



Institut Européen
d'Administration Publique

European Institute
of Public Administration

Working Paper
No. 2003/W/4

Assessing the Assessment

A Review on the Application Criterion
Minority Protection by the European
Commission

by

Eva G. Heidbreder & Laura Carrasco

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European Institute of Public Administration

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Abbreviations

AP	Accession Partnership
CEEC	Central and Eastern European Countries
CFSP	Common Foreign and Security Policy
DG	General Directorate
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
EIDHR	European Initiative for Democracy and Human Rights
EU	European Union
EUMC	European Monitoring Centre on Racism and Xenophobia
FCNM	Framework Convention for the Protection of National Minorities
NGO	Non Governmental Organisation
OSCE	Organisation for Security and Co-operation in Europe
OSI	Open Society Institute
RR	Regular Report
TEC	Treaty establishing the European Community
TEU	Treaty of the European Union
UN	United Nations

Country Abbreviations*

BU	Bulgaria
CZ	Czech Republic
EE	Estonia
HU	Hungary
LV	Latvia
RO	Romania
SK	Slovakia

* These abbreviations are used in the text when referring to the Regular Reports or Accession Partnerships. For example, the 1999 Regular Report on Estonia will be abbreviated *RR 1999 EE*, Slovakia's 2001 Accession Partnership *AP 2001 SK*.

Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and the respect for and the protection of minorities.
European Council, Copenhagen 1993

Introduction¹

In April 2003 ten applicant states signed accession treaties to the European Union. This marked the endpoint of an intensive preparatory phase in which the candidate countries' adherence to criteria for membership of the European Union was annually monitored in the so-called Regular Reports. As part of the Copenhagen accession criteria the above quoted political criteria served as an indispensable precondition for any country to join the European Union. The European Commission published a first analysis of the presently thirteen applicant country's compliance with the criteria in its Opinions on the Application for Membership of the European Union in 1997. Since then, the institution continues its monitoring function by issuing Regular Reports on the progress achieved by the individual candidate states each year. These reports do not only make a clear statement on the adherence of a particular country to a specific criterion. They also depict a detailed picture of the overall situation concerning the relevant subject areas. However, despite the fact that all monitored countries are graded to fulfil the political accession criteria, the reports continue to draw on many persisting shortcomings. The question thus arises of how the Commission arrives at its evaluations. How does it apply the criteria to assess an applicant country's success in meeting them?

This study aims to shed light on the above question by focusing on the criterion "respect for and protection of minorities".² The starting point of the study is the Regular Reports, i.e. the Commission documents assessing adherence to the accession criteria. Following the reports, the situation of the Russian-speaking minority in Estonia and Latvia and the situation of the Roma peoples in Bulgaria, the Czech

¹ Special thanks to the European Institute for Public Administration and in particular to Ines Hartwig and Phedon Nicolaides who supported the study and gave a lot of valuable advice throughout its various stages.

² For means of convenience I will use the term *minority protection* in the following. The term stands for both sides of minority protection, i.e. the enforcement of anti-discrimination norms and the support of minority rights. While the first serves to ensure that minorities are not treated different than other individuals, the latter aims at supporting the maintenance of their distinct culture, language, etc. (cf. OSI 2001: 16).

*Republic, Hungary, Romania and Slovakia will be taken under scrutiny.³ Considering the very general formulation of the political criteria alongside the large amount of states which the Commission's evaluations cover, two problems are apparent. The first obvious obstacle seems to be that of horizontal consistency across the countries monitored. However, as will be illustrated in the course of the paper, this is not the predominant challenge the Commission faces in applying the Copenhagen criterion. More relevant is the second difficulty which lies at hand, namely how to operationalise the criterion. Thus, the central starting point of the study finds expression in a functional question, namely: How does the EU transpose the very general criterion into measurable standards and benchmarks? The particular relevance of this inquiry is amplified by the lack of a clear legal framework for the protection of human rights within the Union itself, which could serve as a basis for the assessment of external actors. Yet, if in certain cases the Commission has to invoke standards that are not part and parcel of the European Union's *acquis communautaire*, what impact does this have on the scope and validity of the annual assessments?*

In the face of these questions, it is necessary to recapitulate the European Union's access to minority protection and human rights in general and in its external policy, in particular in order to place the accession criteria in this context (Part I). The proceeding part focuses on the Commission's actual monitoring system by giving a brief overview on the situation of the minority groups under perspective and the focal points the European assessment formulated in response (Part II). After this mainly illustrative section, the measures, which the candidate states took, and the evaluations the Commission has given on these are being discussed (Part III-IV). This aims at, finally, drawing some conclusions on the effects the elaborated monitoring system really had with view to, on the one hand, the preparation for accession, and on the other hand, to improve the actual situation of minorities in general.

³ Identifying the most pressing problems, the *European Initiative for Democracy and Human Rights* (EIDHR) defines three minority issues. These are: a) the situation of the Roma people throughout a number of CEEC, most importantly in Bulgaria, the Czech Republic, Hungary and Romania; b) the Russian speaking minority in Estonia and Latvia and; c) the recognition of the Kurdish people in Turkey (Commission 1999 b: 3). With respect to the limited scope of the paper, the study will only focus on points a) and b). Yet, it needs to be noted that the Regular Reports also deal with the situation of Roma in Lithuania, Poland and Slovenia.

Part I

The Protection of Fundamental Rights within the European Union

The Original Treaties and the Role of the European Court of Justice

When the European Community was established in 1957, its main objective was economic and not political integration, so it does not come as a surprise that the original Treaties founding the Communities did not contain any reference to fundamental rights, apart from the freedom of movement, the principle of non-discrimination on grounds of nationality, and the principle of equal pay between men and women.

In the course of building the “common market”, however, the legal gap that existed in this field became obvious, as individuals started to complain about Community decisions that allegedly affected their fundamental rights as laid down in their national legislation or in international instruments for the protection of fundamental rights. The European Court of Justice (ECJ) consequently had to react to this apparent lack of protection of such rights at Community level, and since the late 1960s it played a key role in awarding European citizens protection against violations of their fundamental rights. The Court did so by declaring that respect for fundamental rights “forms an integral part of the general principles of Community law” and that they are therefore protected by the ECJ. In safeguarding these rights the ECJ found inspiration in “the constitutional traditions of the Member States” and “from the international treaties for the protection of human rights” of which the Member States are signatories, amongst which “special importance” was attached to the European Convention for the Protection of human rights and Fundamental Freedoms.

The case law of the ECJ has greatly influenced the development and protection of fundamental rights at the Community level, and raised the question of introducing some kind of provision in the Treaties about respect for fundamental rights at Community level that would reinforce and complement the jurisdictionally based system created by the ECJ. Therefore, the Single European Act of 1986 already included in its Preamble the Member States’ determination “to work together to pro-

mote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of human rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice”.

The Contribution of the Treaty of Maastricht to the Protection of Fundamental Rights

It will not be until the Maastricht Treaty that we see a real step towards recognition of the protection of fundamental rights within the Treaties. Its Preamble states the attachment of the Union “to the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law”, while Articles J.1 and K.1 referred to fundamental rights in the fields of Common Foreign and Security Policy and Justice and Home Affairs respectively. Yet, the most relevant article in this respect is Article F(2), which consecrates the jurisprudence of the ECJ by stating that “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of human rights and Fundamental Freedoms [...] and as they result from the constitutional traditions common to the Member States, as general principles of Community law”.

In addition to the explicit references to fundamental rights, the Treaty of Maastricht introduced the concept of European citizenship, in order “to strengthen the protection of the rights and interests of the nationals of its Member States”.⁴ This citizenship confers on European citizens a certain number of political and civil rights, namely the freedom of movement, the right to vote and to stand as a candidate at the municipal elections in the Member State of residence, the right to vote and to stand as a candidate for EP elections, the right to diplomatic and consular protection by any Member State in the territory of third countries, and the right of petition before the European Parliament.⁵

The Treaty of Amsterdam and the Furthering of Non-discrimination Policies

The Amsterdam Treaty marked another step forward in the commitment of the European Union to the protection of fundamental rights. The first paragraph of Article 6 (ex Article F) of the Treaty of the European Union (TEU) states that “the

⁴ Article 2 TEU (ex Article B TEU).

Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”, while paragraph 2 asserts: “the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law”. Moreover, the European Court of Justice is endowed with competence to ensure that the acts of the institutions are in compliance with Article 6(2), “insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty”.

Besides, in Amsterdam a new Article 7 was included in the TEU, attaching new consequences to the breach of fundamental rights by a Member State. This Article allows the Council, meeting in the composition of the Heads of State or Government, to determine the existence of a serious and persistent breach by a Member State of the principles contained in Article 6(1). To determine such a breach, the Council acts by unanimity on a proposal of one third of the Member States or of the Commission, after obtaining the consent of the European Parliament. Once the breach is determined, the Council can decide by qualified majority to suspend certain rights given to the Member State in question by virtue of the Treaty, including the right to vote in the Council. The Nice Treaty re-formulates Article 7 so that the Council can determine that there is a clear risk of a serious breach by a Member State of the principles mentioned in Article 6(1), and address recommendations to that a Member State in order to solve the critical situation before an actual breach of the principles takes place. The initiative for such a decision can come from one third of the Member States, the Commission or the European Parliament.

A further important change was introduced in Article 49 (ex Art. O), which declares the respect for the principles set out in article 6(1) a precondition for applying for EU membership. Therefore, since the Amsterdam Treaty, the respect for fundamental rights is a legal condition of membership.

⁵ See Articles 17 to 22 of the TEC (ex Article 8 TEC).

Last but not least, the Amsterdam Treaty also strengthened the clause of non-discrimination, Article 13 of the Treaty establishing the European Community (TEC), thereby empowering the Council to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.⁶ According to the wording of Article 13, “the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

Following this provision, the European Community (EC) produced two directives in the year 2000, namely Directive 2000/43/EC⁷ on the principle of equal treatment between persons irrespective of racial or ethnic origin of 29 June 2000 and Directive 2000/78/ECE⁸ establishing a general framework for equal treatment in employment and occupation.⁹ To complement the two Directives, a *Community Action Programme*¹⁰ for the years 2000-2006 was approved, in order to support projects aimed at preventing and combating discrimination on all the grounds listed in Article 13.¹¹

Directive 2000/43/EC, the so-called Race Directive, sets out a binding framework for the prohibition of racial discrimination throughout the EU. It applies a very extensive interpretation of discrimination, since it prohibits direct and indirect discrimination but also racial “harassment”.¹² The directive applies to “all persons”, so also to nationals of third countries, and it applies both to natural and legal persons. Moreover, it outlaws discrimination in the areas of employment, social protection, social advantages, education and access to the supply of goods and services. Per-

⁶ It should be noted that Article 13 does not include “language” among the grounds on which discrimination is prohibited.

⁷ OJ L180, 19.07.2000, pp. 0022-0026.

⁸ OJ L303, 02.12.2000, pp. 0016-0022.

⁹ This Directive only refers to discrimination on the grounds of religion or belief, disability, age and sexual orientation with regards to employment and occupation, since discrimination on grounds of sex is already object of EC secondary legislation on the basis of Article 141 TEC.

¹⁰ Council Decision of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006), OJ L 303, 02.12.2000, pp. 0023-0028.

¹¹ This accounts except for discrimination on the grounds of sex which is dealt with by a specific Community Action.

¹² According to Article 2(3) of the Directive, harassment will be deemed to be discrimination “when an unwanted conduct related to racial or ethnic origin takes place with purpose of or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”.

sons who believe themselves to be victims of discrimination are granted access to administrative or judicial procedures to defend their rights, empowering the victims to also seek support by external organisations in the proceedings. The Directive shifts the burden of proof to the respondents if the defendant can provide evidence that set the presumption that there has been discrimination. It foresees mechanisms to sanction those who discriminate. Finally, the Race Directive requires from Member States to designate a body for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin.

The Employment Directive (Directive 2000/78/EC) prohibits discrimination on the grounds of religion or belief, disability, age or sexual orientation. It uses the same approach as the Race Directive (prohibition of direct and indirect discrimination, shift of the burden of proof, positive action, etc.) but its scope is limited to the area of employment.

As a part of the *acquis communautaire* this legislation is also subject of the accession negotiations with the candidate countries and must be fully implemented by them. As will be elaborated on below, despite the essential upgrading of human rights issues by the introduction of anti-discrimination *acquis* in Amsterdam and the further advances reached with the Council Directives, it may however be questioned whether this EU legislation covers minority rights adequately and sufficiently.

Nice and the EU Charter of Fundamental Rights

In December 2000, the Heads of State and Government signed the Treaty of Nice incorporating the reforms that would provide the EU with the institutional capacities to face enlargement. Two amendments have relevance in what concerns the current system of protection and promotion of fundamental rights. The first one is the already mentioned re-formulation of Article 7 TEU, which provides for the possibility to take action when there is a clear risk of a serious breach of the principles of article 6(2). Under Article 46 TEU, the ECJ will be competent only for disputes concerning procedural provisions under Art. 7 and not for the appreciation of the justification of the appropriateness of the decision taken under Art. 7.

The second amendment relates to Article 181 TEC on economic, financial and technical cooperation with third countries, according to which Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms.

Further to the Treaty changes in Nice, an event that developed in parallel to the reform of the Treaties is of paramount importance for the issue of fundamental rights. Indeed, Nice saw the proclamation of a *Charter of Fundamental Rights of the European Union*.¹³ The Charter was the outcome of a process initiated by the Heads of State and Government in the European Council of Cologne in 1999, where they acknowledged the need to make the importance and relevance of fundamental rights more visible to the Union's citizens.¹⁴ The Charter consists of 7 Chapters and 54 Articles, and it is mainly meant to be a codification of previously existing rights that were scattered in different instruments and were therefore not obvious for the general public. The rights and principles included in the Charter must be respected by the EU and by the Member States when applying Community law. The Charter is a political declaration, and it was not endorsed legally binding status, neither was it included in the Treaties. However, although not directly justiciable, the legitimacy of the process through which it was drafted, and the solemnity of its proclamation have made of the Charter a very important reference document.¹⁵ Besides, the status of the Charter and its inclusion in the Treaties is one of the issues listed in the *Declaration on the Future of the Union* annexed to the Treaty of Nice as a subject for debate in the preparations for the next Intergovernmental Conference (IGC) which will take place in 2004. Working Group II of the Convention on the debate on the future of Europe, chaired by Commissioner Vitorino, has the mandate to look into the modalities and consequences of the incorporation of the EU Charter of

¹³ The EU Charter was solemnly proclaimed by the Council, the European Parliament and the European Commission on 07.12.2000; cf. OJ C364, 18.12.2000, p. 1-22.

¹⁴ European Council Decision on the drawing up of a Charter of Fundamental Rights of the EU, Presidency Conclusions, Cologne European Council, 3-4 June 1999.

¹⁵ For instance, the Advocates-General are making an increased number of references to the Charter in their Opinions; the European Court of First Instance has used it already as a guidance (see T-54/99, Max.Mob; or T-177/01, Jegó-Quéré); the EP and the European Ombudsman are receiving and deciding on petitions and complaints from citizens that refer to the Charter; the Commission issued a Communication in which it expressed its determination to regard the Charter as binding upon itself (see Commission Communication, Application de la Charter, SEC(2001), 13 March 2001); several acts adopted under the co-decision procedure have also made references to the Charter.

Fundamental Rights into the Treaties. Although the final decision will lay on the Heads of State and Government in the context of the IGC 2004, we can already draw some conclusions of what the outcome may be from the final report of the Working Group.¹⁶ According to the report, the members of the group either strongly supported or would not rule out giving favourable consideration to the incorporation of the Charter into the envisaged “Constitutional Treaty”, whether through the insertion of the Charter articles into the Treaty, or by including a reference to the Charter in one of the articles of the Treaty (combined with annexing the Charter to the Treaty as a specific part of the Charter or as a Protocol).¹⁷ In the same line, the European Parliament’s report on the impact of the Charter of Fundamental Rights of the EU and its future status advocates for an increased status of the Charter, specially in the context of enlargement, because “it will serve to enshrine a fundamental rights regime at the heart of the European integration process thereby reassuring old, new and potential Member States alike”.¹⁸

With regards to the issue of this study, minority protection, three Articles of the Charter are of relevance:

- First, Article 20 affirms equality before law of all people.
- Secondly, Article 21 states the principle of non-discrimination, enumerating 18 grounds among which non-discrimination based on the membership of a national minority is included.¹⁹ The wording of this Article is based partly in Article 13 TEC, and partly in Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).²⁰ Although at first glance it may look as if this Article “expands” the competence of the European Community to tackle discrimination to those grounds which are not included in Article 13 TEC, the Charter makes it explicitly clear that it does not establish any new powers or tasks for the Community or Union.²¹ Besides, the Charter also establishes that those rights recognised in the Charter which are based on the Treaties

¹⁶ Final report of Working Group II, CONV 354/02, 22.10.2002.

¹⁷ At the date of drafting this study, the report still needs to be discussed in the Plenary.

¹⁸ European Parliament’s Report on the impact of the Charter of Fundamental Rights of the European Union and its future status, A5-0332/2002, 08.10.2002.

