the ECHR and the general principles of EU law. The Charter reaffirms and consolidates the principle of equality and non-discrimination in its Article 21 and explicitly prohibits discrimination on the ground of membership of a national minority. Compared to the Treaty of Lisbon, Article 21 of the Charter seems to be quite progressive since it offers ground for attacking acts of discrimination against members of national minorities. However, the mention of membership of national minorities, which with the Charter aims to be in compliance, is not in line with Article 14 ECHR on the equality principle: the Charter stresses the individual membership of a national minority while the ECRM only speaks of an association with a national minority.

This brings us to the question of the degree to which the EU can take advantage of the harmonizing effect of Article 21 of the Charter. First of all, Article 51 of the Charter should be taken into account since it arranges the field of application of the Charter: Its provisions are directed at “institutions, bodies, offices and agencies of the Union with due regard to the principle of subsidiarity”, with a limited position for Member States to apply the Charter. That is, according to the Explanation, “only when they are implementing Union law”. This Article not only addresses EU Member States but also relates to “regional or local bodies, and to public organizations when they are implementing Union law.”<sup>54</sup> This is a different way to assist minorities. According to Article 21 para 4 of the Charter the meaning and scope of Charter rights meet the ECHR standard. However, EU law can provide more protection than the ECHR, which ensures a minimum level of protection and consistency between the two human rights documents. The Explanations on Article 52 para 3 the Charter clarifies the applicability of the case law of both the ECtHR and the ECJ:<sup>55</sup> case law of the ECtHR is not binding for the ECJ, but we can expect that the ECJ will take ECtHR case law into account. In addition, the accession of the EU to the ECHR in the near future, will be of influence on minority protection by the EU. Once the EU is accessed, the EU and its institutions can be held responsible for its minority policy in the field of human rights protection by the ECtHR. As long as the Charter is not applicable, members of minority groupings in the EU can claim rights based on their EU citizenship or on the position of the third country national and the violation of equality principle. Directives in the area of freedom, security and justice will offer protection to both of them. Inhabitants of Member states of the European Convention on Human Rights can start proceedings before the ECtHR, provided they have finalized proceedings before the highest domestic court. Although the EU cannot be held responsible for its current minority protection policy, due to a lack of legal basis, its Fundamental Rights Agency could perform a European approach towards minority protection.

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<sup>54</sup> Explanations to the CFR, on Article 51, para 2 in which case-law of the ECJ is cited.

<sup>55</sup> Explanations to the CFR, on Article 52, para 4.

## 9. TREATY OF LISBON: AREA OF FREEDOM, SECURITY AND JUSTICE (AFSJ) AND THE PROTECTION OF CITIZENS

The Treaty of Lisbon has given rise to a new dynamism in EU initiative in the domain of freedom, security and justice. This treaty places the subjects in this field – asylum, immigration, police and justice cooperation - under the provisions of the internal market, which imply according to the Articles 68 to 89 TTFEU, submission of most policy areas to the ordinary legislative procedure, with qualified majority voting in the Council. At the same time the infringement proceedings has been introduced in the area of police and judicial cooperation in criminal matters which means that in case of breach of police and judicial rulings in transnational matters, individuals are allowed to start proceeding against other Member States before the ECJ,<sup>56</sup> making use of the preliminary ruling procedure.<sup>57</sup>

The Stockholm program adopted by the European Council in December 2009<sup>58</sup> sets the schedule for adopting measures in this area, which has been followed by Communications of the European Commission in 2009<sup>59</sup> and 2010.<sup>60</sup> The remarkable ambition of these communications is that in this area stress is put on the duty of the European Union to protect European values and to defend European's interests. In this respect it gives attention to human dignity, freedom, equality and solidarity. The reference to values is in line with Article 2 of the TEU that refers to European values, such as human dignity, freedom, democracy, equality, the rule of law and respect for fundamental rights, inclusive the rights of persons belonging to minorities. Article 3 of the TEU is based on economic values and non-discrimination. It also presents issues such as solidarity and respect between peoples, protection of its citizens.<sup>61</sup> According to the European Commission "A European area of freedom, security and justice must be an area where all people, including third country nationals, benefit from the effective respect of the fundamental rights enshrined in the Charter of fundamental rights."<sup>62</sup> The EU provides for adoptive measures to prevent and settle conflict of jurisdiction between Member States and will develop directives that provide for the rights of individuals. It has been active in formulating substantive criminal law in primary and secondary legislation. Articles 82 and 83 TFEU dealing with cross-border crime in the European Union, serve as a legal ground for further legislation in order to project EU society against trans-border criminality. One of the most important legal measures is Directive 2011/36/EU on preventing and combating trafficking in