¹⁹ The list of grounds on which discrimination is prohibited is merely illustrative.

²⁰ However, the ECHR also includes “association with a national minority” as one of the grounds on which discrimination is prohibited. On the other hand, the grounds related to genetic heritage are based on Article 11 of the Convention on Human Rights and Biomedicine.

²¹ Article 51(2) of the Charter states that “this Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties”.

shall be exercised under the conditions and within the limits defined by the Treaties, while those based on the ECHR shall have the same meaning and scope that is provided for in the Convention. Therefore, the EC can only take action on those grounds that are expressly listed in Article 13 TCE, and has no competence to enact anti-discriminatory legislation on the ground of membership of a national minority.

- Thirdly, Article 22 requests the Union to respect cultural, religious and linguistic diversity. This article is based on Articles 6 TEC and 151 TEU and does not add any further elements to these.

Summarising the findings reached so far, we can conclude that having started off as primarily economic entity the EC/EU has extended its legal framework on fundamental rights and freedoms constantly over the years. Yet, even the latest advances in the context of the Charter of Fundamental Rights and in the Convention on a future constitution fall short of explicit EU standards on minority protection. While the legal framework to protect *individuals* inside the EU is from discrimination on various grounds, the special issue of *minorities* remains neglected.

EU Standards for the Protection of Fundamental Rights EU's External Policy

Having observed the situation of fundamental rights *inside* the EU, attention needs to be drawn to the EU standards for the protection of fundamental rights *outside* the Union. In the international framework, the EU has been working on the promotion of human rights and fundamental freedoms outside its borders, basing its action mainly in the general framework of the United Nations (UN) Charter and the UN Universal Declaration of Human Rights.²² Since the proclamation of the EU Charter of Fundamental Rights, the Commission also takes external action in compliance with the rights and principles contained in the Charter.

Looking at the Treaties, we find mentions to the promotion and/or respect of human rights in two of the components of EU's external action: Common Foreign and security Policy (CFSP) and development policy. Article 11(1) TEU includes among

²² The EU also uses as reference documents the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights (UN), and the main international and regional instruments for the protection of human rights, including the European Convention on Human Rights (Council of Europe).

the objectives of the CFSP “safeguarding of the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter”, and the “development and consolidation of democracy and the rule of law, and respect for human rights and fundamental freedoms”. With regard to development cooperation, Article 177(2) TEC states that Community policy in this area “shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms”. Thus, respect for fundamental rights is one of the objectives both of the CFSP and of development co-operation policies. In Nice a step further was taken by extending the objective of promoting the respect of human rights and fundamental freedoms from development co-operation to all forms of co-operation with third countries.²³

The main instrument the EU uses to carry out its external policy is the principle of conditionality. Since the 1990s, the EC has been including a so-called human rights clause in its bilateral and multilateral co-operation agreements with third parties. This clause defines the respect for democratic principles and human rights as an “essential element” of the agreements, making human rights the subject of common interest, part of the political dialogue and an instrument for analysing various positive measures. An additional clause enables all parties, where necessary, to take “restrictive measures in proportion” to the gravity of the offence. Specifically, any serious and persistent human rights violations or any serious interruptions of democratic processes (i.e. “material breaches” of the agreement) can constitute grounds for terminating the agreement or suspending its application in whole or in part. On 29 May 1995, pursuant to a Communication of the Commission on the inclusion of the respect for democratic principles and human rights in agreements between the Community and third countries²⁴, the Council approved a standard formulation that had henceforth to be included in all agreements between the Community and third countries. This standardisation should ensure consistency in the wording and application of these clauses. Recently, the emphasis has changed from a negative approach of human rights in external relations, merely confined to the insertion of

²³ Article 181a TEC as amended in Nice.

²⁴ Communication of the Commission on the inclusion of the respect for democratic principles and human rights in agreements between the Community and third countries, COM(95)216 final.

clauses in trade or association agreements prohibiting the violation of human rights, to a more positive, pro-active approach promoting the democratisation of institutions, strengthening the rule of law, creating civil society platforms, etc.

In the concrete case of enlargement, the EU has also established certain human rights standards as precondition for EU accession. The combination of Articles 6(1) and 49 TEU refer to the political preconditions for EU membership, while the Copenhagen Criteria require that prior to accession the candidate countries achieve stability of institutions, guarantee democracy, the rule of law, human rights and the respect for and the protection of minorities. Noteworthy is that such extra criteria have been established for the first time in the history of EU enlargements. While the states previous joining the Union were only expected to comply with the common *acquis*, the standards put down in Copenhagen could not be directly related to the *acquis communautaire*. This raises questions since the new approach the EU has taken in the ongoing pre-accession process obviously sets new standards which are neither fully reflected in its legal framework nor in its classical enlargement policy.

Shortcomings in EU external Action on Human Rights

Criticism has arisen regarding the external action of the EU in the field of human rights:

1. In the first place, problems were identified regarding inconsistencies in the external action of the EU in its human rights policies. This applies, on the one hand, to inconsistencies between EC policies, and between those and other forms of EU action (especially CFSP) and, on the other hand, to inconsistencies between the actions of the EU and those of the Member States. In this regard, it is worth mentioning the provisions included in the Communication of the Commission on the European Union's role in promoting human rights and democratisation in third countries.²⁵ In this Communication the Commission stresses, among other things, the need to promote a coherent and consistent approach to human rights policies across pillars, and between those and the individual human rights policies of the Member States; and the need to integrate human rights and democratisation into all

EU external policies, so that these issues are included in the planning, design, implementation and monitoring of policies and programmes, as well as in the political dialogues with third countries.

2. These inconsistencies between the pillars and the different levels of EU governance are of general relevance. Yet, the criticisms which are of more direct importance to the content of this study refer to the inconsistency in the standards of human rights protection that the EU applies internally and externally, especially regarding the present candidate countries. Letting aside the situation of the candidate countries, it needs to be highlighted that the EU Charter of Fundamental Rights may become a useful instrument that could bring consistency and coherence between the internal and external dimensions of fundamental rights of the EU. At least this seems to be the opinion of the Commission, which in its above mentioned Communication on the EU's role in promoting human rights and democratisation in third countries states that "the Commission's action in the field of external relations will be guided by compliance with the rights and principles contained in the EU Charter of Fundamental Rights [...], since this will promote coherence between the EU's internal and external approaches".

Focusing on the case of enlargement, the imbalance between the requirements for human rights protection that the EU imposes on candidate countries and the requirements that the EU imposes on itself or on its Member States manifests in different ways.

These "double standards" seem apparent when we screen through the international instruments on human rights that the candidate countries were asked to ratify as a prerequisite for accession to the EU. It suffices to read the report of the European Parliament for the year 2000 on the situation of fundamental rights in the EU²⁶ to note that there are still shortcomings in the ratification by Member States of a number of international instruments on protection of fundamental rights, some of

²⁵ Communication from the Commission to the Council and the European Parliament on the European Union's role in promoting human rights and democratisation in third countries, COM(2001)252 final, 08.05.2001.

²⁶ European Parliament's report on the situation as regards fundamental rights in the European Union (2000), A5-0223/2001.

which are listed as instruments to be ratified by the candidate countries prior to accession (cf. pp. 49).

Another example of these “double standards” is the fact that even though applicant states have been asked to ratify the European Convention of Human Rights of the Council of Europe, neither the EU nor the EC are signatories of the Convention. In its Opinion 2/94²⁷, the ECJ ruled out the accession to the Convention, at least in the present situation. The Court argued that accession would entail a substantial change in the existing Community system for the protection of human rights, and the entry of the Community into a distinct international institutional system. Such changes would be of a constitutional significance that would go beyond the scope of article 235 (Article 308 after Amsterdam), and would therefore require the amendment of the Treaties. Voices have been raised over the years calling for the accession of the EU/EC to the ECHR. According to critics, accession would provide further protection to EU citizens’ rights since it would involve the submission of the ECJ to an external monitoring system (the European Court of Human Rights) in the field of fundamental rights. At the same time, accession would also send an unmistakable message regarding the commitment of the EU towards the protection of fundamental rights, especially to the candidate countries. In the words of Alston and Weiler: “It appears to be highly anomalous, indeed unacceptable, that whilst membership of the Convention system is, appropriately, a prerequisite of accession to the Union, the Union itself – or at least the Community – remains outside that system. The negative symbolism is self-evident” (Alston/Weiler 1999: 30).

This problem may be solved in the context of the next IGC 2004. Indeed, Working Group II of the Convention on the Future of Europe has the mandate to look not only into the modalities and consequences of the incorporation of the EU Charter of Fundamental Rights into the Treaties but also into the modalities and consequences of possible accession of the EC/EU to the ECHR. According to the final report of the Working Group²⁸, all members of the Group either strongly support or are ready to give favourable consideration to the creation of a constitutional authorisation

²⁷ Opinion 2/94, 28.03.1996, Rec. 1996-I, p.1759.

²⁸ Final report of Working Group II, CONV 354/02, 22.10.2002.

enabling the Union to accede to the ECHR.²⁹ The view expressed in the report is that accession to the ECHR:

- would give a strong political signal of the coherence between the Union and the “greater” Europe reflected in the Council of Europe and its pan-European human rights regime,
- would give citizens an analogous protection *vis-à-vis* acts of the Union as they presently enjoy *vis-à-vis* all the Member States; according to the report, this appears to be a question of credibility, given that Member States have transferred substantial competences to the Union, and that adherence to the ECHR has been made a condition for membership of new States in the Union,
- would provide the ideal tool to ensure a harmonious development of the case law of the two European Courts in human right matters.

This question will have to be discussed and agreed upon in the Plenary of the Convention, and it of course remains to be seen what the decision of the Heads of State and Government in the IGC 2004 will be.

3. Discrepancies between internal and external protection of fundamental rights are moreover apparent regarding the scope for action to sanction a state for a breach of fundamental rights. Serious human rights violations by a Member State can be sanctioned according to Article 7 TEU. Yet, the options for monitoring as well as sanctioning actions within the Union are vastly more limited than those referring to third countries or to applicant states. Hence, there is a “potential scope of disparity between the internal and external policies on human rights promotion” (Williams 2000: 616); or as Clapham puts it, the EU suffers from “inconsistency, inherent in the CFSP, whereby the Union decries violations of human rights abroad yet has no voice with regard to human rights problems at home” (1999: 639).

EU Enlargement and the Protection of Minorities: The Case for Improvement

The question of “double standards” between the EU’s internal and external human rights policies becomes even more accentuated with regard to the protection of minorities. Indeed, the issue of minority rights is an important item in the relationship

²⁹ Provided that the Union is given legal personality, issue that is being debated within Working Group III of the Convention on the future of Europe.

with candidate countries but it is broadly absent from the internal agenda of the EU. As already mentioned along this chapter, the Copenhagen Criteria include the respect and protection of minorities by candidate countries as a precondition for accession. However, although the Amsterdam Treaty accommodated the Copenhagen Criteria in Article 6(1) TEU³⁰, the protection of minorities was not included explicitly in that Article.³¹ This omission also applies to Article 49 TEU as adapted in Amsterdam, which only refers to the principles set out in Article 6(1) as a precondition for applying for membership. In words of Bruno de Witte, “respect for democracy, the rule of law and human rights have been recognised as fundamental values in the European Union's internal development *and* for the purpose of its enlargement, whereas minority protection is *only* mentioned in the latter context” (de Witte 2000: 4; italics in original).

Indeed, the explicit mention of minority rights is a new element of EU human rights policy that gained momentum for the very first time in the context of enlargement to the East. In the pre-Maastricht period, the issue of minority protection was mainly circumscribed to an interest of the European Parliament in the linguistic heritage of minorities.³² Maastricht's contribution to the cause of minority protection was Article 128 TEC (Article 151 after Amsterdam), which “gave birth to the concept of cultural diversity” (Toggenburg 2000: 25)³³ by expressing the intention of the Community to contribute to the “flowering of the ‘cultures of the Member States, while respecting their national and regional diversity’” (TEC Art. 151: 1, quoted from Toggenburg 2000: 11).³⁴ Following this provision, EU's institutions have continuously highlighted the benefits of multiculturalism and diversity for and within the Union.

³⁰ Indeed principles of Article 6(1) “are widely regarded as confirmation of the Copenhagen political criteria within the text of the TEU” (Nowak 1999: 687-692).

³¹ “While in Copenhagen special emphasis was laid on the protection of minorities, this criterion was not explicitly included in Article 6(1)” (Nowak 1999: 692).

³² Since the 1980s the EP has issued a number of resolutions dealing with minority languages and cultures (cf. Toggenburg 2000).

³³ For a more extensive analysis see Toggenburg (2000).

³³ “Monitoring the EU Accession Process”, Open Society Institute, 2002.

³⁴ The reform of Amsterdam added that when the Community takes action in any field of its competence, it will take cultural aspects into account “in particular in order to respect and to promote the diversity of its cultures” (Article 151 TEC).

It was only the prospect of Eastern enlargement, and the particular political and historical background of Central and Eastern European Countries regarding minorities which put the issue on the EU's agenda. The fact that minority protection is mentioned as an independent issue in the Copenhagen criteria indicates therefore that the EU did not consider it sufficient to make the protection of human rights alone a precondition for accession.

While there was surely a need for the EU to address the serious shortcomings in minority protection in the CEEC, an obvious contradiction was created by including protection of minorities as a precondition for enlargement, whereas the EU has not taken the appropriate steps to develop an equivalent requisite for its own Member States. Indeed, the requirement to demonstrate "respect for and protection of minorities" is not matched in internal documents binding upon Member States (OSI 2001 a). It is in fact difficult to find common standards on minority protection within the EU framework. Admittedly, the principle of non-discrimination enshrined in Article 13 TEU and in the EU Charter of Fundamental Rights as well as the two Article 13 Directives already give some guidelines with regard to what should be understood by "respect for minorities". Thus, minority issues have been incorporated into EC legislation through anti-discrimination provisions, but there is no legislation dealing specifically with collective minority rights. The question is then whether anti-discrimination is sufficient to ensure the respect for and protection of minorities (cf. Tsilevich 2001).

Undoubtedly, the Race Directive and the Employment Directive constitute a major step in the furthering human rights protection. The prohibition in the two Directives of both direct and indirect discrimination as well as of harassment and the incorporation of a definition of the three concepts constitutes a great improvement. Moreover, it is noticeable that the Race Directive goes beyond the restricted area of employment to cover other important areas such as social protection or education. However, there are some shortcomings to the system created by the two Directives. Of special relevance is the omission of references to religious discrimination in the Race Directive, an aspect that is very often related to discrimination on the grounds of racial or ethnic discrimination. The discrimination on the grounds of religion or

belief is thus only covered by Directive 78/2000/EC, which is limited to the area of employment. Moreover, the Directives do not cover incitement to racial hatred and violence.³⁵ Besides, protection for a minority as a group is not guaranteed since only individuals are allowed to take their complaints up to court. Of course, by ensuring that individuals are not treated differently from others, anti-discrimination legislation indirectly also covers the rights of minorities where its members are legally disadvantaged as individuals.

It can then be argued that enacting anti-discrimination legislation is a first step, but “insufficient in itself to address the spectrum of minority rights enshrined in modern human rights instruments. A more elaborated framework will be required to ensure that the minority problems in Europe’s Eastern half don’t return to haunt the enlarged Union of the future” (Tsilevich 2000).

Looking for EU standards on protection of minorities, it is also difficult to find a common denominator in the legislations of the Member States. Indeed, there is not a single approach to the issue of minorities in the legislation or in the constitutional traditions of the Member States. Just as an example, France³⁶ and Greece do not recognise the existence of minorities, and in the case of Germany only minorities of German nationality are recognised.

Hence, apart from the benchmarks provided by the two Article 13 Directives, and the general commitment to preserve cultural diversity reflected in Article 151 TEC, when monitoring political accession criteria, the Commission has to make use of further European and international instruments on minority protection. Instruments such as the Council of Europe's *Framework Convention for the Protection of National Minorities* are then used by the Commission as source of reference under the

³⁵ However, a proposal of the Commission for a Council Framework Decision on combating Racism and Xenophobia is currently being discussed (COM(2001)664 final, OJ C E/2002/75, p.269, 26.03.2002). The aim of the Decision is the approximation of laws of the Member States and closer cooperation between judicial and other authorities regarding offences related to racism and xenophobia. The Commission proposal explicitly refers to public incitement to violence or hatred for racist and xenophobic purposes as one of the offences that Member States shall punish as a criminal offence. It remains to be seen the outcome of the discussions in the Council. It is worth mentioning that from the preparatory documents in the Council it seems that the scope of the definition of racism and xenophobia is more limited than that of the Commission proposal, which originally included religion or belief together with race, colour, descent and national or ethnic origin. The last documents of the Council only include these last grounds mentioned in the text above.

Copenhagen monitoring mandate. Thus, the instruments the Commission applies to monitor compliance with the Copenhagen Criteria are greater in number and wider in scope than those it can use monitoring the present Member States. As a matter of fact, for the latter only those aspects that are part of the *acquis* are subject to monitoring and can be brought before the European Court of Justice. The asymmetry is self-evident.

This is the more worrying when realised that the ratification record by the Member States of the international instruments on protection of minorities is far from complete. In particular, not all Member States have ratified the *Framework Convention for the Protection of National Minorities* (FCNM)³⁷, or the *European Charter of Regional or Minority Languages*.³⁸ This fact has been highlighted several times by the European Parliament, mainly when issuing its reports on human rights. In its annual *Report on human rights in the world in 2001 and European Union Human Rights Policy* the Parliament reaffirms the defence of minority rights within the EU and in the candidate countries as a major priority for the EU strategy for human rights and democracy according to Article 13 of the Treaty. Besides, the report of the EP for the year 2000 on the situation of fundamental rights in the EU decided to follow the structure of the EU Charter of Fundamental Rights in its evaluation (cf. pp. 11). Therefore, attention was devoted to analysis and recommendations in the field of rights of national minorities. Attention was drawn to the above mentioned lack of ratification by certain Member States of the *European Charter for Regional or Minority Languages* and the *Framework Convention for the Protection of National Minorities*, to the need to “honour their special duty to the various national minorities among the EU population” and give due weight to their (...) rights”, and to the need to improve the situation of Roma/Sinti living within the EU.

There is therefore a need to articulate the standards for the protection of minority rights within the EU – standards that should be clear, unconditional and apply to all

³⁶ France does not recognise the existence of minorities arguing on the basis of the constitutional principle of the indivisibility of the Republic and equality among citizens.

³⁷ France has not signed the Convention; Belgium, Greece, Luxembourg and the Netherlands have not ratified the Convention. Denmark and, to a lesser extent, Germany have ratified the Convention but entered declarations limiting the potential beneficiaries of the FCNM.

³⁸ Belgium, Greece, Ireland and Portugal have not signed the Charter; France, Italy, Luxembourg and The Netherlands have not ratified the Charter yet.

EU Member States, new and old. The danger of creating the perception of “double standards” is in itself reason for the EU to search for more consistency in its approach to minority protection, in order to enhance the credibility of its external conditionality policy (Amato/Batt 1998 a). But beyond the question of credibility there is still another worrying aspect attached to this situation. The protection of minorities is only a criterion monitored in the framework of the Copenhagen Criteria, and since there is no EU binding legislation on the protection of minorities, the question arises of what will happen beyond accession. If the EU does not create standards regarding the respect for and protection of minorities applicable to its Member States and sets up an adequate monitoring system for the compliance with those standards, it may be the case that candidate countries “import” minority-related problems into the Union without the latter having the appropriate means to address them.³⁹ This, added to the growing migration flows arriving to the EU, “will render inevitable the elaboration of a more concrete Union framework on minority rights” (Tsilevich 2001).

³⁹ In words of John Packer, Legal Adviser to the OSCE High Commissioner on National Minorities in 1999, “we have serious concerns that if there is not an EU internal (human rights) assessment process and if there is not a continual annual reporting, new states which become EU members might feel less pressure to meet those human right standards” (Report from the EU Human Rights Forum, 30.11-01.12.1999).

Part II

Minorities in the Process of Enlargement

This section shall illustrate the subject matter of minority protection in the context of enlargement by focusing on the questions: What is the situation minorities live in? How is the EU's monitoring system structured? What are the focal points the EU considers in its assessment?

The next three chapters are to give some answers to these inquiries. The first one discusses the broad historical and regional context the Russian-speaking and Roma minorities live in. It is followed by an outline of how the Commission conducts its monitoring functions. Finally, the two issues are looked at together in an examination of the Regular Reports' content, i.e. the major problems that minority protection faces according to the findings of EU monitoring.

Minorities in Central and Eastern Europe

Compared to Western European states, the proportion of minority population is relatively higher in the CEEC. While the large Roma population in Central and Eastern Europe is deeply rooted in history, the great number of Russian speakers⁴⁰ in Latvia and Estonia has its origin mainly in 50 years of USSR rule. During this period mostly forced Soviet-migration changed the ethnic composition of all three Baltic States substantially. Migration was not only promoted due to Soviet ideology, which supported the creation of cosmopolitan societies, but as well as to provide for new labour force in industrialising parts of the Republic. “Baltic State residents were particularly targeted as anti-Soviet, with the result that tens of thousands of ethnic Estonians, Latvians and Lithuanians emigrated from their native countries. At the same time, incentives were given to Russians, Ukrainians, Georgians, and other groups to migrate to the Baltic States [...]. The result was that the number of ethnic Estonians, Latvians and Lithuanians dropped tremendously between 1934 and 1959 in their respective countries: 100,000 ethnic Estonians, 169,000 Latvians and 267,000 Lithuanians vanished from census data in 25 years”

⁴⁰ I will use the terms *Russian-speaking* minority or *Russian speakers*. Some documents and studies also apply the term *ethnic Russians* which would be misleading in our context since the Russian speaking minority which this study focuses on also includes members of Belarussian, Jewish, and Ukrainian minorities.

(Gelazis 2000: 4-5).⁴¹ Most people who migrated to the Baltic States were native Russian speakers. The language, which belonging to the Slavic language family differs notably from Latvian as a Germanic and Estonian as a Hung-Ugrian language, served not only as basic administrative language but (together with membership of the Communist party) also guaranteed a privileged status in society, e.g. regarding access to higher education. Today, Russian speakers represent a substantial percentage of the Estonian (14 percent) and Latvian population (29.4 percent).

The size of the diverse Roma populations⁴², the biggest minority group in Central and Eastern Europe, is much more difficult to estimate than that of the Baltic minorities. As Marushiakova and Popov emphasise: “No one knows exactly how many Gypsies currently live – and used to live – in Central and Eastern Europe. There are no reliable statistical and demographic data for their distribution or their internal subdivisions, only a significant amount of imprecise and fluctuating information” (2001: 34). The lack of reliable data complicates a systematic monitoring of discrimination. However, so far there is still “no consistent way of counting them: methods include estimating from a count of number of caravans, self-identification and the opinion of neighbours” (Kovats 2002: 2). Mostly due to the preference of Romani people not to identify themselves as Roma when interrogated for official data collection, it is estimated “that recent official statistical censuses generally record only about one third of the real number of Gypsies in each country. [...] The minimum number for the region based on national censuses is about 1,500,000 while the maximum estimate, if one includes those of Roma leaders, is around 6,300,000. One can summarise this complex and confusing picture by stating that today, as in the past, the population of Gypsies varies considerably from country to

⁴¹ Gelazis takes these figures from Lauristin, Marju/Vihalemm, Peeter (eds.) (1997): *Return to the Western World: Cultural and Political Perspectives on the Estonian Post-Communist Transition*. Tartu: Tartu University Press, pp. 305-506.

⁴² EU documents consequently apply the term *Roma* “as a generally accepted generic name for the group of people who speak a Romani tongue and/or share a common ethnic identity, culture and history. The term Gypsy and several variants of Tsigan are considered by many to be pejorative” (Commission 2002 b: 4). Pointing out that the term *Roma* only gained wider use after 1989/90, Marushiakova/Popov however remark that the term *Gypsies* “is wider in scope” and allows to also “include the Gypsy communities who are not Roma or who are considered ‘Gypsies’ by the surrounding but do not wish to be considered as such” (2001: 52). A further difficulty of the term is that “[n]ot all those politically defined as Roma call themselves by this name; and some of those who do not, such as the German *Sinti*, outraged by what they perceive as claims of superior authenticity by *Valach Roma*, even repudiate the appellation Roma” (Marushiakova/Popov 2001: 58). Nevertheless, since this study is focusing on the post-1989/90 era in Central and Eastern Europe I will generally apply the Commission's terminology and use the term *Roma* – bearing in mind the limitations of the term.

country and the proportion they represent of the population as a whole also differs. In some countries (Bulgaria, Romania, Hungary, Slovakia and possibly the Czech Republic) Roma currently represent 5-10 per cent of the total population, while in others (the countries of the former Soviet Union) they constitute less than 1 per cent" (Marushiakova/Popov 2001: 34-35).

Although it is right that Roma represent the largest minority group in the CEEC, Roma peoples do not constitute a uniform entity. On the contrary, the various Romani groups are marked by great plurality.⁴³ Originating from the Indian sub-continent, the first major migration waves of Roma people to Europe date back to the fourteenth and fifteenth centuries. "These migrations produced a disperse mosaic of peoples, united in common origins, culture and to some extent language, but also distinguished by their diverse historical experiences and the resulting impact on each group's culture" (OSCE 2000: 20). This plurality finds expression, on the one hand, in differences between West European Gypsies and Central European Roma and, on the other hand, within these groups themselves. Roma communities, which use between 50 and 100 different dialects, neither have a common tongue nor do they share the same lifestyles (Kovats 2002: 2). Another common but misleading believe is to associate all Roma with nomadism since, as a matter of fact, Roma have been stable residents in many CEEC for centuries (OSCE 2000: 20). Kovats thus comes to the conclusion that "it is important to resist the inherent bias of the Roma/Gypsy discourse, exemplified by the Council of Europe's explicit proposal to 'replace the socio-economic image by a cultural one'" (2002: 2) because there is no such thing as *one* cultural Roma identity.

Looking at the post 1989/90 situation of Roma in the CEEC, the period of socialist rule had, of course, certain effects on the present situation and can therefore not be left out. The treatment of Roma under the diverse Communist regimes cannot be generalised. Nevertheless, there are some recurring patterns across the countries. While throughout earlier periods of Communist rule Roma received state support to develop their cultural identity in some countries, in most cases "during later peri-

⁴³ For a more detailed illustration of the cultural and linguistic plurality amongst Romani/Gypsy groups living in Central and Eastern Europe see Marushiakova/Popov 2001: 37, following. The authors also point to the fact that these subgroups are faced with problems similar to other language minorities and that some of them "such of the *Rumungri* in Central and Europe, have lost their language and traditional ethnic culture and to a great extent even their Roma identity and nowadays many of them are poor and marginalized (ibid. 2001: 40).

ods they were subjected to policies of forced assimilation” (OSCE 2000: 23). According to Communist ideology “[t]he general aim of Communist policy was to make Gypsies equal citizens of their countries but successful equalisation was understood to mean the complete assimilation of Gypsies, so that they would swiftly vanish as a distinct community” (Marushiakova/Popov 2001: 47). In retrospective it is argued from many sides that Roma people were altogether better off before than after the 1989-90 change of regimes. Guy e.g. asserts that “[i]n summary, while moribund assimilation policies of the Communists lapsed, they were replaced by pandemic unemployment and destitution, verbal and physical racist attacks sometimes exalting to murderers and pogroms, increasing segregation in education and housing, and widespread health problems aggravated by poverty” (2001: 13).⁴⁴ Reasons for this may mainly be found in the changed economic context. The shift to market economies meant that the demand for unskilled labour dropped dramatically, a development that affected Roma most strongly. “After 1989 post-Communist economic restructuring, involving the closure of outdated smokestack industries and privatisation of collective farms, soon turned what had been substantial Roma employment levels into almost universal unemployment” (Guy 2001: 13).

Despite the fact that the two minorities presented here are marked by fundamental differences, they have in common that they constitute a substantial proportion of the population in countries they reside in. In consequence, approaches to find political solutions for central challenges concerning integration, discrimination and the provision of minority rights entail comparable aspects. One example from the institutional sphere is that the establishment of an official body to promote minority protection, say an Ombudsperson, is relevant for all applicant states. At legal

⁴⁴ Evaluating the meaning that Communist rule had for Roma, the opinions of various scholars differ slightly. Interpreting longer than 40 years lasting Communist rule as an important feature, Mirga/Gheorghe comment: “Most researchers and activists are in agreement that on balance, in spite many disadvantages, this period was more beneficial for Roma than either what preceded it or came after. In the same way that the incredible diversity of the Romani people is often oversimplified out of all recognition, so too is the crucial period of state socialism. Communism is often seen as a colossal steamroller crushing Romani identity ruthlessly and yet, paradoxically and so grudgingly, it is admitted to have somehow improved the situation of most Roma. [...] Examined in more detail, the monolithic face of Roma Policy under Communism fragments in multiple faces” (Mirga/Gheorghe in Guy 2001: XVI, introduction). Steward, on the other hand, is more critical on the effects of socialist policies on the lives of Roma when he states that “in the case of Gypsies [m]any believe that because their position has by and large (though not universally) worsened since 1989, Communism was for them ‘a good thing’. In reality this is no more true for them than for the other poor of Eastern Europe. Indeed, crucial aspects of official policy towards Gypsies have left a demanding legacy of forty years of social mis-management” (Steward 2001: 86).

and constitutional level in particular broad similarities exist in the Commission's suggested changes which are derived from international standards or directly from the EU framework. Furthermore, although national programmes or action plans differ according to country related specific features, the standards the Commission applies in assessing the outline and functioning of a policy measure are set to compare all states on the same footing. Moreover, minority policies of one state do not only apply to one minority group.⁴⁵ As mentioned in the introduction, horizontal consistency which ensures an equal judgement on all candidate states appears as an area in which the assessment of minority protection could face substantial difficulties. In order to explore how the Commission practically attempts to achieve consistency of its assessments, we shall now turn to the question of how the EU proceeds when monitoring the application of minority protection.

Monitoring Human Rights in the Applicant States

How is the assessment of minority protection in the candidate states put into practice? With regard to the application of the political accession criteria, the Commission has established a set for formal procedures according to which regular monitoring is carried out. The first evaluation of the human rights situation in the applicant states was published in July 1997 as part of the *Agenda 2000*. The Commission's *Opinions* were based on answers that the applicant states gave to a questionnaire designed by the Commission. The questionnaires were complemented by bilateral follow-up meetings, reports purportedly provided by the relevant embassies of the European Union's Member States, assessments from international organisations (including the *Council of Europe* and the *Organisation for Security and Cooperation in Europe* (OSCE)), and reports made by unidentified non-governmental organisations (NGO) (Williams 2000: 608; Nowak 1999: 691).

The Regular Reports (or *Progress Reports*), which have succeeded the opinions "have moved from being assessments of the state of the transition process and the general compliance with the Copenhagen criteria to assessments of detailed compliance based on the negotiating chapters. They can therefore be seen not only

⁴⁵ Apart from Roma there is a number of other relevant minorities in most candidate countries. Thus, a substantial number of ethnic Turks live in Bulgaria, Romania hosts a large Hungarian minority, in the Czech Republic there are a Slovak, Polish, German, Hungarian and Ukrainian minorities, and Slovakia has more than ten recognised minorities. However, since the integration of these minorities is generally more advanced, issues connected to other than the Roma minority find occasional mentioning in the reports but are not a major issue in the Regular Reports.

as part of the verification process for the negotiations but also as part of the conditionality assessment linked to the available financial instruments” (Mayhew 2000: 10). The information used for the reports is provided by the candidate countries themselves, the Member States and Commission representations in the states, by Member State officials seconded through EU programmes to work in the administrations of the candidate countries, and any additional material provided by non-state actors, e.g. Non Governmental Organisations.

Since 1998 the Regular Reports are complemented by *Accession Partnerships* (AP) that define particular priorities for each applicant state – amongst others concerning the political criteria. Accordingly, the Accession Partnerships for Bulgaria, the Czech Republic, Hungary and Romania made the further integration of Roma a medium-term political priority, while Slovakia's partnership agreement laid down that the country was to strengthen the policies and institutions protecting the rights of minorities as a medium-term political priority. Based on the findings of the Regular Reports, the first Accession Partnerships of 1998 were revised in 1999, and a second time in 2002. The improvement of the situation of the Roma minority gained further momentum in these updates “through the implementation of the national action or framework programmes [which are] a political priority in Bulgaria, the Czech Republic, Hungary, Romania and Slovakia” (Commission 2002 b: 6).

The Formal Drafting Process⁴⁶

Given this framework for Commission’s reports on the enlargement process: how does the assessment proceed? From the collection of information to the final adoption of the Regular Reports the EU assessment involves a multitude of actors over a lengthy process. Before the actual drafting begins, the Commission is involved in an intensive period of gathering information of all different kinds. Information included in the Regular Reports is drawn from a wider range of sources. The reports generally refrain from quoting from any source, facts are never to be taken directly from another document but undergo a process of crosschecks with other sources.

The material used can be classified into four broad groups, namely information provided by: the states monitored, the Commission’s delegations, various international organisations, and non-governmental organisations. First, the applicant

⁴⁶ This and the following section are based on an interview conducted with an official of DG Enlargement of the European Commission on 3 July 2002.

states directly give the Commission their view on the relevant issues the Regular Reports deal with. Another source of information is the contributions which the Commission delegations prepare. The delegation papers serve as a first preparatory draft of the reports. They are based on the monitoring a particular delegation has been carrying out throughout the preceding year and include the findings of monthly reports which consider such different references as news items, conferences or expert interviews. Before drafting the preparatory reports for the Commission, meetings with the most relevant national actors are held, i.e. the national ministries, NGOs and social partners.