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56 In domains linked to the Area of freedom, security and justice, national parliaments will be involved in the control and evaluation of the police and justice institutions: Europol and Eurojust.

57 For limitations on the competence of the ECJ see article 276 TFEU.

58 Stockholm program, Council document 17024/09, adopted by the European Council in December 2009.

59 European Commission, 2009, "An Area of freedom, security and justice serving the citizen", COM (2009) 262.

60 European Commission, 2010, Delivering an Area of Freedom, Security and Justice for the Europe's Citizens Action Plan implementing the Stockholm Program". COM (2010) 171.

61 See Treaty of Lisbon, ( part I Treaty of the European Union, Article 3).

62 See note 26 and 27

human beings and the protection of its victims. This directive allows the EU wider powers to intervene in national criminal law in order to protect its citizens.<sup>63</sup> In the interstate relations the principle of mutual recognition is active, which implies that cooperation is based on the respect of national authorities of Member States for the actions of the authorities of another Member State.<sup>64</sup>

Moreover, the Lisbon treaty enables the EU to become active in the field of criminal procedures<sup>65</sup> and proposals for minimum harmonization in areas of criminal procedures with regard to the position of individuals, such as suspects and accused persons and victims in proceedings.<sup>66</sup> The importance of these measures should be seen in the light of the free movement rights which are seen by Article 45 of the Charter as a citizen's right. Free movement and residence can be hampered by punitive state reactions of the state of origin for actions by citizens committed in the host state. It will be obvious that the transfer of criminal powers to the European Union needs to be accompanied by appropriate protection of fundamental rights at the European level.<sup>67</sup> It is not clear which way the European legislator wants to be bound by the principles of the Charter of Fundamental Rights, as in Articles 48 and 49 of the Charter. These Articles regulate the principles of the rule of law and proportionality principle regarding criminal acts and penalties. We can see that the EU aspires to be a Union of values and it has presented a cluster of rights for individuals in criminal cases. These rights will also affect the position of members of minorities when involved in criminal procedures.

## 10. TREATY OF LISBON: MIGRATION AND ASYLUM FOR MINORITIES

Regarding third country nationals, Member States are in the position to rule on them; according to the European asylum and immigration policy, as regulated in the Articles 77- 80 TFEU, there is a legal basis for the EU to issue rulings on the subject of migration and asylum. Directives have been issued on the status of third country nationals, to grant third- country nationals a permanent residency status<sup>68</sup> after five years of legal residency,<sup>69</sup> if they have a minimum level of resources and are not seen as a threat to public order or public security. Family members of EU citizens, being third country nationals have been granted residence rights in the Residence

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63 M. Luchtman (2012), *European Review of Private Law* 2 -2012 ( 347-380), *Principles of European Criminal Law: Jurisdiction, Choice of Forum, and the Legality Principle in the Area of Freedom, Security, and Justice*, p. 358.

64 In this respect we can think of the European Arrest Warrant.

65 Council Document 11457/09, Brussels, 1 July 2009.

66 See directive 2010/64 EU on the right to interpretation and translation in criminal proceedings, OJ 2010 L 280/1 and Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM (2011) 326.

67 See Luchtman, o.w., p. 366.

68 Council Directive 2003/109 of 25 November 2003, Council Directive concerning the status of third-country nationals that are long-term residents.

69 See note 13, o.w., p. 745 Toggenburg states that it "provides for equal treatment in a rather broad range of areas and guarantees a limited form of free movement."