Apart from the material provided by the delegations and the candidate countries themselves, the main international organisations dealing with Human Rights in the European region, namely the *Council of Europe* and the *OSCE*, are central sources of information for the Commission. In fact, in the field of minority rights the co-operation between the Commission, the Council of Europe and the OSCE High Commissioner on National Minorities is very close. Part of the preparatory phase are meetings between the Commission and these bodies. Although, in principle, there is no hierarchy in the use of different sources, documents of the international organisations have a slightly different status than, for instance, academic publications or reports issued by NGOs. This is also reflected by the fact that the Regular reports occasionally refer directly to opinions, recommendations or assessments of these bodies.⁴⁷ The special authority of information provided by the Council of Europe and the OSCE derives from the fact that all EU Member States and applicant countries appertain to these institutions. Moreover, OSCE documents are passed by consensus only.

The fourth class of information is drawn from NGOs. Like for other material, standard double or triple checking is essential to the Commission. Moreover, information must be always confirmed in more than one additional source. Alongside crosschecks with material of other external actors, the Commission delegations play

⁴⁷ The Council of Europe's national reports on compliance with the *Framework Convention for National Minorities*, including the evaluations by the Committee of Ministers of the Council of Europe, are a matter in all 2002 Regular Reports (except for Latvia which still has not signed the Convention) (cf. RR 2002; also RR 2001 CZ). The OSCE is usually mentioned concerning recommendations it has made for certain aspects, e.g. on language or election laws, in certain countries (RR 1998, 1999 EE; RR 1999-2001 LV; RR 1998 SK). Two other institutions the Commission occasionally refers to in the Regular Reports are the United Nations Human Rights Committee (see e.g. RR 2001 LV; RR 2002 CZ) and the European Court of Human Rights (see e.g. RR 1999 BU; RR 2002 LV).

an important role in verifying information. Exclusively the Commission verifies facts on human rights issues.

Verifying information is a time-consuming and complex task. While monitoring legal provisions is less complicated (review of existing legal framework), checking on the implementation of policies as well as monitoring the existence, and especially the functioning of institutions, is a much more difficult undertaking.

According to the Commission, its very prudent approach has so far prevented any serious complaints on the content of the Regular Reports by the applicant countries. It has however also raised criticism, especially by NGOs, that the positions the Commission takes in its reports are too lax.

After the collection of information has been completed, the country desks of the respective country teams in DG Enlargement prepare a first draft of the reports. These drafts undergo an extensive process of reading, discussion, rewriting and re-reading by DG Enlargement's horizontal unit and the country desks, closely involving the Commission's legal service. In this process, the role of the horizontal unit is not only to ensure consistency between the Regular Reports over the years, i.e. to ensure that facts taken up in previous reports are followed up adequately. The equal treatment of the applicant countries is also a priority, and horizontal coordination is to ensure that the same facts are mentioned and judged in the same manner across all applicant states.

Before the adoption of the reports, the Commission informs each candidate country of its main findings and conclusions, without however providing a paper version of the drafts, and without entering into a discussion of these findings and conclusions. However, the Commission's unwritten presentation summarising the envisaged content of the Regular Reports gives the applicant states the chance to submit comments and to provide the Commission with further factual information where they feel this is needed. On this basis, further refinements are implemented during the last weeks before the adoption of the Regular Reports in October. Preceding the final adoption by the College, the reports have to undergo further reading by the Commission's cabinets, the collaborators of the Commissioners and the Commissioners themselves.

Manuals and Guidelines

To ensure consistency of the Regular Reports over the years and across the states monitored, the Commission has established a methodology on how to apply the Copenhagen criteria. The methodology for drafting Regular Reports was developed by the Commission when writing its opinions on the applicant states. Established in 1997, the then elaborated guidelines have been refined over the years, although no far-reaching changes have occurred. The rules of procedure for drafting a report are summarised in an internal handbook. This comprehensive document is used at all levels of the DG Enlargement which are involved in the drafting process, as well as by the delegations. It describes which sources should be consulted, how horizontal co-ordination of texts should be implemented, and outlines how the involvement of major international organisations must be taken into consideration. Apart from this, the handbook includes specific checklists. These lists define how the key element for the EC's assessment – i.e. the Copenhagen criteria – is to be operationalised by outlining the facts that need to be examined. The checklist dealing with issues of minority protection relates to certain major international instruments. Accordingly, the Commission refers to the standards and benchmarks set by the *European Convention on Human Rights* (Council of Europe 1948) and the *Framework Convention for the Protection of National Minorities* (Council of Europe 1995). Considering the European standards established by these instruments, the check-list states that the following issues are to be included in a Regular Report: ratification of major international conventions, introduction of anti-discrimination legislation, establishment and functioning of an ombudsman office with general competencies, the application of human/civil and political rights and special minority rights, as well as an account of the specific situation in the countries (e.g. the situation of Roma, Russian speakers).

Focal Points of the Regular Reports

Minority protection is commonly subdivided into two major areas, namely the protection from discrimination and the promotion of Minority rights.⁴⁸ These two categories are strongly interwoven and often affect the same policy fields. For instance, education policies are discriminatory if children of a certain group suffer from segregation. On the other hand, state support to establish a university that teaches in a

minority language regards the promotion of minority rights. The focal points of the Regular Reports will be summarised in this section according to those subject areas the assessments concentrate on.⁴⁹ Both aspects of minority protection are relevant indicators in each field because under the Copenhagen criterion the Commission has the mandate to monitor the two, anti-discrimination and minority rights.⁵⁰

The Regular Reports have thus established a specific set of issues over the years and across the states which highlight infringements of minority protection relevant to the Copenhagen criteria. The emphasis on specific topics differs partially from aspects which are generally considered when minority protection is discussed in other contexts. One example is the problem of stateless children, which is a central matter of concern because of the specific situation in the Baltic States.

To provide further insight into more general questions, the next subchapter will begin with a discussion on some problems of discrimination and minority rights. The then following parts will focus on the various policy fields that affect minority protection.

Protection from Discrimination and Provision of Minority Rights

In a *Staff Working Document on the European Initiative of Democracy and Human Rights*, the Commission outlines the main issues related to minority protection as such:

“All continents, and the vast majority of modern states, host minority populations. Europe itself is home to about a hundred national minorities. Minority rights are often not fully respected. The most common problems encountered are racism from the majority population; discriminatory treatment from institutions, particularly at the local level; educational and cultural disadvantage; and unsatisfactory level of participation in decision-making and economic prosperity. Some communities, like the Roma, even experience social and economic exclusion. Minorities issues can entail a threat to peace and stability when they translate into nationalistic tendencies, or when peaceful coexistence with the mainstream population, or between different minorities, can no longer be ensured” (Commission 2001 b: 37-38).

Widespread discriminative attitudes against minorities are a fundamental problem that affects societies and public services, but also governments. If discrimination is

⁴⁸ In this division the study follows the approach by the Open Society Institute (OSI: 2001).

⁴⁹ Where it is considered to add important information on the subject matters of this chapter, further literature other than EU publications is being referred to in footnotes.

⁵⁰ It must be noted that the following does not claim to give full accounts of the present situation in each one of the applicant states. Rather, in order to provide an overview on how the Regular Reports define certain topics and which issues the reports identify as central, examples from different reports are referred to. Accordingly, some of the cases quoted below refer to a certain situation in a state at one point of the monitoring period that might have changed later in the pre-accession process.

deeply entrenched and formalised in institutional, social and governmental behaviour, one speaks of institutionalised discrimination.

Anti-Roma sentiments have been deeply rooted in society over the centuries. To encourage a change in attitude and to break with discriminative traditions in legislation and official conduct is a particularly complex task. As the *OSCE High Commissioner on National Minorities* asserts, only during the very last part of the twentieth century concerted European efforts were made to address the individual and cumulative effects of history. In his monitoring report on the situation of Roma and Sinti he concludes: “[w]hile good will coupled with some effective initiatives can be observed on the part of certain authorities in some [OSCE] States, the overall picture remains one of the extreme alienation of a Europe-wide under-class” (OSCE 2000: 24).

With regard to the situation of Roma, some Regular Reports elaborate on discrimination in society and misconduct of state institutions (foremost the police but also the judiciary, cf. RR BU, CZ, HU, RO, SK). Unlike this, the reports for the Baltic States focus on discrimination only in connection to certain areas (most importantly access to citizenship). Moreover, the 2001 reports mention developments in the adoption of EU anti-discrimination legislation.

Discrimination affects all areas of social life: education, employment, housing and access to public services such as health care. It finds further expression in, for example, political representation and the media. Discrimination and social exclusion are one source of high levels of illiteracy, unemployment, poverty and, connected to these factors, commonly low living-conditions. While the imperfect protection of minorities in various fields of life is stated with view to almost all CEEC, the stronger term “social exclusion” is used only in the Regular Reports on Bulgaria, the Czech Republic and Slovakia. But one example is the 2001 report on Slovakia, which explains that poor schooling, housing and high unemployment “have largely contributed to a situation which deepens further social exclusion”.

The most extreme form of anti-minority behaviour is racially motivated violence. Racially motivated violence conflicts with the right to respect of physical integrity,

which includes in some circumstances the rights to security of person and life.⁵¹ The Regular Reports comment in several cases on racial violence by individuals or state institutions, which, in the worst case, is institutionalised. Thus, the 1999 Regular Report on Romania refers to “anecdotal evidence [... of] police brutality, prejudice, racist harassment and violence” which is however difficult to quantify. For Slovakia the 1999 and 2000 reports refer to “violence at the hands of thugs (‘skinheads’) and lack of protection from the police”. The issue is taken up again in the report in 2001: “Violence, notably at the hands of ‘skinheads’, continued to be a serious threat to this [the Roma, EGH] minority. In 2000, the police recorded 35 cases of racially motivated crimes, with Roma being the biggest group of victims. In some cases, Roma were exposed to serious ill-treatment by the police”.

Moving to the topic of minority rights, monitoring concentrates on specific freedoms that individuals or communities are to be granted by state and society. According to international standards, minority rights cover the choice of identity, the use of minority languages in the public and private spheres, minority education, the access to media, and the effective participation in public life (cf. OSI 2001: 17). Of these issues the use of minority languages is mainly discussed in the Regular Reports on Estonia and Latvia. Certain aspects of minority rights in the field of education also appear in the context of bilingual universities (Romania) and the teaching in and of minority languages, culture and history at schools. For example, the 1998 report on Slovakia notes positively that parliament had rejected an amendment to the Education Act, “which could have discriminated against ethnic minorities by prohibiting the teaching of subjects such as geography and history in languages other than Slovak”, while the 2000 report elaborates that the “efforts to provide teachers with training about Romani culture and history have nevertheless been strengthened and the first textbook on Roma history has been made available to schools”. Similar statements can be found in the reports for all CEEC with a substantial proportion of pupils from a minority background.

Political participation and the access to media are less prominent topics in the Regular Reports. Especially the latter is only mentioned in few assessments.

⁵¹ These rights are laid down by the UN Universal Declaration of Human Rights (1948, Art 3), the International Covenant on Civil and Political Rights (ICCPR International Covenant on Civil and Political Rights, see at: <http://www.unhchr.ch/pdf/report.pdf> (last accessed 26 April 2001) (Arts. 6(1), 7, 9(1)) and the European Charter of Fundamental Rights and Freedoms (Arts. 2 and 3; cf. OSI 2001: 17).

The following sections will elaborate on the issues raised in order to provide a more detailed look at the single aspects of both minority rights and anti-discrimination.

Citizenship

The discussion of citizenship can be differentiated into, on the one hand, the attachment of certain rights to citizenship and, on the other hand, the access to citizenship in general. While access to citizenship is a prominent issue in the Regular Reports, the former matter is basically left out and only mentioned in some singular cases, for instance in connection with non-citizens passports that disqualify the owner of certain fundamental rights (RR 1998, 1999 LV). Further, Estonia introduced regulations that connect minority rights to citizenship when ratifying the FCNM, although the Regular Reports refrain from going into this subject matter.⁵² One explanation for this is that Austria and Germany also reserve the official minority status to citizens only, and the Commission would hence run danger to act inconsistently if commenting on Estonian laws while having no say on regulations of EU Member States. Moreover, other EU Member States, for instance France and Greece, have not even ratified the FCNM and their national constitutions do not recognise the existence of minorities (cf. above p. 22).⁵³

Although contradicting international human rights, the impact of non-citizenship often implies far more than the exclusion from political participation, and can mean exclusion from employment, health-care or other social services.⁵⁴ Moreover, in the economic sphere integration of minorities can be limited if non-citizens are not allowed to practise some professions on the grounds of state security, as for example in Latvia, where non-citizens are prohibited to become lawyers, armed security guards or private detectives (RR 1999 LV).⁵⁵

⁵² The OSCE High Commissioner for National Minorities officially exhorted to bind minority rights to citizenship (OSCE 2000).

⁵³ For more details on this see OSI (2001: 50).

⁵⁴ The OSCE High Commissioner for National Minorities reckons that the “most extreme form of political exclusion is, of course, denial of citizenship” (OSCE 2000: 156), a judgement that alludes to the fact that the denial of citizenship entails the exclusion from the full amount of citizenship rights.

⁵⁵ Additionally, after accession only persons holding a national citizenship will gain EU-citizenship since according to Article B of the Common Provisions, Title I (Treaty on European Union) EU citizenship applies to the nationals of the Union’s Member States.

Access to citizenship for Russian-speakers is the most prominent topic of the Estonian and Latvian Regular Reports.⁵⁶ Central obstacles that the reports continuously remark on are shortcomings in providing adequate citizenship laws and naturalisation procedures which include civic and language tests. The reports note several improvements and have, in the last years, certified the states to meet the recommendations by the OSCE in the area of citizenship and naturalisation (RR 2000 EE; RR 1999 LV). However, the need for better information about how to gain citizenship remained a prominent issue in the reports. Apart from the Baltics, changes of the citizenship law allowing easier access to citizenship for Roma people were only a subject in the 1999 report on the Czech Republic.

A special case related to the problem of citizenship is that of stateless children. Even though Estonia and Latvia changed the relevant laws to that end that children born in the country are granted citizenship by birth, the numbers of naturalisation of stateless children remained relatively low. The reports explain this mainly with the wish of parents to naturalise at the same time as their children (cf. RR 1999-2001 EE, LV).

Language Regulations

Another area on which the Regular Reports on Estonia and Latvia put great emphasis is language regulations. The legal framework for the use of minority languages touches on many others issues, such as citizenship, education, media, and political participation, but also economic questions including employment and business laws. In the latter context most attention is being paid to regulations that limit the freedom of expression and economic liberty. The seriousness of intended or actually introduced amendments to language regulations becomes evident in that the reports explicitly refer to Estonia's and Latvia's obligations under international instruments and the Europe Agreements.⁵⁷

⁵⁶ Considering the great number of minority population in the Baltic states, problems arise since “[i]nstead of offering a ‘zero-option’ formula, like all other states on the territory of the former Soviet Union did, the Estonian and Latvian Governments restricted automatic citizenship to those who had held it before the Soviet occupation and their direct descendants” (Zaagman 1999: 23).

⁵⁷ With regard to language regulations, the Open Society Institutes hints to shortcomings of the EU anti-discrimination *acquis*: “Notably, the Directive does not prohibit discrimination on the grounds of language, an issue of particular relevance to Estonia and Latvia. Russian-speaking minorities who seek authority for claims of language discrimination must look to non-EU instruments, including Article 14 of the European Convention of Human Rights (‘ECHR’) and Article 26 of the International Covenant on Civil

Moreover, some language regulations prescribe a certain level of proficiency for the participation in the national economy or even introduce government agencies to control the use of language in the private sector (cf. RR 1998 EE)⁵⁸. In these cases, the Regular Reports express the concern that rights guaranteed to EU-citizens by the Europe Agreements are affected. For instance, referring to the “rights and freedoms guaranteed under the Europe Agreement [which include e.g.] the exercise of business activities for enterprises from the European Union” the 1999 report on Latvia comments: “A liberal attitude will also be particularly important with a view to Latvia’s accession to the European Union. In particular, once Latvia becomes a Member State of the European Union, any European Union national or company would be able to invoke the principle of the prohibition of any discrimination on the grounds of nationality to challenge the application of the national legislation in practical cases”. Employees in the public administration (for example, nurses, police and prison officials) are generally required to show at least a minimum level of proficiency in Estonian, respectively Latvian.⁵⁹ Concerning the use of language in the public sphere, regulations can be quite far-reaching. An example is stated by an Estonian law which “makes it a legal offence for signs addressed to the public not to be in Estonian language” (RR 2002 EE), a regulation which according to the *Advisory Committee on the Framework Convention of National Minorities* is not in line with the Convention and is thus criticised in the Regular Report.

Furthermore, the reports make a special comment on the application of language laws. According to the Commission the states “should ensure that in the implementation of this regulation the principles of proportionality and justified public interest are properly respected” (RR 2001 EE) – the reports on Latvia state the same. This remark concerns however not only the application of relevant laws in

and Political Rights (‘ICCPR’), both of which expressly prohibit discrimination on the grounds of language” (OSI 2001).

⁵⁸ The 1999 report discusses proposed amendments to the Estonian Language Law which, if introduced, would have established strict language regulations for the private sector. “The most controversial provision of the amendments to the law is that the employees of business associations, NGOs and foundations and physical persons as entrepreneurs (self-employed) must use the Estonian language for offering goods and services while performing their work. The Estonian language requirements will not be applied to those foreign experts who have arrived in Estonia on the basis of a work permit for a period of up to a year. [...] The application of the law in the public sector could have considerable impact in some groups of public workers such as prison officials, of which around 40% are non-Estonian citizens and have a relatively low command of the Estonian language” (RR 1999 EE).

⁵⁹ The 2002 report on Estonia contains a detailed paragraph on the work of the so-called *Language Inspectorate*, the official body supervising adhesion to language regulations in the public and private sector, and raises a fair amount of recommendations similar to the examples quoted here.

the economic sphere but it also points explicitly to election laws. In this field, regulations which lay down language requirements for candidates to parliamentary and local elections are continuously at issue, as well as the ban of electoral posters that make use of a language other than the official one (cf. RR 1999 EE).

By introducing language regulations that aim to enhance political participation, a number of candidate states have promoted minority rights. Thus, in Romania in localities where more than 20 per cent of the population belongs to a minority, members of that minority have the right to receive services from local authorities in their mother tongue; moreover the agenda and decisions of the local council are to be made public in the relevant minority language (RR 1999, 2002 RO). A similar Slovak law provides that persons belonging to a minority are able to use their language in official communications with public administrative institutions and in organs of local self-administration where the minority population accounts to at least 20 percent (RR 1999 SK). “The Ministry of the Interior has established the list of 656 municipalities where the Law on the Use of Minority Languages in Official Communications applies (i.e. where national minorities – Hungarian, Ruthenian, Roma, Ukrainian and German – represent at least 20% of the population) and has issued guidelines. Some local authorities have also developed implementing regulations” (RR 2000 SK). Yet, the report objects that in many areas minorities do not make use of this special right due to a lack of information. “For instance, no Roma village has apparently taken advantage of the possibilities to use the Romany language” (RR 2000 SK). In Estonia the law allows that municipalities make a request to use Russian as their administrative language in parallel to Estonian, yet, only if more than 50 percent of the local population are Russian speakers. “However, in practice, a number of municipalities use Russian as a working language” (RR 1999 EE).

Turning to the links between naturalisation and language laws in the two Baltic States, official language tests and the provision of training opportunities supporting Russian speakers to meet the requirements are focal points of the reports. Apart from bureaucratic delays, strict language requirements were often “cited as the main disincentives for securing citizenship” (RR 1999 EE). Yet, besides enabling the Russian-speaking minority to pass language tests, language training is consid-

ered as a key integration instrument in Estonia and Latvia (cf. RR 1999 EE; RR 1999-2001 LV). It includes measures such as intensive training in vocational and higher education, provision of teaching materials, language training camps and youth work.

A different field in which language is an issue concerns minority rights in education (see below, p. 42). It turns around the right for teaching of and in a minority language, but also to run whole educational institutions in a minority language. The discussions in the reports on Romania concentrate on the establishment of a Hungarian speaking as well as a multi-cultural Hungarian-German university (RR 1998-2001 RO). For the Czech Republic and Bulgaria, the reports state that a law allowing the use of minority languages and education in minority languages exists. In Bulgaria, concrete progress is however not reported for the Roma peoples but only with view to the Turkish minority for which “[n]o particular complaints as regards their educational or language rights were reported” (RR 1998 BU).

Unlike the other candidate states, Hungary and Slovakia have promulgated the *European Charter for Regional or Minority Languages*. As the 2001 assessment of Hungary explains, making available education to Roma in their mother tongue and language was one of the central measures the government introduced as a consequence. Apart from the already stated problem that due to a lack of information national minorities make only little use of their rights (RR 2001 SK), the 2000 report on Slovakia further remarks that too little data is available to judge on the implementation of new the language legislation.

In sum, only little attention is being paid to the use of minority languages in the media. Only the Regular Reports on Hungary, Bulgaria and Romania elaborate on minority protection in the context of media at all (see below, p. 46).

Education

Discrimination in the educational sector finds expression in the denial of open access to mainstream education. The reports refer to many instances in which children of minority groups are placed in separate classes or special schools for mentally or physically handicapped. Romani children are most affected by such *de facto* segre-

gation. As a result the children remain on a very low level of education with far reaching negative consequences for their future chances for employment and inclusion into society. Due to long-lasting direct and indirect effects, education is an issue in all Regular Reports and in many states “[e]ducation is considered a main priority in improving the situation of the Roma and other minorities” (RR 1998 HU).

Especially disproportional high numbers of Romani children in special schools are a reoccurring topic of the Regular Reports. According to the Commission’s assessment, Roma represent some 70% of the children at special schools in the Czech Republic (cf. RR 1999, 2001 CZ). The 2000 report on Hungary even estimates that in certain parts of the country up to 94 per cent of the Romani children are placed in special schools, and the national Ombudsman for Ethnic and Minority Rights commented that “the disproportionately high number of Roma pupils in these schools is unjustified and a sign of discrimination” (RR 2000 HU). The reports on Slovakia also mention the continuing overrepresentation of Roma students in schools for retarded children, and that in a number of cases the separation into different classrooms is reported (cf. RR 2000). The 2001 report on the Bulgarian situation states that many Romani children do not attend school at all and that for those who do frequent a school the drop out rate is very high. Apart from this, schools in areas resided exclusively by Roma remain in practice segregated. Poor schooling standards have also effects on the proportion of Roma in higher education, which remains very low (below one per cent in Hungary).

Inspecting minority rights in education, not only the use of minority languages but also the instruction of subjects relevant to minority groups are at stake. Apart from introducing subjects such as language, history and culture of minorities into the curricula, teachers can be trained in these subject matters in order to provide better understanding and thus better education of pupils from a minority background. Moreover, the right to run special educational institutions finds expression in the reports. In this context all Regular Reports on Romania make a reference to the planned establishment of a bi-lingual university. This is, however, an exception, since the reports on other applicant states do not explicitly elaborate on the establishment or existence of multicultural universities. Another issue which occurs only

once in the reports on Hungary the existence of study grants and the provision of specific education and teaching materials for Roma students (RR 2001, 2002 HU).

In the reports for Estonia and Latvia the emphasis is not on unequal opportunities for minorities but turns around the language question discussed above. Thus, the reports mention language training as a key integrative element for adults and socially disadvantaged groups. Further, regulations to allow minorities to protect their cultural rights, i.e. opportunities for teaching in minority language, are discussed. The latter can be put into practice by either bi-lingual teaching or minority schools that work in genuinely developed models which are subject to approval. Teachers at minority schools generally need a certain level of proficiency in the state language. While in Latvia from 2004 onwards all state funded schools will supply secondary education (from 10th grade onwards) in the state language only, Estonian law provides that after 2007 a proportion of 40 per cent of teaching in upper secondary schools can remain in other languages and 60 per cent is to be in Estonian with exceptions being possible. Moreover, in Estonia public funding for Russian elementary schools covering the period of compulsory education is ensured until 2007/8 (cf. RR 2000 EE). Where there is a popular demand, full-time Russian-language education in Basic Schools and Gymnasiums may continue beyond 2007 (cf. RR 2002 EE).

Employment

Rising unemployment rates have been a characteristic of the transformation economies in all CEEC.⁶⁰ Yet even if taking this into account, the unemployment rate, especially among Roma, is appallingly high. This is not only due to poorer education but also because of direct discrimination. The reports estimate for the Roma population in working an unemployment rate ranging from about 60-75 (RR 2001 BU) to 70-97 percent (RR 1999-2001 CZ). Discrimination takes effect in many ways, for example concerning hiring practices in general (cf. RR 2002 CZ), or such particular examples as job advertisements that explicitly exclude Roma (cf. RR

⁶⁰ The development of overall unemployment varied across the countries concerning both scale and sequencing. The highest rates of overall unemployment according to country: BU 18.1% (2002), CZ 8.7% (2000), EE 12.5 (2000), HU 8.4% (1998), LV 14.3 (1998), RO 7 (2002), and SK 19.4 (2001) (see EUROSTAT *Total unemployment rate – Unemployed persons as a share of the total active population*, <http://europa.eu.int/comm/eurostat/Public/datashop/print-product/EN?catalogue=Eurostat&product=1-em071-EN&mode=download>, last update 12 November 2003, accessed 20 November 2003).

2001 RO). Yet, also state legislation may have discriminative effects. As already brought up (cf. p. 36), Latvia legislation restricts non-Latvian speakers to exercise certain jobs (RR 1999 LV). Such laws significantly limit the opportunities for the minority not speaking the state language and thus add to higher unemployment figures among Russian speakers.

Another effect of deficient education is that, if employed, Roma are mostly working as unskilled labourers. On the other side, the proportion of Roma in public offices (administration, parliamentary representations, police etc.) remains extremely low. Against this background, the Commission assessed positively a Bulgarian programme countering youth unemployment which included recruiting 50 young Roma into the police force (RR 2000 BU). Similarly, the 2000 Regular Report on Hungary refers to the “Roma Policemen Programme” under which the number of Roma police officers was increased and co-operation with Roma organisations was enhanced. Furthermore, public work programmes and public utility work programmes were introduced. Job creation programmes for Roma exist in almost all CEEC, yet often lacking sufficient resources to ensure implementation. Due to high unemployment rates among Roma, but also because of the fact that Roma are mainly working in unskilled labour, they are also most affected by economic decline or downward trends. As the Regular Report on Bulgaria for the year 2000 records, regions with a concentrated minority population continue as a whole to suffer from low investment and high unemployment.

Health and Housing

Housing, the access to health care and other social services are not facets of special minority rights. Rather, it must be considered as discrimination if members of a minority are treated less favourable than other groups of society. Deficiencies related to housing are diverse. One aspect is illegally built housing which, according to a survey referred to in the 2001 Regular Report on Bulgaria, represent approximately 70 per cent of houses in Roma neighbourhoods. Despite government programmes many municipalities refuse to legalise these houses and thereby the right to public services (RR 2001 BU). Another view is given in the 2001 report on the Czech situation: “Many Roma reside in low-quality municipal apartments often with inadequate hygienic conditions, which leads frequently towards social margi-

nalisation” (RR 2001 CZ). Similarly the 2000 report on Hungary notes that Roma live in parts of the country with underdeveloped infrastructures and weak economic structures.

The situation of Roma is aggravated in several states where long term unemployment and the lack of citizenship or permanent residence disqualify Roma from access to non-contributory health insurance and public health care systems. The Regular Reports do not go into detail about concrete health problems.⁶¹ Still, they state that in all states monitored Roma live in considerably lower health and housing conditions than the mainstream population, which causes social exclusion of members of a minority. As the 2000 Regular Report for Hungary explains, poor health and living conditions cause a life expectancy for Roma which is on average ten to fifteen years below the average in the rest of the population.

Single reports dwell on further difficulties related to the living conditions of Roma. For instance, some reports refer to concrete incidents of physical segregation. The Czech case of the city Utsi nad Labem, where a wall was built to segregate a Roma residential area from the rest of the city, was given attention to in the 1999 and 2000 reports. Another incident amplified in the 1998 report refers to local officials promoting “that ‘problem citizens’ be moved out of city centres”, or proposing to subsidise those Roma who would sign over their flat to the city upon their departure. Further, “[t]here have also been some incidents of municipalities proposing to separate Roma from other residents” (RR 1998 CZ).

Political Participation

Protection of the right to political participation must be analysed at different levels. On the one hand, the right to vote and stand as candidate relates to the protection from discrimination. On the other hand, special thresholds for representation in parliamentary assemblies, the establishment of local self-governments or the ap-

⁶¹ The Open Society Institute illustrates: “Throughout the region, Roma experience serious health problems associated with extremely poor living conditions which are compounded by large-scale exclusion from the public health system and a range of social services. In many communities, Roma have lower life expectancies and higher infant mortality rates than the majority, and suffer comparatively higher rates of asthmatic ailment, as well as tuberculosis” (OSI 2001 a: 37).

pointment of minority representatives as consultative body to government institutions are aspects of minority rights.⁶²

One reason for which minorities are excluded from political participation is the denial of citizenship (cf. above p. 36), which mostly affects the Russian-speaking minority in Estonia and Latvia. Strict language regulations (cf. above p. 37) further restrict the participation of the largest minority of the Baltic States. While in Estonia amendments to the language law, which would have required members of parliament and of local councils to prove good knowledge of Estonian, were rejected (cf. RR 1998 EE), the Election law in Latvia prescribes language requirements for members of parliament (cf. RR 2000 LV).

A threshold for minority representation in the national parliament exists in Romania where fifteen seats are reserved for minorities in the Chamber of Deputies, of which one is reserved for a Roma representative (Commission 1997).⁶³ Apart from the Romanian only the Hungarian constitution provides for special minority representation. Here, the constitution complemented by the “the 1993 law on minorities, provide for the principle of the representation in Parliament, but these provisions have not always been given practical application” (Commission 1997: Opinion HU). No specific rules guaranteeing the representation of minorities in parliament exist in the other states under perspective, and apart from the 1997 opinions this topic does not find any attention in the Commission's assessments.

Throughout the candidate states Roma are better represented at regional and local level than at the national level. Concerning local self-governments, Hungary has the most far-reaching regulations. Here, an extensive system of local self-governments has been established.⁶⁴ The 1999 Regular Report illustrates in this context: “Following the elections of the local minority self-governments, the number of Roma self-governments has almost doubled. This trend can be interpreted as

⁶² The Open Society Institute evaluates on this issue that although the candidate states have introduced some “innovative measures to create channels for participation” in practice “neither the Roma nor the Russian-speaking minorities can be said to have achieved effective representation in national parliamentary or governmental structures” (OSI 2001 a: 59).

⁶³ For more details see Gál, who also elaborates on this problem in a cross-country comparison (cf. Gál 2000: 9).

⁶⁴ “Some have noted that since minority self-governments in Hungary are strictly consultative in nature, the system has effectively institutionalised the political marginalisation of Roma. Moreover, local governments often ignore the requirement to consult with minority self-governments” (OSI 2001 a: 59-60).

an increasing participation of Roma in public life. Specific Roma Community centres (established with financial support from the State budget) support local communities and contribute to preserving Roma culture”.⁶⁵ The Czech 2002 report elaborates on the appointment of Roma co-ordinators at regional level following the transfer of competencies to the regions. The evaluation, however, remains critical. Due to changes in the administrative design “the fate of the much appreciated Roma advisors seems uncertain, as their administrative basis, the District Offices, will be abolished by the end of 2002”, a network that the Commission assesses as useful in providing contact points between Roma and the community.⁶⁶

Consultative bodies usually operate through experts who work as advisors on the national and sometimes at local level. Such advisors were introduced in several states, they have no decision-making power but offer minorities the opportunity to express their views on issues of concern to them through a designated representative (for further details see below, p. 56).

Media

Representation of minorities in media only finds mentioning in the reports of certain countries. Minority rights in this area concern, on the one hand, programmes in minority languages or such programmes that deal with particular minority issues. On the other hand, the picture that is drawn of minorities by the media is relevant with regard to distribution of discriminative attitudes and the reproduction of stereotypes.

According to the 2001 assessment of Hungary, the National Television and Radio Board granted a broadcasting license for Europe’s only Roma Radio, which how-

⁶⁵ For Bulgaria, the reports state that the “the Turkish minority continues to be fully integrated and represented in political life” (RR 1998 BGL) whereas the representation of Roma does not find such positive mentioning. The Commission remarks critically that the Constitution forbids organisations or political parties that are founded on ethnic, racial or religious grounds and encourages the government to clarify these provisions with reference to the restrictions on the establishment of political parties as to ensure compatibility with international obligations (RR 1999 BGL).

⁶⁶ Gál, however, notices that “[i]n most of the cases where democratic forces are in the government as a result of election of the mid 90’s it is interesting to see that the most important and powerful minority organisations have become part of the government coalitions” (2000: 10). This was, for instance, the case in Slovakia and Romania where there are strong Hungarian minorities. Nonetheless, due to its internal fragmentation, the Roma community does nowhere constitute one of the “most powerful” organisations and hence remains less represented than other minorities. For example, in Slovakia a “Deputy Prime Minister for Human Rights, National Minorities and Regional Development who belongs to the Hungarian Coalition Party was appointed” (RR 1999 SK).

ever had the side effect that the budget of the Roma Magazine of the Hungarian public service TV was considerably decreased.

Other positive assessments are made about Bulgaria where in almost all electronic media minority participation through specialised programmes has been made possible. Apart from national TV broadcasts that supply Turkish news and two programmes that address minority issues and are also produced by minority representatives, a Roma Cable TV broadcasts nation wide (RR 2001 BU). Moreover, seminars for local, regional and national media were carried out in order to raise positive public awareness on minority issues (RR 2002 BU).⁶⁷ In contrast, Latvian law “holds that all films to be shown on television must be dubbed into the state language or have Latvian subtitles. The amount of permitted time to broadcast in foreign languages has been decreased from 30% previously to 25% in October 1998” (RR 1999 LV).