Directive of 2004,<sup>70</sup> before fulfilling the five-year waiting period.<sup>71</sup> These directives are in line with the Common Basic Principles on Integration adopted by the European Council in 2001 in which the Council stressed<sup>72</sup> that a link should be developed between third country nationals and equal treatment. Third country nationals could be members of national minorities. Although the EU provides for equal treatment in a broad range of areas, it does not guarantee free movement and equal treatment for third country nationals being members of a minority generally. It is still the duty of national member states to apply EU standards of free movement and equality and take measures regarding third country members of national minorities. The difficulty regarding asylum seekers is that second Member States – to which the asylum seeker moves after consulting the first member state for asylum – have the duty to follow the third country national regarding his or her legal status which means that the second country may require third country nationals to live under national legal immigration conditions. There are more difficulties at the national level: National Member States are still competent to make political objections when the number of immigrants surpasses an established quantity. Although the European Union can monitor the standards of fundamental rights set in the EU Charter as “a common frame of reference”, the EU will have to respect the rights of the Member States regarding the admittance of third country nationals.<sup>73</sup> This was decided in Article 79 of the TFEU.<sup>74</sup> Besides, Member States have no political consensus on the subject of group-rights and the EU has no clear understanding of who can be considered a member of a minority. In addition, the enlargement has shown differences in standards between the Council of Europe and the European Union regarding the concept of minorities.<sup>75</sup> At least, the European Union does not recognize collective rights. The main piece of information about minority protection in the EU is the above mentioned Framework Convention on the Protection of National Minorities (FCNM) of the Council of Europe. The EU is in a process of making contributions to the implementation of the principles of the FCNM. Apart from the EU measures on Equality rights, the EU is not competent in many areas that are relevant to the protection of minority rights, as there is a lack of a legal basis, for instance to promote regional and minority languages, which becomes clear from the EU policy regarding regional and minority languages.<sup>76</sup>

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70 Council Directive 2003/86/EC on the right to family reunification.

71 Council Directive 2004/38/EC of 29 April 2004; see also Council Regulation 1030/2002 of 13/06/2002 laying down a uniform format for residence permits for third-country nationals.

72 Council of the Union, Presidency Conclusions, 19 November 2004, Press Release 1461504, p. 21.

73 G.N. Toggenburg (2005), “Who is Managing Ethnic and Cultural Diversity in the European Condominium? The Moments of Entry, Integration and Preservation”, *JCMS* 2005 Vol. 43, pp. 717-38, p. 731.

74 Article 79 ( para 5) TFEU states: “This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

75 Toggenburg, (2005) o.w., p. 733.

76 The EU Commission invites national and regional authorities “to give special attention to measures to those language communities whose number of native speakers is in decline from generation to generation, in line with the principles of the European Charter on Regional and Minority languages”. See: COM (2003) 449, final, p. 12.

At the same time the EU, by seeking solutions with the help of soft law, such as by the application of the above-mentioned Open Method of Coordination, can be successful in the acceptance and implementation of measures at the national level. Since the framework in which the EU operates towards national minorities is rather limited, there should be an EU institution charged with supervision of the various actions and measures regarding national minorities.

#### 11. APPLICABILITY OF DISCRIMINATION LAW ON ROMA: EUROPEAN COURT OF JUSTICE (ECJ) IN THE CASE OF CHEZ RAZPREDELENIE BULGARIA AD VERSUS ANELIA NIKOLOVA.<sup>77</sup>