Of the states this study relates to, negative media coverage on minorities is exclusively reported from the Czech Republic (RR 1998).⁶⁸

⁶⁷ Gál adds that in Romania, too, programmes in minority languages are broadcasted on national and provincial TV and radio (2000: 11).

⁶⁸ Yet, according to Gál negative coverage is also a problem in other candidate states (Gál 2001: 11).

Part III

Implementing Minority protection

So far, this paper has concentrated on the living conditions of Russian speaking and Roma minorities in Central and Eastern Europe by looking at the main issues around which minority protection in the candidate states turns. Yet, the Commission goes well beyond illustrating the situation in the candidate states. Most obviously by formulating the priorities of the Accession Partnerships concrete improvements that are to be met prior to accession are defined. The EU hereby exerts pressure and promotes specific policies in the accession countries. Apart from this, indirect involvement the EU has developed own policies. Thus, for example, programmes to improve the situation of Roma were introduced⁶⁹, the anti-discrimination *acquis* has been extended, and in connection to this the *European Monitoring Centre on Racism and Xenophobia* (EUMC) has been established. Further, concerning the candidate states, the EU promotes certain policies not only through the accession criteria but also through support provided in the PHARE framework.⁷⁰ The EU involvement in the minority policies of the CEEC accentuates the importance the EU puts on policies developed and implemented in the candidate states.

The following is to analyse which specific policies have been pursued on the part of the CEEC governments and how the Regular Reports take note of these actions. In other words: Which policies are implemented and how does the Commission evaluate these? To this end, three spheres shall be scrutinised. First, the legal frameworks and the role of international instruments will be analysed since they constitute the basis of minority protection. Secondly, the institutions that have been established or adapted in order to provide minority protection will be presented. And thirdly, governmental approaches to implement minority policies shall be examined. Alike to the last chapter the aim is not only to provide an overview on the state of affairs. Rather, the illustration is to highlight especially those issues which

⁶⁹ Support for Roma communities in the CEEC is mainly channelled through the PHARE programme. Moreover, the EU has developed programmes to improve the situation of Roma people in EU Member States. Some of these programmes are open for participation for Roma from the CEEC (cf. Commission 2002 b: 7)

⁷⁰ For instance, PHARE supports language training programmes in Estonia and Latvia.

the EU considers as central and to show how the Commission assesses improvements in the relevant areas.

Minority Protection at Legal Level

The progress in minority protection at legal level is one of the points on the Commission's internal checklist (cf. p. 32). Accordingly, the reports' chapters on *Human Rights and the Protection of Minorities* usually start with a short summary on which major international human rights instruments the respective state has signed and ratified in the preceding year and which central conventions the state has still not acceded to. Furthermore, significant changes in the national legislation find mentioning. Representing the framework for minority protection, the constitution and legislation are the basis for all national minority policy. Which are then the international instruments the Commission considers essential for the applicant states to accede to?

In this context, international undertakings play a central role not only because the assessment of the political Copenhagen criteria relates to these conventions but also because the inclusion of international instruments into national legal frameworks is part of the accomplishments expected from the CEEC. The opinions published in the Agenda 2000 uniformly take note of two such agreements, namely the *Framework Convention for the Protection of National Minorities of the Council of Europe* and the *Recommendation 1201 of the Parliamentary Assembly of the Council of Europe*, which provides for collective rights of minorities but is not legally binding.⁷¹ The subsequent Regular Reports continue to make routine mentioning on the status of the *Framework Convention*, whereas the *Recommendation 1201* is not taken up again. Further international instruments the reports dwell on are, for example, the *European Social Charter*, as well as its revised version, and the *Additional Protocol no. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*.⁷² The number and choice of conventions commented on varies between the reports. However, consistency is guaranteed since

⁷¹ The *Framework Convention* and the *Recommendation* are the only instruments monitored in the Opinions. Alone the opinion on Latvia refrains from commenting on any convention.

⁷² With view to these specific conventions, the reports also comment on non-ratification of a state, while other conventions listed in the reports annexes are normally only mentioned when a state signed or ratified an agreement.

1999 by an Annex showing which human rights Conventions have been ratified by all candidate states (see below).⁷³

Notably, the *Additional Protocol no. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, which is referred to in a number of reports, does not form part of the annexed list. The same holds true for *Recommendation 1201* monitored in the 1997 opinions. Yet, once more the fact that collective rights are not an issue for EU Member States may be an indication why certain agreements were excluded from monitoring in the Copenhagen framework.

ANNEX 3: HUMAN RIGHTS CONVENTIONS

Human Rights Conventions ratified by the Candidate Countries, 15 September 2002

Adherence to following conventions and protocols	BG	CY	CZ	EE	HU	LV	LT	MT	PL	RO	SK	SI	TK
ECHR (European Convention on Human Rights)	X	X	X	X	X	X	X	X	X	X	X	X	X
Protocol 1 (right of property)	X	X	X	X	X	X	X	X	X	X	X	X	X
Protocol 4 (freedom movement et al.)	X	X	X	X	X	X	X	X	X	X	X	X	O
Protocol 6 (death penalty)	X	X	X	X	X	X	X	X	X	X	X	X	O
Protocol 7 (ne bis in idem)	X	X	X	X	X	X	X	O	O	X	X	X	O
European Convention for the Prevention of Torture	X	X	X	X	X	X	X	X	X	X	X	X	X
European Social Charter	O	X	X	O	X	X	O	X	X	O	X	O	X
Revised European Social Charter	X	X	O	X	O	O	X	O	O	X	O	X	O
Framework Convention for National Minorities	X	X	X	X	X	O	X	X	X	X	X	X	O
ICCPR (International Covenant on Civil and Political Rights)	X	X	X	X	X	X	X	X	X	X	X	X	O
Optional Protocol to the ICCPR (right of individual communication)	X	X	X	X	X	X	X	X	X	X	X	X	O
Second Optional Protocol to ICCPR (death penalty)	X	X	O	O	X	O	X	X	O	X	X	X	O
ICESCR (International Covenant on Economic, Social and Cultural rights)	X	X	X	X	X	X	X	X	X	X	X	X	O
CAT (Convention against Torture)	X	X	X	X	X	X	X	X	X	X	X	X	X
CERD (Convention on the Elimination of All Forms of Racial Discrimination)	X	X	X	X	X	X	X	X	X	X	X	X	O
CEDAW (Convention on the Elimination of All Forms of Discrimination against Women)	X	X	X	X	X	X	X	X	X	X	X	X	X
Optional Protocol to the CEDAW	O	X	X	O	X	O	O	O	O	O	X	O	O
CRC (Convention on the Rights of the Child)	X	X	X	X	X	X	X	X	X	X	X	X	X

X = Convention ratified

O = Convention NOT ratified

BG= Bulgaria; CY= Cyprus; CZ= Czech Republic; EE= Estonia; HU= Hungary; LV= Latvia; LT= Lithuania; MT= Malta; PL= Poland; RO= Romania; SK= Slovak Republic; SV= Slovenia; T= Turkey

Source: European Commission (09.10.2002): *Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries.*

⁷³ Since this list was added to the annex of each Regular Report in 1999, only few changes occurred. While the 1999 and 2000 lists refer to the *Additional Protocol to the Revised European Social Charter (system of collective complaints)*, this protocol is not included in the 2001 and 2002 lists. Instead, in 2001/02 the lists refer for the first time to the *Optional Protocol of the Convention on the Elimination of All Forms of Discrimination against Women*. The list is annexed to all Regular Reports as well as the Commission's Strategy Papers.

In most CEEC the constitutions provide that once ratified by the national parliament, international instruments become automatically part of the domestic legislation and that international law prevails over domestic law (cf. Gál 2000: 7). The status of minorities in the constitutions is principally tackled by basic rights of non-discrimination and the protection of the identity as minorities. Of the states under perspective, only the Hungarian constitution provides for collective rights of minorities and certain rights of self-government and cultural autonomy.⁷⁴

The Regular Reports mainly concentrate on legislation implementing the basic principles of minority protection. Only in few cases constitutional amendments are at issue: An example is the 2001 report on Bulgaria in which the Commission criticises the Bulgarian Constitution for forbidding the organisation of political parties along ethnical, racial or religious lines. Relating to international standards the report estimates: “It could be desirable to clarify these Constitutional provisions with reference to the restrictions on the establishment of political parties, as it is important to ensure compatibility with international obligations”. Further remarks on constitutional amendments can be found in the reports on Latvia where the parliament “amended the Constitution to include a new section outlining basic human rights” (RR 1998 LV), and in the 2002 report which refers to constitutional changes which introduced certain measures strengthening the state language in the context of election legislation. In Slovakia, constitutional amendments created the legal basis for the creation of an ombudsman office (RR 2000 SK).

The question of how basic legal frameworks are transposed in concrete laws is related to the compliance of legislation with the constitution. This finds mentioning, for instance, in the reports on Estonia (RR 2000), and Slovakia (RR 1998). In this context, occasional reference is made to rulings of the national supreme courts or statements and reports by ombudspersons who are empowered to ensure legislative compliance by the state with the constitution (e.g. RR 2001 EE). Another aspect of the elaboration of national legislation is touched on in a number of cases in which the reports also notice explicitly the progress in transposing EU anti-discrimination

⁷⁴ Gál states: “Collective rights of minorities and a certain degree of minority self-government or cultural autonomy are enshrined only in the Hungarian, Slovenian and to some extent in the Croatian constitution and legal system” (2000: 6).

legislation (e.g. RR 2001 BU, EE, LV, SK). In the 2001 Regular Reports this issue is uniformly taken under scrutiny in chapter 13 that focuses on *Social policy and employment*.⁷⁵ Concrete changes the reports dwell on have already been mentioned and cover fields such as the Estonian and Latvian language and citizenship legislation or laws on education (cf. pp. 32-47).

Unlike the assessments on institution building and policy-making, the reports' opinions on the implementation of changes to the CEEC constitutional and legal frameworks are mainly illustrative and state only certain shortcomings concerning the ratification of special international undertakings or the content of particular laws. Especially the later Regular Reports draw their attention increasingly to questions of implementing legal provisions, the issue we will turn now to.

Minority Protection at Institutional Level

Institutions are at the heart of effective minority protection in any state. Only through a suitable institutional set-up that is adequately equipped with human and financial resources can policies be effectively implemented. Administrative capacity building is hence one of the main objectives the EU aims to foster and support in the pre-accession process. This is reflected in the Accession Partnerships and by the fact that, in order to promote institution building, around 30% of PHARE resources are spent to assist the accession candidates in developing the structures, strategies, human resources and management skills which are needed to strengthen their economic, social, regulatory and administrative capacities. Moreover, in the further advanced stages of the pre-accession phase emphasise shifted more and more to policy-making and implementation of policies. Since minority protection is a new policy field for the young Central and Eastern European democracies, establishing new institutions is indispensable. Nonetheless, also adaptations or reforms of already existing institutions should not be neglected.

The latter point takes a much less prominent place in the reports and is prevalently brought up in connection to mistreatment of minorities from the institutional side. As mentioned above (cf. page 33-36), institutional discriminative behaviour oc-

⁷⁵ The inclusion of this chapter is of special relevance since the anti-discrimination *acquis* is the central common instrument to (indirectly) provide for a certain degree of minority protection in the European Union.

curred especially in the police, courts and (local) administrations or by the hand of (local) politicians. Concerning already existing state institutions, the Commission's assessment is greatly restricted to statements on shortcomings and improvements related to the reduction of discriminative structures – be it at legal level or in the exercise of official duties.

In order to get a clearer picture on how minority protection is implemented at institutional level, it is useful to differentiate between basically three groups of institutions. First, there are institutions of minority participation and effective participation in decision-making processes. Secondly, parliamentary Committees for minority issues and offices of an ombudsperson have been established. And thirdly, government offices on or for national minorities were set up (cf. Gál 2000: 9-10).⁷⁶ Although this specific differentiation is not being applied in the Commission documents, it shall be used here because it enables us to better systematise the various measures of the candidate countries which differ in the degree and emphasis they attribute to the single groups.

Institutionalised participation⁷⁷ and involvement of minorities in decision-making processes is a greatly underrepresented issue in most accession states. One exception is Hungary where a network of minority self-governments exists on both the local and national level (see also p. 45). Roma foundations and Roma Community Houses complement these bodies. The self-governments function as agencies for the implementation of governmental policies. Thus, the national Roma self-government in co-operation with the *Office for National Minorities* was appointed to implement the 1999-revised medium-term action programme of the government (RR 1999 HU). After the 1999 elections, the number of local self-governments had almost doubled which, according to the 1999 Regular Report, is a trend that “can be interpreted as an increasing participation of Roma in public life” (cf. above p. 44). One of the concrete programmes of local self-governments is the co-operation with the police to tackle prejudice of the latter against Roma (RR 1999 HU). All in all, the Regular Reports evaluate the Hungarian approach very positively: “Through the

⁷⁶ Some of these institutions have already been dealt with in the chapter on political participation (p. 44-46). Where this is the case, a reference to the preceding part shall suffice.

⁷⁷ Apart from this, minority representation in local self-governments exists in Romania (cf. also p. 44) and Slovakia.

system of local self-Governments, minorities have a considerable degree of cultural autonomy as well as a wide range of educational and linguistic rights” (RR 2001 HU). Roma self-governments also find mentioning in the 2002 Slovakian report which explains that municipalities and regional self-governments have recently acquired new competencies due to which implementation of regional development, education and social protection measures are increasingly carried out on this level.

In the second group of institutions the role of an ombudsperson is strongly emphasised. The special attention given to this institution must be seen in the context of the Union’s anti-discrimination *acquis*. A body with special authority to promote the rights of persons discriminated against will be a legal obligation for all Member States after July 2003. The EU’s legal definition of such an office is formulated in chapter III, article 13 of the *Race Equality Directive*: “Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals’ rights” (cf. above pp. 9).⁷⁸ Since this directive has to be implemented only by 2003, the establishment of such a body cannot yet be a precondition for accession under the Copenhagen criteria. Nonetheless, the existence and functioning of ombudspersons and offices receives great attention in the reports.⁷⁹

Ombudspersons have already been appointed by the parliaments of a great number of candidate states.⁸⁰ The Regular Reports on the Czech Republic, Estonia, Hungary, Romania and Slovakia refer to the existence of an ombudsman, who in some of these states is also called human rights Commissioner or Legal Chancellor. While these bodies are generally constituted as independent state institutions their responsibilities and effective powers differ slightly from state to state. In general,

⁷⁸ See the Council Directive, European Council (2000): *Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, 29 June.

⁷⁹ An ombudsman office is also held important by other international bodies. Hence the OSCE High Commissioner for National Minorities asserts: “In some cases it may be necessary to establish specialized State bodies to combat discrimination. In a number of OSCE countries, such bodies have made a valuable contribution toward combating racism and other forms of discrimination. Another model that has proven effective in some countries is that of an ombudsman” (OSCE 2000: 5).

⁸⁰ Gál differentiates between ombudspersons “with a mandate covering misconduct on part of authorities in human rights and/or minority rights questions” and bodies or ombudspersons “appointed by parliament without special mandate for minority issues [which] have the task to monitor the activities of public bodies and protect human rights in general by investigating complaints” (2000: 10), the latter being in place in the Czech Republic and Romania.

ombudspersons are, on the one hand, to reinforce the protection of citizens against unlawful conduct and mal-administration by public institutions, i.e. to investigate infringements of constitutional rights. On the other hand, offices of this body are to deal with specific complaints by citizens regarding the work of the state or state officials.⁸¹ Apart from an *Ombudsman for National Minorities*, the reports on Hungary also refer to an *Ombudsman for Educational Affairs*, as well as one for *Civil and Political Rights*. For Romania and Estonia the establishment of further regional offices is mentioned in the reports (RR 2001 RO; RR 1999 EE).

Another institution safeguarding minority rights are parliamentary committees. Yet, the Regular Reports do not draw much attention to these committees. Solely the 1999 report on Slovakia remarks that “Parliament established a Committee for Human Rights and National Minorities, including a commission for Roma issues” as part of an overall package by the Slovak authorities to improve the parliamentary and governmental structures for addressing minority issues.⁸²

The third class of institutions is related to governmental policies. These institutions are concerned with the elaboration and implementation of governmental programmes and policies. Direct minority involvement mostly occurs in form of consultative bodies that advise the government or administrative organs. Advisory bodies are thereby also to function as intermediate between the government and NGOs in shaping minority policies.

The most common form of dealing with minority issues at governmental level are inter-ministerial committees which exist in a number of CEEC. While in the Czech Republic and Hungary the committees (or commissions) are special arenas to deal with Roma issues, the Romanian committee has a sub-committee for Roma affairs. In Latvia a co-ordination institution is to ensure consistency in governmental policies. Depending on the country, the committees are responsible for

⁸¹ As the OSCE report elaborates, Hungary and Romania have ombudsmen whose competences also include issues of discrimination against Roma. The perceptions of efficiency of these ombudspersons vary however. While difficult to generalise, there is a tendency that ombudsmen who play a highly visible role in identifying problems confronting Roma or promoting reforms to address those problems enjoy significant legitimacy. In these cases even critics who fault institutions of ombudsman for lacking more vigorous enforcement powers appreciate the fact that communities have an advocate in government (which itself can help narrow chasm of mistrust between Roma communities/national authorities). Legitimacy of ombudsman offices within Romani communities can be further increased if staff includes Roma (OSCE 2000: 59).