In July 2015 the ECJ got the chance to decide on a case of discrimination against Roma communities based on Directive 2000/43/EG which prohibits discrimination based on race or ethnic origin which is in particular enshrined in Article 21 of the Charter of Human Rights. It had to decide on a case of discrimination against a Roma community by the electricity company CHEZ (aka CEZ) in Bulgaria that had repeatedly been condemned by the Bulgarian Anti-Discrimination Commission because of its practice of placing meters out of reach of consumers only in Roma districts. It was a non-Roma, Nikolova, who started this proceedings against CHEZ. This powerful company had persuaded the Supreme Court to reverse the condemnations. So the KZD, a specialized anti-discrimination Commission, an independent State body, referred questions to the ECJ, going over the head of the Supreme Court. The ECJ ruled that this Commission was not a court and rejected the reference as inadmissible. Then the Sofia Administrative Court used this case to refer similar question to the ECJ. The facts of the case are the following: “Ms Nikolova runst, as a sole trader, a grocer’s shop in the “Gizdova mahala” district of the town of Dupitsa in Bulgaria, a district inhabited mainly by persons of Roma origin. In 1999 and 2000 CHEZ RB installed the electricity meters for all the consumers of that district on the concrete pylons forming part of the overhead electricity supply network, at a height of between six and seven meters, whereas in the other districts the meters installed by CHEZ RB were placed at a height of 1.70 meters, usually in the consumer’s property, on the façade or on the wall around the property “ ( ECJ, para 21 and 22). “In December 2008, Ms Nikolova lodged an application with the KZD in which she contended that the reason for the practice at issue was that most of the inhabitants of the ‘Gizdova mahala’ district were of Roma origin, and that she was accordingly suffering direct discrimination on the grounds of nationality. She complained in particular that she was unable to check her electricity meter for the purpose of monitoring her consumption and making sure that the bills sent to her, which in her view overcharged her, were correct” ( para 23). In April 2010 the KZD issued an decision concluding that the practice at issue constituted prohibited indirect discrimination and later in May 2012 the KZD adopted a fresh decision finding that CHEZ RB had discriminated directly against Ms Nikolova on the grounds of her “ personal situation” by placing her, on ac-

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<sup>77</sup> ECJ, Case of 16 July 2015, CHEZ Razpredelenie Bulgaria AD versus Komisija za zashtita ot diskriminatsia and Anelia Nikolova, C-83/14.

count of where her business was located, in a disadvantageous position. On the appeal of ChEZ RB before the Administrative Court of Sofia, that court finds that EU law is applicable, stating that the protected characteristic must be seen in relation to the common Roma “ethnic origin” of most of the inhabitants of the “mahala” district. It takes the view that the Roma community does constitute an ethnic community, one which in Bulgaria indeed has the status of ethnic minority. It also observes that the particular district is commonly referred to as the largest ‘Roma district’ and harbors various Bulgarian towns. From this it concludes that the persons of Roma origins felt victim to the practices of CHEZ RB ( para 26- 31). Regarding the fact the Ms Nikolova is not a Roma herself, the ECJ refers to its case-law in which it decided that the application of the principle of equal treatment is not limited solely to persons possessing the protected characteristic ( para 32). The ECJ states that the purpose of Directive 2000/43 is to end discrimination on grounds of racial and ethnic origin, not only to protect individual members of groups who are targeted by discrimination ( para 56). This would imply in this case that if a measure against a district is based on grounds of the Roma origin of the district’s majority, then the minority in that district can also be considered victims of that discriminatory measure. The practice of CHEZ is direct discrimination if the ethnicity of the majority is the reason of the practice, for example if CHEZ selected the districts because of their Roma population ( para 76). Indirect discrimination in this case requires any measure disadvantaging a Roma majority district which is not applied to non-Roma majority districts to be objectively justified. The comparators are other urban districts provided with electricity by CHEZ ( para 90) which means that authorities must show that the objective differences between the districts justify the differential treatment. Moreover, the ECJ ruled that the practice of CHEZ was seen by others as effectively labelling a Roma community as electricity thieves, which made CHEZs measures harmful and should be considered incapable of justification (para 128).

The case has been returned to the Sofia Administrative Court, where Ms Nikolova will ask to condemn CHEZ to restore the meters to their normal height for all users in her district. If the national court will decide, given the particular facts, that direct discrimination cannot be concluded of, then indirect discrimination will be the basis for a condemnation of CHEZ, unless there will objectively justification for CHEZs acts.