⁸² Gál, however, explains that “[i]n most of the countries in the region parliamentary committees exist for dealing with minority issues, mostly in the framework of the general human rights question” (2000: 10).

developing strategies to promote the integration of minorities, and/or for supervising and administering the implementation of respective programmes.

For the Czech Republic the 1999 report mentions that the number of Roma representatives in the inter-ministerial commission was increased from 6 to 12. Apart from this, a “network of 'Roma advisers' in the districts has continued to play a key positive role. In practice, advisers have gradually become contact-points for the Roma communities themselves. Advisers liaise with the Inter-Ministerial Roma Commission and some are currently members of it” (RR 1999 CZ).

Similar commissions or national councils including members of the government as well as various minority representatives exist in Bulgaria, Romania and Slovakia, where they are to take part in the development of strategies for minority policies. In Romania, a working group of Roma associations was established which is set up by the Roma community and includes elected representatives from the Community who are to facilitate the liaison with the public authorities (RR 1999 RO).

Another sort of relevant institutions are government bodies which execute governmental policies. Examples are the Latvian *Naturalisation and Citizenship and Migration Boards* as well as the Estonian *National Language and Citizenship and Migration Boards*. Since these bodies are responsible for executing naturalisation policies, they are central to the specific problem of non-citizenship amongst the Russian speaking population. Unlike the other CEEC, both Estonia and Latvia have established a foundation to support social integration, namely the *Non-Estonian Integration Foundation* and the *(Social) Integration Foundation*. These foundations include representatives from local governments, NGOs and others. In Estonia the Foundation is responsible for the implementation of the State Integration Programme under the control of the Ministry of Ethnic Affairs.

Yet other government agencies are national offices/bureaux. The Hungarian *Office for Ethnic and National Minorities* in co-operation with the national Roma self-government prepares and monitors the implementation of governmental programmes. The *Legal defence Bureau for National and Ethnic Minorities*, set up by the Ministry of Interior, shall serve to improve legal protection of Roma. Moreover, Hungary has set up *Local Conflict Management Offices*. In Romania *National Office for Roma*, and in and Slovakia a *Bureau of Legal Protection for Ethnic Minori-*

ties are to supervise minority protection. The role of the Latvian *National Human Rights Office* has been an issue in the recommendations of the OSCE, which launched a discussion on the transformation of the office into an ombudsman institution with a broader mandate. Although the *National Office* has started to implement some short-term recommendations by an international expert group to improve co-ordination and to avoid duplication between the state bodies, an independent ombudsman office has not been founded (RR 2001 LV).

The Regular Reports assessing Institutions

The illustration of how the CEEC implement minority protection at institutional level has already touched on views the Commission expresses in its reports. Taking a closer look at the evaluations, the most dominant and recurrent arguments turn around a lack of human and financial resources and the lack of independent powers of institutions. Although it needs to be stressed that the evaluations of the Open Society Institute and those of the Commission are not fully equivalent, the following synopsis of the Institute gives a good overview also on the Regular Reports' criticisms. According to the Open Society Institutes' assessment, insufficiencies of governmental institutions can be summarised in "three principal shortcomings" (OSI 2001: 62). First, in all cases the mandate of institutions remains essentially consultative with respect to governmental counterparts. Secondly, none of the institutions is vested with "sufficient financial or human resources to confront problems such as discrimination". Finally, government institutions responsible for minority affairs have not been granted legal powers to ensure adequate enforcement of minority protection laws (OSI 2001: 62-66).⁸³

More detailed is the Regular Reports' list concerning shortcomings affecting the work of the ombudsmen offices. While formal functions have been established and although national parliaments have appointed ombudsmen, the effective powers and resources these possess remain insufficient in all CEEC. Thus, the Czech ombudsman has no power to sanction the authorities and only limited force to notify superior organs or even to make a case public. Although in most CEEC the cases submitted to ombudsmen have increased, only for Estonia an increase in staff is re-

⁸³ The Institute draws from this the following conclusion: "Thus, to date, non country in the accession region has a functioning official body with specific responsibility to enforce anti-discrimination law or assist victims in seeking legal redress" (OSI 2001 a: 44).

ported (RR 2001 EE), while in Slovakia the personal was reduced (RR 2001 SK). The Romanian reports on the years 2000 and 2001 take positive note on rising numbers of complaints submitted which “shows growing public awareness of the role and function of the Ombudsman” (RR 2000 RO). However, effectiveness and credibility of the ombudsman were undermined because of insufficient co-operation from the side of other state institutions which failed to respond to questions from the ombudsman within the legally set deadline (RR 2001 RO). Very blankly, the 1999 Hungarian report puts down the case that “[t]he Ministry has not accepted the Ombudsman’s report”.

These problems affect basically all relevant institutions, although in few instances an increase of staffing and budgetary resources is reported. This holds also true for those institutions responsible for implementing governmental policies as well as for experts and consultative bodies. Moreover, the actual set-up of certain institutions appears ineffective, one example being the Hungarian inter-ministerial sub-committee on Roma matters which, despite meeting, proved unable to produce any substantial results (RR 2000 HU).

Implementation of Minority Protection: Governmental Approaches

In the cause of the accession-process the Commission has put increasing emphasis on the need for the candidate states to develop action plans on minority protection. To date, the governments of all candidate states have set up national action plans to improve minority protection. For some of the programmes the reports state explicitly that minority representatives were actively involved in the drafting process (RR 1999 BU, HU). The national action plans provide for the concrete blueprints on how to tackle particular minority related aspects. Containing outlines for intended measures, they are thus a central but still distinctive element of the actual implementation of minority policies.

The diverse candidate states introduced their action programmes between 1997 and 2002. As the names tell, plans such as *The Integration of Society in Latvia* and *National Programme for Latvian Language Training*, the *Framework programme for the integration of Roma into Bulgarian Society*, or the *Concept of the Government Policy towards Members of the Roma Community* pick up relevant problems of each

particular state. Touching basically on the areas described above as focal points of the Regular Reports, the action plans are concerned with issues like discrimination, unemployment, education, health care, housing, cultural protection, and access to national media, citizenship, naturalisation, language training, etc. Over the years some states have revised their programmes and added new priorities including aspects like positive action in education, employment, social and health care and housing; support or minority culture and language, but also “changing social attitudes” (cf. RR 2002 CZ).

Certain states have moreover introduced special measures to reinforce better implementation. The 2002 Czech report refers for instance to “a set of measures [the Government has adopted] to achieve a more vigorous implementation of government policy for Roma [...]. Key Measures include the extension of the ‘street workers’ (social workers) scheme, the adoption of a primary school pilot project over 2002-2003 school year and the extension of preparatory classes to prepare Roma children for mainstream primary schools and the presence of assistant teachers beyond primary school”.

Furthermore, a number of states have introduced specific additional programmes, for instance to tackle prejudice and discrimination between Roma and the police (RR 1999 HU). Other special programmes mentioned are a Czech *anti-racism campaign* and a so-called *Tolerance Project* (RR 2001 CZ) which aimed to improve the communication and support cultural activities focusing on national minorities. The initiative was taken up again in a project “consisting mainly of an information and media campaign at regional and local level, a media presentation of the Roma social street workers, as well as an education campaign at secondary schools” (RR 2002 CZ). A problem often raised in the reports on the Baltic States (cf. above, p. 37) was tackled by Latvia in “an expensive campaign informing the public about citizenship issues” (RR 2002 LV). Besides the national integration programme, the 1999 Latvian report also mentions a *National Programme for Latvian Language Training* supported by PHARE means. The language programme also includes integration at the community level through summer camps, youth clubs, etc. Another measure was implemented in Hungary where a special anti-discrimination network of legal offices, set up by the Ministry of Justice, offers legal assistance free of charge to members of a minority group (RR 2002 HU).

Apart from specific programmes designed to enhance integration or the situation of Roma and Russian speakers, minority issues are ideally also dealt with in national programmes aiming at other policy fields, say education, employment or health care. The action-plans are generally funded by the state budget and make use of international assistance for certain projects – including PHARE means.

The Regular Reports assessing Implementation

The reports evaluate the national action plans differently. While “Bulgaria has a good Framework Programme on integration of minorities targeted at Roma” and Romania “has made steady progress in implementing last year’s Roma strategy” (RR 2002 RO), the Hungarian “programme itself does not provide a detailed strategy for addressing the problems specified” (RR 2002). Generally, the main part of the criticism that the assessments raise concentrates on the actual implementation of the programmes. Only few states receive slightly better evaluations. Thus the 2002 report on Estonia assesses that “the implementation of the integration programme appears to have continued satisfactorily”. The following part will state the central points of the Regular Reports’ critical assessments.

Naturally, as the pre-accession phase draws to an end, the tangible implementation of minority protection moves into the centre of attention. Despite the fact that rather comprehensive approaches on how to tackle the situation of minorities have been established, there is a discrepancy between the blueprints and the actual implementation of these. This is also reflected by the fact that the implementation of policy programmes takes a prominent place in the Accession Partnerships of all states.⁸⁴ The 1999 partnership provisions for Bulgaria, the Czech Republic, and Hungary refer to existing programmes for which the priority is “to start implementation” (AP 1999 BU, HU) or to “implement actions contained” in the programme (AP 1999 CZ). For those states which did not yet have a fully elaborated action plan in 1999, the partnerships demand to “strengthen dialogue between the Government and the Roma community with a view to elaborating and implementing a strategy to improve economic and social conditions of the Roma and provide adequate financial support to minority programmes” (AP 1999 RO), respectively to

⁸⁴ The Accession Partnerships go beyond the aspect of governmental programmes and highlight certain particular issues for each state which are however left out in this context since the point to be made here is the general evaluation of how the candidate states implement minority policies.

“improve the situation of the Roma through strengthened implementation including provision for the necessary financial support at national and local levels, of measures aimed, notably, at fighting against discrimination (including within the public administration), foster employment opportunities and increase access to education” (AP 1999 SK). Both the partnerships on Estonia and on Latvia argue in a similar vein, using the same wording to express that the state should “implement concrete measures for the integration of non-citizens including language training and provide necessary financial support” (AP 1999 EE, LV). These targets are formulated as short-term priorities for all the accession candidates. Central to the claims for implementation is in all cases the demand for sufficient financial resources.

The 2001 Accession Partnerships do not differ in essence and refer to basically the same issues. Yet, instead of being called “short-term priorities” the targets are listed under the heading “priorities and intermediate objectives”. Interesting for our context is that the partnership on Romania explicitly refers to the need for administrative capacity building “in order to implement the Government Strategy on the improvement of the situation of Roma”. Another example in which the assessment clearly emphasises the connection between institutions and an effective implementation can be found in the evaluation of Bulgaria, for which the 2002 reports stresses that “[i]f the Framework Programme is to be effectively implemented, institutional and administrative strengthening of the National Council on Ethnic and Demographic Issues (NCEDI) is essential“.

Since these priorities are based on the findings of the Regular Reports, it does not come as surprise that implementation is also the most central point in the evaluations of the later reports. Although the main problem of sufficient monetary resources applies to all states, there is a difference in how far the single countries have advanced. Further problems that also touch on institutional aspects are mentioned, for instance, in connection with Hungary where “[t]he implementation of the 1999 medium-term programme has further, progressed, but slowly, due to ineffective planning and the lack of co-ordination between the Ministries” (RR 2002 HU). A problem occurring in a number of states is that “Roma policy is not well integrated into general social development strategies and exists as a separate and parallel project” (RR 2002 HU), or similarly that “co-ordination among the relevant

ministries and bodies, dealing with Roma issues, remains very weak” (RR 2002 SK).

Apart from the action plans, the implementation of the anti-discrimination *acquis* is an important topic. While the 2001 assessment on Romania criticises that “comprehensive *anti-discrimination* legislation has been adopted – but it is not yet operational”, most other states are evaluated more positively on this issue. All in all, the situation is well summarised by the latest Strategy Paper, issued by the commission in October 2002. The document gives a condensed review on the main aspects the Commission’s assessment attaches special importance to:

“In all countries with considerable Roma communities, progress has been made with the implementation of national action plans to improve the difficult situation the members of these communities are facing. Continued efforts are required to ensure that the various action plans continue to be implemented in a sustained manner, in close co-operation with Roma representatives. Adoption and due implementation of comprehensive anti-discrimination legislation, in line with the Community anti-discrimination *acquis*, would be an important step forward where such legislation is still missing.

Further positive developments can be noted with regard to the protection of minorities. In Estonia and Latvia, continued progress was made in the integration of non-citizens. In several countries, the legal and institutional framework for the protection of minorities was further reinforced. In Bulgaria, Slovakia and Romania members of minority communities continued to play an important role in national political life” (Commission 2002 a: 13-14).

In the Commission’s later assessments, the implementation of actions plans attracts clearly more attention. This, and the implementation of the anti-discrimination *acquis*, remains the two areas in which, according to the Regular Reports’ evaluation, improvements are still needed in all the future Member States.

Part IV

Assessing the EU's Assessment

After this intensive discussion of the evaluation procedure, the contents of the reports, minority policies the candidate countries pursue, and the views the Commission takes on the latter point, let us now return to the initial question to see which answers may be deducted. How is the political criterion “minority protection” being applied by the European Commission?

The introduction identified two areas in which challenges for the application of the minority criterion were expected. On the one hand, consistency across the countries and over the years was anticipated to be hard to achieve in the Regular Reports. On the other hand, it was unclear how the Commission would operationalise the criterion for whose content the *acquis* lacks a clear legal basis. The analysis of the Commission’s assessment procedure greatly falsified the expectation that consistency within and across the Regular Reports was the central obstacle of EU monitoring. However, the basis on which the minority criterion is operationalised proved to be a fundamental problem to EU monitoring as such.

Assessing the EU’s assessment, I will summarise the findings made up to this point. Based on this synopsis, conclusions on how the EU evaluates minority protection in the Central and Eastern European candidate states shall be derived.

Procedures and Organisation of the Drafting Process

As far as the formal drafting of the Regular Reports (i.e. the organisation of the assessment procedure) is concerned, the Commission follows an elaborated and clearly defined structure. A lengthy drafting process follows an intensive period of gathering information from a multitude of different sources. This involves a great amount of actors and stretches over several months from the first preparatory draft submitted by the delegations to the final publication of the reports. Both drafting and the collection of information follow formalised guidelines that are summarised in an internal handbook used by all Commission staff at any level. To further ensure an equal treatment across the candidate states and over the years, a special horizontal unit in DG Enlargement overviews the whole process and functions as co-ordinator ensuring consistency of the content of the draft versions produced by the country teams. This intricate co-ordination involving multiple cross-reading and

re-drafting phases provides a high degree of consistency. It thus seems that cross-country inconsistencies are quite effectively evaded.⁸⁵ Thus, at the level of procedures and co-ordination no major discrepancies could be found.⁸⁶

While consistency may be obtained by effective procedural rules established in the Commission, operationalising the Copenhagen criteria faces the key problem that “[m]inority protection, at present a *sine qua non* for accession, as outlined in the accession criteria, is altogether absent from EU law” (Abdikeeva 2001: 2). Concluding that the Copenhagen criteria turned out to be “a kind of ‘structural principle’ of the enlargement process” Toggenburg points out that Amsterdam transposed all criteria into Primary law – except the one on minorities. “By doing so, the Treaty gave the criteria a clear legal quality and defined them as founding principles of the EU which are common to all Member States (internal dimension, Article 6(1) TEC) and which are to be respected by any state applying for membership (external dimension, Article 49 TEC). The fact that the minority clause was kept separated appears to indicate that its inclusion – whereby it would have assumed a clear binding force and an internal dimension – was not desired” (Toggenburg 2000: 17).⁸⁷

None the less, according to the accession criteria it was well desired to monitor the candidate states’ minority policies. To realise its monitoring mandate, the Commission refers to benchmarks and standards, which are derived from a mix of international instruments. While there is a general justification for drawing on international instruments, which all member and candidate states have ratified, discrepancies occur where this is not the case. Concrete examples for the different treatment of the candidate states as compared to the present Member States are

⁸⁵ Some inconsistencies that can be found will be illustrated in the next chapter which assesses the content of the reports.

⁸⁶ Taking human rights as whole and asking how consistently these are woven into the EU’s policies, this statement must be further qualified. In practice, a whole range of DGs deal with human rights. “The result is that no individual Commissioner and no senior EU bureaucrat can be identified as the visible face of human rights, either within the Commission or viewed from outside” (Alston/Weiler 1999: 36). Moreover, Alston and Weiler criticise that the Commission is under-staffed, that it is lacking expertise and bureaucratic “clout”, “none of the bureaucratic entities responsible for human rights policy is large enough to develop the range of staff and the level of expertise required to contribute to the development of the ‘consistent, efficient, credible and conspicuous’ human rights policy which the Union aspires” (1999: 35).

⁸⁷ The author hence continues: “The Copenhagen criteria are not legally binding; they are merely of a political nature, being adopted in the conclusions of the European Council. Nevertheless, in an indirect sense they might be seen as legally binding in as far as they reflect already existing law. Hence the question whether ‘respect for and the protection of minorities’ is part of the *acquis* or not, should be raised. If no legal Community standard is identified, the standard applied in the course of eastern enlargement has to be of (more or less) political nature” (Toggenburg 2000: 18).

easily to be found, even on the very fundamental level of adhesion to international instruments. For instance, while the CEEC are urged to comply with the requirements of the *Framework Convention on Use of Minority Languages*, only eight of the fifteen EU Member States have presently ratified the Convention. Even more pressure is put on the future members to accede to the *Framework Convention for National Minorities* which five of the present Member States but only one of the applicants have not ratified.⁸⁸ Despite the fact that one third of the EU-15 fail to ratify the *Framework Convention*, the Commission uses it as one of its main frames of reference to monitor the Copenhagen minority criterion and the latest Regular Report states unmistakably that “Latvia is urged to ratify it” (RR 2002 LV).

Monitoring the criterion “minority protection” thus implies apparent contradictions concerning the EU’s internal and external approach to human rights, which raise questions about the “sustainability” of the set of standards which the Commission has developed in the pre-accession context. According to Guy, the contradictory positions the EU takes “about the necessary extent of compliance with EU requirements on minority rights for accession are less surprising when it is recognised that they reflect a deep ambivalence on this subject within the Community. EU inconsistency in demanding that CEE applicants respect the rights of the minorities, while remaining virtually silent about those of the existing members, has been noted by various scholars. [...] This contradiction led the Brahams to fear the removal of Roma minority rights from CEE agendas following accession” (Guy 2001: 18).⁸⁹ This worry is aggravated by the positions the Member States have taken towards minority protection on the latest fora, i.e. in the discussions on the Charter of Fundamental Rights and Freedoms and other human rights initiatives which make it “necessary to examine the expressiveness and the nature of a Copenhagen criterion which was not elevated to the nobility of Primary law” (Toggenburg 2000: 17).

⁸⁸ The Member States which have not ratified the European Charter for Regional or Minority Languages are France, Italy, Luxembourg, Belgium, Greece, Ireland, and Portugal (with the latter four having not even signed the Charter). The Framework Convention has not been ratified by Belgium, Greece, Luxembourg and the Netherlands (France being the only state not having even signed). Latvia has signed but not yet ratified the Framework Convention.

⁸⁹ “It remains to be seen whether the EU and other supranational institutions will demand real compliance with entry criteria as regards Roma or will tacitly accept that the costs of achieving socio-economic equalisation and the problems of enforcing the removal of discrimination are insuperable in the short term. Following this logic, all that can be realistically required of applicants is a show of good will in the form of legislation which, while enhancing the formal rights and status of Roma, leaves their material prospects fundamentally unchanged and therefore their dominant social identity” (Guy 2001: 23).

Against this background, Abdikeeva arrives at the harsh appraisal that “Member States have shown at best indifference, and at worst fierce opposition to elevating protection of their minorities to the level of integration objectives – or even fully recognising its relevance” (2001: 2). At the heart of the “sustainability” problem hence lays the question of how much political will exists on the part of the Member States to establish genuine EU standards of minority protection.

That “sustainability” in the monitoring of the political criteria will be a minor concern after accession has been further amplified by the Commission’s 2002 Strategy Paper. The document suggests to include specific internal market safeguard mechanisms into the Accession Treaties which would prologue Brussels’ mandate to monitor the future Member States on those economic criteria which have not been fully implemented by the date of accession. However, no safeguard clauses are proposed with view to minority protection – another area where most applicant states are still far from meeting the standards referred to so far in the Copenhagen framework.

It may thus be concluded that not so much the implementation of the monitoring process, nor are inconsistent units of measurement in the different reports a fundamental problem. As far as the actual implementation procedures are concerned, the Commission works with high efficiency. However, the transposition of the political criterion into workable, tangible standards and benchmarks is critical. Again, the problem is not so much of a technical nature, as there are a broad number of valuable international instruments from which the Commission draws to establish its proper set of monitoring standards. Yet, where the Commission refers to international instruments whose standards are not part of the *acquis* but are used to operationalise the minority criterion, the EU faces a general credibility deficit which is structurally given in the Copenhagen monitoring framework.

EU monitoring suffers hence not from inconsistency deriving from technical problems to provide an unbiased equal treatment of all applicant states. Instead, it suffers from a structural deficiency that derives from a legally inconsistent foundation of minority protection in the European Union.

Contents of the Commission's Monitoring

As pointed out, scrutinising the contents of the Regular Reports horizontal (cross-country) and vertical (over the years) consistency are of relevance. Yet, there are still two further aspects to it. A third category relates to consistency between the issues mentioned and the actually existing problems, i.e. no aspects of minority protection may be excluded or overemphasised. Last but not least, the content of the reports needs to be consistent as far as the criticism raised and the final evaluations are concerned, i.e. consistency between the self-set standards and the conclusions drawn from the contents of the monitoring process must be guaranteed.

Scrutinising the outcomes of the drafting process, certain shortcomings in providing full consistency can be identified with regard to all four spheres. However, these inconsistencies must be carefully distinguished and differentiated. As will be pointed out, horizontal and vertical consistency, as well as consistency of the issues listed in the reports, do not seriously challenge the trustworthiness of the reports' effectiveness. Nonetheless, some of the discrepancies in these fields shall be mentioned.

The Open Society Institute offers a thorough examination in which it lists shortcomings in the assessment of almost every country. Hinting to vertical inconsistencies, the Institute, referring to Bulgaria, criticises that the reporting appeared "somewhat inconsistent" since certain issues raised in the 1999 report were not followed up in 2000 "notwithstanding their persistence" and that certain serious issues were not taken up at all (OSI 2001: 79). Similarly, it is brought forward that tasks listed in the 1999 Accession Partnership of the Czech Republic's "have not been adequately monitored" in the Regular Reports (OSI 2001: 125).

The bulk of criticism focuses on aspects the Open Society Institute considers central but which are, however, missing in the reports. Thus, the Estonian reports are found not faultfinding enough with view to certain language laws. Furthermore, the Institute asserts that the criticism actually raised "appears, from the perspective of minority rights, modest" (OSI 2001: 179). Still another aspect finds mentioning with regard to Latvia. In the eyes of the Institute, Latvia's "accession priorities [...] are brief and arguably do not reflect the major concerns of Latvia's minorities" and, moreover, "[a]lthough the Commission bases its evaluations of government compliance with the political criteria largely on the assessment of other bodies,

notably the OSCE and the Council of Europe, it has, in the view of some, lent little public support to the concerns expressed by these bodies” with the result that “[a]bsent the requisite nuance, the Commission’s relatively cursory public statements are susceptible to misinterpretation, particularly by those seeking endorsement of existing government policies” (OSI 2001: 269-270).

Finally, in the Hungarian case, a fundamental question is brought up which can actually be raised *vis-à-vis* all reports. Referring to the overall evaluation it is put into question why the Commission assesses the state to fulfil the political criterion *minority protection* while it continues to evaluate the situation of the Roma minority to be unsatisfactory (OSI 2001: 217-218).

Some of these critical points are surely worth considering and might provoke controversial discourses. Yet, it shall be refrained from entering such discussions because the first three categories of inconsistencies respecting the content do not represent major quandaries. The greatest part of these contradictions may be explained to derive from, on the one hand, unavoidable – yet not structurally given – failings and, on the other hand, the particularly prudent approach the Commission takes *vis-à-vis* this sensitive topic (cf. above p. 31). Furthermore, horizontal differences between the reports can also sometimes be found because certain issues attain more attention in the specific context of one state while they are more or less neglected in another.

However, the discrepancies between the Commission’s set of standards and its evaluations are of a different quality and raise the question *why* these inconsistencies occur. Again, the most plausible answer relates back to the fundamental legal gap already elaborated on. Although the Commission can quite freely list breaches of minority standards, it would be hard to defend a fully consistent evaluation which would state that due to insufficient minority protection a candidate country should not be admitted to a Union of states which itself cannot agree on formalising these very standards. Hence, although the Commission manages with sure instinct to bridge the legal gap in the field of minority protection, in the last consequence its monitoring faces in a full-blown credibility deficit.

Still another facet is discussed by Guy who reverses our perspective by inquiring whether the CEEC are after all capable of meeting the standards monitored under

the Copenhagen criteria. The author argues with regard to Roma rights that particularly the financial resources of the candidate countries are obviously not sufficient to meet the Copenhagen criterion. Since the applicant states will in no way be able to erase the socio-economic disadvantage of Roma, Guy agrees with Braham and Braham that it is unlikely that the criterion “can be fulfilled other than in merely formal terms in the foreseeable future, and certainly not by the time of accession” (Braham/Braham quoted by Guy 2001: 16). Subscribing to this point of view, the Commission’s positive evaluations can also be interpreted as a pragmatic approach to reality: The candidates are not able to fully implement measures to provide for minority protection, thus effective adherence to the criteria at legal level suffices to meet the criterion.

In sum, the Commission’s assessment can be described, on the one hand, as very effective and efficient with regard to the practical and procedural implementation of its monitoring mandate. This includes the solution the institution has found facing the lack of legal provisions on the EU level. By referring to international instruments it has established its own set of standards for minority protection, plus a comprehensive system of mechanisms to apply these standards. Nevertheless, on the other hand, the fact that the legal basis the Commission builds on (without pointing this out explicitly) is not part of the EU legal system corrupts the monitoring process in a two-fold manner by posing a serious credibility deficit. First, it makes the monitoring of minority issues appear as a merely remittent phenomenon that will end with accession and which actually has no real advocate within the EU. Thus, “sustainability” is not guaranteed and the issue will lose momentum once the candidate states have become full members. Secondly, the fact that the Commission has to apply standards with view to the accession candidates which do not account for the present Member States, the official goal of the monitoring process, i.e. a strict evaluation of the states’ preparedness to enter the Union on the basis of the Copenhagen criterion, cannot be realised.⁹⁰

⁹⁰ Williams comes to this conclusion as one of two possible answers to the outcomes of Commission’s evaluations. “[T]he Commission has concluded constantly that most applicant states have *fulfilled* the Copenhagen political criteria [...]. One must conclude, therefore, that either the criteria is flawed (in the sense that in reality it operates as no more than a guide rather than a condition) or the Commission has engaged upon a human rights policy determined to interfere in the affairs of potential members regardless of whether or not the applicants’ level of observance of the human rights standards would be accepted internally” (Williams 2000: 616).

Conclusion

Three essential shortcomings in the EU's monitoring of minority issues have been asserted, namely: structural inconsistencies of standards, a thereof deriving credibility deficit of the Commission's evaluations, and an imbalance between the Copenhagen demands and the resources the CEEC can actually deliver to achieve these goals. Yet, it would be too simple a judgement to draw the conclusion that the Commission's assessment in the annual Regular Reports is simply flawed. Although the generally suggested purpose of the Copenhagen criteria is arguably not met, i.e. the final decision on whether a state may or may not accede to the European Union is more a political than a technical decision based on clear and unbiased measures, the shortcomings in strictly applying the minority criterion does not discredit the assessment as such.

Taking a broader perspective on minority issues in the context of EU policy-making, the most central impact of the Copenhagen monitoring framework was that, for the first time, a comprehensive approach to minority protection has moved on the EU agenda – even if it remained restricted to a limited section of the agenda.⁹¹ As the claims uttered by both scientific scholars and NGOs⁹² indicate the continuation and extension of safeguarding minority protection has become a prominent issue. This allows the conclusion that once politicised the now “hot issue”, minority protection will not suddenly cool down with enlargement. It is more likely that public and private preoccupation with the topic will persist in one way or another.

⁹¹ In his detailed historic review on how the EU has dealt with minority questions Toggenburg thus states: “Especially the EU's eastern enlargement provided an impetus to look beyond the linguistic dimension of minorities in Europe, giving the minority question a clear political (and legal) dimension. This new approach, however, seems to be limited to minorities in Central and Eastern Europe” (2000: 11).

⁹² To provide just two examples from the broad amount of literature: Amato and Batt argue that “[i]n particular, the area of minority rights seems set to reach the political agenda of an enlarged EU. There are several reasons why the EU should become more actively involved in minority rights” (1998: 6) and the Open Society Institute comments: “On the eve of enlargement, there is an urgent necessity to ensure that the momentum generated by the accession process is not lost. There are some indications that candidate State Governments have viewed their efforts to demonstrate compliance with the political criteria instrumentally, rather than as a genuine and permanent commitment. [...] Such attitudes must be answered definitely, and prior to admission; it must be made clear that compliance with basic democratic standards is more than a condition for entry; it is a condition for membership This will inevitably require a different approach that focuses on the EU's ability and willingness to maintain its focus on minority protection in the post-enlargement context” (OSI 2002: 17).

Considering the future classification of minority protection in the EU it is necessary, once more, to recall the problem of different internal and external standards. The question of which significance minority protection will be attributed remains open. Will the EU extend its legislation in the field, or will the level of awareness in the future Member States be reduced? In the strict sense of their meaning, both options seem little likely. Neither will the Member States show willing to equip the supranational level with further means to monitor minority protection; nor can the EU allow to let the still multiple and unsolved deficiencies in minority protection in the CEEC to be unobserved. Yet, to avoid the problem of double standards which can not be kept up after accession, the most likely vision for the future monitoring of minority issues is that these will be dealt with on the basis of individual complaints only, i.e. through the legal framework that has been created with the introduction of the anti-discrimination *acquis* and the Race Directive.

Taking a positive stand on this, one can argue that the EU prepared itself to ensure the protection of minorities in all future Member States and that minority protection will gain further momentum in future.⁹³ Still, many commentators are much more sceptical in their estimations and argue that the EU still lacks essential credentials for a serious minority policy.⁹⁴ Avoiding to be deeper drawn into the rather hypothetical discourse on legal developments within a future European Union, we can however conclude that the existence and application of the Copenhagen criterion has already had an influence on the EU legal framework. The extension of anti-discrimination and fundamental rights legislation was, at least partially, influenced by the standards developed in the Copenhagen framework. In the context of the *Convention on the Future of Europe* fundamental rights are being ascribed an even greater importance. Although it is presently unpredictable whether the far-reaching proposals will indeed be implemented, the fact that certain recommendations will be passed by the Convention will exert further pressure on the development of more comprehensive human rights standards in the EU legal framework.

⁹³ See, for instance, Toggengurg who argues that the Copenhagen political criteria not included in the *acquis* are “no legal condition for accession or membership. The role given to the criterion of minority protection will primarily depend on the political constellation dominating the respective phase of Eastern enlargement. Still, in political terms it seems quite impossible that in the future the EC will take essential retrograde steps as it has already devoted significant attention to its new approach towards minorities” (2000: 19).

⁹⁴ A very rigorous position is advocated by Abdikeeva: “Returning to the original question of what ‘EU standards’ of human rights protection are to be met by the accession candidates, the answer appears truly disconcerting: there are none. If the European Union itself presently has any standards worth mentioning, they are double standards. Without immediate and meaningful measures to correct this situation, the EU’s example in human rights and minority protection risks being a bad one” (2001: 3).

Last but not least, it is noticeable that the Commission has developed far-reaching expertise and mechanisms to manage the difficult assignment of monitoring minority protection. Despite the stated contradictions the Copenhagen standards are based on, despite the credibility deficit of the Commission's evaluations, and despite the CEEC's *de facto* incapability to meet all the standards spelled out, the Commission keeps up a stringent assessment which meticulously states the standing of minority protection in the candidate countries. What is the value of this considering the shortcomings of the final assessment? Two essential aspects may serve as an answer.

First, by extending its activities to a new policy sector the Commission has expanded its scope of influence and hence its institutional impact. Although monitoring will not continue in the same form as it was developed in the pre-accession process, learning processes that were necessary to carry out this task will most probably also influence the future acting of the institution where minority issues are at issue. It may hence be concluded that it was in the institutional interest of the Commission to use the rights transferred to it under the monitoring mandate to its limits. This was especially the case in a policy area not formally part of the *acquis* because it allowed the Commission to attain new capabilities and shape the mode the EU applies these.

The second impact monitoring had is related to what has been said on minority issues entering the EU agenda. Less than adapting the *acquis* to the end that minority rights become an integral part, yet more than only monitoring external actors, the EU has developed its own action programmes to tackle challenges of minority protection.⁹⁵ These policy approaches, on the one hand, truly support the underlining aim of the whole process as such, i.e. to improve the situation of minorities in the candidate states. On the other hand, considering that once integrated into the Union remaining deficiencies in the "respect for and protection of minorities" will become common problems, these programmes might point into the direction of a genuine EU minority-policy, at least on the practical level of trying to find

⁹⁵ See: Commission of the European Communities, DG Enlargement Information Unit (1999 a) *Enlargement Briefing: EU Support for Roma Communities in Central and Eastern Europe*. December 1999; Commission of the European Communities, DG Enlargement Information Unit (2002 c): *Enlargement Briefing: EU Support for Roma Communities in Central and Eastern Europe*. May 2002.

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