## 12. FUNDAMENTAL RIGHTS AGENCY (FRA) AND MINORITY PROTECTION

The institutional framework for a capable minority protection has been found in the European Monitoring Centre on Racism and Xenophobia (EUMC) that was created to focus on issues surrounding discrimination, racism and xenophobia.<sup>78</sup> The EUMC has proved to be limited in its legal capacities since the EUMCs functions did not include the right to take initiatives. Because of these the European commission transformed the EUMC into a new institution, a Fundamental Rights Agency, in order to make it possible to treat discrimination in a wider

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<sup>78</sup> Council Regulation (EC) no 1035/97 of 2 June 1997, establishing a European Monitoring Centre on Racism and Xenophobia, OJ C 194.

context. The establishment of this new institution took place on 15 February 2007, and the main task of this agency is according to Article 4 of the Regulation 168/2007, “the collection of information and data, the provision of advice to the EU and its Member States and the promotion of dialogue with civil society.”

Regarding human rights protection, it is supposed to actively promote fundamental rights.<sup>79</sup> It will not only monitor the implementation of EU law, but also indicate what new legal measures should be taken.<sup>80</sup> The FRA is not able to deliver legally binding decisions, nor is its competence to judge individual human rights violations. It is able to take a mapping exercise that will give insight into the existing activities in the field of human rights.<sup>81</sup> The Agency’s work is determined for five years by the Council of the European Union and its competences toward Member States are limited to cases of implementing EU law.<sup>82</sup> According to consideration no. 10 of the Agency’s Founding Regulation its work should cover “the protection of rights of persons belonging to minorities, as well as gender equality, as essential elements for the protection of fundamental rights”. The EP has stressed that the FRA should be occupied with minority issues,<sup>83</sup> and should play a dominant role in this matter. The FRA will deal with thematic subjects, such as the principle of equality and victimization, Roma rights and ethnic profiling. In 2008 the FRA launched a new program on the situation of Roma and Travellers in the EU,<sup>84</sup> for which the cooperation with the Council of Europe has been foreseen.<sup>85</sup> Another important task is the formulation and publication of “conclusions on specific thematic topics” for the EU and the Member States, but the FRA has been excluded from commenting on EU legislative instruments, which stands, according to Toggenburg, in contrast with the Paris principles prescribing that national human rights institutions may freely consider any questions.<sup>86</sup> Another important task of the Agency is to deliver annual reports on fundamental rights issues after indirect monitoring of the member states and dialogue with civil society.

### 13. CONCLUDING REMARKS

The legal position of minorities in the EU is not hopeless any longer. Although EU law and policies are not always clear, there are interesting developments for minorities since the introduction of EU Equality Directives and the introduction of the 2009 Lisbon Treaty and the recent case law of the European Court of Justice (ECJ).

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79 Preamble to Founding Regulation, para 4.

80 EP Resolution: “Promotion and protection of fundamental rights”(2006) OJ C 117 E/242.

81 G. Toggenburg (2008), The role of the new EU Fundamental Rights Agency: Debating the “sex of angels” or improving Europe’s human rights performance? ELR, Issue 3,0

82 See art. 2 of the Founding Regulation.

83 See note 61, o.w., P6\_TA (2005) 0208, 26 May 2005, paras 39 and 40, OJ 2006 C 117 E, 242.

84 See website FRA: [http://fra.europa.eu/fraWebsite/home/home\\_en.htm](http://fra.europa.eu/fraWebsite/home/home_en.htm)

85 See arts 6-10 of the Founding Regulation

86 G. Toggenburg, (2008),” The role of the new EU Fundamental Rights Agency: Debating the ‘sex of angels’ or improving Europe’s human rights performance?” 33 E.L. Rev. June, Sweet & Maxwell and Contributors, pp.385-398, p.394.

In practice only EU Member States are competent regarding national minorities. Different types of “minorities” could be acknowledged, such as persons belonging to an old minority group, discriminated due to religious or cultural background, and new migrating EU citizens; although there are similarities between their legal and personal situations, they do have different needs and worries. At least, they need a perspective of integration into the society of their host state. The national authorities are supposed to take the necessary measures to promote integration of national minorities, in different areas of society, such as the labor market, the education system, and in the social context. What could be useful for integration are measures to be taken to preserve and foster group identities.

Member States have the legal means to grant national citizenship or withdraw national citizenship. By exercising their national sovereignty, they determine the possible European status of members of minorities. If they grant nationality, members of national minorities will have the right to free movement and residence and to other rights connected to the status of European citizenship. EU citizenship links questions of European migration. National migration policy regarding EU citizens and their family members is not possible. When EU citizens make use of their right of movement and to reside in another member state, there could be regional developments in the sense that members of minorities, living in another EU country, can join together because of the free movement rights of EU citizens.<sup>87</sup> However, as has been stated earlier, it is the member state that decides on who is entitled to hold citizenship.

The EU is a Union of values and the aims for protection of minorities is one of the issues of the EU in the context of anti-discrimination, although the concept of minority has not been clarified either in the treaty or in the text of the Charter of Human Rights. Individuals as members of minorities can claim human rights protection since minority protection is seen as part of human rights protection in Article 21 of the Charter. The application of the Charter by national authorities is obligatory when EU measures are being adopted or applied. Members of minorities have the right to start proceedings before the ECJ in cases of discrimination on the basis of Article 21 of the Charter. Minorities are not categorized as such. The EU policy of inclusiveness of treatment of third country nationals officially remaining in the EU, shows that equal treatment in a rather broad range, alongside ethnic and cultural diversity is welcomed by the EU system and is effectively working for EU citizens and third-country nationals. Obviously, the ECJ can empower lower national courts regarding measures of discrimination against minorities which is demonstrated in the 2015 ECJ case of *CHEZ versus Nikolova*. In this case the ECJ shows the important role of the ECJ to advance the struggle of Roma communities against systematic discrimination, be it direct or indirect discrimination, based on EU directives and Article 21 of the Charter of Human Rights. Ruling on equal treatment it can establish a powerful tool for national communities marginalized by local authorities or businesses.

If the Charter is not applicable, minorities have to address national legal instances and ultimately the ECtHR in order to claim their rights.

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87 The border between Italy and Austria has, according to Toggenburg, ”to a large degree been ‘neutralized’ by the European common market, providing the German speakers in South Tyrol being EU citizens with closer contacts to their former homeland Austria”. See: Toggenburg (2005), o.w., p. 724.

The European directives on the protection of victims of criminal actions and defendants in procedures demonstrate the concern of the EU for its citizens in vulnerable positions. In fact there are EU policies related to the inhabitants of the European Union and the EU humane approach towards them, in the context of culture and language and in its acceptance of regional diversity. However, the EU has no say in national affairs regarding minorities.

The European multilevel structure contains provision for new forms of communication, interaction and cross-fertilization. These competences can be used in different areas, such as in that of minority protection and forms of migration. In the area of anti-discrimination and social inclusion the EU can link them to other issues, such as cultural, regional, language or social policy, integration of European citizens, all kinds of aspects in which the EU is managing national policies in order to integrate national differences under the EU umbrella. Toggenburg speaks of “diversity management”<sup>88</sup> as “the effort to integrate diversity within unity.” The recognized method of cooperation is the Open Method of Coordination according to which the EU negotiates on the basis of best practices and the evaluation thereof with the Member States.

The EU is not prohibited from mainstreaming its policies in the interest of minorities and migrants. The EU engagement is not restricted solely to financial support, especially in regard of minority language projects, but also through the EU’s cultural and regional policies and its fundamental rights experts. The latter is of importance because of the Human Rights Agency established in 2007 in Vienna.<sup>89</sup> This Agency can give the EU the opportunity to look at national minority issues and stimulate Member States to respect their minorities and to take integration measures. The preservation and protection of minority interests lies in the line of the FRA’s functions. The FRA will be in a position to stimulate the adherence to fundamental rights principles and practices in the EU Member States. The Commission’s intention is to give the Charter a broad practical legal context.<sup>90</sup> The FRA’s thematic areas can be covered by the legal context of the Charter. The broad mandate given to the FRA will ensure that national minorities that attention will be given to their problems in the FRA.

After all, EU law and measures facilitate the EU in the development of post-national citizenship based on diversity, even though the actual scope of protection, due to lack of enforceability, remains questionable.

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88 G. Toggenburg (2005), o.w., p.718.

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